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SJC-13227

COMMONWEALTH vs. WILL TATE.

Bristol. April 6, 2022. - August 22, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

<u>Rules of Professional Conduct</u>. Attorney at Law, Attorney-client relationship, Conflict of interest, Use of confidence or secret. Conflict of Interest. Consent. Evidence, Disclosure of evidence, Firearm. Practice, Criminal, New trial, Assistance of counsel, Disclosure of evidence, Duplicative punishment.

 $I\underline{\text{ndictments}}$  found and returned in the Superior Court Department on January 31, 2014.

The cases were tried before <u>Renee P. Dupuis</u>, J., and a motion for a new trial, filed on September 6, 2019, was heard by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Matthew H. Feinberg for the defendant.

Stephen C. Nadeau, Jr., Assistant District Attorney, for the Commonwealth.

Merritt Schnipper, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

GEORGES, J. In this case, we are asked to decide whether a defendant is entitled to a new trial on the ground of ineffective assistance of counsel where, prior to trial, defense counsel disclosed confidential information to the Commonwealth concerning the location of what became key incriminating evidence. This decision rests in part upon a determination whether, prior to counsel's disclosure, the defendant had given counsel his informed consent to make it.

We conclude that because trial counsel did not present the defendant with any option other than disclosing the existence of the incriminating objects, the defendant's purported consent to the disclosure was neither adequately informed nor voluntary.

See Mass. R. Prof. C. 1.0, 471 Mass. 1305 (2015). Moreover, where trial counsel mistakenly believed that he had a duty to disclose the confidential, incriminating information to the Commonwealth, and did not obtain the defendant's informed consent prior to making that disclosure, an actual conflict of interest existed that rendered the representation constitutionally ineffective. See Commonwealth v. Perkins, 450 Mass. 834, 854 (2008). Accordingly, the order denying the defendant's motion for a new trial must be vacated and set

aside, and the matter remanded to the Superior Court for a new  ${\sf trial.}^1$ 

Background. a. Shooting. The jury could have found the following. On the evening of January 4, 2014, the victim, David Rodriquez; his sister, Jasmine Ward; and their mother, Reina Rodriguez, were socializing and drinking alcohol together in the family's apartment in Fall River. At some point, Ward informed the victim that she had plans later that evening to meet with the defendant, who was her former coworker. victim's former girlfriend, Kendra Lopes, also had worked for the same company at the same time as the defendant, and the victim was aware that the defendant previously had tried to establish a sexual relationship with Ward and Lopes. Upon learning of Ward's plans to meet the defendant, the victim insisted that Ward instead stay with him that night, and Ward agreed to do so. Ward nonetheless continued sending text messages to the defendant, who had arrived at the apartment complex to meet with her.

Surveillance video footage from the security cameras at the apartment building shows that, at 12:40 A.M. on January 5, 2014,

<sup>&</sup>lt;sup>1</sup> We acknowledge the amicus brief submitted by the Committee for Public Counsel Services, the Massachusetts Association of Criminal Defense Lawyers, and the Boston Bar Association.

 $<sup>^{2}</sup>$  Because she and the victim share a last name, we refer to Reina Rodriguez by her first name.

the victim left the elevator at the first-floor lobby. He walked toward an entrance to the building and gestured for someone to come inside. The defendant then entered the building and followed the victim into the laundry room. After several minutes, both men left the laundry room, and the defendant appeared to leave the building.

At around the same time, Ward, who had remained in the victim's apartment, had started feeling sick and went to the bathroom to vomit. When the victim returned to the apartment, he did not see Ward and did not know where she was. He left the apartment again and went back to the first floor, where he saw the defendant's vehicle drive past the main entrance. The victim ran outside with his cellular telephone in his hand. As he did so, he was shot twice by the defendant; one bullet struck him in the chest, and the other in the right thigh. The defendant quickly left the scene. The victim died before paramedics arrived.

The investigation soon focused on the defendant. Because the defendant was living at his mother's house in Rhode Island at the time of the shooting, Massachusetts State police officers sent a request to the Rhode Island State police to locate him. On the morning following the shooting, the defendant, his mother, and his sister were driving towards the Fall River police station, where he planned to turn himself in, when the

vehicle was stopped by Rhode Island State police troopers. The troopers ordered all three individuals from the vehicle and placed the defendant in handcuffs. Without advising the defendant of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), one of the troopers, referencing the firearm used in the shooting the previous evening, asked the defendant, "Where's the gun?" to which the defendant responded, "I threw it off the Braga bridge."

The troopers transported the defendant to Rhode Island
State police headquarters, where he made several spontaneous
statements regarding the shooting before he was left alone in
his holding cell. The defendant was arraigned as a fugitive the
following day, at which point he waived the rendition process
and was transported to Massachusetts.

b. <u>Trial proceedings</u>. The following month, in February of 2014, the defendant was arraigned in the Superior Court on charges of murder, G. L. c. 265, § 1; carrying a firearm without a license, G. L. c. 269, § 10 (<u>a</u>); and carrying a loaded firearm without a license, G. L. c. 269, § 10 (<u>n</u>). Trial took place between March 28 and April 7, 2016. The Commonwealth proceeded on theories of deliberate premeditation and extreme atrocity or cruelty; the theory of defense was self-defense.

