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COMMONWEALTH vs. MIGUEL A. JIMENEZ.

15-P-160

APPEALS COURT OF MASSACHUSETTS

2016 Mass. App. Unpub. LEXIS 306

March 18, 2016, Entered

**NOTICE:** SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *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 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)*.

**JUDGES:** Cypher, Wolohojian & Neyman, JJ.<sup>2</sup>

2 The panelists are listed in order of seniority.

## OPINION

### MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

The defendant appeals from the order denying his motion to vacate guilty plea (and the order denying his motion for reconsideration), arguing that the affidavits raised a substantial issue of ineffective assistance of counsel such that an evidentiary hearing was required before denying the motion. Without in any way intending to imply or suggest any view on the ultimate merits, we agree that an evidentiary hearing should be held before resolving the credibility of defense counsel's affidavit. We accordingly vacate the orders and remand for further

proceedings.

On January 5, 2006, the defendant -- represented by counsel -- pleaded guilty to two counts of possession of a class B substance with intent to distribute and furnishing a false name upon arrest. Approximately eight months later, he filed his first motion to withdraw his plea. That motion was based on alleged "ineffective assistance of counsel and lack of constructive notice of immigration warnings." Plea counsel's affidavit (submitted in connection with the motion) was not helpful to the defendant in that it stated that counsel had discussed "the significance and consequences of pleading guilty, including . . . immigration consequences." Counsel further attested that the defendant "seemed more concerned with the exact number of days he would be incarcerated than with the possibility of the immigration consequences." The motion judge, who had also been the plea judge, denied the motion without a hearing. That order was not appealed.

More than seven years later, the defendant filed a second motion to withdraw his plea. This second motion was supported by an affidavit from the defendant as well as a new affidavit from plea counsel (second affidavit). Plea counsel's second affidavit averred that the defendant's "immigration status was of the utmost importance to [the defendant]" while plea counsel had represented him. Plea counsel also stated that he had advised the defendant that "because the committed sentence did not exceed one year, his plea did not constitute an aggravated felony and he would therefore not be deportable." The defendant having since been deported, it is this advice that forms the basis of the defendant's claim of ineffective assistance. The judge discredited plea counsel's affidavit as well as that submitted by the defendant, and denied the motion

without a hearing.

The defendant then filed a motion to reconsider, which was supported with additional materials, including affidavits from various family members. The judge conducted a nonevidentiary hearing on this motion during which there was explicit discussion of the defendant's request for an evidentiary hearing. During this discussion, the judge indicated his willingness to conduct an evidentiary hearing, but stated that he would want to receive testimony from plea counsel since the judge considered plea counsel's testimony "critical." Defense counsel would not commit to producing plea counsel to testify at an evidentiary hearing. After taking it under advisement, the judge denied the motion for reconsideration.

We begin with the defendant's argument that the judge was required to conduct an evidentiary hearing.

"The decision to hold an evidentiary hearing on a motion for a new trial is left largely to the sound discretion of the judge. Only when the motion and affidavits raise a substantial issue is an evidentiary hearing required.

"In determining whether a substantial issue meriting an evidentiary hearing . . . has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised. . . . In determining the adequacy of the defendant's showing, the motion judge may consider whether the motion and affidavits contain credible information of sufficient quality to raise a serious question. . . . A judge is not required to accept as true the allegations in a defendant's affidavits even if nothing in the record directly disputes them, or if the affidavit is uncontroverted. . . . [T]he credibility, weight, and impact of the affidavits are entirely within the motion judge's discretion."

*Commonwealth v. Vaughn*, 471 Mass. 398, 404-405 (2015) (citations and quotation marks omitted).

Here, plea counsel's second affidavit on its face raised a serious issue because it, in effect, amounted to a confession of mistaken advice concerning the immigration consequences of the plea. Furthermore, plea counsel's affidavit was corroborated by those from the defendant's mother and cousin, which were submitted in

connection with the motion to reconsider.<sup>1</sup> On their face, the affidavits raised a serious issue that would ordinarily require an evidentiary hearing in the context of an alleged failure by counsel to give proper immigration advice in connection with tendering a plea. See, e.g., *Commonwealth v. Lavrinenko*, 473 Mass. 42, 63 (2015) (remanding for evidentiary hearing); *Commonwealth v. Martinez*, 86 Mass. App. Ct. 545, 545-546 (2014) (same); *Commonwealth v. Henry*, 88 Mass. App. Ct. 446, 457 (2015) (same).

1 Those affidavits state that plea counsel misadvised the defendant regarding the immigration consequences of his plea. They also claim that the defendant's immediate and extended family all live in the United States.

Plea counsel's original and second affidavits were indeed "critical," as the judge concluded, and their credibility was central, especially since they contain apparent discrepancies which are unexplained. The transcript of the hearing on the motion to reconsider reveals that the judge, to his credit, was willing to conduct an evidentiary hearing. That willingness apparently changed when defense counsel would not commit to producing plea counsel as a witness. As understandable as this is, we are not convinced, in light of the authority cited above, that it was a sufficient basis to forego an evidentiary hearing -- even though the two affidavits, while not mutually exclusive, could have been viewed by the judge as lacking in credibility.

For these reasons, we vacate the orders denying the defendant's motion to vacate guilty plea and motion for reconsideration, and remand the matter for an evidentiary hearing consistent with this memorandum and order. On remand, in evaluating credibility, the judge may consider -- keeping due regard for the sensitivities of the attorney-client privilege -- plea counsel's willingness to appear and explain the apparent discrepancies in his affidavits.

*So ordered.*

By the Court (Cypher, Wolohojian & Neyman, JJ.<sup>2</sup>),

2 The panelists are listed in order of seniority.

Entered: March 18, 2016