SJC 11771

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

APPEALS COURT NO.
2013-P-1256

COMMONWEALTH,
Appellee

VS.

RAMON TORRES,
Appellant

ON APPEAL FROM JUDGMENTS OF
THE BROCKTON DISTRICT COURT

BRIEF FOR THE COMMONWEALTH

TIMOTHY J. CRUZ,
District Attorney,
Plymouth District
STACEY GAUTHIER
Assistant District Attorney
BBO # 671535
32 Belmont Street
Brockton, MA 02301
(508) 584-8120
stacey.gauthier@state.ma.us

October 9, 2014

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I. Whether the defendant was entitled to withdraw his guilty plea due to subsequent discoveries concerning misconduct at the Hinton Drug Laboratory where Annie Dookhan was merely the notary on the drug certificate, there was no showing that anyone else involved in the case committed any "egregious misconduct," and the defendant presented no more than second thoughts, from hindsight concerning his assessment of the strength of the Commonwealth's anticipated trial evidence at the time of his plea?

II. Whether the appellate record on the defendant's challenge to the denial of his 2013 Motion to Withdraw Guilty Plea should be deemed to include a Memorandum that could not have been considered in the trial court, that is not binding on anyone in court, that would not be properly admissible on its own and, even if properly presented though witnesses in the trial court to become part of the record, the information in the Memorandum would be subject to challenge through cross-examination and rebuttal?

STATEMENT OF THE CASE

On March 22, 2007, the defendant was arraigned in the Brockton District Court on one count of

Distribution of a Class B Substance and one count of a School Zone Violation. Def. R. 1-2.[1] On January 17, 2008, he entered a guilty plea on the distribution charge and the school zone charge was dismissed. Def. R. 1. He received a sentence of one year in the Plymouth County House of Correction with eighty-two days credit. Def. R. 1.

Five years later, on April 3, 2013, the defendant filed a motion to withdraw his guilty plea and for a new trial. Def. R. 3, 9-11. A hearing on the defendant's motion for a new trial was held on April 30, 2013. On that date, the judge denied the motion in a margin notation. Def. R. 12. On May 16, 2013, the defendant filed a notice of appeal. Def. R. 3, 14.

On August 8, 2013, the case was entered into this Court. The case was then stayed pending the Supreme Judicial Court's decisions in the "Hinton Drug Lab cases." After receiving status reports from both the defendant and the Commonwealth, on April 24, 2014, the

[1] Citations to the defendant's record appendix appear as "Def. R. ____." Citations to the defendant's brief appear as "Def. Br. _____." Citations to the motion for a new trial hearing appear as "Tr. ___." Citations to the Commonwealth's record appendix appear as "CW R. ____."

Single Justice vacated the stay and set a due date for the defendant's brief.

STATEMENT OF THE FACTS

The Police Report.[2]

On March 21, 2007, at approximately 9:40 p.m., Detective Keating from the Brockton Police Department saw the defendant walking near Spring Street and Harrison Avenue. Def. R. 6. Detective Keating pulled his car to the side of the road. Def. R. 6. The defendant approached Keating and asked him what he was looking for. Def. R. 6.

Detective Keating told the defendant he was looking for "rock."[3] The defendant asked him how much and Detective Keating said he was looking for a "forty."[4] The defendant said he did not have it on

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[2] The defendant has made no apparent effort to provide the Court with a transcript of the plea (reconstructed or otherwise) although it is his burden to provide adequate record for review. Instead, he just cites to the police report generated in this case. This is improper since the exact nature of the defendant's admissions during the plea colloquy could be significant to the defendant's claims. Insofar, as shown by the record presented during the colloquy, the defendant specifically admitted that he had been in possession of cocaine that he intended to distribute. Nonetheless, the Commonwealth will follow the defendant's lead and cite to the police report for factual background.

[3] Street slang for crack cocaine. Def. R. 6.

[4] $40.00 worth of crack cocaine. Def. R. 7.

him, but would take Detective Keating to get it. Def. R. 7. The defendant then got into Detective Keating's car and told him to drive to West Park Street. Def. R. 7. Detective Keating gave the defendant two $20.00 bills. Def. R. 7. The defendant got out of the car and went into 436 Warren Avenue. Def. R. 7.

Three minutes later, the defendant returned. Def. R. 7. He got back into the car and handed Detective Keating two clear plastic bags that contained an off-white rock-like substance. Def. R. 7. Later, the substance field-tested positive for the presence of cocaine. Def. R. 7.

The defendant began smoking the crack cocaine in the car. Def. R. 7. Detective Keating was pulled over by other officers from the Brockton Police department. Def. R. 7. They arrested the defendant. Def. R. 7.

During booking, three clear plastic bags that contained an off-white substance were found in the defendant's pocket. Def. R. 7. The defendant laughed and stated, "That's soap. That's not the real stuff." Def. R. 7. The substances in those bags were determined to be soap, and were destroyed. Def. R. 7.

The Drug Certificate.

Detective Patrick Donohue of the Brockton Police Department delivered the two plastic bags to the Department of Public Health laboratory in Boston on March 29, 2007. Def. R. 8. On June 21, 2007, Kate Corbett and Della Saunders analyzed the substance contained in one of the two plastic bags. Def. R. 8. It weighed 0.06 grams. Def. R. 8. It was found to contain cocaine. Def. R. 8. Annie Dookhan signed the certificate as a notary. Def. R. 8.

The Motion to Withdraw Guilty Plea.

On April 3, 2013, the defendant filed a motion to withdraw his guilty plea. Def. R. 3, 9-11. He asserted in the motion that Annie Dookhan was believed to have either participated in the testing of the substances, or acted as a quality control manager at the laboratory. Def. R. 9. She had been identified by law enforcement as a person who intentionally contaminated drug evidence to ensure a positive result. Def. R. 9. As a result of her actions, other laboratory supervisors were suspended, and the laboratory was shut down. Def. R. 9.

The defendant argued that as a result of Annie Dookhan's conduct, the defendant's plea was not

knowing or voluntary and therefore violated the Fourteenth Amendment and Article 14. Def. R. 9.

At the hearing on the motion, trial counsel argued that the fact that Annie Doohkan was the only notary should not diminish the significance of her involvement in the matter. Tr. 3. Further, the chemist and the assistant chemist have no way "of remembering back in '07 as to what exactly was done and whether Annie got her hands into this (indiscernible) and made it worse than should've been." Tr. 5. Therefore, trial counsel argued the case should be dismissed. Tr. 5.

The Commonwealth did not submit a written opposition, but did argue an opposition against the motion at the hearing. Tr. 5. The Commonwealth argued that Annie Dookhan was merely a notary, and there were two independent chemists who confirmed the substance was cocaine. Tr. 5.

ARGUMENT

I. THE DEFENDANT WAS NOT ENTITLED TO WITHDRAW HIS GUILTY PLEA DUE SUBSEQUENT DISCOVERIES CONCERNING MISCONDUCT AT THE HINTON DRUG LABORATORY WHERE ANNIE DOOKHAN WAS MERELY THE NOTARY ON THE DRUG CERTIFICATE, THERE WAS NO SHOWING THAT ANYONE ELSE INVOLVED IN THE CASE COMMITTED ANY "EGREGIOUS MISCONDUCT," AND THE DEFENDANT PRESENTED NO MORE THAN SECOND THOUGHTS, FROM HINDSIGHT CONCERNING HIS ASSESSMENT OF THE

STRENGTH OF THE COMMONWEALTH'S ANTICIPATED TRIAL EVIDENCE AT THE TIME OF HIS PLEA.

The defendant claims that he is entitled to withdraw his guilty plea because of subsequent discoveries of misconduct at the Hinton Drug Laboratory, specifically, relating to Annie Dookhan and Kate Corbett. However, Annie Dookhan merely signed his drug certificate as a notary. See Commonwealth v. Gardner, 467 Mass. 363, 369 (2014) (holding in Commonwealth v. Scott, 467 Mass. 336 (2014) does not apply where Dookhan was only the notary). With regard to the conduct of Kate Corbett, the Commonwealth maintains that the defendant has improperly included the Memorandum regarding Ms. Corbett in his Appendix and that the Memorandum should not be considered as it is not properly part of the appellate record (see Issue II, infra). Nevertheless, even if considered, the Memorandum provides no support for any relevant egregious misconduct in this case affecting the defendant's rights.

A defendant is not entitled to withdraw his plea merely because he later discovers that he was wrong about the anticipated quality of the prosecution's case. Brady v. United States, 397 U.S.

742, 757 (1970). An intelligent and voluntary plea represents the defendant's consent to the entry of judgment of conviction against him without the Commonwealth having to prove his guilt beyond a reasonable doubt at trial. Id. at 748. Such a plea quite validly removes the issue of actual factual guilt from the case. Commonwealth v. Fanelli, 412 Mass. 497, 500 (1992). Thus, the critical question is whether the defendant's plea was sufficiently intelligent and voluntary at the time, not on whether it turns out that he was wrong about his chances if he chose to go to trial. Scott, supra at 345.

A guilty plea is intelligent if it was made with knowledge of the elements of the crime and the procedural protections waived by going forward with a plea rather than insisting on a trial. Id. A plea is voluntary as long as it is not the product of coercion, duress, or improper inducements beyond the pressure inherent in facing potential conviction and sentencing after trial. Id.

The defendant has never claimed that he was not fully aware of the elements of the crime with which he was charged and with the trial rights and the protections he was waiving by entering a guilty plea.

Nor has the defendant ever suggested he thought that what he possessed could have been counterfeit drugs or anything other than cocaine. See, United States v. Merritt, 755 F.3d 6, 11 (1st Cir. 2014) (noting "the appellant has never maintained that this counterfeit drug scenario [or for that matter any other exonerative tale] has any grounding in reality. To the contrary, the appellant admitted his factual guilt at the change-of-plea hearing - an admission from which he has never retreated. Such a set of circumstances militates powerfully against reversing a trial court's denial of a plea withdrawal motion").