Among other evidence, the jury heard from a State police trooper who testified that, in August of 2014, while executing a

search warrant at the defendant's mother's home in Rhode Island, officers recovered a locked box in the basement. Inside the box, they found a semiautomatic handgun with a laser pointer attachment, a box of .40 caliber ammunition, and a magazine that contained several rounds of .40 caliber ammunition. Bullets recovered from the victim's body were tested and determined to have come from the gun found in the box. The lawful owner of the gun, a friend of the defendant who was living in another State, testified that the defendant stole the gun from him. The friend also testified that the laser pointer attachment that came with his purchase of the gun allows a user to see where the gun is aimed.

The jury convicted the defendant of the lesser included offense of murder in the second degree, as well as possession of a firearm without a license and possession of a loaded firearm without a license. He filed a timely notice of appeal.

c. <u>Posttrial proceedings</u>. In September of 2019, represented by newly appointed appellate counsel, the defendant filed a motion for a new trial on the ground of ineffective assistance of his trial counsel. In July of 2020, the trial judge conducted an evidentiary hearing on the motion. The defendant and his mother both submitted sworn affidavits prior to the hearing, and trial counsel testified as the sole witness. In October of 2020, the motion was denied, and the defendant

appealed from that denial. The defendant's appeal from the denial of the motion for a new trial was consolidated with his direct appeal, and we transferred the matter to this court on our own motion.

Discussion. In his motion for a new trial, the defendant argued that he had been denied the effective assistance of counsel because, prior to trial, his counsel disclosed to the Commonwealth that the gun the defendant used to shoot the victim was in the defendant's mother's basement. defendant maintained that this breach of the duty of confidentiality "irreparably prejudiced" him by exposing the jury to information that he had stolen the gun, that he had lied to police about the location of the qun, and that the qun had had a laser attachment that assisted with accuracy in shooting. According to the defendant, the introduction of this evidence of prior bad acts and bad character essentially forced him to testify at trial, and thus to waive his right to remain silent. The defendant also argued that trial counsel's agreement with the Commonwealth that counsel would not file a motion to suppress the defendant's statement to police that he had thrown the gun off a bridge, in exchange for the Commonwealth not introducing spontaneous statements that the defendant made regarding his involvement in the shooting during an interview at the Fall River police station, constituted ineffective

assistance of counsel. In addition, the defendant contends in his direct appeal that his convictions under G. L. c. 269, \$ 10 (<u>a</u>), which prohibits carrying a firearm without a license, and G. L. c. 269, \$ 10 (<u>n</u>), which prohibits carrying a loaded firearm without a license, are duplicative.

Motion for a new trial. "[W]e review a judge's denial of a defendant's motion for a new trial to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Caldwell, 487 Mass. 370, 374 (2021). Where an evidentiary hearing is conducted on a motion for a new trial, we "accept the [judge's] findings where they are supported by substantial evidence in the record," and we "defer to the judge's assessment of the credibility of witnesses" (citations omitted). Commonwealth v. Jacobs, 488 Mass. 597, 600 (2021). We afford "special deference . . . to both factual findings and the ultimate decision where, as here, the motion judge was also the trial judge." Commonwealth v. Tinsley, 487 Mass. 380, 385 (2021), citing Commonwealth v. Lane, 462 Mass. 591, 597 (2012). Other than for a conviction of murder in the first degree, a defendant seeking a new trial based on ineffective assistance of counsel must demonstrate that counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer." See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

i. Motion hearing. The trial judge found that, some six months after the shooting, while accessing other items stored in the basement, the defendant's mother came across a storage bin in an area of the basement where she stored out-of-season In her affidavit, the defendant's mother averred that, prior to that discovery, she had found in her basement the jacket that she remembered the defendant had been wearing on the evening of the shooting, and that she had visited him in jail to ask him if there was anything else in the basement that she "needed to know about." He said that there was and that she would "know it when [she] saw it." Upon searching the basement later that day, the defendant's mother noticed the storage bin, which she opened to find a locked box inside. Concerned about what it might contain, she contacted his trial attorney, informed counsel of what she had found, and told him that she wanted the items out of her home. Counsel instructed her not to touch anything or to open the box until he contacted her. also suggested that she obtain her own counsel.

After speaking with the defendant's mother, counsel sought advice concerning the situation from three friends of his who were attorneys also experienced in criminal defense.<sup>3</sup> He also

<sup>&</sup>lt;sup>3</sup> Although the defendant's mother did not open the locked box, counsel testified at the hearing on the motion for a new trial that he had "assumed" that it contained a weapon.

contacted the Board of Bar Overseers, although he did not feel that he was able to obtain any helpful guidance in doing so. Based in part on these conversations, counsel concluded that he had an ethical obligation to disclose to the prosecution the information that he had learned from the defendant's mother. The judge found that counsel also believed that the defendant's having lied to police about the location of the gun would hurt his theory of self-defense, and that it would be in the defendant's best interest to "get out in front of the issue by acknowledging the defendant's lie and turning over the items to the prosecution." Counsel then wrote the defendant a letter, dated August 27, 2014, that said:

"Please be advised that the firearm and jacket that you were wearing were recently discovered. I believe that it is my ethical obligation to make this fact known to the Commonwealth of Massachusetts. I have researched this and consulted with two highly experienced attorneys. It is also my information that the individual who discovered the weapon may have sought independent legal advice perhaps discussing this issue.

