

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-996

COMMONWEALTH

vs.

RUSSELL BLAKE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant pleaded guilty in 1992 to operating under the influence of liquor, operating a motor vehicle after license revocation, unlawfully attaching number plates, and giving a false name to a police officer. In 2004, the defendant filed a pro se motion to withdraw his plea, which was denied. In 2019, this time represented by counsel, the defendant moved again to withdraw his plea, arguing that asserted failures to inform him of the consequences of the plea violated his rights to due process and effective assistance of counsel. A judge denied the motion after a nonevidentiary hearing. We affirm.

Discussion. Motion to withdraw guilty plea. A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). See Commonwealth v. Conaghan, 433 Mass. 105, 106

(2000). Given the "strong policy of finality," Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012), a judge should only grant a motion to withdraw a plea if "the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth" (footnote omitted), Commonwealth v. DeMarco, 387 Mass. 481, 486 (1982). We review a judge's decision denying such a motion "only to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Grace, 397 Mass. 303, 307 (1986). Abuse of discretion is defined as a clear error of judgment in weighing the factors relevant to a decision, such that it falls outside the range of reasonable alternatives. L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

a. Due process. The defendant argues that he should be allowed to withdraw his plea because nothing in the record affirmatively shows that his plea was made voluntarily and intelligently. Due process requires that a guilty plea be accepted only where "the contemporaneous record contains an affirmative showing that the defendant's plea was intelligently and voluntarily made." Commonwealth v. Furr, 454 Mass. 101, 106 (2009). "The burden is ordinarily on the Commonwealth to show that a challenged guilty plea was understandingly and voluntarily made." Commonwealth v. Lopez, 426 Mass. 657, 660 (1998).

"If the contemporaneous record of the plea proceedings is unavailable, 'it may be reconstructed through testimony or other suitable proof of what happened in court when the guilty plea was taken.'" Lopez, 426 Mass. at 660, quoting Commonwealth v. Quinones, 414 Mass. 423, 432 (1993). A defendant may offer an affidavit, but a judge is not required to credit the affidavit or to hold a hearing on a motion for a new trial, even where nothing in the trial record directly contradicts the affidavit. See Commonwealth v. Rzepphiewski, 431 Mass. 48, 55-56 (2000); Commonwealth v. Scoggins, 439 Mass. 571, 578 (2003).

Here, due to the age of this case, there is no available audio recording or transcript of the defendant's plea hearing. The defendant waited twelve years to file his first motion to withdraw his guilty plea, and then an additional fifteen years before filing the one now before us. Not only does the defendant's delay in moving to withdraw his guilty plea serve as "an indicium of satisfaction with the plea agreement," Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 13 (2006), it also places the defendant at fault for the absence of a record and the inability effectively to reconstruct it, see Lopez, 426 Mass. at 661-662.

Despite the lack of transcript or recording of the proceedings, the Brockton District Court docket states that the defendant's plea was "offered [and] accepted after colloquy."

Although the plea was taken in the Stoughton District Court and there is no mention of the colloquy on the Stoughton docket, the record contains no indication that we cannot rely on the Brockton docket, so we accept the facts set forth therein as true. See Commonwealth v. Mattos, 404 Mass. 672, 677 (1989) (docket is prima facie evidence of facts recorded therein).

The only other evidence that the defendant offered in support of his motion was a self-serving affidavit, which the judge was not required to credit. See Rzepphiewski, 431 Mass. at 55-56; Lopez, 426 Mass. at 661-662. The affidavit from the defendant's current counsel, stating that plea counsel remembered nothing about the 1992 case but nevertheless refused to provide an affidavit, did little to support the defendant's contention that his plea was not knowing or voluntary. Therefore, the motion judge did not abuse his discretion in denying the defendant's motion to withdraw his guilty plea. See Lopez, supra at 665-666.¹

¹ To the extent that the defendant's current motion argues lack of a sufficient colloquy, it likely could have been denied on direct estoppel grounds alone. See Commonwealth v. Rodriguez, 443 Mass. 707, 710 (2005). See also Commonwealth v. Sanchez, 485 Mass. 491, 498 (2020). The defendant's 2004 motion appears to have been based on the same argument he makes here: that he did not receive a full plea colloquy. The motion was denied on the ground that, in the relevant jury session, it was the practice of the court to give a full colloquy. We take judicial notice that the defendant sought to appeal from the order denying his 2004 motion, but the appeal was dismissed for failure to prosecute. See Jarosz v. Palmer, 436 Mass. 526, 530

b. Ineffective assistance of counsel. The defendant also argues that plea counsel was ineffective in failing to inform him that that his plea could lead to increased sentences if he were convicted of future crimes. To prevail on a claim of ineffective assistance, a defendant must establish that counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer" and "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Here, we need discuss only the first prong. See Commonwealth v. Lys, 481 Mass. 1, 7 (2018). To determine whether competent counsel must warn defendant of a particular consequence of a guilty plea, courts have looked at whether the consequence was "practically inevitable" and "particularly severe." See Commonwealth v. Sylvester, 476 Mass. 1, 8-9, 10 (2016), quoting Padilla v. Kentucky, 559 U.S. 356, 363-364, 373 (2010).

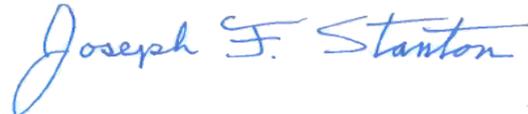
Here, the defendant relies on his own affidavit and his plea counsel's refusal to offer an affidavit as evidence that he was not informed of future punishments he might suffer if he pleaded guilty. However, the defendant has not demonstrated that competent counsel would have been required to give any such warnings. Unlike the immigration consequences at issue in

(2002) (court may take judicial notice of court records in related proceedings).

Padilla, enhanced sentencing in the event that the defendant committed future crimes was not practically inevitable; the very commission of such crimes was within the defendant's own control. "It is unlikely, therefore, that counsel's purported failure to advise the defendant of the collateral consequences of his plea agreement with respect to possible future sentencing enhancements should he be convicted of another crime deprived him of an otherwise available, substantial ground of defense." Commonwealth v. Henry, 488 Mass. 484, 497 (2021). Cf. Commonwealth v. Roberts, 472 Mass. 355, 363 (2015) (due process did not require judge to warn defendant that pleading guilty to sex offenses raised potential of civil commitment, which was not "virtually mandatory" but depended on future circumstances). Thus, the defendant has not demonstrated that plea counsel performed deficiently.

Order denying motion for a
new trial affirmed.

By the Court (Milkey,
Kinder & Sacks, JJ.²),



Clerk

Entered: January 7, 2022.

² The panelists are listed in order of seniority.