

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-532

COMMONWEALTH

vs.

DENNIS SENA.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

On June 1, 2015, the defendant pleaded guilty to various drug offenses and money laundering in violation of G. L. c. 267A, § 2. The judge imposed concurrent ten-year to ten-year and one-day sentences on two of the narcotic offenses, concurrent two-year house of correction sentences on two additional narcotic offenses, and a concurrent four and one-half to five-year sentence on the charge of money laundering.

About one and one-half years later, on November 28, 2016, the defendant filed a motion to withdraw his guilty pleas and enforce an alleged plea bargain, which was denied by the judge who presided over the change of plea hearing. The defendant

¹ The defendant's surname has been referred to as both "Senna" and "Sena" in the filings. We adopt the spelling as it appears in the indictments charging the defendant with various drug offenses and money laundering.

appealed, and a different panel of this court affirmed the order denying the motion in an unpublished decision issued pursuant to our former rule 1:28. See Commonwealth v. Sena, 96 Mass. App. Ct. 1102 (2019). While that appeal was pending, the defendant filed a motion to withdraw and dismiss the money laundering charge, which, as the judge noted in denying the motion, was effectively a second motion to withdraw his guilty plea to the crime of money laundering. The defendant also filed a motion seeking credit for time served, which was similarly denied. Before us is the defendant's appeal from the denial of his motions to vacate his guilty plea to the charge of money laundering and for jail credit. We affirm.

1. Motion to withdraw guilty plea. The defendant alleges that his guilty plea should be vacated because the Commonwealth failed to recite facts sufficient to establish that he engaged in money laundering at the change of plea hearing, and that the prosecutor improperly responded to a question posed by a grand juror during the presentation of the evidence to the grand jury. In a detailed memorandum of decision and order, the judge rejected the defendant's arguments and denied the motion.

We review the judge's decision "to determine whether [he] abused [his] discretion or committed a significant error of law." Commonwealth v. Resende, 475 Mass. 1, 12 (2016), citing Commonwealth v. Scott, 467 Mass. 336, 344 (2014). The motion

was properly denied. As the judge explained, and apart from the fact that the defendant should have raised both claims in his first motion to vacate his guilty plea, there is no merit to either argument.

First, although the prosecutor's description of the facts that supported the money laundering charge were minimal, they were sufficient to establish that the defendant had committed the crime of money laundering in connection with his drug distribution activities. During the change of plea hearing, the prosecutor outlined the evidence that supported the defendant's drug distribution scheme in detail and noted that:

"As [the defendant] was being placed under arrest, officers recovered a single bag of marijuana from [the defendant's] mouth along with two other bags of marijuana in his hand. They also recovered from his pocket, 2,650 dollars in cash."

We conclude that the prosecutor's recitation of facts was sufficient to establish that the Commonwealth would have proven that the money found on the defendant's person established that the defendant engaged in money laundering. Moreover, the judge asked the defendant whether he agreed with the facts recited by the prosecutor,² and also asked the defendant if plea counsel had

²THE COURT: "All right. Mr. Sena, did you hear what the Prosecutor told me?"

THE DEFENDANT: "Yes, sir."

THE COURT: "Is what he said true?"

explained the elements of each offense, to which the defendant replied affirmatively.³ In these circumstances, we discern no abuse of discretion or error of law.

Next, the defendant's claim of an alleged impropriety in the grand jury proceedings, i.e., that the prosecutor allegedly misled a grand juror in responding to the juror's question about the elements of money laundering, is moot. See Commonwealth v. Zion, 359 Mass. 559, 563 (1971) ("If there were any nonjurisdictional defects in the proceedings prior to the time when the defendant pleaded guilty, they were rendered irrelevant

THE DEFENDANT: "Yes, sir."

³ THE COURT: "And finally, you were charged with a crime of what's known as money laundering.

"The grand jury alleging again, on the same date, July 12th, 2013 you, knowingly, transported or possessed some monetary instrument that was derived from criminal activity. And that you possessed, or transported, that instrument -- I take it it's money -- to promote, carry on, or facilitate the drug activity with which you were charged. Do you understand that violation?"

THE DEFENDANT: "Yes, sir."

THE COURT: "Now, with regard to all of these indictments, did you review them with [plea counsel]?"

THE DEFENDANT: "Yes, sir."

THE COURT: "Did he explain to you the elements of each separate offense?"