"I am mindful that you told the police that you threw the weapon over the Braga Bridge as you left the scene, but notwithstanding this untruth I cannot advise you or anyone else to continue to hide this from the authorities. I am writing this for the protection of many people although I am aware that this untruth will not help your case.

"I urge you to be more forthright with me in the future so that we may face serious issues early in the case and not waste time researching ethical issues.

"It is my intent to see that the authorities both here and in Rhode Island . . . recover the weapon and coat

independently. Said another way, I do not want anyone other than the authorities touching the weapon or the coat.

"If you have any questions, please contact my office."

Trial counsel testified at the hearing on the motion for a new trial that he brought this letter with him when he next met with the defendant at the house of correction. The judge found that, during the meeting, trial counsel discussed "what his ethical obligations were, the impact of the discovery on the case and his determination that the items would have to be turned over to the authorities." Following this discussion, the defendant signed his name beneath a statement at the bottom of the letter that stated:

"I . . . have received a copy of the above correspondence/advice from [my attorney] and I am in agreement with this position."

After meeting with the defendant, counsel notified the lead prosecutor about the defendant's mother's discovery. The prosecutor then informed Massachusetts State police, who, working with Rhode Island authorities, obtained warrants to search the mother's house, seized the defendant's jacket and the locked box, and then obtained a separate warrant to search the box, where they found a firearm.

In her memorandum of decision, the judge indicated that she found trial counsel to be credible and credited his testimony in its entirety. This testimony included the statement by highly

experienced trial counsel, with forty-eight years of practice as an attorney, that he honestly had believed that he had a duty to disclose the information he had learned from the defendant's mother to the Commonwealth; indeed, counsel testified at the hearing, "I . . . still believe I'd do it to this day." The judge concluded that counsel was not ineffective in disclosing the confidential information, because the defendant "gave informed consent to the disclosure of the evidence after meeting with [trial counsel] and discussing the matter." The judge did not address whether counsel was ineffective in not moving to suppress the defendant's statement about throwing the gun off a bridge.

The defendant argues that the judge's finding that the defendant had given informed consent was clearly erroneous; he contends that trial counsel failed adequately to inform him of the consequences of disclosure and that therefore he did not "knowingly, intelligently, and voluntarily consent[] to relinquishing his known rights."

ii. Attorney's duties of confidentiality and loyalty.

"Two ethical duties are entwined in any attorney-client relationship. First is the attorney's duty of confidentiality, which fosters full and open communication between client and counsel, based on the client's understanding that the attorney is statutorily obligated . . . to maintain the client's

confidences. . . . The second is the attorney's duty of undivided loyalty to the client. . . . These ethical duties are mandated by the . . . Rules of Professional Conduct." City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 846 (2006). See Mass. R. Prof. C. 1.6, as amended, 474 Mass. 1301 (2016); Mass. R. Prof. C. 1.7, as appearing in 471 Mass. 1335 (2015). See, e.g., Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108 (2009). The duty of loyalty is "perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668, 692 (1984). "[A] defendant must be able to seek the advice and guidance of his [or her] attorney and must be able to rely on the undivided loyalty of his [or her] counsel to present the defense case with full force and zealousness" (citation omitted). Perkins, 450 Mass. at 850. Integral to the duty of loyalty that a lawyer owes a client is the duty of confidentiality. See Damron v. Herzog, 67 F.3d 211, 215 (9th Cir. 1995), cert. denied, 516 U.S. 1117 (1996). "The constitutional quarantee to effective assistance of counsel, untroubled by conflicts of interest, is intended not only to prevent the problems that can spring from contemporaneous divided loyalties, but also to prevent prejudice to a defendant arising from an attorney's treatment of privileged information." Commonwealth v. Martinez, 425 Mass. 382, 391 (1997). See In re "Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 17 (2d Cir.

1986) (attorney's duty of loyalty "encompasses an obligation . . . not to divulge confidential communications from the client").

Conflict of interest. "A conflict of interest arises whenever an attorney's regard for one duty, such as that owed to a third party or in service of his [or her] own interests, leads the attorney to disregard another duty, such as that owed to his [or her] client." Perkins, 450 Mass. at 851. See Mass. R. Prof. C. 1.7 comment 1 ("Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests"). "[U]nder art. 12, if a defendant establishes an actual conflict of interest, he [or she] is entitled to a new trial without a further showing; [the defendant] need not demonstrate that the conflict adversely affected his [or her] lawyer's performance or resulted in actual prejudice." Commonwealth v. Mosher, 455 Mass. 811, 819 (2010). On the other hand, "where only a 'potential' or 'tenuous' conflict is demonstrated, the conviction will not be reversed except upon a showing of material prejudice." Commonwealth v. Shraiar, 397 Mass. 16, 20 (1986).