The defendant has not presented anything that casts doubt on his sworn acknowledgement of guilt during the plea proceeding. He does not even claim that he in any way relied on the drug certificate to inform him about the nature of the substance in the two clear plastic bags that he handed to the detective. Def. R. 7. As a matter of fact, apart from the testing at the Hinton Laboratory, the substance in those bags field tested positive for the presumptive presence of cocaine when tested by the police. Def. R. 7. The defendant's statements to the police about the soap found in his pocket also

demonstrated his personal ability to discriminate between counterfeit substances and the real thing.

There is also no claim or showing that anyone involved in the defendant's prosecution engaged in any sort of egregious misconduct; such as making a material misrepresentation concerning the actual state of the evidence prior to the plea, as occurred in Scott, supra at (misconduct by Dookhan who participated in drug analysis) and the two cases on which the Scott court primarily relied, Ferrara v. United States, 456 456 F.3d 278 (1st Cir. 2006) (prosecutor's efforts to conceal recantation by key witness), and United States v. Fisher, 711 F.3d 460 (4th Cir. 2013) (officer made material misrepresentation in search warrant affidavit). Scott, supra at 345-348. Here, we merely have Annie Dookhan's signature on the drug certificate as a notary, and a false reference to Kate Corbett's possession of a degree in Chemistry.

Our highest courts have consistently rejected claims that a defendant is entitled to withdraw a guilty plea because it turns out that the prosecution would have had greater difficulty than the defendant thought proving guilt at trial. That, in hindsight,

it appears that the defendant misjudged the strength of the prosecution's case does not warrant the withdrawal of an otherwise knowing and voluntary plea.

To show a violation of the due process requirement of an intelligent and voluntary plea, "[i]t is not enough for a defendant to show that he misjudged the prosecution's case or was unaware of a possible defense." Scott, supra at 347, citing Brady v. Unites States, supra and United States v. Broce, 488 U.S. 563, 572, 573-574 (1989).

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after his plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of applicable [circumstances] does not become vulnerable because later [developments] indicate that the plea rested on a faulty premise.

Brady v. United States, supra (internal citations omitted). See, United States v. Broce, supra at 572 (defendant not entitled to withdraw plea based on good faith but mistaken evaluation of facts or assessment of existence of grounds for constitutional challenge).

Issues concerning the relative weight of the Commonwealth's evidence go to the likelihood of the prosecution's ability to prove guilt beyond a reasonable doubt if the defendant chooses to go to trial. But, the defendant's right to challenge the Commonwealth's ability to prove guilt at trial is exactly what the defendant gives up by waiving his right to a trial. The relative weight of the prosecution's evidence and the defendant's ability to prevail at any trial does not go to the defendant's knowledge of either the nature of the charge or to whether he in fact committed the crime, i.e. the knowing and intelligent nature of the plea. United States v. Ruiz, 536 U.S. 622, 629-631 (2002) (finding subsequent discovery of impeachment evidence insufficient grounds for withdrawal of plea). See also, Parker v. North Carolina, 397 U.S. 790, 796-798 (1970) (in absence of ineffective assistance, any error in evaluation of admission of confession insufficient to entitle defendant to withdraw plea).

The fundamental premise of the defendant's claim is that he is entitled to withdraw his plea because he now believes, based on newly discovered evidence, he could have effectively challenged the Commonwealth's

ability to prove his guilt at trial. His basic problem is that he specifically gave up his right to put the Commonwealth to its proof at trial, by voluntarily pleading guilty. An otherwise voluntary and intelligent plea by itself quite validly removes the issue of factual guilt from the case. Fanelli, supra at 501.

The defendant has failed to show how any challenge based on later discoveries concerning the analysis of drugs at the Hinton Laboratory in general had any bearing on the voluntariness or factual basis for his plea based on his own knowledge of the nature of the drugs. Commonwealth v. Berrios, 447 Mass. 701, 710 (2006) (noting "to demonstrate how the potential [evidentiary] problem for the Commonwealth has any bearing on the voluntariness of the defendant's plea").

The defendant essentially just presumes that the post-trial doctrine concerning "newly discovered" evidence applies equally where the defendant has entered a guilty plea. Def. Br. 13-14. However, the Scott court just stated that if the doctrine had any application and if the defendant could not establish sufficient prejudice under a Ferrara type egregious

misconduct analysis, then it is unlikely he would be able to establish prejudice under a newly discovered analysis. Scott, supra at 258-361.

Absent some ineffective assistance, egregious misconduct or misrepresentation inducing the plea by someone involved in the prosecution of the defendant's case, newly discovered evidence should never entitle a defendant to withdraw his pleas if it does no more than raise questions about the prosecution's ability to meet its burden at trial.

Newly discovered evidence that presents new challenges to the weight or admissibility of aspects of the Commonwealth's evidence raises concerns about the fairness of the determination of the defendant's guilt at any prior trial. But with a guilty plea, the conviction is based on the defendant's former admission in open court, not of any proof at trial. The requirement that the Commonwealth fairly prove the defendant's guilt beyond a reasonable doubt at trial is the central feature of what the defendant gave up by pleading guilty.

In most cases, as in this case, a defendant's guilty plea will be primarily based on his personal knowledge of what he did and what actually happened in

the circumstances surrounding the crime. Newly discovered evidence that does no more than raise questions about the strength of the evidence in the Commonwealth's possession, does not call into question the defendant's personal knowledge of his guilt. It raises, at most, questions concerning the accuracy of the defendant's prospective assessment of the strength of the trial evidence against him. However, this Court too has previously determined that a defendant who presents no more than a misappraisal of the strength of the prosecution's anticipated proof is not entitled to withdraw his guilty plea.[5] Commonwealth v. Dozier, 24 Mass. App. Ct. 961, 963 (1987) (rejecting "rather novel" claims that defendant is entitled to withdraw his plea because at the time he was not able to fully assess the strength and weaknesses of the prosecutor's case), Commonwealth v. LeDoux, 58 Mass. App. Ct. 1104 (2003) (misapprehension of strength of Commonwealth's case did not make plea involuntary) (unpublished case attached).

In this case in particular, any problems with the drug analysis raise no questions concerning the

[5] Such claims will always be based on claims of newly discovered evidence because otherwise the misappraisal would never have taken place.

accuracy of the defendant's plea to possessing and intending to distribute cocaine based on his personal knowledge of the circumstances of the crime and familiarity with the business he was conducting. The defendant has presented no evidence to support any claim that he did not in fact commit the crime nor has he made any suggestion that he thought he might possess and intend to distribute anything other than cocaine. As a matter of fact, he readily told the police during booking that the three plastic bags he had on him contained soap, demonstrating his personal ability to tell the difference. Def. R. 7. Wilkins v. United States, 754 F.3d 24, 30 (2014) and United States v. Merritt, supra (both noting in circumstances involving Dookhan that absence of any claim of actual innocence cuts against allowing any withdrawal of the guilty plea). As a matter of fact, there is no affidavit from the defendant that he would have in fact done anything differently or exactly what he would have done differently if he had the information at the time of the plea. He has therefore not raised any reason to doubt his solemn admission of guilt or the ultimate justice of his conviction under the law.

That it now may appear to the defendant that he may have been able to get away with the crime he knows he committed, only presents second thoughts concerning the wisdom of his decision to knowingly and voluntarily admit his guilt. The ultimate wisdom of that choice from the particular, self-centered and personal perspective of the defendant is a matter going beyond any legitimate concern for the justice of the conviction or whether the defendant did or did not actually commit the crime.

Contrary to the defendant's argument, this case should not be remanded to the district court for findings consistent with the Scott decision. Def. Br. 14-16. This case is not controlled by the Scott decision because Annie Dookhan was not the primary or secondary chemist. See Commonwealth v. Gardner, supra at 367 (holding in Commonwealth v. Scott, 467 Mass. 336 (2014) does not apply where Dookhan was the notary). Further, the issue regarding Kate Corbett is not properly before this Court. Nevertheless, any information contained in the Memorandum could merely be used to impeach Ms. Corbett's credentials, not the actual test itself. There was no evidence that she falsified any test results. Def. R. 15-20. Although

it appears that Ms. Corbett did not actually have a degree in Chemistry, she had completed the requirements for a second major in Chemistry. Def. R. 17. There is no showing that the defendant took Ms. Corbett's credentials into account in deciding to plead guilty.

Even if this Court were to find that Kate Corbett did not have an actual degree in Chemistry, this falls far short of the intentional misrepresentations found in Scott (evidence tampering) and the cases on which that opinion relied. Scott, supra at 247-350.

II. THE MEMORANDUM THAT WAS ISSUED AFTER THE DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA WAS DENIED SHOULD NOT BE DEEMED A PROPER PART OF THE APPELLATE RECORD IN THE CASE WHERE IT DOES NOT CONTAIN INDISPUTABLE FACTS, FINDINGS, OR CONCLUSIONS.

The defendant had included a copy of a November 18, 2013 Memorandum written by Acting Laboratory Director for the State Police Forensic Services Group in his Record Appendix (Def. R. 15-20) and referenced it in his brief even though it is not properly part of the Appellate Record in this appeal from the April 2013 denial of his motion to withdraw his plea. The

Memorandum was not, and could not have been, presented in the trial court as it did not even exist at the time of the denial of his motion.

The Commonwealth filed a motion to strike the document from the defendant's record appendix and references to the document in his brief. CW Ap. 1-7. The defendant opposed the motion (CW Ap. 8-12) and the Court referred both the motion and the opposition to the panel designated to decide the appeal. CW Ap. 13.

The record on appeal only properly consists of the original papers filed in the trial court, the exhibits on file, the transcript of the proceedings (if any), and a certified copy of the docket entries. Mass. R. App. P. 8(a). The Memorandum does not fit within any of those categories.

Since the critical issue on appellate review is whether the trial court judge committed any reversible error at the time by declining to allow the defendant to withdraw his plea, the appellate review is properly limited to the factual basis for the arguments that were presented in the trial court prior to the challenged decision. See Commonwealth v. Johnson, 461 Mass. 44, 48 (2011) (when reviewing decision on motion to suppress, evidence presented at trial not

considered); Commonwealth v. Rivera, 441 Mass. 358, 367 (2004) (later presented expert testimony cannot be the basis for concluding judge erred in earlier ruling). Material that was not before the judge in the trial court is therefore not properly made part of the record. Commonwealth v. Robinson, 83 Mass. App. Ct. 419, 426 (2013).

