Appendix A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1227

COMMONWEALTH

vs.

TYRONE GARDEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Tyrone Garden, was accused of raping a woman on September 18, 1991, and the Commonwealth obtained a complaint in District Court charging the defendant with aggravated rape, G. L. c. 265, § 22(a), on September 11, 2006. However, the indictment did not issue until April 19, 2007 -- seven months after the applicable limitation period had expired. See G. L. c. 277, § 63.

Prior to trial, the defendant unsuccessfully moved to dismiss the indictment on the grounds that the issuance of a complaint did not toll the limitations period. The defendant's subsequent request to proceed by way of an interlocutory appeal of this ruling was also unsuccessful. In denying the request, a single justice of the Supreme Judicial Court indicated that, in the event of a conviction after trial, the defendant could raise

the issue in his direct appeal. However, on the eve of trial, the defendant entered a guilty plea -- waiving his right to pursue an appeal of the orders on all pretrial motions.

At that time, the same statute of limitations issue that the defendant had raised in his motion to dismiss was pending before the Supreme Judicial Court in an unrelated case, Commonwealth v. Perella, 464 Mass. 274 (2013) (Perella). Eventually (approximately eight months after the defendant's plea), the Supreme Judicial Court decided Perella in a manner that favored the defendant's interpretation. Id. at 283-284.

The defendant thereafter sought to vacate his guilty plea by way of a motion for a new trial. Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001). In his motion, the defendant argued that, where he had raised the statute of limitations issue, justice was not served by his guilty plea to a crime for which the limitations period had run. Alternatively, the defendant argued that his counsel was ineffective because he failed to investigate and advise him of the fact that the issue he litigated was pending in the Supreme Judicial Court and did not, on the basis of the pending issue, move to continue his trial. The motion judge (who was also the plea judge) denied the defendant's motion, indicating that, given the age of the case, he would not have granted a continuance of the trial. This appeal followed, and we affirm.

Discussion. We review the denial of a motion to withdraw a guilty plea to determine whether there has been an abuse of discretion or other error of law. See Commonwealth v. Lastowski, 478 Mass. 572, 575 (2018).

1. Rule 30(b). The defendant first contends that a new trial is warranted because Perella decided in his favor that the statute of limitations had run on the indictment to which he pleaded guilty. Id. at 283-284. While we agree the indictment in the defendant's case fell outside the limitation period of "within [fifteen] years of the date of commission of [the] offense," set forth in G. L. c. 277, § 63, the claim does not warrant a new trial.

The defendant's guilty plea to the indictment "waive[d] all nonjurisdictional defects in the proceedings prior to the entry of the guilty plea," Commonwealth v. Berrios, 84 Mass. App. Ct. 521, 524 (2013), quoting from Commonwealth v. Fanelli, 412 Mass. 497, 500 (1997), and a violation of the statute of limitations is a nonjurisdictional defect. See Commonwealth v. Bougas, 59 Mass. App. Ct. 368, 372 (2003), quoting from Smith, Criminal Practice and Procedure § 1321 (2d ed. 1983 & Supp. 2002).

Furthermore, we are not persuaded by the defendant's assertion that his guilty plea to a defective indictment created an injustice. The evidence of the defendant's guilt, which included DNA evidence linking the defendant to the rape was

overwhelming, and thus his challenge to the timeliness of the prosecution, unlike some other evidentiary type challenges, did not undermine the "integrity of [the] verdict" here. Commonwealth v. Pring-Wilson, 448 Mass. 718, 736 (2007). We perceive no error.

2. Ineffective assistance. The defendant also argues that plea counsel, who did not advise him about the posture of Perella or, in the alternative, move for a continuation of the trial on the basis of Perella, rendered ineffective of counsel. We are not persuaded.

To prove ineffective assistance of counsel, the defendant must show "[1] serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, [2] . . . [that] it has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The defendant's assertion fails on both prongs of this bipartite analysis.

This case is controlled in all material respects by the holding in Commonwealth v. Boria, 460 Mass. 249 (2011), which raised a similar challenge to counsel's failure to seek a continuance pending the outcome of an issue on appeal in an unrelated case. There, the court was not persuaded that the

failure to seek what would have been a lengthy stay of the proceedings on the "chance that an issue may be decided to the defendant's advantage, constitutes ineffective assistance of counsel," id. at 253-254, and neither are we.

Furthermore, when a defendant challenges his counsel's failure to file a motion, "the proper question is whether filing of the motion 'might have accomplished something material for the defense,'" Commonwealth v. Lally, 473 Mass. 693, 703 n.10 (2016), quoting from Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977), but a request for a continuance would have been futile here. The motion judge, who was also the plea judge, clearly indicated that, given the age of the case, he was not granting any continuances, and the judge would have been well within his discretion to do so. Commonwealth v. Burston, 77 Mass. App. Ct. 411, 417 (2010).

The defendant's challenge to counsel's performance also fails on the prejudice prong, as the defendant obtained a favorable disposition in the face of an overwhelmingly strong case for the Commonwealth. See Commonwealth v. Pike, 53 Mass. App. Ct. 757, 763 (2002) (no prejudice when defendant received more favorable disposition under plea agreement than he likely

would have received after trial). We perceive no prejudice.

