

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-596

COMMONWEALTH

vs.

COURTNEY LYNCH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from the order denying his third motion to withdraw his guilty plea or for a new trial. He argues that his plea was not knowing and intelligent because the plea judge did not advise him of the possibility that his conviction could serve as a predicate for civil confinement as a sexually dangerous person. He also argues that his plea counsel was ineffective for failing to advise him of the same possibility. We affirm.

Background. In February 2000 the defendant pleaded guilty to indecent assault and battery on a child under fourteen years of age. He was sentenced to two and one-half years in the house of correction, with nine months to serve and the balance suspended for five years.

In September 2000 the Commonwealth filed a petition to commit the defendant as a sexually dangerous person under G. L. c. 123A. Two years later the defendant filed his first motion to withdraw his plea, claiming among other things that the plea judge did not inform him, as required at the time by Mass. R. Crim. P. 12 (c) (3) (B), as appearing in 378 Mass. 866 (1979),<sup>1</sup> that he could be civilly committed as a sexually dangerous person. The plea judge denied the motion, and a panel of this court affirmed in an unpublished memorandum and order under our rule 1:28. See Commonwealth v. Lynch, 61 Mass. App. Ct. 1124 (2004). Thereafter, in October 2004, the defendant was adjudicated a sexually dangerous person and committed to a treatment center.

In October 2011 the defendant filed, pro se, his second motion seeking to withdraw his plea.<sup>2</sup> A second judge denied the motion, and the defendant did not prosecute an appeal.

In April 2017 the defendant filed the motion that is the subject of this appeal. A third judge denied the motion without an evidentiary hearing, finding that the defendant did not prove

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<sup>1</sup> Similar language appears in the current version of the rule. See Mass. R. Crim. P. 12 (c) (3) (A) (ii) (b), as amended, 482 Mass. 1499 (2019).

<sup>2</sup> The grounds for the second motion were set out in the defendant's supporting affidavit, which is not in the record before us.

that he was prejudiced by the plea judge's failure to inform him of the possibility of civil commitment.

Discussion. A motion to withdraw a guilty plea is treated as a motion for a new trial under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). See Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014). We review a judge's decision on a rule 30 (b) motion only for a "significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307 (1986). "Absent . . . constitutional concerns, 'a judge should only grant a postsentence motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth.'" Commonwealth v. Roberts, 472 Mass. 355, 360 (2015), quoting Commonwealth v. DeMarco, 387 Mass. 481, 486 (1982). This standard is to be applied "rigorously." Roberts, supra, quoting DeMarco, supra at 487.

"Civil confinement as a sexually dangerous person, although tangentially connected to the criminal process, is not a 'virtually mandatory' consequence of a sexual offense conviction." Roberts, supra at 363. For this reason and others, "[t]he failure of [a] judge . . . to advise the defendant of the possibility of civil confinement [does] not rise to the level of constitutional error." Id. at 364. Nonetheless, a judge's failure in this regard may provide a

basis for withdrawing a plea if the defendant demonstrates prejudice, meaning "a reasonable probability that but for the judge's error he or she would not have pleaded guilty and would have insisted on proceeding to trial." Id. at 365. The defendant must show specifically that a "decision not to plead guilty would have been rational under the circumstances." Id. In determining whether the defendant met this burden, the judge may consider various factors, including "whether the defendant asserted his legal innocence," "weaknesses in the Commonwealth's case or a possible defense," "whether the parties had reached a plea agreement," "whether [t]he defendant was represented by, and had the advice of, able counsel," and "the sentence the defendant received versus the maximum allowable sentence had he or she gone to trial" (quotations and citations omitted). Id.

