COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1246

COMMONWEALTH

vs.

DANIEL SULLIVAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In 2011, the defendant was charged in District Court with two counts of violating an abuse prevention order issued pursuant to G. L. c. 209A, as well as two counts of criminal harassment. As to the two 209A counts, he pleaded to sufficient facts as to one, and a jury found him not guilty on the other. As to the two criminal harassment counts, one count was dismissed, and on the other, the defendant was found not guilty.[1] The appeal before us has to do with the defendant's subsequent efforts to have his various criminal records sealed pursuant to G. L. c. 276, § 100C.

Background. We begin by relaying the tortuous procedural history of the defendant's efforts to have his records sealed.

[1] The defendant initially was found guilty, but after prevailing on appeal, he was found not guilty on retrial.

The defendant's initial motion to seal his records was filed on March 14, 2019, and a District Court judge (first judge) denied it that same day. Although the defendant filed a timely notice of appeal, instead of pursuing that appeal, he filed a series of motions for reconsideration. After these serially were denied, the defendant did not file new notices of appeal seeking to challenge the denial of such motions. A second judge issued an order barring the defendant from filing new motions for reconsideration.

Eventually, the defendant filed what purported to be a new motion to seal his records rather than another motion for reconsideration. Deeming the new motion improper, a third judge refused to rule on it. According to the third judge, the defendant in effect was seeking to get him to sit in judgment of his colleague (the first judge) who had denied the original motion to seal, and he had no authority to do that. Instead, according to the third judge, the defendant's remedy was to pursue an appeal. The defendant then filed a second notice of appeal.

Meanwhile, the defendant separately sought to have his records sealed administratively through the independent path recognized by G. L. c. 276, § 100A. See Commonwealth v. Pon, 469 Mass. 296, 298-299 (2014) (describing two independent routes). As a result, the commissioner of probation sealed the

records pertaining to three of the four charges that the defendant had faced. The commissioner determined that the record regarding the fourth charge -- the criminal harassment charges for which the jury found the defendant not guilty on retrial -- would be eligible for automatic sealing three years from December 11, 2018.

Discussion. In light of the defendant's success in having his records sealed pursuant to § 100A, most of this case already is moot. See Pon, 469 Mass. at 298-299. On or about December 11, 2021, the defendant was eligible to have his remaining records sealed pursuant to § 100A, which would render the entire case moot.

In addition, to the extent that the defendant now seeks appellate review of the first judge's March 14, 2019, order denying the initial motion to seal, it is not clear that such an appeal is properly before us.[2] It also is not clear whether the

[2] As noted, although the defendant's initial notice of appeal challenging the denial of his motion to seal was timely, he then filed serial motions for reconsideration. If those motions tolled the appeal period, a question we do not decide, then the original notice of appeal was premature and hence a nullity. Cf., e.g., Padden v. West Boylston, 64 Mass. App. Ct. 120, 124 (2005), quoting Anthony v. Anthony, 21 Mass. App. Ct. 299, 302 (1985) ("[a]ppellate courts must 'give unqualified effect to the language' of [Mass. R. A. P.] 4(a), which instructs that [in civil cases] 'an appeal founded on a notice of appeal filed prior to disposition of a postjudgment motion under Mass. R. Civ. P. 50(b), 52(b) or 59 is a nullity and shall be dismissed'"). The defendant did not file an additional notice of appeal after his motions for reconsideration were denied.

defendant could appeal from the third judge's refusal to act on the new motion to seal, as opposed to pursuing other avenues of relief.

Notwithstanding these complications, we exercise our discretion to address the merits. In deciding whether to seal criminal records pursuant to § 100C, a judge is to employ a balancing test. See Pon, 469 Mass. at 314-319 (setting forth balancing test). The first judge explained her reasoning in an order on one of the motions to reconsider in a thoughtful three-page decision. She did not abuse her discretion in balancing the relevant factors, particularly where the evidence that the unsealed records were interfering with his employment opportunities was thin. We are unpersuaded by the defendant's arguments that the first judge relied on improper factors or otherwise committed an error of law.

Passing over the question of whether the third judge lacked "authority" to consider the defendant's renewed motion to seal his records, we do not view him as having erred in declining to do so in the circumstances presented. The third judge issued his ruling a mere eight months after the defendant's last motion for reconsideration had been denied. The only change in circumstance that the defendant argued had occurred in the interim was the administrative sealing of the records relating to three of the four relevant charges. The defendant has not

explained how this would constitute a material change in circumstance with respect to the records relating to the one charge that remained unsealed. In these circumstances, the third judge properly could view the new motion as one for reconsideration of the first judge's denial of the original motion to seal. Because the first and second judges issued orders precluding the defendant from filing additional motions for reconsideration, we discern no error in the third judge's refusal to entertain the motion.

Order denying motion to seal records affirmed.

By the Court (Milkey, Kinder & Sacks, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: December 13, 2021.

[3] The panelists are listed in order of seniority.