

APPENDICES

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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).

COMMONWEALTH OF MASSACHUSETTS

Appendix 1, p. 1

APPEALS COURT

18-P-369

COMMONWEALTH

vs.

ANTONIO AVILEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On October 16, 2000, the defendant pleaded guilty to multiple offenses, including forcible rape of a child under the age of sixteen, aggravated kidnapping, and unlawful possession of a firearm. Approximately ten years later, he filed a motion for a new trial alleging ineffective assistance of counsel that was denied. We subsequently affirmed the order denying the motion in an unpublished decision pursuant to our rule 1:28. See Commonwealth v. Avilez, 82 Mass. App. Ct. 1104 (2012), cert. denied, 133 S. Ct. 999 (2013). Thereafter, the defendant filed a second motion for a new trial, in which he relied on the same arguments he advanced in support of his first motion for a new trial. That motion also was denied and the order denying the motion was affirmed in a second unpublished decision. See

Commonwealth v. Avilez, 85 Mass. App. Ct. 1115 (2014), cert. denied, 135 S. Ct. 312 (2014).

On May 4, 2015, the defendant filed a third motion for a new trial. The motion was allowed with respect to one conviction, possession of a firearm, which the Commonwealth conceded was duplicative, and was denied with respect to the remaining convictions on the ground that the issues raised by the defendant had already been litigated and determined in his first and second motions for a new trial and, therefore, the doctrine of direct estoppel prevented the defendant from obtaining another determination of his claims. See Commonwealth v. Rodriguez, 443 Mass. 707, 709-710 (2005). The order denying the defendant's third motion for a new trial also was affirmed. See Commonwealth v. Avilez, 90 Mass. App. Ct. 1107 (2016).

The defendant filed a fourth motion for a new trial on August 15, 2017, in which he again sought to vacate his conviction of aggravated kidnapping on the ground that it is duplicative of his convictions of forcible rape of a child. The motion was summarily denied because the defendant had not submitted a supporting affidavit. See Mass. R. Crim. P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001). The defendant then filed a motion for reconsideration, requesting findings of fact and rulings of law, which was denied by a judge of the Superior Court (motion judge), who was not the plea judge or the judge

who ruled on the prior motions. The motion judge denied the motion in a margin endorsement as follows:

"DENIED. Setting aside the issue of an affidavit, on the merits, the undersigned is persuaded that the 'duplicative charge' claim has been fully litigated, and is otherwise baseless, since the kidnapping charge was not used to enhance the rape charges."

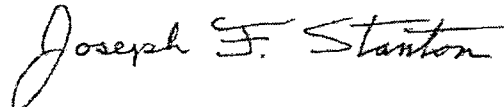
We review the decision to deny a motion for a new trial to determine whether the judge committed an error of law or abused his discretion.¹ See Commonwealth v. Loring, 463 Mass. 1012, 1013 (2012). We have reviewed the record in this case carefully and discern no error of law or abuse of discretion. We agree with the conclusion reached by the motion judge that the issue of duplicative convictions has been litigated and determined in the defendant's prior unsuccessful motions to withdraw his guilty pleas. It suffices to note that, in his third motion for a new trial the defendant claimed that his conviction of kidnapping was duplicative of the convictions of rape. That argument was rejected by the judge, and his order denying the motion for a new trial on that basis was affirmed. As such, the defendant is estopped from relitigating the issue. See Rodriguez, 443 Mass. at 709-710.

¹ We recognize that the defendant's appeal stems from the denial of his motion for reconsideration. However, because the motion judge addressed the merits of the underlying claim as presented in the fourth motion for a new trial, in the interests of judicial economy, so do we.

Furthermore, although it is not necessary to reach the merits of the defendant's claim, we note, as the Commonwealth has explained in its brief, that there is no legal or factual basis for the defendant's claim. The aggravating circumstances for which the enhanced sentence was imposed on the forcible rape of a child charge was the defendant's possession of a firearm, and not the fact that he had kidnapped the victim.

Orders denying fourth motion for
new trial and motion for
reconsideration affirmed.

By the Court (Vuono, Sacks &
Lemire, JJ.²),


Clerk

Entered: November 9, 2018.

² The panelists are listed in order of seniority.

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).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-1124

COMMONWEALTH

vs.

ANTONIO AVILEZ.

NOTE:

The original of the within rescript
will issue in due course, pursuant
to M.R.A.P. 23

APPEALS COURT

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On October 16, 2000, the defendant pleaded guilty to multiple offenses including forcible rape of a child under the age of sixteen, aggravated kidnapping and unlawful possession of a firearm. Approximately ten years later, he filed a motion for a new trial alleging ineffective assistance of counsel, which was denied. We subsequently affirmed the order of denial in an unpublished decision pursuant to our Rule 1:28. See Commonwealth v. Avilez, 82 Mass. App. Ct. 1104 (2012), further appellate review denied, 463 Mass. 1106 (2012), cert. denied, 133 S. Ct. 999 (2013). Thereafter, the defendant filed a second motion for a new trial in which he relied on the same arguments he advanced in support of his first new trial motion. That motion also was denied and the order of denial was affirmed in another unpublished decision. See Commonwealth v. Avilez, 85

Mass. App. Ct. 1115 (2014), further appellate review denied, 468 Mass. 1105, cert. denied, 135 S. Ct. 312 (2014).

