

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-12280

COMMONWEALTH vs. AARON A. LASTOWSKI.

Franklin. October 3, 2017. - January 4, 2018.

Present (Sitting at Greenfield): Gants, C.J.,
Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Sex Offender Registration and Community Notification Act.
Constitutional Law, Sex offender, Plea, Assistance of
counsel. Practice, Criminal, Plea, Assistance of counsel.

Complaint received and sworn to in the Greenfield Division
of the District Court Department on May 13, 2013.

A motion to withdraw pleas of guilty, filed on May 14,
2015, was heard by William F. Mazanec, III, J.

The Supreme Judicial Court granted an application for
direct appellate review.

Edward Gauthier for the defendant.
Cynthia M. Von Flatern, Assistant District Attorney, for
the Commonwealth.

KAFKER, J. In 2014, the defendant pleaded guilty to three
counts of indecent assault and battery on a person age fourteen
or older. One year later, the defendant moved to withdraw his

guilty pleas, contending that plea counsel was constitutionally ineffective because plea counsel failed to advise him of the duty to register as a sex offender, and its consequences, or explain that he might have sought a continuance without a finding. A judge in the District Court, who had also been the plea judge, denied the defendant's motion, finding the defendant's affidavit and assertions not credible.

The defendant appealed from the denial of his motion, and we granted his motion for direct appellate review. We conclude that the motion judge correctly determined that the defendant did not satisfy the prejudice requirement of the Saferian test. See Commonwealth v. Saferian, 366 Mass. 89 (1974). We therefore affirm the decision of the judge in denying the defendant's motion to withdraw his guilty pleas.

1. Background. We summarize the following facts from findings made by the judge and other undisputed record materials, reserving certain details for discussion of the legal issues.

a. Plea hearing. On May 7, 2014, the defendant, Aaron Lastowski, tendered guilty pleas on three counts of indecent assault and battery on a person age fourteen or older in violation of G. L. c. 265, § 13H. As part of his pleas, the defendant was required to submit a tender of plea or admission and waiver of rights form. The plea judge first had the

defendant acknowledge that the form had the defendant's signature and that the signature manifested his having read and understood the paragraphs regarding his waiver of rights.

After this acknowledgment, the prosecutor presented the factual basis for the charges. According to the prosecutor, if the Commonwealth took this case to trial, it would have been able to prove the following facts.

On May 7, 2013, the first victim reported to the Montague police department that she had been sexually assaulted at the Hillcrest Homes apartment complex in the Turners Falls area of Montague. The next day, Detective William Doyle of the Montague police department spoke with her. She stated that the defendant had approached her with an alcoholic drink in his hand and had squeezed her breast while stating, "I really like to squeeze titties when I'm drinking." She was bruised from the assault and allowed the apartment complex's property manager to take a photograph of the injury.¹

On May 9, 2013, Detective Doyle spoke with a second victim, who also lived at the apartment complex. She told the detective that, a few months prior, she had been standing at the rear door of her apartment and had asked the defendant to move. The

¹ This victim was present during the plea hearing, and the Commonwealth was permitted to read her victim impact statement into the record.

defendant had responded by deliberately rubbing his elbow on her breast. When she confronted the defendant about this, he said, "Oh, you know you like it." In addition, the second victim reported that the defendant had told her that he gets "touchy-feely" when he drinks.

Finally, Detective Doyle spoke with a third victim, who lived in an apartment complex near where the defendant lived. She stated that, on six or seven occasions, the defendant had knocked on her door asking for a cigarette. She reported that he would reach out and grab her breast, and that on one occasion he had grabbed her groin area.

After conducting a plea colloquy explaining the defendant's trial rights, the judge found that there was a factual basis for the admissions and that they were made knowingly, willingly, and voluntarily with knowledge of the consequences. The judge accepted the defendant's tender of plea. The judge, however, did not inform the defendant of the possible consequences of registration as a sex offender.

After considering the Commonwealth and the defendant's recommendations, the judge adopted the defendant's recommendations.² The defendant was placed on probation for one

² The prosecutor's recommendation was for two years' probation, whereas the defendant's recommendation was for one year's probation.

year and was required to complete sex offender and mental health evaluations with follow-up counselling and treatment as recommended. The defendant was also ordered to abstain from alcohol, to submit to testing, and to remain fifty yards away from and have no contact with any of the three victims.

b. Motion hearing. On May 14, 2015, the defendant, represented by new counsel, filed a motion to withdraw his guilty pleas, contending that plea counsel had been ineffective and that his pleas had not been made willingly, freely, and voluntarily with full knowledge of the consequences. After hearing arguments, the motion judge, who, as stated, had also been the plea judge, denied the defendant's motion on the basis of the affidavits and pleadings without an evidentiary hearing. The judge did not credit the defendant's contention that he would not have pleaded guilty had he known he might have had to register as a sex offender. Likewise, the judge did not find credible the defendant's assertion that he had pleaded guilty in error because he had not known he could request a continuance without a finding.