Here, the motion judge analyzed each of the above factors and concluded that the defendant failed to demonstrate that it would have been rational for him not to plead guilty.<sup>3</sup> We discern no significant error of law or abuse of discretion in the judge's conclusion. First, as the judge observed, the defendant did not assert his innocence in either his first or

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<sup>3</sup> Presumably because of the intervening decision in Roberts, the motion judge addressed the defendant's claim on its merits even though the defendant raised essentially the same claim in his first motion to withdraw his plea. The Commonwealth does not argue that direct estoppel bars the claim.

second motion to withdraw his plea. Second, the judge was well warranted in finding that the Commonwealth's case was "very strong."<sup>4</sup> Third, the judge cited the fact that "[t]he defendant's plea was entered into after an involved negotiation between the defendant's attorney, the prosecutor and the [plea] judge." Fourth, the judge observed that the defendant was represented by retained counsel, who was able to persuade the plea judge "to sentence the defendant to half the period of incarceration being recommended by the prosecutor." Last, the judge properly found that the defendant received a favorable disposition: he was facing thirty months of incarceration (or ten years if the Commonwealth chose to prosecute the case in Superior Court) but was sentenced to serve only nine months with the balance of twenty-one months suspended. Based on these factors,<sup>5</sup> the judge was within his discretion to conclude that the defendant did not meet his burden of proving prejudice. Cf.

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<sup>4</sup> The Commonwealth's case included evidence that the victim reported the abuse almost immediately; the victim's mother heard the defendant telling her to keep quiet because he could get in trouble; and the defendant confessed to the police and admitted that his intent was to digitally penetrate the victim's vagina, but he was thwarted by her retreat.

<sup>5</sup> The judge cited an additional Roberts factor -- the timing of the defendant's request to vacate his plea. See 472 Mass. at 365. But as the judge noted, although the defendant's current motion came seventeen years after his plea, his first motion "was not untimely" as it was filed "approximately two years after his plea and a year after a petition to civilly commit him was filed."

Commonwealth v. Lastowski, 478 Mass. 572, 579 (2018) (defendant failed to prove prejudice from plea counsel's failure to advise him about sex offender registration, where Commonwealth had strong case and defendant could articulate only "generalized concern" about consequence of registration); Commonwealth v. Resende, 475 Mass. 1, 17-19 (2016) (defendant failed to prove he would not have pleaded guilty had he known of governmental misconduct at drug lab, where Commonwealth had strong case and defendant received significant benefit from pleading guilty).

Although the motion judge did not separately address the defendant's ineffective assistance claim (perhaps because of the oblique manner in which it was raised), we disagree with the defendant that this omission requires remand. To begin with, the Commonwealth is correct that the defendant waived his claim by failing to raise it in his previous motions.<sup>6</sup> The defendant must therefore demonstrate a substantial risk of a miscarriage of justice, see Commonwealth v. Randolph, 438 Mass. 290, 296 (2002), and he has not done so. Assuming that plea counsel did not advise the defendant of the possibility of civil confinement,<sup>7</sup> and that this fell below what one would expect of

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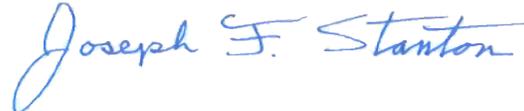
<sup>6</sup> Roberts is not intervening law in this respect because it did not concern ineffective assistance of counsel. See 472 Mass. at 363 n.10.

<sup>7</sup> The only record evidence on this point is a 2002 affidavit from plea counsel, filed with the defendant's first motion to withdraw his plea, in which counsel averred that he did "not

an ordinary fallible lawyer, the defendant failed to prove that he was thereby prejudiced. To satisfy the prejudice requirement, the defendant had to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Commonwealth v. Clarke, 460 Mass. 30, 47 (2011), quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010). For the reasons stated above, the motion judge was within his discretion to find that such a decision would not have been rational in these circumstances. Cf. Lastowski, 478 Mass. at 578-579; Resende, 475 Mass. at 17-19.

Order entered May 19, 2017,  
denying motion to withdraw  
guilty plea and for new  
trial affirmed.

By the Court (Hanlon,  
Lemire & Shin, JJ.<sup>8</sup>),



Clerk

Entered: January 3, 2020.

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recall whether or not [he] informed [the defendant] that by pleading guilty, he could be subject to additional or different punishment pursuant to the provisions of the statute governing sexually dangerous persons." Plea counsel is now deceased.

<sup>8</sup> The panelists are listed in order of seniority.