An "actual" conflict of interest exists "when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other

responsibilities or interests." <u>Perkins</u>, 450 Mass. at 851, quoting Mass. R. Prof. C. 1.7 comment 4. "The critical inquiry is whether the lawyer has a competing interest or responsibility that 'will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.'" <u>Perkins</u>, <u>supra</u> at 851-852, quoting Mass. R. Prof. C. 1.7 comment 4. Contrast <u>Commonwealth</u> v. <u>Stote</u>, 456 Mass. 213, 220-221 (2010) (defense counsel's intimate personal relationship with assistant district attorney in office that represented Commonwealth on appeal, "standing alone," did not create "actual" conflict, where couple did not live together and therefore their relationship was not conducive to "inadvertent breaches of confidentiality," and assistant district attorney was not handling case on appeal [citation omitted]).

B. <u>Confidentiality</u>. As stated, the duty of confidentiality is correlative to an attorney's duty of loyalty. See <u>Damron</u>, 67 F.3d at 214-215. "It is axiomatic that among the highest duties an attorney owes a client is the duty to maintain the confidentiality of client information" (citation omitted). <u>Perkins</u>, 450 Mass. at 851. Thus, as several other States also have concluded, "a defense attorney's disclosure of confidential information . . . necessarily implicates the attorney's duty of loyalty as well as the defendant's constitutional right to the

effective assistance of counsel." See <u>State v. Jones</u>, 278 Mont. 121, 125 (1996). See, e.g., <u>State v. Bain</u>, 292 Neb. 398, 406 (2016) ("government interference in the confidential relationship between a defendant and his or her attorney can implicate the . . . right to counsel [under the Sixth Amendment to the United States Constitution]").

The duty of confidentiality is embodied in Mass. R. Prof. C. 1.6; rule 1.6 prohibits a lawyer from revealing "confidential information relating to the representation of a client," except in certain, narrowly limited circumstances. The comments to rule 1.6 define "confidential information" broadly, and explain that such information goes far beyond statements made by the client to the attorney and includes "information gained during or relating to the representation of a client, whatever its source, that is . . . likely to be embarrassing or detrimental to the client if disclosed" (emphases added). See Mass. R. Prof. C. 1.6 comment 3A. A lawyer may reveal such confidential information, however, if the lawyer receives the client's

<sup>&</sup>lt;sup>4</sup> Specific, limited exceptions exist to the requirement of confidentiality, where a lawyer reasonably believes that a client will be committing a crime that would result in death or substantial bodily injury to another. In such circumstance, an attorney may disclose certain information to prevent that harm, without the client's consent. See Mass. R. Prof. C. 1.6 (b) (1)-(3); Matter of a Grand Jury Investigation, 453 Mass. 453, 457-459 (2009); Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 115 (1997), and cases cited.

"informed consent" to the disclosure. See <a href="McClure">McClure</a> v. <a href="Thompson">Thompson</a>, 323 F.3d 1233, 1244 (9th Cir.), cert. denied sub nom. <a href="McClure">McClure</a> v. <a href="Belleque">Belleque</a>, 540 U.S. 1051 (2003) ("[T]he mere fact of consent is not sufficient to excuse what would otherwise be a breach of the duty of confidentiality. Consent must also be informed"). See, e.g., <a href="Commonwealth">Commonwealth</a> v. <a href="Tahlil">Tahlil</a>, 479 Mass. 1012, 1014 (2018), citing Mass. R. <a href="Prof. C. 1.6">Prof. C. 1.6</a> (a).

"Informed consent" is defined as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." See Mass. R. Prof. C. 1.0. Where an attorney discloses confidential information without first obtaining the client's informed consent, and no exception permitting disclosure is applicable, see note 4, supra, the attorney has committed a breach of the duty of confidentiality. See McClure, 323 F.3d at 1244-1247 (where defense counsel did not advise client of all potential adverse consequences of disclosure, client's consent was not informed, and breach of confidentiality would have occurred if disclosure was not permissible under exception in order to prevent commission of crime involving imminent risk of substantial bodily injury or death).

The duty of confidentiality necessarily extends to information regarding the location of incriminating objects, as such information would be "detrimental to the client if disclosed." See Mass. R. Prof. C. 1.6 comment 3A. Thus, before a criminal defense attorney may share information regarding the location of incriminating objects with the prosecution, counsel first must obtain the informed consent of the client criminal defendant. Notwithstanding the attorney's honestly held belief to the contrary in this case, a defense attorney has no affirmative obligation to disclose such information. See Wemark v. State, 602 N.W.2d 810, 817 (Iowa 1999) ("a defense lawyer has no legal obligation to disclose information about the location of an instrument of a crime when possession of the instrument is not taken"). Although Mass. R. Prof. C. 3.4, as appearing in 471 Mass. 1425 (2015), provides that a lawyer may not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value," this rule is not applicable where a lawyer simply has knowledge of the location of possibly incriminating evidence about which the lawyer remains silent. See, e.g., J.W. Hall, Jr., Professional Responsibility in Criminal Defense Practice § 28.60 (3d ed. Nov. 2021). Cf. Matter of a Grand Jury Investigation, 470 Mass. 399, 406-407 (2015) (client's privilege against self-incrimination

precluded client's attorney's law firm from turning over client's cellular telephone, which might contain potentially incriminating evidence, to police, and firm could not be compelled to do so).

