18-P-765 Appeals Court

COMMONWEALTH vs. VAUGHN LEWIS.

No. 18-P-765.

Bristol. January 7, 2019. - October 31, 2019.

Present: Agnes, Sacks, & Ditkoff, JJ.

Controlled Substances. Practice, Criminal, Plea, Conduct of government agents. Constitutional Law, Plea, Conduct of government agents. Due Process of Law, Plea. Evidence, Guilty plea, Certificate of drug analysis.

Indictments found and returned in the Superior Court Department on March 12, 2009.

A motion to withdraw a plea of guilty, filed on March 1, 2017, was heard by Robert C. Cosgrove, J.

MarySita Miles for the defendant.
Robert P. Kidd, Assistant District Attorney, for the Commonwealth.

DITKOFF, J. The defendant, Vaughn Lewis, pleaded guilty to possession of heroin with the intent to distribute, G. L. c. 94C, § 32 (a), and possession of cocaine with the intent to distribute, G. L. c. 94C, § 32A (c). A Superior Court judge allowed the defendant's motion to withdraw his guilty plea with

respect to the cocaine charge based on the malfeasance of chemist Annie Dookhan,[1] where Dookhan was one of the certifying analysts, but denied the motion with respect to the heroin charge, where the heroin was tested in a different laboratory by an analyst other than Dookhan. The defendant now appeals from the partial denial of his motion. Concluding that the judge acted within his discretion in determining that the guilty pleas were divisible, and that the defendant is not entitled to the conclusive presumption of government misconduct based on the non-Dookhan heroin certificates, we affirm.

1. Background. Based on information provided by a confidential informant that the defendant was operating a drug distribution service out of a first-floor apartment, the New Bedford police began conducting surveillance. After the informant made a controlled purchase of cocaine from the defendant at the apartment, an officer obtained a search warrant.

On the evening of February 18, 2009, officers conducted surveillance in preparation for the execution of the warrant. The officers observed the defendant exit the front door of the apartment building and get into a car parked in front of the building. The operator of the car drove it away, and the

[1] See generally Commonwealth v. Scott, 467 Mass. 336, 338-342 (2014) (describing Dookhan's misconduct).

officers followed. The officers stopped the car and placed the defendant in custody. Pursuant to the warrant, an officer searched the defendant and recovered $465, one plastic bag of suspected heroin from his coat pocket, and a set of keys.

The officers used the keys found on the defendant to gain access to the first-floor apartment. During a search of the apartment's kitchen, the officers found one plastic bag of suspected heroin in the butter compartment of the refrigerator, multiple baggies containing residue, and a digital scale. In one of the bedrooms, the officers located more baggies, a bottle of inositol that the officers believed to be a cutting agent, a drug ledger, five tablets of Klonopin, and a probation receipt, mail, and utility bills that indicated the defendant was living in the apartment. Outside the apartment, in a closet, the officers found a plastic bag containing eleven individual bags of suspected cocaine and two plastic bags of a suspected cutting agent next to a dog collar and dog food. The defendant owned and cared for dogs at his apartment. In the basement of the building, officers recovered a loaded .22 caliber firearm and a loaded .45 caliber firearm. A total of $2,470 was seized from the defendant as a result of the search.

The bag that contained suspected cocaine and the two bags that contained a suspected cutting agent were sent to the William A. Hinton State Laboratory Institute (Hinton laboratory)

for analysis. The Hinton laboratory issued three drug certificates. Each certificate identified the substances -- including the bags of a suspected cutting agent -- as cocaine. Dookhan had signed each certificate as an assistant analyst. The suspected heroin recovered from the defendant's person and from the refrigerator in the apartment was tested and certified as heroin by Michele Manzello, an analyst at a State laboratory in Worcester (Worcester laboratory).[2]

A grand jury returned indictments charging the defendant with trafficking in twenty-eight grams or more of cocaine, G. L. c. 94C, § 32E (b) (2); possession of heroin with the intent to distribute, subsequent offense, G. L. c. 94C, § 32 (b); possession of cocaine with the intent to distribute, subsequent offense, G. L. c. 94C, § 32A (d); possession of Klonopin, G. L. c. 94C, § 34; and four firearm charges.[3] Prior to the plea hearing, the defendant moved to dismiss the firearm charges based on a lack of evidence that the defendant possessed the

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[2] The five tablets of Klonopin that were found in one of the apartment's bedrooms were tested and certified as clonazepam by Rebecca Pontes, an assistant analyst at the Worcester laboratory. (Klonopin is a brand name for clonazepam.)

