

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-656

COMMONWEALTH

vs.

ANTHONY J. DAVIS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from the order denying his motion to file a late motion to revise or revoke sentence, and from the order denying his motion to reconsider that ruling. In essence, the defendant seeks revision of the lengthy sentence he received for his conviction of masked armed robbery, G. L. c. 265, § 17. He argues that he should have been allowed to file a late rule 29 motion because his plea counsel was ineffective for failing to file the motion within sixty days as required by the rule. See Commonwealth v. Stubbs, 15 Mass. App. Ct. 955 (1983). We affirm.

Background. On June 19 and 20, 2007, the defendant pleaded guilty to a number of charges stemming from a violent home

invasion that took place approximately two years earlier.¹ He was sentenced to serve twenty to thirty years in State prison on the masked armed robbery conviction (the lead sentence). He was also sentenced to serve twenty to thirty years in State prison on the conviction of armed home invasion, to be served concurrently with the lead sentence. The remaining convictions carried lesser sentences, some of which were to be served from and after the lead sentence, and some of which were to be served concurrently.

On June 25, 2007 (i.e., a few days after his plea and sentencing), counsel filed a notice of appeal from the sentence.² The following day, the defendant filed another notice of appeal.³ The sentence was affirmed by the Appellate Division of the Superior Court on June 16, 2008.

¹ The charges were: masked armed robbery, armed home invasion, armed assault with intent to murder, assault and battery by means of a dangerous weapon, and assault and battery. The charge of armed burglary was nol prossed.

² The trial court's docket reflects that the appeal was filed by counsel, which is consistent with the fact that plea counsel remained counsel of record at this time. The docket does not reflect that plea counsel filed a motion to withdraw before January 22, 2019. It was only at this later point that lead counsel was allowed to withdraw and new counsel was appointed.

³ The docket refers to this second notice of appeal as a duplicate, but we have obtained copies of the two notices and -- although they are to the same effect -- they are not duplicates. In both instances, the defendant signed the notice.

Almost twelve years after his plea, on January 22, 2019, the defendant -- represented by new counsel⁴ -- filed a motion to withdraw his guilty plea to the charge of armed home invasion on the ground that the Commonwealth failed to present sufficient facts at the plea colloquy to support the conviction. The particular lacuna was the lack of evidence that the defendant had been armed when he entered the victims' home. The Commonwealth acknowledged the problem, and the defendant's motion was allowed by the same judge who had taken the plea and imposed the original sentence. The Commonwealth then filed a nolle prosequi for the home invasion charge.

Next, on June 24, 2019, the defendant moved, pursuant to rule 29, for leave to file an untimely motion to revise or revoke his masked armed robbery sentence. The motion was supported by an affidavit from plea counsel stating that he had no memory of discussing the filing of a rule 29 motion with the defendant around the time of sentencing, but that it was his practice to file such a motion "on every unagreed plea where the sentence imposed exceeds the defense recommendation unless I

⁴ The docket reflects the defendant's present counsel entered an appearance on January 22, 2019. The docket also reflects the formal withdrawal of plea counsel and a successor counsel on that same day; it appears that successor counsel may have become involved in the case as far back as October 2007, when he filed a motion for production of transcripts. In any event, plea counsel was out of the case by the time the defendant filed his motion to withdraw his plea to the home invasion charge.

perceive a reason not to file the motion." Plea counsel further averred that he saw no reason why he would not have filed a timely motion to revise or revoke in this case.

Simultaneously with the motion seeking leave to file late, the defendant filed the proposed rule 29 motion itself. In essence, the motion argued that the lead sentence (on the masked armed robbery) was unjust, see Mass. R. Crim. P. 29 (a) (2), as appearing in 474 Mass. 1503 (2016),⁵ because "at the time of his sentencing this Court focused the sentencing scheme on the Commonwealth's overreaching representation that the defendant committed an armed home invasion." In the defendant's view, the armed home invasion conviction was a type of keystone for the sentence; once it was removed, the entire sentencing scheme became unjust.

The judge (who was the same judge as at all prior relevant proceedings, including sentencing) denied the motion for leave to file the untimely rule 29 motion, as well as the defendant's

⁵ That section of the rule provides:

"The trial judge, upon the judge's own motion, or the written motion of a defendant, filed within sixty days after the imposition of a sentence or within sixty days after issuance of a rescript by an appellate court on direct review, may, upon such terms and conditions as the judge shall order, revise or revoke such sentence if it appears that justice may not have been done."

subsequent motion to reconsider that ruling. These are the orders before us now on appeal.