In fact, the Memorandum would not even be admissible in the trial court, illustrating why it is inappropriate to take judicial notice of such a document at the appellate level. The Memorandum is entirely hearsay and not subject to any hearsay exception. At the least, the conclusions, judgments, and opinions in the Memorandum are not admissible as an official or public record. Commonwealth v. Nardi, 452 Mass. 379, 393 (2008); Massachusetts Guide to Evidence, § 803(8) 258, 274 (2013). For the same reason, the Memorandum is not admissible as a business record. Julian v. Randazzo, 380 Mass. 391, 393 (1980); Burke v. Memorial Hosp., 29 Mass. App. Ct. 948,949 (1990), Massachusetts Guide to Evidence, § 803(6)(A) Note 269 (2013).

Nor would the Memorandum be admissible as a learned treatise. For that hearsay exception to apply

there would have to be preliminary evidence establishing it as a "reliable authority" and even then the portions of it could only be introduced on cross-examination. Commonwealth v. Sneed, 413 Mass. 387, 394-396 (1992). Massachusetts Guide to Evidence, § 803(18)(B), 260 (2013). To be properly admitted, the information contained in the report would have to be presented through witnesses and then subject to challenge through cross-examination and rebuttal.

The defendant incorrectly included the Memorandum in his record appendix, in violation of the rules of appellate procedure. Mass. R. App. P. 18(a) (record appendix in criminal appeal may only include "parts of the record"). The report should be stricken and the defendant's references to its contents should be disregarded.

In any event, the consideration of the Memorandum would not affect the result of the analysis presented in Issue I. The Memorandum makes no suggestion that Ms. Corbett (or anyone other than Annie Dookhan) engaged in any malfeasance in drug testing at the lab. Def. R. 15-20. Therefore, the Memorandum provides no support for finding any egregious prosecutorial

misconduct such as was found to have been committed by Dookhan in Scott, supra.

The defendant argues that this Court can consider the Memorandum because the Supreme Judicial Court considered the Hinton Drug Laboratory investigative reports regarding Annie Dookhan in the Scott decision. CW. R. ___. However, Annie Dookhan was indicted and had entered guilty pleas at the time of the Scott decision. Here, there is no evidence that any criminal charges were ever filed against Kate Corbett. Further, in the Scott case, the defendant's motion to withdraw his plea specifically stated that Dookhan had been identified by the police as having intentionally contaminated drug evidence, falsified drug findings, and altered chain of custody documents.[6] In addition, at the hearing on the motion in Scott, the judge noted on the record that he was aware of the allegations regarding Annie Dookhan, and that she was under indictment.[7] In the instant case, no one at the proceeding in the trial court was aware of any

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[6] Scott's brief available online at: http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-11465 page 4.

[7] http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-11465, page 7.

allegations against Kate Corbett, since the Memorandum did not come out until months after the decision.

Although the defendant cites to Jarosz v. Palmer, 436 Mass. 526, 530 (2002) for the proposition that "a judge may take judicial notice of facts in connection with records of the court in related actions," the Memorandum he attached is not part of any court action. Again, there is no evidence that there are any court proceedings or indictments pending against Kate Corbett.

It is only appropriate for a court to take judicial notice of facts if the facts are indisputably true; either because they are generally known and effectively unchallengeable as representing the truth or because they are readily verifiable by resort and authoritative tests that themselves cannot reasonably be challenged. Commonwealth v. Greco, 76 Mass. App. Ct. 296, 301 (2010); Federal National Mortgage Association v. Therrion, 42 Mass. App. Ct. 523, 525 (1997); Massachusetts Guide to Evidence, § 201 (2013).

The conclusions, judgments, and opinions in the Memorandum on which the defendant seeks to rely (Def. Br. 11-13, Def. R. 15-20) are by no means indisputably true. Rather, their validity turns on whether they

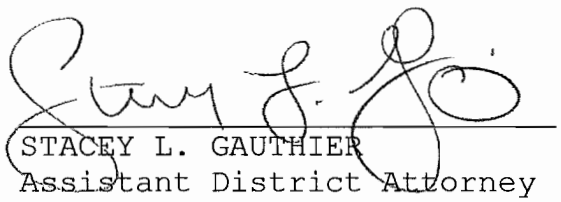
are fully (and unquestionably) supported by verifiably accurate facts found during the investigation; a matter for the fact finder in the trial court. Throughout the investigation, Kate Corbett maintained that she had earned a Bachelor of Science in Chemistry. Def. R. 16, 18. Unlike Annie Dookhan, Ms. Corbett made no admission that she knowingly testified falsely, or put false information in her Curriculum Vitae. Therefore, 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.

CONCLUSION

For the above stated reasons, the Commonwealth respectfully requests that the Court affirm the denial of the defendant's motion to withdraw his plea.

Respectfully submitted,

TIMOTHY J. CRUZ
District Attorney

BY: 

STACEY L. GAUTHIER
Assistant District Attorney
For the Plymouth District
BBO # 671535

October 9, 2014

COMMONWEALTH'S ADDENDUM

58 Mass.App.Ct. 1104, 789 N.E.2d 184 (Table), 2003 WL 21277112 (Mass.App.Ct.)
Unpublished Disposition
Briefs and Other Related Documents

Appeals Court of Massachusetts.
COMMONWEALTH,
v.
Joseph LEDOUX.

No. 02-P-295.
June 3, 2003.

Background: Following his convictions in the trial court on negotiated pleas of guilty to multiple counts of armed robbery and assault with intent to rob, defendant moved to withdraw pleas, for new trial, and for reconsideration. Upon denial of motions, defendant appealed.

Holdings: The Appeals Court held that:
(1) any failure on part of state to give up anything of value in exchange for defendant's plea did not invalidate plea;
(2) value of state's agreement with defendant was sufficient to serve as consideration for plea; and
(3) defendant's alleged misapprehension of strength of state's case did not render plea involuntary.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

Any failure on part of state to give up anything of value in exchange for defendant's guilty plea did not invalidate plea.

[2] KeyCite Citing References for this Headnote

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

Assuming applicability of failure of consideration argument in analyzing validity of plea agreement, value of state's agreement with defendant was sufficient to serve as consideration for defendant's plea, where defendant received reduced sentence and state did not proceed on habitual offender indictment.

A.1

[3] KeyCite Citing References for this Headnote

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

Defendant's alleged misapprehension of strength of state's case against him on charge which it agreed to drop in exchange for his guilty plea did not render plea involuntary, where dropped charge was not so obviously invalid on its face as to have had no actual value in plea bargaining and state recommended less than maximum sentence on indictments to which defendant pled guilty.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The defendant appeals from the denials of his motion to withdraw his pleas of guilty and for a new trial and for reconsideration.[FN1] He claims that his decision to plead guilty was based upon an agreement by the Commonwealth to dismiss an indictment charging him as an habitual offender, where there was allegedly no legal basis for the habitual offender indictment. The defendant argues that his 1988 convictions for manslaughter and operating under the influence causing serious bodily injury [FN2] cannot provide the two predicate felonies to support an habitual offender indictment because they both arose from the same motor vehicle incident.

FN1. He also claims that his change of plea was not voluntary because his counsel did not advise him on the weakness of the Commonwealth's case.

FN2. These offenses are unrelated to the convictions from which the defendant now appeals.

1. *Collateral attack on basis of agreement to plead guilty.* In exchange for pleading guilty, the defendant was promised and received both a recommendation of a lesser sentence and a nolle prosequi on the habitual offender charge. There is no allegation of failure of the Commonwealth to perform its agreement. Cf. *Doe v. District Attorney for Plymouth Dist.*, 29 Mass.App.Ct. 671, 677, 564 N.E.2d 588 (1991).

[1] The defendant claims that he nevertheless has the right to revoke his guilty pleas on the grounds that, in essence, the Commonwealth gave up nothing of value in exchange.[FN3] This proposition is not supported by any authority cited by the defendant nor can we find any.

FN3. The defendant asserts that his prior felony convictions arose out of the same incident and thus cannot qualify as both of the two prerequisite felonies required for an habitual offender conviction. See *Benton v. Maryland*, 395 U.S. 784, 790-791 & n. 6, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *Commonwealth v. Richardson*, 175 Mass. 202, 203-204, 55 N.E. 988 (1900); *Commonwealth v. Levia*, 385 Mass. 345, 350, 431 N.E.2d 928 (1982); *Commonwealth v. Meehan*, 14 Mass.App.Ct. 1028, 1029, 442 N.E.2d 43 (1982); *Commonwealth v. Keane*, 41 Mass.App.Ct. 656, 660, 672 N.E.2d 131 (1996).

[2] The value of the "bargain" is for the defendant to assess. He essentially is making a failure of consideration argument, claiming that there was no benefit to him and/or no detriment to the Commonwealth in the "exchange." Even if this were the appropriate framework within which to analyze the plea bargain, there is arguably controversy and uncertainty as to the proper

A.2

interpretation of the habitual criminal statute in the context of these indictments. In these circumstances the value of the Commonwealth's agreement was sufficient to serve as consideration because the defendant did receive a reduced sentence and the Commonwealth did not proceed on the colorable habitual offender indictment. See Restatement (Second) of Contracts § 74 (1981).

[3] 2. *Voluntariness of pleas.* The defendant's misapprehension of the strength of the Commonwealth's case for the charge which it agreed to drop did not make his pleas involuntary, as he argues. See e.g. *Commonwealth v. Dozier,* 24 Mass.App.Ct. 961, 511 N.E.2d 35 (1987) (in which we rejected a similar argument as applied to the indictment to which the defendant pleaded guilty). The defendant is not aided by arguing, that his pleas were not voluntary because his counsel was ineffective in failing to advise him on the weakness of the habitual offender indictment. *Id* at 963, 511 N.E.2d 35.

Simply stated, while the applicability of the habitual offender indictment to the facts of the defendant's case may be debatable, it is not so obviously invalid on its face that it could be regarded as a worthless benefit to be rid of it. Furthermore, the defendant received a palpable additional benefit by having the Commonwealth recommend less than the maximum sentence on the indictments to which he did plead guilty.[FN4]

FN4. The defendant received a sentence of 18-20 years on one count of armed robbery. He received 8 concurrent sentences for the remaining counts of armed robbery and assault with the intent to rob.