In Wemark, 602 N.W.2d at 812-813, for instance, the defendant appealed from the denial of his application for postconviction relief following his conviction of murder in the first degree in the stabbing death of his wife, on the ground that trial counsel improperly had advised him to reveal to prosecutors the location of the knife used in the stabbing. The Iowa Supreme Court concluded that "the decision by defense counsel to disclose the location of the knife to the prosecutor was premised upon ethical concerns which did not require disclosure." Id. at 817. The court explained that, where an attorney "actively participate[s] in hiding [a fruit or instrumentality of a crime], or take[s] possession of it in such a way that its discovery becomes less likely," such conduct "constitutes an abuse of a lawyer's professional responsibilities" (citation omitted). Id. at 816. Where, however, the attorney does not disrupt or take possession of the object, the attorney "has a duty to preserve the confidences of the client." Id. at 817. See People v. Meredith, 29 Cal. 3d 682, 686 (1981) ("an observation by defense counsel or his investigator, which is the product of a privileged

communication, may not be admitted unless the defense by altering or removing physical evidence has precluded the prosecution from making that same observation").

C. Application. Here, the information that trial counsel received from the defendant's mother about what she found in her basement was confidential information governed by Mass. R. Prof. C. 1.6, as it concerned the location of an instrumentality of the crime. Trial counsel's belief that he was obligated to disclose the information to the prosecution was inaccurate, as he did not take possession of the evidence, alter it, or hide See Wemark, 602 N.W.2d at 816. Nonetheless, prior to the disclosure, trial counsel confronted what he perceived to be an ethical dilemma: he honestly, albeit mistakenly, believed, as evidenced by his letter to the defendant and his testimony at the hearing, that he had had an obligation to disclose to the Commonwealth the location of the jacket and the locked box. At the same time, he was bound by Mass. R. Prof. C. 1.6, and his duty of loyalty to his client, to refrain from making the disclosure unless he received the defendant's informed consent to do so.<sup>5</sup>

<sup>&</sup>lt;sup>5</sup> We do not address the question whether a violation of a rule of professional conduct, alone, constitutes behavior falling "measurably below that which might be expected from an ordinary fallible lawyer," for purposes of establishing a claim of ineffective assistance of counsel. See <u>Commonwealth</u> v. Saferian, 366 Mass. 89, 96 (1974). Under Federal law, a

Accordingly, we must determine whether the conflict that counsel faced was an actual conflict of interest that rendered his representation per se ineffective. A determination whether counsel committed a breach of his duty of confidentiality to the defendant is crucial in this analysis. See <a href="McClure">McClure</a>, 323 F.3d at 1242-1243, quoting <a href="Nix v. Whiteside">Nix v. Whiteside</a>, 475 U.S. 157, 171 (1986) ("The duty of an attorney to keep his or her client's

The United States Supreme Court has cautioned that, "[w]hen examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the [S]tate's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." See Nix, 475 U.S. at 165. Many States have adopted this approach. See, e.g., Blackshear v. State, 274 Ga. 842, 843 (2002); <u>State</u> v. Clay, 824 N.W.2d 488, 501-502 (Iowa 2012); Schoonover v. State, 218 Kan. 377, 384 (1975), cert. denied, 424 U.S. 944 (1976); Cooper v. State, 356 S.W.3d 148, 157 (Mo. 2011), cert. denied, 568 U.S. 831 (2012); People v. Grimes, 32 N.Y.3d 302, 318 (2018); Rivera v. State, 58 A.3d 171, 179-180 (R.I. 2013); Smith v. State, 243 S.W.3d 722, 725 (Tex. Ct. App. 2007); McCloud v. State, 2021 UT 51,  $\P\P$  63-70; State v. Cooper, 2019 WI 3, ¶¶ 21-22.

violation of a rule of professional conduct may be considered in the analysis of ineffectiveness, but such a violation, without more, does not necessarily amount to a constitutionally deficient performance. See <a href="Nix v. Whiteside">Nix v. Whiteside</a>, 475 U.S. 157, 165 (1986) ("breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"); <a href="Strickland v. Washington">Strickland v. Washington</a>, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides"). See also Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000).

confidences in all but a handful of carefully defined circumstances is so deeply ingrained in our legal system and so uniformly acknowledged as a critical component of reasonable representation by counsel that departure from this rule 'make[s] out a deprivation of the Sixth Amendment right to counsel'").

