

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

21-P-60

COMMONWEALTH

vs.

COREY STINSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from the denial of his motion for a new trial in which he sought to withdraw his plea of guilty to one count of unlawful possession of a firearm. We affirm.

Background. In June 2012, a grand jury returned indictments charging the defendant with unlawful possession of a firearm (count one); unlawful possession of a firearm subsequent offense (count two); breaking and entering in the daytime (count three); receiving stolen property (count four); and larceny in a building (count five). The defendant entered into a plea agreement and pleaded guilty to all counts except count two on November 15, 2012. Count two was the subject of a motion to dismiss that was scheduled for a hearing on two occasions, but was never heard. Ultimately, count two was dismissed by the

Commonwealth at the defendant's change of plea hearing.<sup>1</sup> As relevant here, after accepting the defendant's guilty plea, the judge imposed an agreed upon sentence of three to five years in State prison on count one, unlawful possession of a firearm.

About five years later, on June 26, 2017, the defendant was charged with new criminal offenses, including unlawful possession of a firearm, second or subsequent offense.<sup>2</sup> The predicate offense was the defendant's conviction of unlawful possession of a firearm resulting from his guilty plea in 2012. Thereafter, on August 20, 2018, the defendant filed a motion for a new trial, which is the subject of this appeal.<sup>3</sup> He contended that his plea to the firearms charge had not been made knowingly and voluntarily because plea counsel provided him with ineffective assistance. In an affidavit submitted in support of his motion, the defendant claimed that counsel had failed to inform him that he had been improperly charged as a second offender and, consequently, his motion to dismiss count two would have been successful. He further averred that he believed the Commonwealth dismissed count two "[a]s part of the plea

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<sup>1</sup> The Commonwealth made an oral motion to dismiss count two, which the judge allowed with the defendant's consent.

<sup>2</sup> The defendant subsequently pleaded guilty to the new offenses on November 20, 2018.

<sup>3</sup> Neither party has provided us with a copy of the defendant's motion for a new trial. We discern the basis for the motion from the defendant's affidavit and the judge's memorandum of decision and order.

'deal'" and he accepted the Commonwealth's offer of a three to five year sentence because he was fearful of being convicted as a second offender and exposing himself to a longer prison term of five to seven years. The defendant asserted, "If I had understood the strength of the motion to dismiss the second and subsequent firearm indictment, I would not have accepted the three to five year [S]tate prison sentence and would have insisted upon prosecuting the motion." The defendant also alleged that counsel never explained to him that he was eligible to receive a sentence of eighteen months on the firearms offense and, instead, erroneously told him that he faced a minimum sentence of two and one half years.

Following a nonevidentiary hearing, a judge of the Superior Court, who was not the plea judge, rejected the defendant's ineffective assistance of counsel claim and denied the new trial motion in a detailed memorandum of decision of order. After reviewing the record, which included the transcript of the plea hearing and affidavits submitted by the defendant and two prosecutors,<sup>4</sup> both of whom had knowledge of the case, the motion

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<sup>4</sup> We note the absence of affidavits from the defendant's plea counsel and his appellate counsel. Generally, a judge may take into account the "suspicious failure" to provide information from an "expected and available" source. Commonwealth v. Goodreau, 442 Mass. 341, 354 (2004). Here, however, the judge noted that the defendant's efforts to obtain an affidavit from plea counsel were unsuccessful. Accordingly, the judge

judge concluded that 1) the defendant's affidavit was self-serving and not credible, 2) the plea deal to which the defendant had agreed was reasonable, and 3) the defendant failed to show that a better plea bargain could have been negotiated.

Discussion. A motion to vacate a guilty plea is properly brought as a motion for a new trial under Mass. R. Crim. P. 30(b), as appearing in 435 Mass. 1501 (2001). See Commonwealth v. Resende, 475 Mass. 1, 12 (2016). "[A] judge may grant a motion for a new trial any time it appears that justice may not have been done" (citation omitted). Id. "We review the allowance or denial of a motion to withdraw a guilty plea to determine whether the judge abused [his] discretion or committed a significant error of law." Id., quoting Commonwealth v. Scott, 467 Mass. 336, 344 (2014).

As the judge observed, a defendant seeking a new trial based on a claim of ineffective assistance of counsel must show 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). The judge concluded that the defendant did not meet his burden on the first prong of the test articulated in Saferian for two

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appropriately did not consider the absence of an affidavit from plea counsel in reaching his conclusion.

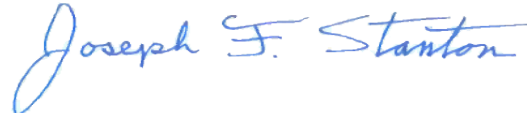
reasons. First, the judge did not accept the allegations set forth in the defendant's affidavit. The judge described the affidavit as "self-serving" and "not credible." Specifically, the judge found that the defendant's assertion that counsel advised him to plead guilty to avoid a second and subsequent firearm conviction was belied by the record. He noted that the defendant filed a motion to revise and revoke his sentence shortly after he pleaded guilty and did not raise this issue at that time. Rather, he advanced the claim that he was unaware of the "strength of the motion to dismiss the second and subsequent firearm indictment" only after he was charged with a new firearm offense five years later. In addition, the judge noted that the defendant's claim was contradicted by the affidavits of two prosecutors, who averred that the Commonwealth did not oppose the motion to dismiss count two and did not use dismissal of count two as leverage to induce the defendant to plead guilty. Second, the judge concluded that plea counsel had negotiated a reasonable disposition.

The judge could, as he did, dismiss the assertions set forth in the defendant's affidavit as unsupported allegations. "A judge is not required to credit assertions in affidavits submitted in support of a motion for a new trial, and may evaluate them in light of factors pertinent to credibility, including bias, self-interest, and delay." Commonwealth v.

Torres, 469 Mass. 398, 403 (2014). See Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 48 (1997) ("The credibility, weight, and impact of the affidavits in support of the motion are entirely within the judge's discretion. He is not required to believe them even if they are undisputed" [citation omitted]). In light of the judge's disbelief of the defendant's affidavit and his finding that the plea resolution was favorable to the defendant, we cannot say that the judge abused his discretion in concluding that counsel's representation did not fall "measurably below that which might be expected from an ordinary fallible lawyer." Saferian, 366 Mass. at 96.<sup>5</sup>

Order denying motion for a  
new trial affirmed.

By the Court (Vuono, Shin &  
Singh, JJ.<sup>6</sup>),



Clerk

Entered: April 22, 2022.

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<sup>5</sup> Because the defendant failed to meet his burden on the first prong of the Saferian test, it was not necessary to address the second prong as the judge did here. Given our conclusion, we need not address the judge's analysis any further.

<sup>6</sup> The panelists are listed in order of seniority.