Discussion. "It is well settled that rule 29 (a) 'establishes strict jurisdictional time limits for the filing of . . . motions [to revise or revoke a sentence].'" Commonwealth v. DeJesus, 440 Mass. 147, 150-151 (2003), quoting Commonwealth v. Layne, 386 Mass. 291, 295 (1982). See DeJesus, supra at 152 (defendant must file affidavit or "otherwise indicate the grounds on which [motion to revise or revoke] is based"). A motion to revise or revoke a sentence must be filed within sixty days after a sentence is imposed and a judge cannot consider a motion filed after this time frame. Id. at 151-152, and cases cited. See Commonwealth v. Amirault, 415 Mass. 112, 117 (1993), and cases cited (rule 29 review limited to facts as they existed at time of sentencing; "judiciary may not act as a super-parole board"). However, in Stubbs, 15 Mass. App. Ct. 955, the defendant filed a motion to revise or revoke after the sixty-day time limit, claiming his attorney promised to file the motion, but failed to do so in a timely manner. The record did not show "such a motion was contemplated at the time of sentencing [or] whether a promise . . . was made at the time of sentencing or made subsequently within the prescribed time limit." Id. at 955. The Appeals Court, relying on United States v. Ackerman, 619 F.2d 285, 287-288 (3d Cir. 1980), remanded the case for

findings concerning whether there was ineffective assistance of counsel. Stubbs, supra.

"In the Ackerman case, the court stated that, if there was no justification for an attorney's failure to file a motion to correct or reduce the defendant's sentence and there was a finding of ineffective assistance of counsel, the proper procedure would be for the court to vacate the sentence and reimpose it, thereby affording the defendant an opportunity to file a motion to revise or revoke (under analogous Fed. R. Crim. P. 35). United States v. Ackerman, supra. Cf. Commonwealth v. McNulty, 42 Mass. App. Ct. 955, 956-957 (1997) (where claim of ineffective assistance of counsel on untimely rule 29 motion deemed waived, court need not address Stubbs exception)."

Commonwealth v. Fenton F., 442 Mass. 31, 37 (2004).

In order to prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of showing that counsel's performance fell below that of an ordinary, fallible lawyer and that counsel's failing "likely deprived the defendant of an otherwise available, substantial ground of defence."

Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Here, the defendant's claim of ineffective assistance is that counsel should have filed a rule 29 motion seeking sentencing relief from the sentencing judge while, at the same time, the defendant was pursuing sentencing relief from the Appellate Division pursuant to G. L. c. 278, § 28B. But the decision as to which route might prove more effective at reducing the defendant's sentence is a strategic one especially where, as here, the claim is not that the masked armed robbery sentence was illegal, but

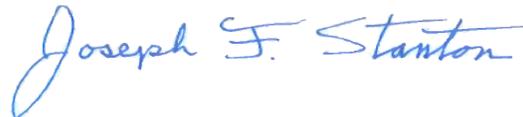
rather that it was too severe. See Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006), quoting Commonwealth v. Adams, 374 Mass. 722, 728 (1978) ("A strategic or tactical decision by counsel will not be considered ineffective assistance unless that decision was 'manifestly unreasonable' when made"). The defendant has given no reason why such discretionary relief would have been better sought from the sentencing judge than from the Appellate Division. Nor does he explain how or why plea counsel could or should have filed a rule 29 motion arguing that the masked armed robbery sentence would become unjust should the home invasion charge be dismissed in the future. "The purpose of a rule 29 motion is 'to permit a judge to reconsider the sentence he has imposed and determine, in light of the facts as they existed at the time of sentencing, whether the sentence was just.'" Commonwealth v. McCulloch, 450 Mass. 483, 487 (2008), quoting DeJesus, 440 Mass. at 152. We note that plea counsel's affidavit is silent on all of these salient points. Furthermore, plea counsel's affidavit is cautiously phrased and does not state that he promised the defendant that he would file a rule 29 motion. Moreover, neither the defendant's brief nor his affidavit grapples with the important fact that sentencing relief was being sought from the Appellate Division at the time he contends counsel should have instead sought it from the sentencing judge.

In these circumstances, the judge did not err in concluding that this case is not controlled by Stubbs, 15 Mass. App. Ct. 955, or in denying the defendant leave to file a late rule 29 motion.

The order dated August 2, 2019, denying the motion to file a late motion to revise or revoke sentence, and the order dated October 22, 2019, denying the motion to reconsider are affirmed.

So ordered.

By the Court (Wolohojian,
Englander & Hand, JJ.⁶),



Clerk

Entered: May 3, 2021.

⁶ The panelists are listed in order of seniority.