The motion judge found that, before the defendant signed the statement at the end of the letter indicating his agreement with its described plan to disclose, counsel discussed with the defendant "the impact of the discovery on the case." The judge's finding is supported by trial counsel's testimony that he explained to the defendant the impact that disclosure would have on the defendant's right to remain silent at trial. notwithstanding the defendant's assertions to the contrary, counsel did communicate to the client at least something about the risks of disclosure. The motion judge did not find, however, that counsel communicated to the defendant the "reasonably available alternatives" to disclosure, which Mass. R. Prof. C. 1.0 mandates as necessary to establish informed consent. Nor is there any evidence in the record that would have supported such a finding; trial counsel did not assert that he discussed with the defendant any option other than disclosure, and the letter that counsel wrote and handed to the defendant presents disclosure as the sole available option. that letter, counsel stated explicitly that he had an "ethical

obligation" to share the information that he had learned with the prosecution team, and that it was his "intent to see that the authorities . . . recover the weapon and coat independently."

Certainly, nondisclosure of the information was a "reasonably available alternative" that the defendant should have been advised to consider. See Mass. R. Prof. C. 1.0. Even if trial counsel believed that disclosure was the defendant's best option from a strategic point of view, in light of the concern that the defendant's mother potentially would share the information with police or the prosecutor if counsel or the defendant did not do so, the decision whether to disclose the confidential information was the defendant's to make. At a minimum, counsel should have discussed with him the potential impact of not disclosing the information, and the various possible risks associated with pursuing such a strategy, which potentially could have avoided certain powerful evidence being put before the jury. Absent evidence of such a discussion, we cannot say that the defendant's consent was "informed." See McClure, 323 F.3d at 1244 (defendant "can provide valid consent only if there has been appropriate 'consultation' with his or her attorney"); Mass. R. Prof. C. 1.0 comment 6.

Moreover, on this record, we are unable to conclude that the defendant's purported consent was voluntarily given. Trial

counsel did not testify, and the record does not suggest, that, during the attorney's jailhouse visit, he informed the indigent defendant that the defendant could seek to have his current counsel withdraw and to be appointed a different attorney.

Counsel explicitly stated in his letter that he knew the disclosure would harm the defendant and that, in reaching his decision to disclose, counsel had taken into consideration the "other" interests at stake, making abundantly clear to the defendant that the defendant's interests were not counsel's only, or highest, priority. As counsel offered the defendant no other option aside from disclosure, and counsel gave the defendant reason to doubt that disclosure was in his best interests, the defendant's consent to disclosure was not voluntary; a choice cannot be voluntary if, in fact, it is not a choice.

company, pursuant to which counsel wore a wireless microphone so that his purportedly confidential conversations with his client could be recorded to provide material for a television documentary. See <a href="Perkins">Perkins</a>, 450 Mass. at 854. We explained that an actual conflict of interest existed in those circumstances because,

"[o]n the one hand, counsel had a duty to give undivided loyalty to and zealous representation of his client. On the other hand, counsel assumed the obligation of wearing a wireless microphone and giving third parties seemingly unfettered access to his confidential relationship with the defendant. These competing responsibilities created an actual conflict of interest for counsel, and the defendant was not required to show, pursuant to art. 12, that the conflict resulted in actual prejudice or that it had an adverse effect on counsel's performance."

## Id.

Although <u>Perkins</u> involved a conflict between counsel's duty of confidentiality to a client and counsel's voluntarily assumed duty to a third party, a conflict also can exist between counsel's duty zealously to advocate for a client and counsel's personal interest in avoiding violating other ethical rules. In <u>Douglas</u> v. <u>United States</u>, 488 A.2d 121, 127 (D.C. 1985), for instance, a defendant filed a complaint with the bar disciplinary authority arguing that his trial counsel had failed to undertake diligent efforts to obtain his release pending trial. Counsel was unaware of the complaint until the second day of the defendant's trial, when counsel was informed by bar

counsel that bar counsel was opening an inquiry into his conduct. <u>Id</u>. at 128. After learning of this investigation, the trial judge sua sponte declared a mistrial on the ground of a conflict of interest. Id. at 128-129.

In reviewing the propriety of the trial judge's actions, the District of Columbia Court of Appeals held that, had trial counsel continued to represent the defendant without the defendant knowingly and intelligently agreeing to waive the conflict, the representation likely would have been constitutionally ineffective, and would have deprived the defendant of his right to the effective assistance of counsel. See id. at 137. The court explained that,

"as soon as [trial counsel] learned of Bar Counsel's intention to pursue an investigation of appellant's complaint, he acquired a personal interest in the way he conducted appellant's defense -- an interest independent of, and in some respects in conflict with, appellant's interest in obtaining a judgment of acquittal. For instance, fearing that appellant's complaint to Bar Counsel might later be expanded to include claims of ineffective assistance at trial, [trial counsel] would have an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for post hoc criticism of his efforts. This could compromise [trial counsel's | professional judgment about the best means of defending this particular case; it could encourage the most standard or conservative trial strategy, as well as overcautious tactical decisions and courtroom demeanor. Furthermore, concerns about the pending investigation might impede communications between appellant and [trial [Trial counsel] might be apprehensive about sharing with appellant the reasons behind tactical defense decisions and refrain from disclosing to appellant any unexpected problem that arose during the course of trial. Appellant, in turn, might be reluctant to question [trial

counsel's] trial decisions for fear of further alienating counsel in the midst of trial." (Footnote omitted.)