***2** There was no error.

Denial of motions to withdraw pleas of guilty and for new trial and for reconsideration affirmed.

Mass.App.Ct.,2003.
Com. v. LeDoux
58 Mass.App.Ct. 1104, 789 N.E.2d 184 (Table), 2003 WL 21277112 (Mass.App.Ct.)
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 2002 WL 32758813 (Appellate Brief) Brief for the Commonwealth (Sep. 18, 2002)
- 2002 WL 32758829 (Appellate Brief) Brief for the Commonwealth (Sep. 18, 2002)
- 2002 WL 32758819 (Appellate Brief) Brief and Record Appendix for the Defendant-Appellant Joseph LeDoux On Appeal from the Woburn District Court (Jun. 6, 2002)
- 2002 WL 32758823 (Appellate Brief) Brief and Record Appendix for the Defendant-Appellant Joseph LeDoux on Appeal from the Woburn District Court (Jun. 6, 2002)
- 2002-P-0295 (Docket) (Feb. 25, 2002)

END OF DOCUMENT

A.3

Appellate Procedure Rule 8: The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits on file, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases. In a civil case, in an appeal from an appellate division, the original papers and exhibits shall include the report of the trial judge to the appellate division with any exhibits made a part of such report.

(b) The Transcript of Proceedings.

(1) Civil Cases, Except Child Welfare Cases: Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered. Within ten days after filing the notice of appeal the appellant shall order from the court reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the lower court for an order requiring the appellant to do so. At the time of ordering, a party shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

(2) Criminal Cases: Duty of Clerk; Duty of Court Reporter. Upon the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the lower court, within ten (10) days, shall order from the court reporter a transcript of the proceedings and shall file a certificate of such order. The parties are encouraged to stipulate to those parts of the proceedings which are unnecessary to the appeal. Upon receipt of an order, the court reporter shall prepare one original typed transcript. The court reporter shall deliver the original typed transcript to the clerk of the lower court who shall, by means of xerography or other similar method which produces legible copies, prepare one copy thereof for each of the appellate court, the appellant, and the appellee. The clerk of the lower court shall deliver one copy each to the appellant and the appellee and shall certify that the copies of the appellant and appellee have been delivered. The clerk of the lower court shall retain custody of the original typed transcript and one copy thereof until the record is transmitted to the appellate court as provided by Rule 9 (d) . The Commonwealth shall pay the cost of the original of the typed transcript and a copy for the appellate court. Except as provided in Rule 8(b)(4), the cost of the copy for the appellant shall be paid for by the appellant.

(3) Electronically Recorded Proceedings, Except Child Welfare Cases.

(i) Applicability. Rule 8(b)(3) applies to proceedings which were recorded electronically on equipment under the control of the court and which were not recorded by an official court reporter. If, however, a complete transcript of the electronic recording has been produced for use by the trial court, and it or a copy is available to the parties, such transcript or copy shall be utilized in lieu of preparing another pursuant to this Rule 8(b)(3). Upon receipt of the notice of appeal in such cases, the clerk shall advise the parties of the name of the preparer of the transcript; the parties shall then follow the procedure under Rule 8(b)(1) in a civil case, or Rule 8(b)(2) in a criminal case, as if a court reporter had been present, except the appellant's time for ordering a transcript shall be extended to within ten days after appellant's receipt of the clerk's notification of the name of the preparer of the transcript.

(ii) Duties of the Appellant and of the Clerk; Selection of Transcriber. If the appellant deems all or part of the electronic recording necessary for inclusion in the record, the appellant shall, simultaneously with filing a notice of appeal, order from the clerk of the lower court, in accordance with any rule or established policy of the court, a cassette copy of the electronic recording, which is hereinafter called "the cassette." The clerk shall promptly provide the cassette, unless the provisions of the second paragraph of Rule 8(b)(3)(i) apply. If a portion of the electronic recording has already been transcribed for use by the trial court, and such transcript or a copy is available to the parties, the clerk shall, in addition to providing the cassette, at the same time advise the parties of the name of the preparer of the transcript.

Within fifteen days of receipt of the cassette from the clerk, appellant shall file in court and serve on each appellee a document which includes the date of receipt of the cassette; a designation of the parts of the cassette the appellant intends to include in the transcript; and the name, address, and telephone number of the individual or firm selected to prepare the transcript, provided that the appellant and each appellee have agreed to this choice and the appellant so states. If the appellant and appellees have not so agreed, said document shall also specifically notify the clerk to select the transcriber.

The designation of the parts of the cassette to be transcribed should be precise and include such details as the name of the witness whose testimony has been designated and the portions to be included, giving an exact quote of the beginning words and concluding words of each designated portion.

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If such selection of an individual or firm to prepare the transcript is not included, or if the transcript is to be provided at the expense of the Commonwealth, the individual or firm shall be selected by the clerk. When the selection is made by the clerk, the individual or firm shall be selected in accordance with procedures promulgated by the Chief Administrative Justice. The clerk shall promptly notify all parties of any such selection made by the clerk. Any individual or firm selected to transcribe the record pursuant to Rule 8(b)(3) is hereinafter called "the transcriber."

If the appellant has designated the entire cassette for transcription, then within said fifteen days of receipt of the cassette from the clerk, appellant shall also send or deliver to the transcriber the cassette provided by the clerk and a written order designating the entire cassette for transcription. If the appellant has not designated the entire cassette, then after twenty days have expired from the service upon the appellee of appellant's designation of transcript, the appellant shall promptly send or deliver to the transcriber the cassette provided by the clerk and a written order which states those parts of the cassette designated by the parties for transcription. In addition, the order, whether for all or part of the transcript, shall include a statement that the original of the designated portions of the transcript should be sent to the clerk of the lower court, and shall indicate the number of copies if any, to be sent to the appellant. The appellant shall promptly file with the clerk and serve on the other parties a copy of the order placed with the transcriber. Unless the entire cassette is to be transcribed, the appellant shall, together with appellant's designation of transcript, file and serve on the appellee a statement of the issues the appellant intends to present on the appeal. The appellant shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription, and, where the Commonwealth is not responsible for the cost of transcription, make satisfactory arrangements with the transcriber to pay for the trial court's original of the designated portions of the transcript and any copies ordered by the appellant for the appellant's own use.

(iii) Duties of the Appellee. If the appellee deems it necessary to have a cassette in order to consider counter-designating, or for any other purpose, the appellee shall, after receipt of the notice of appeal, promptly order the cassette from the clerk or promptly arrange with the appellant to use appellant's cassette. If the appellant has not designated and ordered the entire transcript and if the appellee deems a transcript of other portions of the proceedings to be necessary, the appellee shall within fifteen days after receipt of the appellant's designation, file in court, and serve on the appellant, a designation of such additional parts. The designation of the parts of the cassette to be transcribed should be precise and include such details as the name of the witness whose testimony has been designated and the specific portions to be included, giving an exact quote of the beginning words and concluding words of each designated portion. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the lower court for an order requiring the appellant to do so. If the appellee desires a copy of designated portions of the transcript, the appellee shall promptly communicate to the transcriber the number of copies wanted and, in cases where the Commonwealth is not responsible for the cost of the transcript, make satisfactory arrangements with the transcriber for payment for the appellee's own copies.

The appellee shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription.

(iv) Duties of the Transcriber. The transcriber shall prepare an original typed transcript of the designated portions and the requested number of copies, in accordance with the designations, and shall deliver said original to the clerk, with the following certificate of accuracy:

I, _____, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, of the designated portions of the cassette provided to me by the appellant or appellee of a trial or hearing of the _____ Division of the _____ Court Department in the proceedings of _____ v. _____, case(s) no.(s) _____ before Justice _____ on _____.

(Day and Date)

Date: _____

_____

Transcriber's Signature

The transcriber shall deliver legible copies to all parties who have so requested.

(v) Unintelligible Portions of the Cassette. If portions of the cassette cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate their content. If agreement cannot be reached, the parties shall promptly present their differences as to such portions to the trial judge who heard the testimony. The trial judge shall, if possible, settle the content of the unintelligible portions, which shall then be included in the transcript.

(vi) Transcripts Paid for by the Commonwealth. In criminal cases, the Commonwealth shall pay the cost of the original of the designated portions of the typed transcript and a copy for the appellate court. Except as provided in Rule 8(b)(4), the cost of the copy for the appellant shall be paid for by the appellant who shall make arrangements with the transcriber to pay for such copy. Whenever the Commonwealth is to pay for an original or copy of the designated portions of the transcript, each party designating any portion of the cassette for transcription shall, at the time of filing the designation, also file a certificate that the parts designated are necessary to permit full consideration of the issues on appeal. Unless one of the parties specifically requests otherwise, that part of the cassette dealing with impanelment of a jury shall not be transcribed.

(4) Cost of Transcripts for Indigents. In all cases in which counsel is required to be made available pursuant to Supreme Judicial Court Rule 3:10 the cost of any transcript for such a party shall be paid for by the Commonwealth.

(5) Child Welfare Cases

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(i) **Proceedings Recorded by an Official Court Reporter.** On the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the lower court on behalf of the appellant, shall order from the court reporter a transcript of the entire proceeding or of such parts of the proceeding not already on file. The clerk of the lower court shall notify all parties of the date the transcript was ordered by sending a copy of the order form to all parties. On receipt of the order the court reported shall prepare an original typed transcript for filing with the lower court and a copy for the appellant and any party who so requests. The court reporter shall deliver the original to the clerk of the lower court who shall immediately notify all parties of its receipt, and the court reporter shall deliver legible copies to the appellant and to any party who so requests.

(ii) **Electronically Recorded Proceedings**

(a) **Applicability:** Rule 8(b)(5)(ii) applies to child welfare cases which were recorded electronically on equipment under the control of the court ad which were not recorded by an official court reporter. If, however, a complete transcript of the electronic recording has been produced for use by the lower court, and it or a copy is available to the parties, that transcript or copy shall be used.