THE DEFENDANT: "Yes, sir."

by such pleas"); Commonwealth v. Sylvia, 89 Mass. App. Ct. 279, 287 (2016) ("By pleading guilty [a] defendant admit[s] all facts well charged in the indictments against him, and waive[d] all nonjurisdictional defects" [quotations and citations omitted]). Accordingly, we affirm the order denying the second motion to withdraw the guilty plea.

2. Motion for credit for time served. The defendant sought application for jail credit based on an illegal sentence that he served approximately fifteen years prior to the date the charges in the instant case arose. The record shows that in February, 2002, the defendant violated his probation and, due to a scrivener's error in the docket, he was sentenced to serve a two and one-half-year sentence on a charge of possessing a Class B substance with intent to distribute, rather than a one-year sentence for simple possession. Although the docket entry was subsequently corrected, the defendant served the longer -- illegal -- sentence.⁴

In reaching his conclusion that the defendant was not entitled to relief, the judge noted that while our cases prohibit a defendant from "banking" time, i.e., receiving credit

⁴ Simple possession in violation of G. L. c. 94C, § 34, carries a maximum penalty of not more than one year in the house of correction whereas a conviction of possession with intent to distribute in violation of G. L. c. 94C, § 32, permits imposition of a sentence of up to two and one-half years in the house of correction or ten years in state prison.

from an earlier conviction toward a new conviction, our case law permits a defendant to receive credit for "dead time," i.e., time served in connection with an unrelated crime where it is shown that the defendant was actually innocent of that crime or other compelling circumstances exist.⁵ See Commonwealth v. Holmes, 469 Mass. 1010, 1011 (2014). The judge further noted that "it would seem proper to deem the service of an unlawful sentence (or at least that portion that exceeds the permissible maximum) as a 'compelling circumstance' equating with 'dead time' rather than 'banked time.'" Here, however, after reviewing the defendant's record, the judge determined that the defendant had not actually served any "dead time" as a result of the error and, therefore, was not entitled to credit. We agree. As the judge explained:

"On December 4, 2001, the defendant was charged in the Boston Municipal Court with possession of a firearm, assault and battery, resisting arrest, and possession of Class B, D, and E controlled substances, for which he was later indicted (see Suffolk Superior Court Crim. No. 0210157). Approximately six weeks later, on January 22, 2002, the defendant was charged in the Cambridge District Court with possession of a Class B controlled substance with intent to distribute, and a school zone violation, for which he was also indicted (see Middlesex Superior Court Crim. No. 2002594). On January 21, 2003, the defendant

⁵ A prisoner may not "bank" time from an earlier conviction toward a new conviction. See Manning v. Superintendent, Mass. Correctional Inst., Norfolk, 372 Mass. 387, 395-396 (1977). However, the term "dead time" generally refers to "time spent in confinement for which no day-to-day credit is given against any sentence." Commonwealth v. Milton, 427 Mass. 18, 21 n.4 (1998).

plead[ed] guilty in Suffolk Superior Court and received a 3 year to 3 years and one day committed sentence. The following day, he plead[ed] guilty in Middlesex Superior Court, receiving a concurrent 3 year to 3 years and one day sentence. According to [the judge's] review of the dockets in each case, the defendant was credited with 205 days jail credit in each county, meaning the sentences effectively commenced sometime in July, 2002. Consequently, any time held from July, 2002 can be attributed to [the defendant's] Suffolk and Middlesex sentences and cannot qualify as 'dead time for which no credit is given.' . . .

"At issue, then, is whether [the defendant] is entitled to credit for the time served from the date of his probation surrender on February 25, 2002, until July, 2002. As noted, this roughly five-month period would be a permissible term of incarceration on the crime of simple possession under G. L. c. 94C, § 34. Thus, the defendant's claim that he received an unlawful sentence must be limited to that portion of the sentence that exceeded the statutory maximum and that was not otherwise credited to some other lawful sentence. Because the defendant was given 205 days of jail [credit on] the 2003 Suffolk and Middlesex cases, he did not suffer any 'dead time' and therefore is not entitled to relief."

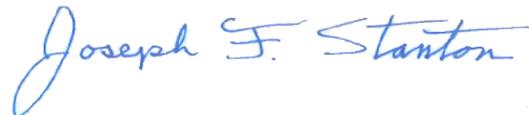
Our review of the record supports the judge's reasoning.

Accordingly, the defendant's motion seeking credit for time served was properly denied.

Order denying second motion
to withdraw guilty plea
affirmed.

Order denying motion seeking
credit for time served
affirmed.

By the Court (Vuono,
Sullivan & Lemire, JJ.⁶),



Clerk

Entered: August 16, 2022.

⁶ The panelists are listed in order of seniority.