Id. at 136-137. See, e.g., Patterson, 432 Mass. at 780 (actual conflict existed where defendant's "interests would be better served by having the attorney testify [as a defense witness] while the attorney's interests would be better served by not testifying"); State v. Taylor, 1 S.W.3d 610, 612 (Mo. Ct. App. 1999) (actual conflict of interest rendered representation ineffective where defense counsel was "caught between his obligation to do his best for [the defendant] and a desire to protect his own reputation and financial interests"); State v. Armstrong, 290 Neb. 991, 1015-1016 (2015) (actual conflict between defense counsel's interest in avoiding criminal or ethical sanctions and defendant's interest in presenting strongest defense possible rendered representation ineffective).

Similarly, in <u>Jones</u>, 278 Mont. at 131, 133-134, the Montana Supreme Court held that, for purposes of a claim of ineffective assistance of counsel, a presumption of prejudice was warranted where, during a hearing on a defense attorney's motion to withdraw, the attorney disclosed confidential client information to the judge and expressly criticized the client's decision to exercise his right to trial. The court determined that the lawyer "totally abandoned his duties of loyalty and confidentiality to [the defendant] by putting his personal

interest in not wanting to take [the] case to trial ahead of [the defendant's] interest in representation by an attorney devoted solely to his interest in exercising his right to trial," id. at 134, and that this behavior "created 'an obvious conflict of interest,'" id. at 133, quoting Frazer v. United States, 18 F.3d 778, 782 (9th Cir. 1994). See Frazer, supra at 783 (conflict of interest existed where lawyer verbally assaulted client and threatened to provide substandard performance if client chose to exercise right to trial); Taylor v. State, 428 Md. 386, 409-410 (2012) (presumption of prejudice due to conflict of interest applies where attorney creates "an adversarial relationship" with client defendant by filing suit against defendant for unpaid legal fees prior to defendant's trial).

For similar reasons, we conclude that, here, despite the fact that his firmly and honestly held view of his ethical duties was misguided and inaccurate, trial counsel experienced an actual conflict of interest between what he thought were his ethical duties and his duties toward his client. Counsel did not demonstrate "undivided loyalty" to the defendant. See <a href="Perkins">Perkins</a>, 450 Mass. at 850. Rather, he stated plainly in his letter that he was acting "for the protection of many people," albeit that he also explained that he was "aware" that the information disclosed would "not help" the defendant's case.

Tellingly, counsel's belief that he was ethically obligated to disclose meant that he had a "personal interest in the way he conducted [the defendant's] defense -- an interest independent of, and in some respects in conflict with, [the defendant's] interest in obtaining a judgment of acquittal." See <a href="Douglas">Douglas</a>, 488 A.2d at 136. Here, counsel's contrary interests and concerns are evidenced by the fact that he was single-mindedly focused on obtaining the defendant's consent to disclosure, and did not present or meaningfully explore potential courses of conduct other than disclosure or, more importantly, allow the defendant to consider other courses of conduct.

Counsel's actions also cannot be justified on the basis of trial strategy. "The very problem with an attorney's conflict of interest is that the attorney's judgment about strategic choices is clouded by the conflict." Patterson, 432 Mass. at 780 n.18. Although the motion judge found that trial counsel had decided that disclosure was the best strategic option for the defendant to pursue, this determination is "suspect because it is not possible to determine reliably to what extent the decision[] [was] based on valid strategic considerations and to what extent the decision[] [was] the result of impermissible considerations" of trial counsel's perceived ethical obligation to the Commonwealth. See Commonwealth v. Michel, 381 Mass. 447, 454 n.10 (1980). See also Wemark, 602 N.W.2d at 817 (tactics or

strategy did not support trial counsel's disclosure of location of knife defendant used to stab his wife, as disclosure was premised on counsel's false understanding that he was ethically obligated to disclose and "tactics were developed as a means to deal with the disclosure"). The conflict thus "foreclose[d] alternatives that would otherwise [have been] available" to the defendant. See <a href="Perkins">Perkins</a>, 450 Mass. at 851, quoting Mass. R. Prof. C. 1.7 comment 4. In these circumstances, we cannot say that the defendant received the effective assistance of counsel; he therefore is entitled to a new trial under art. 12 without a further showing of prejudice. See Stote, 456 Mass. at 217.

D. Permissible courses of action in similar circumstances.

We emphasize that attorneys confronting similar circumstances to those counsel did here, where they know of the location of possibly incriminating information but take no action to obtain possession of or to conceal or destroy any potentially inculpatory objects, violate no ethical rule by remaining silent. Nonetheless, if, in light of the attorney's knowledge, the attorney believes that he or she would be unable zealously to represent the client and to provide "thorough and competent representation," or that there has been an irreconcilable breakdown in the attorney-client relationship, the attorney should seek to withdraw well before trial. See Commonwealth v. Walter, 396 Mass. 549, 558 (1986) ("motion [to withdraw] would

have been a proper, thoughtful, and prudent action for [defense counsel] to take if he believed he was faced with a possible conflict as opposed to a genuine conflict"). See, e.g.,

Commonwealth v. Melo, 472 Mass. 278, 305-306 (2015);

Commonwealth v. Rice, 441 Mass. 291, 297 (2004). Of course, if the attorney were to withdraw, any successor attorney to represent the client likely would confront similar issues, particularly if prior counsel had made any notes concerning the conflict in the client's file. See Commonwealth v. Mitchell, 438 Mass. 535, 548, cert. denied, 539 U.S. 907 (2003)

("Appointment of new counsel would simply have shifted the ethical dilemma from one attorney to another"). But a decision to protect a client's confidential information by saying nothing does not represent interference with the Commonwealth's pursuit of its case.

