

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-681

COMMONWEALTH

vs.

ANTONIO O. DIAS, JR.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 1996, the defendant pleaded guilty to various drug and other offenses, including receiving a stolen motor vehicle. Before us now is the defendant's appeal from the denial of his seventh motion under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), to withdraw his guilty pleas and for a new trial. He also appeals from the denial of his motion for reconsideration. In the rule 30 (b) motion the defendant claims that he received ineffective assistance of plea counsel, and that his pleas were not knowing and voluntary, because counsel failed to advise him of the immigration consequences of the pleas.²

¹ We note that the criminal complaints also list the defendant's name as Antonio Dias and Antonio O. Dias.

² The defendant was deported to Portugal after he finished serving his sentences; it appears that this occurred in or around 1999.

The motion judge properly determined that direct estoppel or waiver bars the defendant's claim. The defendant raised the same claim in his first rule 30 (b) motion, filed in 1997. The plea judge considered the motion and rejected the defendant's assertion that his attorney gave "incorrect advice on the collateral issue of the impact of the convictions on [the defendant's] ability to remain in the United States." Instead of appealing,³ the defendant raised the same or similar claim again in his second and third rule 30 (b) motions, which were denied in 1998 and 1999, respectively. The defendant did not appeal either decision.

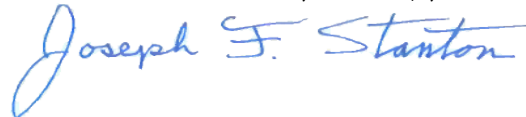
Despite these earlier decisions, the defendant claims that he is still entitled to an evidentiary hearing on his current motion because of the intervening decision of Padilla v. Kentucky, 559 U.S. 356 (2010). But though the defendant claims that the "Padilla issue" is new, he expressly relied on Padilla in his fourth rule 30 (b) motion, filed in 2011 through counsel. While the defendant appealed the denial of that motion, he did not pursue on appeal "any argument concerning his counsel's performance with respect to immigration warnings." Commonwealth v. Dias, 83 Mass. App. Ct. 1124 (2013). The defendant then once again raised his ineffective assistance claim, without citing

³ The defendant claims that he would have appealed but for the deficient performance of his first motion counsel.

Padilla, in his fifth and sixth rule 30 (b) motions, both filed in 2013. On his appeal of the denial of those motions, a panel of this court concluded that direct estoppel barred his claim. See Commonwealth v. Dias, 87 Mass. App. Ct. 1106 (2015). This procedural history establishes that the Padilla issue was actually litigated and decided in conjunction with the defendant's fourth motion, or, alternatively, that he did not raise the issue at the earliest opportunity. He is thus barred from raising it now. See Commonwealth v. Rodriguez, 443 Mass. 707, 709-711 (2005); Commonwealth v. Watson, 409 Mass. 110, 112 (1991).

Order entered July 31, 2017, denying motion to withdraw guilty pleas and for new trial, and order entered August 30, 2017, denying motion for reconsideration affirmed.

By the Court (Sullivan,
Kinder & Shin, JJ.⁴),



Clerk

Entered: December 7, 2018.

⁴ The panelists are listed in order of seniority.