

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

APPEALS COURT
CASE NO. 2013-P-1256
SUPREME JUDICIAL COURT
NO. SJC-11771

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

RAMON TORRES,
Appellant/Defendant.

ON APPEAL FROM AN ORDER IN THE BROCKTON DIVISION
OF THE DISTRICT COURT DEPARTMENT

REPLY BRIEF

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Dated: October, 2014.

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ARGUMENT¹

I. THE COMMONWEALTH FAILS TO ADDRESS MR. TORRES'S ARGUMENT THAT HE IS ENTITLED TO REMAND BASED UPON THE NEW RULE ANNOUNCED IN THE SCOTT DECISION.

In his principal brief, Mr. Torres argues that his case should be remanded to the Brockton District Court so that the plea judge can make findings consistent with the Scott decision. (Defendant's Brief at 14-16). The Commonwealth fails to address this argument entirely.

It is axiomatic that "a criminal defendant is entitled to enjoy the benefit of a newly declared constitutional rule announced while his appeal is pending." Commonwealth v. Gentle, 80 Mass. App. Ct. 243, 245-246 (2008), citing Griffith v. Kentucky, 479 U.S. 314, 322 (1987). In Scott, the Supreme Judicial Court announced a new legal rule by applying the Ferrara analysis in cases involving chemist Annie Dookhan and the Drug Lab. See Commonwealth v. Scott, 467 Mass. 336, 338 (2014), citing Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). The Court stated:

. . . when a defendant seeks to vacate a guilty plea as a result of underlying

¹ All abbreviations will follow the same format as used in Mr. Torres's principal brief.

governmental misconduct, rather than a defect in the plea procedures, the defendant must show that egregiously impermissible conduct . . . by government agents . . . antedated the entry of his plea and that the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice.

Scott, 467 Mass at 346 (internal citations and quotations omitted). The Scott Court specifically addressed cases that did not directly implicate chemist Annie Dookhan:

Should the Ferrara analysis be applied in the case of a motion for a new trial under Mass. R. Crim. P. 30(b) that does not arise from the investigation of Dookhan, the defendant will have the burden to establish each element of the first prong of Ferrara, and the adequacy of the defendant's showing will be committed to the sound discretion of the motion judge.

See id. at 354.

Mr. Torres's case involves an allegation of misconduct on the part of Ms. Dookhan and the entire Drug Lab. (Tr. 5). It cannot be disputed that Mr. Torres's case was pending on direct appeal when Scott was decided. Thus, the Ferrara analysis should be used in this case. See Scott, 467 Mass at 354. The motion judge did not have the benefit of the Scott decision in deciding Mr. Torres's Motion to Withdraw. Neither the parties nor the Court was aware of the

burden that Mr. Torres would be required to prove. Accordingly, Mr. Torres is entitled to proceedings in the Brockton District Court so that findings can be made that are consistent with the new rule announced in Scott.

II. THIS INSTANT APPEAL DOES NOT TURN UPON THIS COURT'S CONSIDERATION OF THE CORBETT MEMORANDUM BUT RATHER THE MEMORANDUM UNDERSCORES THE NEED FOR FURTHER PROCEEDINGS IN THE BROCKTON DISTRICT COURT.

The Corbett Memorandum is an illustration of circumstances that demonstrate the need to remand this matter back to the trial court for further proceedings. Mr. Torres agrees with the Commonwealth's statement: "the relative weight and significance of the judgments and conclusions in the Memorandum is a matter to be explored before a fact finder in the trial court." (Commonwealth Brief at 24). As argued above, the matter should be remanded to the Brockton District Court so that Mr. Torres can demonstrate whether there was egregious misconduct by the government in his case - whether by Kate Corbett or anyone else at the Drug Lab. And, the Court needs to consider whether any such conduct had a material influence on his decision to plead guilty.

Notwithstanding, the Commonwealth's argument for the exclusion of the Corbett Memorandum is not consistent with the Supreme Judicial Court's actions in the Scott decision. In that case, the Supreme Judicial Court considered the "Hinton Drug Laboratory Record Appendix" which included, among other things, "extensive investigative reports" in connection with Chemist Annie Dookhan's misconduct. See Scott, 467 Mass. at 337, n. 3. It does not appear that the documents in that Hinton Drug Laboratory Record Appendix were before the trial court judge. See id. at 343 ("[t]he defendant's motion was supported by an affidavit of counsel averring to general information concerning the investigation into Dookhan's misconduct"). Indeed, the Hinton Drug Laboratory Record Appendix was not even filed in the Scott case; it was filed in the companion Roderiguez case. See Document #5, Commonwealth vs. Rodriguez, SJC-11462.²

The Corbett Memorandum is also an investigative report regarding conduct at the Drug Lab and, therefore, it is of the same nature as the documents considered by the Scott Court. Even accepting the

² Available for viewing at:
http://www.massappellatecourts.org/display_docket.php?dno=SJC-11462

Commonwealth's argument regarding the admissibility of the Corbett Memorandum in the trial court as true, the Supreme Judicial Court has already considered similar "outside of the record" documents involving the investigation of the Drug Lab. See Scott, 467 Mass. at 337, n. 3. It would be unfair, inconsistent and against the interests of justice to consider investigative reports in one set of Drug Lab cases and to strike the Corbett Memorandum in Mr. Torres's case.

CONCLUSION

Based upon the foregoing arguments, the Defendant Ramon Torres requests that this Court reverse and vacate the trial court's denial of the Defendant's Motion to Withdraw His Guilty Plea and for a New Trial. In the alternative, the Defendant requests that this Court remand this matter to the Brockton District Court for findings on: (1) whether there was egregious government misconduct by the government in this case; and (2) whether there is a reasonable probability that Mr. Torres would not have pleaded guilty had he known about the misconduct at the Hinton Drug Lab.

Respectfully submitted,

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By his attorney,

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CERTIFICATION PURSUANT TO MASS. R. APP. P 16(k)

The undersigned Matthew J. Koes, Esquire, hereby certifies that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18 and Mass. R. App. P. 20.

/s/ Matthew J. Koes

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