Moreover, even if a defendant properly is informed and chooses to withhold his or her consent to disclosure following a full and adequate discussion with counsel, the attorney later may confront other ethical issues in the continued representation of the client, stemming from counsel's "fundamental duty as an 'officer' of the court, who 'must not allow the tribunal to be misled by . . . evidence that [he or she] knows to be false.'" See Commonwealth v. Leiva, 484 Mass. 766, 778 (2020), quoting Mass. R. Prof. C. 3.3 comment 2, as

appearing in 471 Mass. 1416 (2015). A criminal defense attorney "who knows that the defendant, the client, intends to testify falsely . . . has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed." Mass. R. Prof. C. 3.3 (e). To be subject to this duty, the attorney must have actual knowledge that the client will testify falsely; a reasonable belief that a client might do so does not trigger similar obligations. See Mitchell, 438 Mass. at 544-548. So long as counsel confines his or her examination of a defendant to matters about which counsel does not know a defendant will testify falsely, see Mass. R. Prof. C. 3.3 (e) comment 8, counsel may balance the duty to advocate zealously for the client and to maintain client confidentiality with the "fundamental duty as an 'officer' of the court" not to mislead the tribunal, see Leiva, 484 Mass. at 778, quoting Mass. R. Prof. C. 3.3 (e) comment 2.

iii. Motion to suppress. The defendant asserts that trial counsel should have filed a motion to suppress the defendant's statement about throwing the gun off a bridge, as the defendant was in police custody at the time that he was questioned about the location of the gun, and he had not yet been advised of his Miranda rights.

At trial, counsel informed the judge that he had made a strategic decision not to seek to suppress the statement given without the benefit of Miranda warnings. The prosecutor then explained that the parties had reached an agreement under which the defendant would not seek to suppress his statement about the gun and the prosecutor would not introduce a statement that the defendant made at the Fall River police station, after he had been advised of his Miranda rights.

In his motion for a new trial, the defendant argued that trial counsel made a strategic error in stipulating to the introduction of the defendant's first statement to police, prior to being provided his Miranda rights, and the exclusion of the recorded statement; the defendant argued, in particular, that the introduction of the first statement further damaged his case. As stated, in her denial of the motion for a new trial, the judge did not address this argument. Because we conclude that counsel was ineffective due to a conflict of interest, we need not reach the issue whether counsel also was ineffective in failing to seek suppression of the first statement. Of course, on remand for a new trial, the parties may litigate anew any of the previously stipulated-to issues, as well as any other issue concerning the evidence to be introduced or excluded at trial.

b. <u>Direct appeal</u>. In his direct appeal, the defendant argues that his convictions under G. L. c. 269, § 10 (a), which

prohibits carrying a firearm without a license, and G. L. c. 269, § 10 (n), which prohibits carrying a loaded firearm without a license, cannot both stand. He maintains that conviction of both of these offenses constitutes impermissible duplicative punishment, as the criminal actions for which he is being punished under each charge are "so closely related in fact as to constitute in substance but a single crime." See <a href="Commonwealth">Commonwealth</a> v. Valliere, 437 Mass. 366, 371 (2002), quoting <a href="Commonwealth">Commonwealth</a> v. St. Pierre, 377 Mass. 650, 662-663 (1979).

We addressed this issue in <u>Commonwealth</u> v. <u>Taylor</u>, 486

Mass. 469, 473 (2020). There, the Commonwealth had charged the defendant only under G. L. c. 269, § 10 (<u>n</u>) (unlicensed loaded firearm), and not under G. L. c. 269, § 10 (<u>a</u>) (unlicensed firearm). We concluded that this was impermissible under the statute, as the Legislature intended a charge under G. L. c. 269, § 10 (<u>n</u>), to constitute further punishment of a defendant who also had been convicted under G. L. c. 269, § 10 (<u>a</u>). See <u>Taylor</u>, <u>supra</u> at 474-475. Accordingly, we determined that "G. L. c. 269, § 10 (<u>n</u>), is not a freestanding crime; it must be accompanied by a charge of G. L. c. 269, § 10 (<u>a</u>) or (<u>c</u>)." <u>Id</u>. at 475. Thus, the defendant's argument that his convictions under both G. L. c. 269, § 10 (<u>a</u>), and G. L. c. 269, § 10 (<u>n</u>), constitute duplicative punishment is unavailing.

3. <u>Conclusion</u>. The order denying the defendant's motion for a new trial is vacated and set aside, and the matter is remanded to the Superior Court for a new trial.

So ordered.