(b) **Duties of the Appellant and Clerk.** Upon the filing of a notice of appeal, the clerk of the lower court shall produce a cassette copy of the electronic recording. Within 10 days of production of the cassette, the clerk of the lower court shall, unless the parties file a stipulation designating the parts of the cassette which need not be transcribed, on behalf of the appellant order a transcription of the entire cassette from a transcriber selected by the clerk in accordance with procedures promulgated by the Chief Justice for Administration and Management. The clerk shall also notify all parties of the name of the transcriber and the date the cassette was sent for transcription by sending a copy of the order form to all parties.

On receipt of the order the transcriber shall prepare an original typed transcript for filing in the lower court and a copy for the appellant and any party who so requests. The transcriber shall deliver the original to the clerk of the lower court who shall immediately notify all parties of its receipt, and the transcriber shall deliver legible copies to the appellant and to any party who so requests. The appellant and appellee shall cooperate with the transcriber by providing information necessary to facilitate transcription. The transcriber shall certify the original transcript using the following certificate of accuracy:

I, _____, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, of the designated portions of the cassette provided to me by the clerk of the lower court of a trial or hearing of the _____ Division of the _____ Court Department in the proceedings of _____, case(s) no(s). _____ before Justice _____ on _____.

Date: _____

_____
Transcriber's Signature

(iii) **Unintelligible Portions of the Cassette.** If portions of the cassette cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate their content. If agreement cannot be reached, the parties shall promptly present their differences as to such portions to the trial judge who heard the testimony. The trial judge shall, if possible, settle the content of the unintelligible portions, which shall then be included in the transcript.

(iv) **Costs.** The appellant shall pay for the cost of the original transcript filed with the lower court and for any copies ordered by the appellant. If there is more than one appellant, the cost of the original and any copies shall be divided between the various appellants. Any other party who requested a copy of the transcript shall pay for its copy. For any party for whom counsel is made available pursuant to Supreme Judicial Court Rule 3:10 , the cost of any transcript requested by, or on behalf of, such party shall be paid in accordance with G.L. c. 261 .

(c) **Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript Is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within thirty days after the notice of appeal is filed, file a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may file objections or proposed amendments thereto within ten days after service. Thereupon the statement and any objections or proposed amendments thereto shall be submitted to the lower court for settlement and approval and as settled and approved shall be included by the clerk of the lower court in the record on appeal.

(d) **Agreed Statement as the Record on Appeal.** In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may, within thirty days after the notice of appeal is filed, prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the lower court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the lower court, and as approved shall be retained in the lower court as the record on appeal.

Copies of the agreed statement shall be filed as the appendix required by Rule 18.

(e) **Correction or Modification of the Record.** If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court, either before or after the record is transmitted to the appellate court, or the

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appellate court, or a single justice, on proper suggestion or on its own motion, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to a single justice.

Amended June 27, 1974, effective July 1, 1974; amended effective February 24, 1975; amended May 15, 1979, effective July 1, 1979; June 28, 1979, effective July 1, 1979; February 17, 1983, effective April 1, 1983; May 29, 1986, effective July 1, 1986; June 23, 1986, effective July 1, 1986; October 1, 1998, effective November 2, 1998; July 28, 1999, effective September 1, 1999, June 26, 2002, effective September 3, 2002.

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Appellate Procedure Rule 18: Appendix to the Briefs

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(a) **Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies.** The appellant shall prepare and file an appendix to the briefs. In civil cases, the appendix shall contain: (1) the relevant docket entries in the proceedings below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the lower court should not be included in the appendix.

In criminal cases, the appendix need not contain relevant portions of the transcript, but shall contain: (1) the relevant docket entries in the proceedings below; (2) a copy of the complaint or indictment; and (3) any paper filed in the case relating to an issue which is to be argued on appeal. Any party in a criminal case may include in an appendix to his brief any other parts of the record to which he wishes to direct the particular attention of the court.

The appendix shall include any order of impoundment or confidentiality from the lower court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts, provided that the court may decline to permit the parties to refer to portions of the record omitted from the appendix, unless leave be granted prior to argument.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, any appendix shall be filed and served with the brief. If separately bound, the same number of copies of the appendix shall be filed with the clerk as required by Rule 19(b) for the filing of the brief, and two shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number and except as otherwise provided in subdivision (e) of this rule.

(b) **Determination of Contents of Appendix in Civil Cases; Cost of Producing.** The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than ten days after the date on which the clerk notifies the parties that the record has been assembled, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within ten days after receipt of the designation, serve upon the appellant a designation of those parts. The parties shall not engage in unnecessary designation and may refer to parts of the record not included in the appendix if permitted by the appellate court or a single justice pursuant to the provisions of Rule 18(a) or 18(f). However, this does not affect the responsibility of the parties to include materials necessary to their appeal, including exhibits, in the appendix.

Where a party designates as part of the record any matter that has been impounded or has been made confidential by statute, rule, or order, the designation shall so state.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. In the event of a dispute as to the parts to be included or the advance required to include them, the matter shall be settled by the lower court on motion and notice. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

(c) **Alternative Method of Designating Contents of the Appendix in Civil Cases; How References to the Record May Be Made in the Briefs When Alternative Method Is Used.** In civil cases, if the appellant shall so elect - with leave of the appellate court or a single justice - preparation of the appendix may be deferred until after the briefs have been filed and the appendix may be filed twenty-one days after service of the brief of the appellee. Notice of the election by the appellant to defer preparation of the appendix shall be filed and served by him within ten days after the date on which the clerk notifies the parties that the record has been assembled. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 18 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page-proof copies of his brief within the time required by Rule 19(a) , with appropriate references to the pages of the parts of the record involved. In that event, within fourteen days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 20(a) containing references to the pages of the appendix in place of or in addition to the initial

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references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

(d) Arrangement of the Appendix. The pages of the appendix shall be consecutively numbered and the parts of the record which are reproduced therein shall be set out in chronological order. The appendix shall commence with a chronologically ordered list of the parts of the record which it contains, with references to the pages of the appendix at which each part begins. When an appendix relates to two or more cases or to more than two parties, the appendix shall indicate the case to which each paper belongs and by whom it was filed. Unless the party filing the appendix reproduces the entire transcript of testimony, he shall, preceding each portion of testimony transcript reproduced, insert a concise statement identifying:

(1) the witness whose testimony is being reproduced;

(2) the party originally calling him;

(3) the party questioning him; and

(4) the classification of his examination (direct, cross, or other).

When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page number of the original transcript at which such matter may be found may be indicated in brackets immediately before the matter which is set out, unless it already appears on the matter as set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) may be omitted. A question and its answer may be contained in a single paragraph.

(e) Reproduction of Exhibits and Transcripts. Exhibits and transcripts or portions thereof in civil cases, designated for inclusion in the appendix, may be contained in separate volumes, suitable indexed.

(1) Appeals Court. On appeals to the Appeals Court, five copies of the exhibits volume or volumes, and two copies of the transcript volume or volumes, shall be filed with the appendix and one copy of each shall be served on counsel for each party separately represented.

(2) Supreme Judicial Court. On appeal to the Supreme Judicial Court, and on further appellate review, five copies of the exhibits volume or volumes and five copies of the transcript volume or volumes shall be filed with the appendix and one copy of each shall be served on counsel for each party separately represented.

(3) Appeals transferred to the Supreme Judicial Court from the Appeals Court. In any appeal transferred to the full Supreme Judicial Court, in which copies of the exhibits and transcripts have already been filed in the Appeals Court pursuant to this rule three additional copies of the transcript volume or volumes shall be promptly filed with the clerk of the Supreme Judicial Court, unless the court by order in a particular case shall direct a lesser or greater number.

(f) Hearing of Appeals on the Original Record Without the Necessity of an Appendix. On motion, the appellate court or a single justice may, in specific cases, dispense with the requirement of an appendix and permit appeals to be heard in whole or in part on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

(g) Reproduction of Impounded Materials. If the entire case has been impounded, the cover of the appendix shall clearly indicate that the appendix is impounded. If the entire case has not been impounded, a separate appendix volume shall be filed containing the impounded material and the cover thereof shall clearly indicate that it contains impounded material.

Amended effective February 24, 1975, amended June 2, 1976, effective July 1, 1976; May 15, 1979, effective July 1, 1979; April 25, 1984, effective July 1, 1984; November 17, 1986, effective January 1, 1987, amended effective February 1, 1991; May 1, 1994; amended June 11, 1997, effective July 1, 1997; October 1, 1998, effective November 2, 1998.

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Section 201. Judicial Notice of Adjudicative Facts

(a) Scope. This section governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either

(1) generally known within the territorial jurisdiction of the trial court or

(2) capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.

(c) When Taken. A court may take judicial notice at any stage of the proceeding, whether requested or not, except a court shall not take judicial notice in a criminal trial of any element of an alleged offense.

(d) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(e) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that they may, but are not required to, accept as conclusive any fact which the court has judicially noticed.

NOTE

Subsection (a). There is a settled distinction between adjudicative facts and legislative facts. See Cast Iron Soil Pipe Inst. v. Board of State Examiners of Plumbers & Gas Fitters, 8 Mass. App. Ct. 575, 586, 396 N.E.2d 457, 464 (1979), and cases cited. Adjudicative facts are the kind

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Section 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. [Exception not recognized]

(2) Excited Utterance (Spontaneous Utterance). A spontaneous utterance if (A) there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (B) the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought.

(3) Then-Existing Mental, Emotional, or Physical Condition.

(A) Expressions of present physical condition such as pain and physical health.

(B) (i) Statements of a person as to his or her present friendliness, hostility, intent, knowledge, or other mental condition are admissible to prove such mental condition.

(ii) Statements, not too remote in time, which indicate an intention to engage in particular conduct, are admissible to prove that the conduct was, in fact, put in effect. Statements of memory or belief to prove the fact remembered or believed do not fall within this exception.

(iii) Declarations of a testator cannot be received to prove the execution of a will, but may be shown to show the state of mind or feelings of the testator.

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(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for the purpose of medical diagnosis or treatment describing medical history, pain, symptoms, condition, or cause, but not as to the identity of the person responsible or legal significance of such symptoms or injury.

(5) Past Recollection Recorded.

(A) A past recorded statement may be admissible if (i) the witness has insufficient memory to testify fully and accurately, (ii) the witness had firsthand knowledge of the facts recorded, (iii) the witness can testify that the statement was truthful when made, and (iv) the witness made or adopted the recording when the events were fresh in the witness's memory.

