COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-134

COMMONWEALTH

vs.

SANDY PIMENTEL.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Charged with distribution of cocaine as a subsequent offense, the defendant eventually pleaded guilty to the lesser charge of distribution of cocaine in violation of G. L. c. 94C, § 32A (a). He was sentenced to two years and six months in the house of correction, suspended for three years. He now appeals from the order denying, without hearing, his third motion for a new trial,[1] in which he sought to withdraw his guilty plea.

At the plea colloquy, the judge said, "I have to be satisfied that you're pleading guilty freely and voluntarily," to which the defendant replied, "Well, it's been hard, you know, for me to decide to plead guilty. I didn't want to, but." The

[1] Each motion was styled as a motion for postconviction relief; the third such motion, which is the subject of this appeal, was filed on February 27, 2019, and denied on January 6, 2020.

judge asked, "You don't want to?" To this, defendant responded, "I didn't want to, but I have to say yes." The judge explained, "No, you don't have to say yes. You have an absolute right to have a trial and to have a jury determine." The defendant said, "That's what I wanted. I wanted to try, but."

At this point, the defendant's counsel asked the judge "if we could just step it back for one moment." After making it clear that there was a jury venire in the building and that trial could commence, the judge gave counsel and the defendant a five-minute recess.

After the recess, the defendant stated, "I'm going to plead guilty today." The judge reminded him that he did not have to, and he responded that he understood. The judge told him that he had the right to have a trial, and the defendant responded again that he understood. The judge explained to the defendant that his attorneys, Attorney Keefe and Attorney McCall, could not make the decision for him, and that if he wanted a trial, it was his attorneys' job to represent him at that trial. The defendant responded, "Yes, Your Honor."

In this, the defendant's third motion for a new trial, the defendant claimed that he was denied the effective assistance of counsel. He filed an affidavit in which he asserted that, "During the recess [at the plea hearing] I advised my counsel that I wished to retain a new attorney to conduct my trial. I

also advised him that that lawyer was present at the courthouse. Counsel advised me that the judge would not allow the last minute substitution of counsel." The defendant further asserted in his affidavit that, "Notwithstanding my interest in securing new counsel, my current counsel made no request for substitution of counsel or a continuance . . . . Faced with the dilemma I entered the plea."

Of course, a motion to substitute counsel or to request a continuance need not automatically be granted when made on the day of trial. Commonwealth v. Carsetti, 53 Mass. App. Ct. 558, 561 (2002) ("It is within the judge's sound discretion to grant a request for new counsel on the eve or day of trial, or to allow a motion for a continuance . . . . [T]here is no mechanical test for determining when such a denial is . . . arbitrary . . . [but] the judge should make findings showing a balancing between the defendant's rights and the interests of the Commonwealth" [citation omitted]). The defendant did not say in his affidavit that his attorneys were unprepared for trial, although he did assert that he was informed, after arriving at the courthouse, that trial was scheduled for that day. He did not provide any other reason in his affidavit explaining why he would not have wanted his then-current counsel to represent him at trial. Nor did he state in his affidavit that, had a continuance or substitution of counsel been

requested and denied, he would nonetheless have insisted on going to trial.

Nevertheless, even assuming what we do not decide, that if counsel had refused upon the defendant's request even to ask for a continuance or to substitute another lawyer who was at that time present in the courthouse this would have fallen below what was required of counsel and would have prejudiced the defendant by depriving him of the ability to go to trial, see Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), the defendant's appeal is still without merit.

This is because the judge implicitly declined to credit the defendant's affidavit, stating that, particularly in the absence of an affidavit from plea counsel describing the events that took place during the recess, the defendant had not sufficiently established his claim of ineffective assistance. It is well settled that, in the absence of an affidavit of trial counsel, or an affidavit from postconviction counsel indicating that one had been sought but that trial counsel refused to provide it, a motion judge is not required to credit the self-serving affidavit of a defendant claiming ineffective assistance of counsel. See Commonwealth v. Thurston, 53 Mass. App. Ct. 548, 553-554 (2002) (among other reasons, defendant's claim that he received inadequate legal representation was "conspicuously marred by [his] fail[ure] to include an affidavit from his

original defense counsel or to explain the absence of such affidavit"). See also Commonwealth v. Lopez, 426 Mass. 657, 665 (1998) (defendant's motion to withdraw guilty plea undermined by his failure to present supporting affidavits from plea counsel, who were still practicing in Massachusetts). As the defendant neither filed an affidavit of plea counsel, nor an affidavit of postconviction counsel indicating that one had been sought from plea counsel, we see no error in the judge's conclusion that the showing made by the defendant was insufficient to support his claim of ineffective assistance. The order denying the defendant's third motion for a new trial is affirmed.

So ordered.

By the Court (Rubin, Milkey & Henry, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: January 21, 2022.

[2] The panelists are listed in order of seniority.