[3] Possession of a large capacity firearm, G. L. c. 269, § 10 (m), as an armed career criminal, G. L. c. 269, § 10G (c); possession of a large capacity feeding device, G. L. c. 269, § 10 (m), as an armed career criminal, G. L. c. 269, § 10G (c); possession of a firearm in the commission of a crime, G. L. c. 265, § 18B; and unlawful possession of a firearm, G. L. c. 269, § 10 (h).

weapons found in the basement, a common area in the apartment building. A print lifted from one of the firearms excluded the defendant, and none of the items found near the firearms was attributable to the defendant. The defendant's motion to dismiss the firearm indictments was allowed without objection from the Commonwealth. Immediately after, the defendant pleaded guilty to possession of heroin with the intent to distribute and possession of cocaine with the intent to distribute in exchange for the elimination of the subsequent offense portions of those charges and the entry of a nolle prosequi on the possession of Klonopin charge and the trafficking cocaine charge. Consistent with the parties' agreement, the judge imposed concurrent sentences of five years to five years and one day on the two convictions.

On March 1, 2017, the defendant filed a motion to withdraw his guilty plea to the cocaine charge because of Dookhan's misconduct at the Hinton laboratory. At the hearing on the motion on June 23, 2017, the Commonwealth announced that it did not oppose the defendant's motion. At this point, the defendant orally moved to dismiss the cocaine charge and to withdraw his guilty plea to the non-Dookhan heroin charge.[4] The Commonwealth

[4] Neither a pretrial motion to dismiss nor a motion to withdraw a guilty plea may be made orally. See Mass. R. Crim. P. 13 (a) (1), as appearing in 442 Mass. 1516 (2004); Mass. R. Crim. P. 30 (c) (1), as appearing in 435 Mass. 1501 (2001). The

opposed the withdrawal of the guilty plea on the heroin charge. On October 26, 2017, a Superior Court judge, who also had been the plea judge, allowed the motion to withdraw the guilty plea to the cocaine charge, denied without prejudice the motion to dismiss that charge, and denied the motion to withdraw the guilty plea to the heroin charge. This appeal followed.

2. Standard of review. "A motion . . . pursuant to Mass. R. Crim. P. 30(b) is the proper vehicle by which to seek to vacate a guilty plea. . . . Under Mass. R. Crim. P. 30(b), a judge may grant a motion for a new trial any time it appears that justice may not have been done." Commonwealth v. Williams, 89 Mass. App. Ct. 383, 387 (2016), quoting Commonwealth v. Scott, 467 Mass. 336, 344 (2014). "We review the denial of a motion to withdraw a guilty plea to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Lastowski, 478 Mass. 572, 575 (2018), quoting Commonwealth v. Sylvester, 476 Mass. 1, 5 (2016). "Particular deference is to be paid to the rulings of a motion judge who served as the [plea] judge in the same case." Sylvester, supra at 6, quoting Scott, supra.

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defendant, however, followed up his oral motions with a written motion, and the Commonwealth raises no procedural objection on appeal.

3. Divisibility of the plea agreement. The defendant's primary argument is that, because the cocaine charge was the lead charge (a contention the Commonwealth contests), the vacatur of that charge requires the withdrawal of his plea on the heroin charge, even if that charge was untainted by any misconduct. At least one State follows the rule that "a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding." State v. Turley, 149 Wash. 2d 395, 400 (2003). That, however, has never been the rule in Massachusetts. To the contrary, we have consistently permitted guilty pleas to stand even when other guilty pleas, entered at the same time, were vacated. See, e.g., Commonwealth v. Cano, 87 Mass. App. Ct. 238, 239, 244-248 (2015) (affirming denial of motion to withdraw guilty plea to threats charge but remanding for evidentiary hearing on plea to assault charge); Commonwealth v. Tavernier, 76 Mass. App. Ct. 351, 352, 364-365 (2010) (defendant pleaded guilty to twenty-four charges on seven complaints; court reversed denial of motion to withdraw guilty plea as to seventeen charges, affirmed as to two charges, and noted that others were undisturbed); Commonwealth v. DeCologero, 49 Mass. App. Ct. 93, 98 (2000) (affirming denial of motion to withdraw guilty plea to trafficking in cocaine but reversing denial of motion to

withdraw guilty plea to conspiracy to traffic in cocaine arising from same incident); Commonwealth v. Pixley, 48 Mass. App. Ct. 917, 917 & n.1 (2000) (guilty plea to drug charge vacated as unintelligent; other pleas not challenged). Cf. Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 390 & n.1 (2012) (requesting clarification on remand whether judge vacated only assault plea).