(B) The recorded statement itself may be admitted in evidence, although the original of the statement must be produced if procurable.

(6) Business and Hospital Records.

(A) Entry, Writing, or Record Made in Regular Course of Business. A business record shall not be inadmissible because it is hearsay or self-serving if the court finds that (i) the entry, writing, or record was made in good faith; (ii) it was made in the regular course of business; (iii) it was made before the beginning of the civil or criminal proceeding in which it is offered; and (iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

(B) Hospital Records. Records kept by hospitals pursuant to G. L. c. 111, § 70, shall be admissible as evidence so far as such records relate to the treatment and medical history of such cases, but nothing contained therein shall be admissible as evidence which has reference to the

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question of liability. Records required to be kept by hospitals under the law of any other United States jurisdiction may be admissible.

(C) Medical and Hospital Services.

(i) Definitions.

(a) Itemized Bills, Records, and Reports. As used in this section, "itemized bills, records, and reports" means itemized hospital or medical bills; physician or dentist reports; hospital medical records relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured; or any report of any examination of said injured person including, but not limited to, hospital medical records.

(b) Physician or Dentist. As used in this section, "physician or dentist" means a physician, dentist, or any person who is licensed to practice as such under the laws of the jurisdiction within which such services were rendered, as well as chiropodists, chiropractors, optometrists, osteopaths, physical therapists, podiatrists, psychologists, and other medical personnel licensed to practice under the laws of the jurisdiction within which such services were rendered.

(c) Hospital. As used in this section, "hospital" means any hospital required to keep records under G. L. c. 111, § 70, or which is in any way licensed or regulated by the laws of any other State, or by the laws and regulations of the United States of America, including hospitals of the Veterans Administration or similar type institutions, whether incorporated or not.

(d) Health Maintenance Organization. As used in this section, "health maintenance organization" shall have the same meaning as defined in G. L. c. 176G, § 1.

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(ii) Admissibility of Itemized Bills, Records, and Reports. In any civil or criminal proceeding, itemized bills, records, and reports of an examination of or for services rendered to an injured person are admissible as evidence of the fair and reasonable charge for such services, the necessity of such services or treatments, the diagnosis, prognosis, opinion as to the proximate cause of the condition so diagnosed, or the opinion as to disability or incapacity, if any, proximately resulting from the condition so diagnosed, provided that

(a) the party offering the evidence gives the opposing party written notice of the intention to offer the evidence, along with a copy of the evidence, by mailing it by certified mail, return receipt requested, not less than ten days before the introduction of the evidence;

(b) the party offering the evidence files an affidavit of such notice and the return receipt is filed with the clerk of the court after said receipt has been returned; and

(c) the itemized bill, record, or report is subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization rendering such services, or by the pharmacist or retailer of orthopedic appliances.

(iii) Calling the Physician or Dentist as a Witness. Nothing contained in this subsection limits the right of a party to call the physician or dentist, or any other person, as a witness to testify about the contents of the itemized bill, record, or report in question.

(7) Absence of Entry in Records Kept in Accordance with Provisions of Section 803(6). The absence of an entry in records of regularly conducted activity, or testimony of a witness that he or she has examined records and not found a particular entry or entries, is admissible for purposes of proving the nonoccurrence of the event.

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(8) Official/Public Records and Reports.

(A) Record of Primary Fact. A record of a primary fact, made by a public officer in the performance of an official duty, is competent evidence as to the existence of that fact.

(B) Prima Facie Evidence. Certain statutes provide that the admission of facts contained in certain public records constitute prima facie evidence of the existence of those facts.

(C) Record of Investigations. Record of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records, unless specifically authorized by statute.

(9) Records of Vital Statistics. The record of the town clerk relative to a birth, marriage, or death shall be prima facie evidence of the facts recorded, but nothing contained in the record of a death which has reference to the question of liability for causing the death shall be admissible in evidence.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 902, Self-Authentication, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. [Exception not recognized]

(12) Marriage, Baptismal, and Similar Certificates. [Exception not recognized]

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records or Documents Affecting an Interest in Property. A registry copy of a document purporting to prove or establish an interest in land is admissible as proof of the content of the original recorded document and its execution and delivery by each person who signed it. However, the grantee or entity claiming present ownership interest of the property must account for the absence of the original document before offering the registry copy.

(15) Statements in Documents Affecting an Interest in Property. Statements of a person's married or unmarried status, kinship or lack of kinship, or of the date of the person's birth or death which relate or purport to relate to the title to land and are sworn to before any officer authorized by law to administer oaths may be filed for record and shall be recorded in the registry of deeds for the county where the land or any part thereof lies. Any such statement, if so recorded, or a certified copy of the record thereof, insofar as the facts stated therein bear on the title to land, shall be admissible in evidence in support of such title in any court in the Commonwealth in proceedings relating to such title.

(16) Statements in Ancient Documents. Statements in a document in existence thirty years or more the authenticity of which is established.

(17) Statements of Facts of General Interest. Statements of facts of general interest to persons engaged in an occupation contained in a list, register, periodical, book, or other compilation, issued to the public, shall,

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in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them, be admissible in civil cases as evidence of the truth of any fact so stated.

(18) Learned Treatises.

(A) Use in Medical Malpractice Actions. Statements of facts or opinions on a subject of science or art contained in a published treatise, periodical, book, or pamphlet shall, insofar as the court shall find that the said statements are relevant and that the writer of such statements is recognized in his or her profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error, or mistake against physicians, surgeons, dentists, optometrists, hospitals, and sanitaria, as evidence tending to prove said facts or as opinion evidence; provided, however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action, give the adverse party or that party's attorney notice of such intention, stating the name of the writer of the statements; the title of the treatise, periodical, book, or pamphlet in which they are contained; the date of publication of the same; the name of the publisher of the same; and wherever possible or practicable the page or pages of the same on which the said statements appear.

(B) Use in Cross-Examination of Experts. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.

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(19) Reputation Concerning Personal or Family History. Reputation within a family as to matters of pedigree, such as birth, marriage, and relationships between and among family members, may be testified to by any member of the family.

(20) Reputation Concerning Boundaries or General History. Evidence of a general or common reputation as to the existence or nonexistence of a boundary or other matter of public or general interest concerning land or real property.

(21) Reputation as to Character. A witness with knowledge may testify to a person's reputation as to a trait of character, as provided in Sections 404, Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes, 405, Methods of Proving Character, and 608, Impeachment by Evidence of Character and Conduct of Witness.

(22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or confinement in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Commonwealth in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown, but does not affect admissibility.

(23) Judgment as to Personal, Family, or General History, or Boundaries. [Exception not recognized]

(24) Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care.

(A) Admissibility in General. Any out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with

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the child, or the circumstances under which it occurred, or identifying the perpetrator offered in an action brought under G. L. c. 119, §§ 23(C) and 24, shall be admissible; provided, however that

(i) the person to whom the statement was made, or who heard the child make the statement, testifies;

(ii) the judge finds that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort;

(iii) the judge finds pursuant to Section 803(24)(B) that such statement is reliable; and

(iv) the judge's reasons for relying on the statement appear in the judge's findings pursuant to Section 803(24)(C).

(B) Reliability of Statement. A judge must assess the reliability of the out-of-court statement by considering the following factors:

(i) the timing of the statement, the circumstances in which it was made, the language used by the child, and the child's apparent sincerity or motive in making the statement;

(ii) the consistency over time of a child's statement concerning abuse, expert testimony about a child's ability to remember and to relate his or her experiences, or other relevant personality traits;

(iii) the child's capacity to remember and to relate, and the child's ability to perceive the necessity of telling the truth; and

(iv) whether other admissible evidence corroborates the existence of child abuse.

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(C) Findings on the Record. The judge's reasons for relying on the statement must appear clearly in the specific and detailed findings the judge is required to make in a care and protection case.

(D) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

NOTE

Confrontation Clause. In a criminal case, a hearsay statement offered against the accused must satisfy both the confrontation clause and one of the hearsay exceptions. For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 803, refer to the Introductory Note to Article VIII.

Subsection (1). To date, the present sense impression exception has not been adopted in Massachusetts. See Commonwealth v. Mandeville, 386 Mass. 393, 398 n.3, 436 N.E.2d 912, 916 n.3 (1982).

Subsection (2). This subsection is taken nearly verbatim from Commonwealth v. Santiago, 437 Mass. 620, 623, 774 N.E.2d 143, 146 (2002). See also Commonwealth v. McLaughlin, 364 Mass. 211, 221 –222, 303 N.E.2d 338, 346–347 (1973). "The statement itself may be taken as proof of the exciting event." Commonwealth v. Nunes, 430 Mass. 1, 4, 712 N.E.2d 88, 91 (1999). See Commonwealth v. King, 436 Mass. 252, 255, 763 N.E.2d 1071, 1075 (2002). The proponent of the evidence is not required to show that the spontaneous utterance qualifies, characterizes, or explains the underlying event as long as the court is satisfied that the statement was the product of a startling event and not the result of conscious reflection. See Commonwealth v. Santiago, 437 Mass. at 624–627, 774 N.E.2d at 147–148.

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COMMONWEALTH'S RECORD APPENDIX

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

APPEALS COURT
NO. 2013-P-1256

COMMONWEALTH

V.

RAMON TORRES

COMMONWEALTH'S MOTION TO STRIKE NON-RECORD HEARSAY DOCUMENT FROM THE DEFENDANT'S RECORD APPENDIX AND STRIKE ANY REFERENCES TO THE DOCUMENT FROM THE DEFENDANT'S BRIEF

Now comes the Commonwealth, pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, and moves to strike pages 15 through 20 from the defendant's record appendix in the above named case. Mass. R. App. P. 16(k). As grounds for this motion, the defendant has included a hearsay document in his record appendix and made an argument based on that document, even though the document is not part of the record on appeal. His inclusion of the document in the record appendix and the argument based on that document violates Rule 8(a) (the record on appeal includes the original papers and exhibits on file, the transcript of proceedings and a certified copy of the docket entries prepared by the clerk of the lower court). It also violates Rule 18(a) (party may include in record appendix "parts of the record").