The judge based his findings on several factors: (1) the strength of the evidence; (2) the defendant's past criminal record; and (3) the timing of the request to withdraw the guilty pleas. First, the judge explained that there were three separate victims who were willing to cooperate with the

prosecutor and, consequently, the defendant faced a very real possibility of incarceration if convicted at trial. If sentenced consecutively, the defendant could have faced over six years in a house of correction. Additionally, the judge found that the "defendant-capped plea" had been favorable because it would have allowed the defendant to withdraw his pleas and proceed to trial if the disposition imposed had exceeded the terms of the defendant's request.

Second, the judge reviewed the defendant's record and noted that the defendant had had four different charges continued without a finding, including one for assault and battery. Further, the defendant had a conviction on his record. Consequently, the judge found it "extremely unlikely" that the instant case would have been continued without a finding.

Third, the judge found the timing of the defendant's request to be suspect. The request came one year after he had been placed on probation and just twelve days before he faced a second violation of probation hearing, thus suggesting that the probation violation was the real reason for the motion to withdraw the guilty pleas, not the failure to inform him of registration requirements.

2. Standard of review. "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)]."

Commonwealth v. Sylvester, 476 Mass. 1, 5 (2016), quoting Commonwealth v. Lavrinenko, 473 Mass. 42, 47 (2015). "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" (quotation omitted). Sylvester, supra. "A judge may make the ruling based solely on the affidavits and must hold an evidentiary hearing only if the affidavits or the motion itself raises a 'substantial issue' that is supported by a 'substantial evidentiary showing.'" Id., quoting Commonwealth v. Scott, 467 Mass. 336, 344 (2014). "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.

3. Discussion. To prevail on a motion to withdraw a guilty plea claiming ineffective assistance of counsel, a defendant must show that (1) the "behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer," and (2) counsel's poor performance "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Millien, 474 Mass. 417, 429-430 (2016), quoting Saferian, 366 Mass. at 96. See

Strickland v. Washington, 466 U.S. 668, 687 (1984).³ Here, the requirement of prejudice in the second prong of the Saferian standard resolves the issue.⁴ As the motion judge found, the

³ "Consideration of the Massachusetts test of ineffective assistance of counsel, as set forth in Commonwealth v. Saferian, 366 Mass. 89, 96, (1974), leads us to the conclusion that if the Saferian test is met, the Federal test is necessarily met as well." Commonwealth v. Fuller, 394 Mass. 251, 256 n.3 (1985).

⁴ In Commonwealth v. Sylvester, 476 Mass. 1, 2 (2016), we concluded that plea counsel was not ineffective under the first prong of the Saferian standard when he advised his client in 2002 that the client would need to register as a sex offender but did not explain the consequences of sex offender registration. We left "for another day the question whether such advice would be constitutionally ineffective based on the current statutory scheme for sex offender registration." Id. We likewise leave this question unanswered today, as there is no need to resolve it given the judge's persuasive reasons for deciding that this defendant was not prejudiced. We do so without in any way condoning the judge's failure to warn the defendant, as required by Mass. R. Crim. P. 12 (c) (3), as appearing in 442 Mass. 1511 (2004), that he may be required to register as a sex offender. In relevant part, Mass. R. Crim. P. 12 (c) (3) (A), as appearing in 470 Mass. 1501 (2015), now provides that a judge accepting a guilty plea shall "[p]rovide notice to the defendant of the consequences of a plea. The judge shall inform the defendant . . . that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender." In Sylvester, supra at 10, we concluded that the duty to register as a sex offender is a "practically certain" effect of a conviction for a sex offense. We further noted, however, that G. L. c. 6, § 178E (d), provides that a judge's failure to inform a defendant of the duty to register "shall not be grounds to vacate or invalidate [a] plea" (citation omitted). See Sylvester, supra at 12.

Given the judge's findings on prejudice, we also need not, and do not, address unresolved questions about what advice, if any, plea counsel gave regarding the defendant's duty to register. The defendant contends on appeal that his affidavits

defendant had no substantial ground of defense and rejecting the advantageous pleas here would not have been rational.

Commonwealth v. Clarke, 460 Mass. 30, 46, 47 (2011). Most importantly, no one was in a better position than the motion judge, who was also the plea judge, to know that another continuance without a finding was "extremely unlikely."

and exhibits adequately alleged that his plea counsel had not advised him of the requirement to register, and the consequences of so registering, and was thus ineffective.

The judge generally found the defendant's affidavit not credible without expressly addressing the issue of counsel's advice. Without express findings, we cannot resolve the issue here, given the state of the record. There was no affidavit from plea counsel, but appellate counsel described efforts to get such an affidavit, which plea counsel rebuffed. At oral argument, appellate counsel contended that plea counsel was present at the motion hearing and would have testified if the judge had ordered an evidentiary hearing. The judge also did not address the credibility of the defendant's fiancée's affidavit, which stated that, at least at the meetings where she was present, no such advice was given.