We have done so even in the face of drug laboratory malfeasance. In fact, in Commonwealth v. Ubeira-Gonzalez, 87 Mass. App. Ct. 37, 42 n.5 (2015), we found ourselves "at a loss . . . to conjure any justification for the grant of a new trial" on resisting arrest and assault and battery charges to which guilty pleas were entered at the same time as pleas to charges tainted by chemist Sonja Farak's misconduct. See Commonwealth v. Ware, 471 Mass. 85, 93 (2015) ("Farak pleaded guilty to numerous criminal charges that arose from her work as a chemist at [a State laboratory]. Her misconduct has raised significant concerns about the administration of justice in criminal cases where a defendant was convicted of a drug offense and she was the analyst"). Cf. Commonwealth v. Gaston, 86 Mass. App. Ct. 568, 576 (2014) (conviction on drug charge reversed after trial because of Dookhan's misconduct; denial of motion for new trial on other charges affirmed). Similarly, in Ware, supra at 89-90, the Supreme Judicial Court faced guilty pleas entered on the

same day to two sets of charges, one arising from a 2009 indictment and one from 2010 indictments. Only the 2009 indictment was tainted by Farak's misconduct. See id. at 90 nn.7-8. The court affirmed the denial of the defendant's motion for broad postconviction discovery and stated that "the defendant should be afforded an opportunity to conduct postconviction discovery relating to the 2009 charge, the only one in which the Commonwealth would have offered a drug certificate signed by Farak." Id. at 96. We deduce from this limited remand that the Supreme Judicial Court also allows guilty pleas entered on the same day to be divided.

We do not foreclose the possibility that the parties could, at the time of the plea colloquy and with the assent of the plea judge, state that the guilty pleas are indivisible. Cf. State v. Chambers, 176 Wash. 2d 573, 581 (2013) (when determining whether plea agreement is indivisible, court "look[s] only to objective manifestations of intent, not unexpressed subjective intent"). Here, however, nothing in the plea colloquy expressed the intent that the guilty pleas be indivisible. Cf. Commonwealth v. Francis, 477 Mass. 582, 586 (2017), quoting Commonwealth v. Smith, 384 Mass. 519, 523 (1981) (enforceable plea agreement requires that "the defendant had reasonable grounds for assuming his interpretation of the bargain," and

relied on this interpretation to his detriment).[5] Nor do we foreclose the possibility that a motion judge, especially where that judge was also the plea judge, might discern from other indicia that the parties intended the guilty pleas to be indivisible. In a motion for new trial, however, the burden is on the defendant to prove facts that are "neither agreed upon nor apparent on the face of the record." Commonwealth v. Gilbert, 94 Mass. App. Ct. 168, 172 (2018), quoting Ubeira-Gonzalez, 87 Mass. App. Ct. at 41. Here, the defendant's guilty pleas to the heroin and the cocaine charges were made at the same time, in the same proceeding, but the judge began the plea colloquy by requiring the prosecutor to read the sentences of each charge separately. At the end of the colloquy, the defendant pleaded guilty to each charge individually. As the parties did not objectively manifest their intentions to enter into indivisible pleas, the motion judge acted within his discretion in determining that the defendant failed to show that

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[5] The Commonwealth's statements at the motion hearing seven years later are not a substitute for a contemporaneous assertion of indivisibility. Rather, this represented the Commonwealth's litigating position that the entire plea had been driven by the dismissal of the firearm charges, and thus the defendant could not establish a reasonable probability that he would not have pleaded guilty had he known of the misconduct, as required by the Ferrara-Scott two-prong test. See Ferrara v. United States, 456 F.3d 278, 290-297 (1st Cir. 2006); Scott, 467 Mass. at 352-354. The plea judge found the Commonwealth's theory "unlikely." See Williams, 89 Mass. App. Ct. at 389.