The April 30, 2013 denial of the defendant's Motion to Withdraw his Guilty Plea and for a New Trial is the subject of the defendant's appeal (Defendant's

OFFICE OF THE
DISTRICT ATTORNEY
PLYMOUTH DISTRICT
32 BELMONT STREET
P.O. BOX 1665
BROCKTON, MA 02403

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Record Appendix [Def. R. 12]). His Notice of Appeal was filed on the same date. Def. R. 14.

Now, on appeal, the defendant asks this Court to consider a six page memorandum from Kristen Sullivan, Acting Laboratory Director of the Massachusetts State Police Forensic Services Group dated November 18, 2013, seven months later, concerning chemist Kate Corbett. That is the document he has included a copy of in his "Record Appendix" without leave of the Court. Def. R. 15-20.

The November 18, 2013 Memorandum was not, and could not have been, presented to the judge in the trial court who denied the motion that is the subject of this appeal. The Memorandum was written almost seven months after the denial of the motion. Since the critical issue on appellate review is whether the judge in the trial court made an error when he denied the defendant's Motion to Withdraw his Guilty Plea and for a New Trial, the appellate review is properly limited to the record that was before the trial court. See Commonwealth v. Johnson, 461 Mass. 44, 48 (2011) (when reviewing a decision on a motion to suppress, the evidence at trial is not considered); Commonwealth v. Rivera, 441 Mass. 358, 367 (2004) (later presented expert testimony cannot be the basis for concluding the judge erred in an earlier ruling). Material that was not before the judge in the trial court is therefore not properly made part of the record. Commonwealth v. Robinson, 83 Mass. App. Ct. 419, 426 (2013).

Even if the defendant had filed a motion to expand the record to include the Memorandum, any allowance of that motion would not be proper in these

OFFICE OF THE
DISTRICT ATTORNEY
PLYMOUTH DISTRICT
32 1ONT STREET
BOX 1665
BROCKTON, MA 02403

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circumstances either. Rather, where a defendant seeks to overturn a conviction based on facts that are not part of the record, "such arguments are properly relegated to a [subsequent] new trial motion" where the Commonwealth could appropriately address the admissibility, reliability, and the weight and credibility of the document. Id. at 427; Commonwealth v. Szargowicz, 77 Mass. App. Ct. 488, 501 n.8 (2010) (motion to expand the record denied where the material was not before the motion judge, but the party may seek its admission at any subsequent hearing in the trial court).

Therefore, any potential motion to expand the record to include factual evidence and opinions that were not before the judge in the trial court should be denied and neither the Court nor the Commonwealth should have to address the contents of the Memorandum in this appeal. Commonwealth v. Tripolone, 44 Mass. App. Ct. 23, 26 n. 6 (1997); Commonwealth v. Santos, 80 Mass. App. Ct. 1111 n.1 (2011) ("Since our consideration of whether the motion judge erred [by denying the motion to vacate the plea] is properly confined to the record that was before him, we deny the motion to expand the record") (unpublished opinion, copy attached).

The Memorandum itself would not even be admissible in the trial court. The Memorandum is entirely hearsay and not subject to any hearsay exception. At the least, the conclusions, judgments, and opinions in the Memorandum are not admissible as an official or public record. Commonwealth v. Nardi, 452 Mass. 379, 393 (2008); Massachusetts Guide to Evidence, § 803(8) 258, 274. For the same reason, the Memorandum is not admissible as a business record. Julian v. Randazzo, 380 Mass. 391, 393 (1980); Burke v. Memorial Hosp., 29 Mass. App. Ct. 948, 949

OFFICE OF THE
DISTRICT ATTORNEY
PLYMOUTH DISTRICT
32 BELMONT STREET
P.O. BOX 1665
BROCKTON, MA 02403

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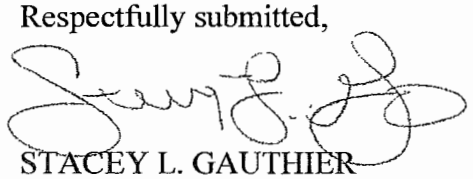
(1990); Massachusetts Guide Evidence, 803(6)(A) Note 269. Nor would the Memorandum be admissible as a learned Treatise. For that hearsay exception to apply there would have to be preliminary evidence establishing it as a "reliable authority" and even then portions of it could only be introduced on cross-examination. Commonwealth v. Sneed, 413 Mass. 387, 394-396 (1992). Massachusetts Guide to Evidence, § 803(18)(B), 260.

CONCLUSION

The defendant incorrectly included the Memorandum in his record appendix, in violation of the rules of appellate procedure. Mass. R. App. P. 18(a) (record appendix in criminal appeal may only include "parts of the record"). The Memorandum should be stricken (not left to the panel to resolve after at least preliminary review and analysis).

The Commonwealth respectfully requests that this Court strike the Memorandum contained on pages 15-20 of the defendant's record appendix because it is not part of the record and its inclusion in this appeal is prejudicial to the Commonwealth. Further, any references to the Memorandum in the defendant's brief should be stricken, or at least entirely disregarded.

Respectfully submitted,



STACEY L. GAUTHIER
Assistant District Attorney
For the Plymouth District
BBO # 671535

OFFICE OF THE
DISTRICT ATTORNEY
PLYMOUTH DISTRICT
32 [illegible] FRONT STREET
BOX 1665
BROCKTON, MA 02403

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80 Mass.App.Ct. 1111, 955 N.E.2d 933 (Table), 2011 WL 5025356 (Mass.App.Ct.)
Unpublished Disposition
Briefs and Other Related Documents
Judges and Attorneys
Only the Westlaw citation is currently available.

Appeals Court of Massachusetts.
COMMONWEALTH
v.
Antonio SANTOS.

No. 07-P-1635.
Oct. 24, 2011.

By the Court (MEADE, WOLOHOJIAN & MILKEY, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** On June 10, 2003, the defendant pleaded guilty to two counts of possession of marijuana with intent to distribute, and one count of possession of marijuana, subsequent offense. A District Court judge accepted the pleas and sentenced him to fifteen months of probation. Over four years later, the defendant moved to withdraw his pleas, claiming that he was incompetent to offer a guilty plea at the time he pleaded guilty. On September 13, 2007, the same judge who had accepted the pleas denied the motion without a hearing. We affirm.

The standard for competence to plead guilty is the same as competence to stand trial. *Commonwealth v. Russin,* 420 Mass. 309, 316-317 (1995). The test is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" of the proceeding against him. *Commonwealth v. Goodreau,* 442 Mass. 341, 350 (2004), quoting from *Commonwealth v. Russin, supra* at 317. Except to the extent that it bears on that test, a diagnosis of mental illness is beside the point. *Commonwealth v. Robbins,* 431 Mass. 442, 448 (2000).

The defendant supported his motion to withdraw his pleas with his own affidavit in which he stated that while he was receiving counseling between 1997 and 1999, he was diagnosed with dysthymic disorder and oppositional defiant disorder (ODD). He also averred that he terminated counseling in 1999 and refused to take prescribed medication, and that his condition was therefore subsequently left untreated. Although the defendant's affidavit stated in conclusory fashion that on June 10, 2003, he was not competent to plead guilty, to understand the consequences of doing so, or to assist his trial counsel, the defendant offered no specifics as to why. Conspicuously absent was any affidavit from the attorney who had represented the defendant at the time of the plea documenting that the defendant was unable to assist in his own defense or was otherwise incompetent to plead guilty or stand trial. Nor did the defendant provide any explanation from a mental health expert as to how diagnoses of ODD and dysthymic disorder might affect his competence to plead guilty. The defendant did provide an affidavit from his attorney on the plea withdrawal motion stating that in unrelated Federal criminal proceedings (brought in 2005 and still pending in 2007), a psychologist had determined that the defendant was incompetent to stand trial.[FN1]

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FN1. The psychologist in the Federal proceeding prepared a written report dated August 8, 2007. It is not clear whether defense counsel on the plea withdrawal motion had a copy of that report when she signed her affidavit on August 30, 2007, and, in any event, it does not appear from the record before us that the psychologist's report was ever submitted to the motion judge (who denied the motion to withdraw the guilty pleas on September 13, 2007). The defendant nevertheless included in the appellate record appendix a copy of the August 8, 2007, psychologist's report, and three other such psychologist reports that were prepared in 2008, 2009, and 2010. He has also filed a motion to expand the appellate record to include those filings. Since our consideration of whether the motion judge erred is properly confined to the record that was before him, we deny the motion to expand the record. Moreover, we note that the underlying substantive question is whether the defendant was competent to tender his pleas in 2003, and subsequent evaluations would be of little, if any, import to that question.

During the plea hearing, the judge conducted a colloquy with the defendant in an effort to ensure that the pleas were knowingly and voluntarily given. Throughout, the defendant's answers were coherent, responsive, and respectful. Nowhere in the transcript of that hearing is there evidence of any problems existing between the defendant and his then-counsel with regard to preparing for trial or considering a potential plea. To the contrary, the defendant expressly acknowledged that he had had enough time to discuss the case fully with his attorney, and that he was satisfied that the attorney was acting in his best interest and had fairly represented him. Before accepting the pleas, the judge found that the defendant voluntarily made them while understanding the consequences.