Order denying motion to withdraw guilty plea affirmed.

By the Court (Milkey, Maldonado & Desmond, JJ.[1]),

Joseph F. Stanton

Clerk

Entered: May 1, 2018.

[1] The panelists are listed in order of seniority.

Appendix B

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
WOCR 2007 – 00797

COMMONWEALTH OF MASSACHUSETTS

v.

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TYRONE GARDEN,
Defendant

MEMORANDUM OF DECISION AND ORDER ON MOTION TO WITHDRAW GUILTY PLEA

The defendant maintains that he should be allowed to withdraw his guilty plea because plea counsel was constitutionally ineffective for failing to investigate the existence of the pending appeal before the Supreme Judicial Court that would have impacted the defendant's statute of limitations argument raised previously and denied in this case. Alternatively, the defendant argues that justice was not done where he pleaded guilty to aggravated rape on an indictment that issued after the 15 year statute of limitations had run. For reasons that follow, the court is not persuaded as to either contention and therefore this motion is **DENIED**.

To sustain his claim of ineffectiveness, the defendant must show that the plea counsel: 1) committed serious incompetency that fell measurably below that which might be expected from an ordinarily fallible lawyer, and 2) thereby likely deprived the defendant of an otherwise available substantial ground of defense. Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

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Assuming arguendo that the failure to investigate and/or find the *Perella*[1] case then pending before the SJC amounted to serious incompetency, the second requirement of *Saferian*, supra, is problematical.[2] The simple discovery of the pending appeal that *could have* impacted the defendant's case, would only *actually* have deprived him of a substantial ground of defense if the defendant convinced the court that his case should be stayed on the chance that the SJC would rule in his favor.

As expressed at hearing, the undersigned was the judge who would have ruled on such a request, and there would be virtually no chance that such a motion would have been allowed. The trial date on which the defendant pled guilty was at least the third scheduled date for jury trial. Both sides reported that they were ready for trial. Numerous motions in limine were argued and decided. The empanelment process had begun. The date of offense was over twenty years in the past and the indictment was five years previous. When the "surprise" issue of the defendant's consideration of a plea arose, the undersigned told him what he would be inclined to impose the "lenient" sentence of nine to ten years in state prison if he pled. Given all of these factors, the undersigned states unequivocally today that he would not have granted a virtual open-ended stay of this case, and the defendant's choice would be limited to a trial by jury or guilty plea.

Of course, there was no such request to stay the proceedings. Regardless, the defendant still could have preserved his right to appeal the issue of the statute of limitations by having a trial. The fact that he made a decision to accept the relatively "sure thing" of a nine to ten year

[1] 464 Mass. 274 (2013), (complaint, as opposed to indictment, within limitations period does not constitute timely commencement of criminal proceeding).
[2] This is not to decide that a reasonably fallible lawyer would have learned of the pendency of the appeal under the circumstances of this case.

sentence on a life felony where the allegations were heinous, and the evidence of guilt overwhelming, was completely rational. It is only with the visual acuity of pure hindsight does the defendant state that he would have insisted on a trial. This is meaningless; on the facts known to the defendant, (even if they did not include the bare existence of the *Perella* appeal), the reality was otherwise when he could have preserved the option to pursue the statute-of-limitations-based appeal himself. Therefore, the court does not credit the defendant's affidavit to this effect, especially absent any affidavit from plea counsel. See, Commonwealth v. Lys, 91 Mass. App. Ct.718, 722-23 (2017); Commonwealth v. Fanelli, 412 Mass. 497, 501 n.3 (1992). The undersigned is also convinced, as he was on February 1, 2012, that the defendant knowingly, voluntarily and intelligently waived his right to trial, including the right to appeal pre-trial rulings.

The analysis is no different with regard to the defendant's second, general "justice may not have been done" argument. Anyone who finds, after his guilty plea, that the law has changed in such a way that it would have benefitted him if it happened earlier, could say that they would not have pled guilty. No one could have known what the outcome of any appellate court's decision would have been here, whether through the *Perella* case or the defendant's own appeal if he went to trial. In this case, the defendant simply made a rational decision that to accept the plea bargain was preferable to his chances of winning an appeal. Today's self-serving statements aside, the defendant convinced the court then that he knew he was guilty of aggravated rape, and that he wanted to plead guilty, despite having argued earlier that his indictment was time-barred. "A strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012). The undersigned finds no exceptional situation here

that resulted in an injustice.

ORDER

For the reasons stated, the defendant's motion to withdraw guilty plea is ***DENIED***.

David Ricciardone, Superior Court Justice

Dated: August 18, 2017

480 Mass. 1107
(This disposition is referenced in the North Eastern Reporter.)
Supreme Judicial Court of Massachusetts.

COMMONWEALTH
v.
Tyrone GARDEN

September 13, 2018

Reported below: 93 Mass. App. Ct. 1108 (2018).

Opinion

*1 Appellate review denied.

All Citations

Slip Copy, 480 Mass. 1107, 2018 WL 4566996(Table)

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