the parties' intent was that the guilty pleas stand or fall together. Accordingly, the guilty plea on the heroin charge survives the vacatur of the guilty plea on the cocaine charge.[6]

4. Motion to withdraw the guilty plea on the heroin charge. The Supreme Judicial Court articulated a two-prong test, based on Ferrara v. United States, 456 F.3d 278, 290-297 (1st Cir. 2006), for analyzing a defendant's motion to withdraw a guilty plea in cases involving Dookhan's misconduct at the Hinton laboratory (Ferrara-Scott test). See Scott, 467 Mass. at 346-353. "Under the first prong of the analysis, a defendant must show egregious misconduct by the government that preceded the entry of the defendant's guilty plea and that occurred in the defendant's case." Commonwealth v. Resende, 475 Mass. 1, 3 (2016). "[W]here Dookhan signed the certificate of drug analysis as either the primary or secondary chemist in the defendant's case, the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth." Scott, supra at 338. Under the second prong of the Ferrara-Scott test, the defendant also "must demonstrate a

[6] Because the defendant has already served the sentence, we need not address whether the judge would have the discretion, upon request, to resentence the defendant in light of the vacatur of the sentence on the cocaine charge. See Commonwealth v. Pacheco, 477 Mass. 206, 216 (2017).

reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Scott, supra at 355.

When the defendant is entitled to the conclusive presumption, the defendant has met the evidentiary burden to satisfy the first prong of the Ferrara-Scott test. See Resende, 475 Mass. at 3. In such cases, Dookhan's certification as either the primary or secondary analyst prior to the defendant's guilty plea serves as the nexus that establishes the presumption of egregious misconduct by the government. See Scott, 467 Mass. at 348, 352-353. Here, however, Dookhan was neither the primary nor the secondary analyst on the heroin certificate, and thus there is no such nexus that would entitle the defendant to the conclusive presumption. Although the defendant pleaded guilty to both the heroin and the cocaine charges, Dookhan was involved only in the analysis of the cocaine. See Resende, supra at 5-6, 15-16 (first prong of Ferrara-Scott test satisfied as to certificate signed by Dookhan as analyst, but not satisfied as to certificates Dookhan did not sign as analyst but for which she served as "setup operator"). Cf. Ware, 471 Mass. at 96 (defendant afforded opportunity to conduct postconviction discovery only relating to charge for which Commonwealth would have offered drug certificate signed by Farak after her misconduct at State laboratory came to light). Where Dookhan was an analyst on one certificate, a defendant does not receive

the conclusive presumption for other certificates in which Dookhan played no role. See Resende, supra.

"Absent this conclusive presumption, a defendant who moves to withdraw his guilty pleas has the evidentiary burden of establishing, as an initial matter, each element of the first prong of the Ferrara-Scott framework." Resende, 475 Mass. at 14. To do so, the defendant must "show [1] that Dookhan engaged in 'egregiously impermissible conduct' in his case, and [2] that such misconduct preceded the entry of his guilty pleas." Id., quoting Ferrara, 456 F.3d at 290. Here, the defendant did not show that egregious misconduct by the government occurred in relation to the heroin charge. Accordingly, we need not consider whether, under the second prong, the defendant demonstrated a "reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Scott, 467 Mass. at 355.

5. Conclusion. The judge acted within his discretion in denying the defendant's motion to withdraw his guilty plea to the heroin charge. See Resende, 475 Mass. at 12.[7] Accordingly,

[7] We need not address the defendant's contention that the motion judge improperly denied his motion to dismiss the cocaine charge because the Commonwealth has since dismissed this charge. See Commonwealth v. Resende, 427 Mass. 1005, 1006 (1998) (issues were moot where cases against defendants had been dismissed). Similarly, we need not apply the principle that a defendant who withdraws a guilty plea because of Dookhan's misconduct may not be punished more severely after retrial. See Bridgeman v.

so much of the order entered on November 9, 2017, as denies the defendant's motion to withdraw his guilty plea to possession of heroin with the intent to distribute is affirmed.

So ordered.

District Attorney for the Suffolk Dist., 471 Mass. 465, 475-478 (2015).