***2** Especially where, as here, the motion judge was the plea judge, substantial deference is owed to the judge's decision on the motion to withdraw. We are to uphold the judge's ruling unless "no conscientious judge, acting intelligently, could honestly have taken the view expressed by [him]." *Commonwealth v. Gomez*, 450 Mass. 704, 711 (2008), quoting from *Commonwealth v. Goodreau*, 442 Mass. at 348. On this record, the defendant has not come close to meeting that standard. The judge was not required to accept the defendant's self-serving claims of incompetency, especially where they were stated in only conclusory fashion. *Commonwealth v. Marrero*, 459 Mass. 235, 241 (2011). He was entitled to consider the defendant's responses and demeanor from the plea hearing,[FN2] as well as the notable absence of supporting documentation from plea counsel. *Commonwealth v. Goodreau*, 442 Mass. at 354 (judge "may take into account the suspicious failure to provide pertinent information from an expected and available source"). The defendant did not demonstrate how his prior diagnoses of ODD and dysthymic disorder, or his subsequent determination of incompetency to stand trial in 2007, had any appreciable bearing on his competency to offer a plea in 2003. Compare *Commonwealth v. Companonio*, 445 Mass. 39, 50 (2005) (characterizing postconviction commitment to a mental hospital as "essentially irrelevant"). Therefore, the judge did not abuse his discretion in denying the motion or in determining that the defendant had not raised a "substantial issue" requiring an evidentiary hearing. *Commonwealth v. DeVincent*, 421 Mass. 64, 67 (1995) ("Appellate courts generally defer to the sound discretion of the trial judge on whether a motion for a new trial requires an evidentiary hearing or whether it can be decided on the basis of the facts alleged in the affidavits").[FN3]

FN2. The defendant seeks to make much of the fact that the judge did not specifically inquire at the plea hearing whether the defendant had been diagnosed with any mental illness. It is far from clear that the judge's asking that question would have elicited an affirmative response given that-according to counsel's statements at oral argument-the defendant was at that time in denial that he had any mental illnesses. In any event, the defendant offers no support for the proposition that his prior diagnoses of ODD and dysthymic disorder meant that he was incompetent to offer a plea in 2003.

FN3. See *Commonwealth v. Bowler*, 60 Mass.App.Ct. 209, 210 (2003) ("A postconviction motion to withdraw a plea is treated as a motion for a new trial"), quoting from

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Commonwealth v. Correa, 43 Mass.App.Ct. 714, 716 (1997).

Order denying motion to withdraw guilty pleas affirmed.

Mass.App.Ct.,2011.
Com. v. Santos
80 Mass.App.Ct. 1111, 955 N.E.2d 933 (Table), 2011 WL 5025356 (Mass.App.Ct.)
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 2011 WL 703583 (Appellate Brief) Defendant's Reply Brief (Feb. 9, 2011) Original Image of this Document (PDF)
- 2011 WL 636287 (Appellate Brief) Brief for the Commonwealth (Jan. 31, 2011) Original Image of this Document (PDF)
- 2010 WL 3995795 (Appellate Brief) Brief and Record Appendix for the Defendant on Appeal from Judgment of the Brockton District Court (Sep. 20, 2010) Original Image of this Document (PDF)
- 2007-P-1635 (Docket) (Oct. 17, 2007)

Judges and Attorneys (Back to top)

Judges

Judges

- **Milkey, Hon. James R.**
Commonwealth of Massachusetts Appeals Court
Boston, Massachusetts 02108
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

END OF DOCUMENT

R.7

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. APPEALS COURT
CASE NO. 2013-P-1256

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

RAMON TORRES,
Defendant/Appellant.

DEFENDANT'S OPPOSITION TO COMMONWEALTH'S MOTION TO STRIKE NON-RECORD HEARSAY DOCUMENT FROM DEFENDANT'S RECORD APPENDIX AND STRIKE ANY REFERENCES TO THE DOCUMENT FROM THE DEFENDANT'S BRIEF

NOW COMES the Defendant/Appellant Ramon Torres ("Mr. Torres") and hereby OPPOSES the Commonwealth's Motion to Strike Non-Record Hearsay Document from Defendant's Record Appendix and Strike Any References to the Document from the Defendant's Brief.

Mr. Torres plead guilty to one charge of distribution of a Class B substance in violation of G.L. c. 94C, § 32A. The substance that provided the basis for the charge was tested at the William A. Hinton State Laboratory Institute in Jamaica Plain, Massachusetts ("Drug Lab"). When Mr. Torres learned of the rampant malfeasance at the Drug Lab, he filed a Motion to Withdraw His Guilty Plea and for a New Trial ("Motion to Withdraw") in the Brockton District Court. See Commonwealth v. Scott, 467 Mass. 336, 337 (2014)("Scott"). Mr. Torres now appeals the denial of his Motion to Withdraw.

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After entry in this Court, Mr. Torres's case was stayed pending the Supreme Judicial Court's decisions in: Commonwealth vs. Adam Davila, SJC-11463; Commonwealth vs. Corey Bjork, SJC-11464; Commonwealth vs. Rakim Scott, SJC-11465; Commonwealth vs. Rene Torres, SJC-11466; Commonwealth vs. Reginald Gardner, SJC-11470; Commonwealth vs. Geordano Rodriguez, SJC-11462. At the request of this Court, Mr. Torres filed a status report on March 24, 2014. Mr. Torres requested that this matter be remanded back to the Brockton District Court for further proceedings consistent with the Scott decision. His request was denied (Wolohojian, J.).

One of the important considerations in this appeal is whether this Court should remand the case for further proceedings in light of the intervening Scott decision. (Defendant's Brief, pp. 14-16). In Scott, the Supreme Judicial Court announced a two-part test for when a defendant seeks to vacate a guilty plea as a result of underlying government misconduct. See Commonwealth v. Scott, 467 Mass. 336, 344-354 (2014). The two-part test announced in Scott was not addressed in the Brockton District Court in deciding Mr. Torres's Motion to Withdraw. And, since the Motion to Withdraw was decided in April 2013, additional information has since been discovered. The November 18, 2013 Memorandum regarding chemist Kate Corbett ("Corbett Memorandum") is an illustration of circumstances that

demonstrate the need to remand the matter back to the trial court for further proceedings.

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. See Document #5, Commonwealth vs. Rodriguez, SJC-11462.[1] See also Jaroz v. Palmer, 436 Mass. 526, 530 (2002) ("a judge may take judicial notice of facts in connection with records of the court in related actions").

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.

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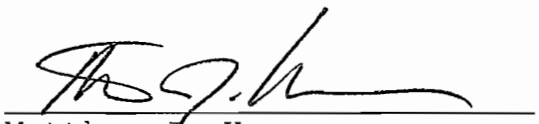
[1] Available for viewing at: http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-11462

Even accepting the 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. Accordingly, the Corbett Memorandum should not be stricken from the Mr. Torres's Brief and Record Appendix.

Respectfully submitted,

RAMON TORRES,
By his attorney,



Matthew J. Koes
BBO No. 668682
340 Union Ave.
Framingham, MA 01702
(508) 598-7060
mkoes@mkoeslaw.com

Dated: September 24, 2014.

Certificate of Service

I, Matthew J. Koes, do hereby certify that on this 24th Day of September, 2014, I caused a true and accurate copy of the foregoing document to be served upon the following counsel of record via first class mail, postage pre-paid:

Stacey L. Gauthier, Esq.
Office of District Attorney/Plymouth
32 Belmont Street
P.O. Box 1665
Brockton, MA 02303

Matthew J. Koes

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Gauthier, Stacey (PLY)

From: Appeals Court Clerk's Office <AppealsCtClerk@appct.state.ma.us>
Sent: Wednesday, October 01, 2014 4:00 PM
To: Gauthier, Stacey (PLY); Stacey L. Gauthier, A.D.A.
Subject: 2013-P-1256 - Notice of Order

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

October 1, 2014

RE: No. 2013-P-1256
Lower Ct. No.: 0715CR002169

COMMONWEALTH vs. RAMON TORRES
NOTICE OF DOCKET ENTRY

Please take note that, with respect to the MOTION to strike non-record hearsay document from record appendix and strike any references to the document in brief, filed by Ramon Torres. (Paper #18),on September 26, 2014, the following order was entered on the docket:

RE#18: Referred to the panel designated to decide this appeal. *Notice ^

ELECTRONIC NOTIFICATION. The Clerk's Office requests that all counsel of record and self-represented litigants registe to receive electronic (i.e., e-mail) notification of actions, orders, judgments, rescripts, and decisions entered by the Appeals Court, including notices scheduling oral argument, in an appeal in which they are participating.

HOW TO REGISTER. Registration is simple. Visit the e-notification page of the court's website at mass.gov/courts/appealscourt/e-notification.html and click on Consent to Electronic Notification Form. Complete and print a copy of the form, then email it to enoticesignup@appct.state.ma.us.

FILINGS AFTER ASSIGNMENT OF APPEAL TO PANEL. Once an appeal is assigned to a panel for consideration on the merits, with or without oral argument, all further filings in the appeal are required to be filed electronically by e-mailing the document in PDF to emotions@appct.state.ma.us.

FILING OF CONFIDENTIAL OR IMPOUNDED INFORMATION. When filing any document containing confidential, impounded, or sealed material, compliance with Mass.R.App.P. 16(d), 16(m), 18(a), 18(g), and the S.J.C.'s Interim Guidelines for the Protection of Personal Identifying Information is required.
Very truly yours,
The Clerk's Office
To: Stacey L. Gauthier, A.D.A., Matthew J. Koes, Esquire

If you have any questions, or wish to communicate with the Clerk's Office about this case, please contact the Clerk's Office at 617-725-8106. Thank you.

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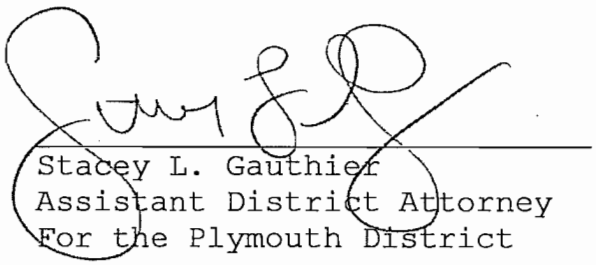
CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)

I, Stacey L. Gauthier, do hereby certify that the Commonwealth's brief in the case of Commonwealth v. Ramon Torres, Appeals Court No.2013-P-1256, complies with Mass. R. App. P. 16(k).



Stacey L. Gauthier
Assistant District Attorney
For the Plymouth District

Date: October 9, 2014

SJC 11771

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

APPEALS COURT NO.
2013-P-1256

COMMONWEALTH,
Appellee

VS.

RAMON TORRES,
Appellant

ON APPEAL FROM JUDGMENTS OF
THE BROCKTON DISTRICT COURT

BRIEF FOR THE COMMONWEALTH

TIMOTHY J. CRUZ,
District Attorney,
Plymouth District
STACEY GAUTHIER
Assistant District Attorney
BBO # 671535
32 Belmont Street
Brockton, MA 02301
(508) 584-8120
stacey.gauthier@state.ma.us

October 9, 2014