

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

21-P-799

COMMONWEALTH

vs.

YATOS PINTO.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In 2006, the defendant pleaded guilty to one count of assault with a dangerous weapon and one count of threatening to commit a crime.² In April of 2020, over thirteen years later, the defendant filed a motion for a new trial claiming that his pleas were the involuntary result of coercion from his attorney. The plea judge having retired, a different judge of the Boston Municipal Court denied his motion without holding a hearing. The defendant appealed the ruling, and we now affirm.

In support of his motion, the defendant submitted two affidavits. The first affidavit was from himself, and in it, he

¹ Also known as Malachi Yahtues. As is our custom, we use the name that appears on the complaint.

² As a result of the plea, the Commonwealth dismissed additional charges of kidnapping, assault and battery by means of a dangerous weapon, and another count of threatening to commit a crime.

attested that he informed his counsel of a viable alibi defense months before trial. He further claimed that despite assurances from his attorney that "he had everything under control," on the day of the trial, counsel urged him to plead guilty because he was not prepared to argue the case. Counsel believed the victim would not appear in court, allowing a dismissal for lack of prosecution, and so he failed to investigate the alibi defense,³ interview potential witnesses, or prepare trial motions, cross-examination questions, opening and closing statements, and a defense theory. As a result, counsel informed the defendant that he had two choices: he could either plead guilty or go to trial without a defense. Because counsel informed him that if he went to trial, it was "virtually guaranteed" that he would lose, the defendant "felt forced" to enter a guilty plea "in order to avoid the significantly worse consequences" of proceeding to trial. The defendant also submitted a second affidavit from his alibi witness and former girlfriend, who stated that it was possible that the defendant was with her on the night of the crime, although she no longer recalled due to

³ The defendant further alleged that counsel failed to give the Commonwealth notice of his intention to claim an alibi defense under Mass. R. Crim. P. 14 (b) (1) (A), as appearing in 442 Mass. 1518 (2004), thereby precluding him from raising the issue at trial.

the passage of time. She did, however, recollect that she never heard from the defendant's attorney.

An appellate court treats a defendant's motion to withdraw a guilty plea as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). Commonwealth v. Rodriguez, 467 Mass. 1002, 1004 (2014). Under this rule, "a judge may grant a motion for a new trial any time it appears that justice may not have been done."⁴ Commonwealth v. Scott, 467 Mass. 336, 344 (2014). Such a determination is "committed to the sound discretion of the judge." Id. We review only to "determine whether there has been a significant error of law or other abuse of discretion." See Rodriguez, 467 Mass. at 1004.

The motion judge in the present case predicated her denial on her assessment that the defendant's affidavits in support of his motion were not credible. She was unpersuaded by the defendant's "bare assertions" that he "felt forced" to enter a guilty plea. She also discredited his former girlfriend's testimony and noted that even if true, it failed to provide information related to the voluntariness of the defendant's pleas. We agree with the judge's latter determination and defer

⁴ However, "[a] strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012).

to her assessments of credibility. See Commonwealth v. Vaughn, 471 Mass. 398, 405 (2015) ("credibility, weight, and impact of the affidavits are entirely within the motion judge's discretion"). Other than the defendant's self-serving affidavit, which the judge was not required to credit, there was no evidence suggesting that he was coerced into pleading guilty. See Commonwealth v. Lopez, 426 Mass. 657, 662 (1998). The judge did not commit an error of law or an abuse of discretion in so finding.

In addition to the motion judge's findings, several other considerations militate in favor of our conclusion that the defendant has failed to support his claim that his plea was coerced by his attorney and therefore not voluntary. First, the defendant failed to procure an affidavit from trial counsel or to explain the absence of such an affidavit. See Vaughn, 471 Mass. at 405, quoting Commonwealth v. Goudreau, 442 Mass. 341, 354 (2004) ("failure to provide pertinent information from an expected and available source . . . speaks volumes"); 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"). Second, as the Commonwealth aptly notes, the defendant's motion

was dilatory,⁵ which "often suggest[s] that, when the plea was made, the defendant was satisfied with his arrangement; had been counselled as to its particulars, and could be lawfully deemed to have accepted what were the unforeseeable, but possible, consequences." Lopez, 426 Mass. at 663. And third, the defendant's decision to plead guilty to two charges in exchange for the Commonwealth's dismissal of three more, two of which were much more serious, was a rational one that suggests that he

⁵ As a result of his delay in bringing the motion for a new trial, the defendant was unable to produce a transcript of his plea. Due to the significant lapse of time and lack of court records in this case, "[t]he presumption of regularity and the policy of finality . . . come into play." Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 14 (2006), quoting Commonwealth v. Grant, 426 Mass. 667, 671 (1998). "This presumption of regularity, normally afforded collateral review of proceedings in which the record has been lost or destroyed, stands, unless and until a defendant advances countervailing credible and persuasive evidence sufficient to rebut that presumption." Id. at 14-15. The defendant has failed to present the requisite evidence here. His supporting affidavit alone, with accusations of error by the plea counsel, is not sufficient to rebut this presumption of regularity.

was acting in his own best interests and not that he had been coerced.

Order denying motion for a
new trial affirmed.

By the Court (Desmond,
Ditkoff & Walsh, JJ.⁶),



Clerk

Entered: June 22, 2022.

⁶ The panelists are listed in order of seniority.