On the other hand, the defendant did acknowledge that his pleas could result in registration by signing under the second section of his tender of plea or admission and waiver of rights form (colloquially called the "green sheet"). The green sheet stated that the pleas could, among other things, "trigger the provisions of the sex offender registration statute." See Commonwealth v. Grant, 426 Mass. 667, 672 (1998) (defendant's signature was one of several facts that "besp[oke] the defendant's intention to consummate the plea bargain"). Further, plea counsel affixed his signature and Board of Bar Overseers number to the third section of the green sheet and certified that he had "explained to the defendant the legal rights and consequences" including triggering the provisions of the sex offender registration statute. See Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 583 (2001) (signatures on green sheet provided evidence that defendant and counsel discussed consequences of plea).

The defendant contends that he had an available, substantial ground of defense that the three victims were conspiring to evict him and his fiancée from their apartment. He also asserts that had he known he could request a continuance without a finding or that a guilty plea could trigger sex offender registration, he would not have pleaded guilty but instead would have opted for a trial. The judge found, and we agree, that the prejudice requirement had not been satisfied.

"In the context of a guilty plea, in order to satisfy the 'prejudice' requirement, the defendant has the burden of establishing that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Clarke, 460 Mass. at 47, quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985). See Commonwealth v. Roberts, 472 Mass. 355, 365 (2015). Additionally, the defendant must "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Clarke, supra, quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010). "To prove the latter proposition, [we have held that] the defendant bears the substantial burden of showing that (1) he had an 'available, substantial ground of defence' . . . that would have been pursued if he had been correctly advised of the dire [registration] consequences attendant to accepting the plea

bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of 'special circumstances' that support the conclusion that he placed, or would have placed, particular emphasis on [registration] consequences in deciding whether to plead guilty" (footnote omitted). Clarke, supra at 47-48, quoting Saferian, 366 Mass. at 96, and Hill, supra at 60.⁵ Here, none of those requirements was met.

First, as the judge found, the defendant did not demonstrate that he had an available, substantial ground of defense. The Commonwealth had a strong case against the

⁵ We first proposed the "special circumstances" inquiry for cases involving the withdrawal of guilty pleas with immigration consequences. Commonwealth v. Clarke, 460 Mass. 30, 47-48 (2011). See Commonwealth v. Lavrinenko, 473 Mass. 42, 57 (2015) (defendant's status as refugee was special circumstance); Commonwealth v. DeJesus, 468 Mass. 174, 183 (2014) (risk of deportation was special circumstance because "noncitizen defendant confronts a very different calculus than that confronting a United States citizen . . . preserving his right to remain in the United States may be more important to him than any jail sentence" [quotation omitted]). We have also considered "special circumstances" relevant to the withdrawal of guilty pleas in cases related to the State drug laboratory failures. See Commonwealth v. Scott, 467 Mass. 336, 356 (2014); Commonwealth v. Wallace, 92 Mass. App. Ct. 7, 13-14 (2017). We likewise consider it to be an appropriate inquiry in analyzing the withdrawal of a guilty plea with sex offender registration consequences. That being said, "[u]ltimately, a defendant's decision to tender a guilty plea is a unique, individualized decision, and the relevant factors and their relative weight will differ from one case to the next." Commonwealth v. Roberts, 472 Mass. 355, 365-366 (2015), quoting Scott, supra.

defendant, who thus faced a very real possibility of incarceration if convicted at trial. Three separate victims cooperated with the prosecutor and reported the assaults and idiosyncratic conduct of the defendant, namely, his obsession with, and statements about, touching breasts. Further, one victim appeared in court nearly one year after the incident to be present for her victim impact statement.

Second, as the judge found, it was "extremely unlikely" that the defendant would have received a continuance without a finding even if he had requested one. The defendant's record revealed that he had already had four different complaints continued without a finding, the latest continuance occurring in 2004 on a charge of assault and battery. Additionally, he had been convicted of defrauding an insurer. If convicted of the three instant charges, the defendant could have faced a committed sentence. In contrast, by accepting the plea deal, the defendant, who was working and supporting his family, was placed on probation for a term of one year. The motion judge, who was the plea judge, was of course in the best position to know whether he would have found another continuance without a finding acceptable.

Third, there were no "special circumstances" identified. See Scott, 467 Mass. at 356; Clarke, 460 Mass. at 47. We discern no error in the judge's determination that the

defendant's affidavit was not credible regarding the significance of sex offender registration for the defendant. The defendant averred a generalized concern that, if he were to be classified as a level three sex offender, his "name and face [would] be on the Internet for [his] friends, family, and employer to see," but he did not aver any "special circumstances" demonstrating that he would have placed "particular emphasis" on registration in deciding whether to plead guilty. See Scott, supra. For example, although the defendant expressed concerns about his ability to work and support his family, the pleas provided more, not less, protection of his employment. By avoiding a committed sentence, he was able to continue his full-time employment. Given the strength of the evidence against him and his prior record, more than a generalized concern about registration and Internet dissemination was required to reject a plea that avoided a committed sentence. Cf. Lavrinenko, 473 Mass. at 58 (defendant's refugee status was special circumstance).

4. Conclusion. The defendant has not satisfied the second prong of the Saferian standard and thus cannot prevail on an ineffective assistance of counsel claim. We therefore conclude that the motion judge did not abuse his discretion in denying the defendant's motion to withdraw his guilty pleas.

Judgment affirmed.