On May 4, 2015, the defendant filed a third motion for a new trial. The motion was allowed with respect to one conviction, possession of a firearm, which the Commonwealth conceded was duplicative, and denied with respect to the remaining convictions. The defendant's appeal from the denial, in part, of his third new trial motion is now before us. For the reasons that follow, we affirm.

We review the decision to deny a motion for a new trial to determine whether the judge committed an error of law or abused his discretion. See Commonwealth v. Loring, 463 Mass. 1012 (2012). Here, the motion judge concluded that the issues raised by the defendant had already been litigated and determined in his first and second motions for a new trial and, therefore, the doctrine of direct estoppel prevented the defendant from obtaining another determination of his claims. See Commonwealth v. Rodriguez, 443 Mass. 707, 709-710 (2005).

We discern no error of law or abuse of discretion. In his third new trial motion, which was supported by the same affidavit submitted in support of the second motion for a new trial, the defendant claims that his attorney erroneously advised him regarding the length of the sentence the judge would impose on the charge of kidnapping. This precise claim was

raised -- and rejected -- in both the first and second motions for a new trial. The defendant's argument that the prosecutor improperly amended the indictments was also raised and litigated in the prior new trial motions. As to these claims, the judge correctly determined that the doctrine of direct estoppel bars further litigation.

The defendant also argued, for the first time, that he is entitled to a new trial on the ground that his convictions are duplicative and, with respect to his conviction of aggravated kidnapping, he claimed that the sentence must be vacated under the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U. S. 466 (2000). These claims were available to the defendant and could have been raised in his first (or second) motion for a new trial. Accordingly, they are waived and our review is limited to determining whether there was an error that created a substantial risk of a miscarriage of justice. See Commonwealth v. Randolph, 438 Mass. 290, 293-294 (2002).

As regards his claim of duplicative convictions, the defendant claimed that all of the offenses arise out of the same course of conduct and are so closely related as to constitute only a single crime. The record does not support this argument. Contrary to the defendant's contention, the offenses were not predicated on the same conduct. As the Commonwealth notes in

its brief, each offense was based on separate and distinct criminal acts which were described by the prosecutor at the plea hearing.¹ The defendant admitted that he had committed each of these acts. Because multiple convictions and sentences are permissible where, as here, each conviction is premised on a separate criminal act, the convictions are not duplicative and, therefore, it was not error to deny the defendant's motion on this ground. See Commonwealth v. Vick, 454 Mass. 418, 435 (2009). See also Commonwealth v. Rodriguez, 83 Mass. App. Ct. 267, 273 (2013) ("There is no merit to the defendant's argument that the rape and the licking of the victim's breast were both part of a continuous stream of conduct occurring within a short time frame and governed by a single criminal design" [quotation omitted]).

Nor did the judge err in denying the defendant's motion on the ground that Apprendi v. New Jersey, supra, requires that the sentence imposed on his conviction of aggravated kidnapping be vacated. In Apprendi, the Court stated, "Other than the fact of

¹ The rape charges (indictments 685 and 686) were based, respectively, on the defendant's penetration of the victim's mouth with his penis and the penetration of the victim's vagina with his tongue. Further, the defendant sexually assaulted the victim by touching her chest and by touching her vaginal area, which formed the basis of the kidnapping and sexual assault charge (indictment 687) as well as the indecent assault and battery charge (indictment 690). Finally, the defendant's conviction for armed assault with intent to rape (indictment 688) was predicated on his attempt to penetrate the victim's vagina with his penis.

a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. The indictment at issue alleged that the defendant kidnapped and committed a sexual assault on a person while armed with a dangerous weapon, which carries a minimum sentence of twenty-five years in State prison. See G. L. c. 265, § 26. The defendant asserted that the sexual assault and dangerous weapon elements of the offense are "facts" or "enhancements" that increase the penalty for kidnapping beyond the statutory minimum of ten years in State prison and because a jury did not find beyond a reasonable doubt that the kidnapping involved a dangerous weapon and a sexual assault, the sentence, which exceeds ten years, must be vacated.

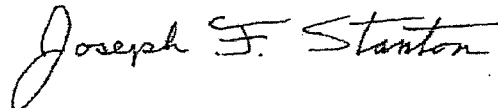
The defendant's argument misconstrues the holding in Apprendi. Apprendi does not apply where, as here, a defendant admits to the facts that increase the sentence. See Blakely v. Washington, 542 U.S. 296, 303 (2004) ("[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant" [emphasis original] [quoting from Apprendi, supra at 490]). See also Commonwealth v. DePace, 442 Mass. 739, 742-743 (2004) ("The Apprendi case was not concerned with the sufficiency of a grand jury indictment"). Because the

defendant knowingly and voluntarily admitted to facts which support the imposition of the statutory minimum sentence of twenty-five years, there was no error let alone a substantial risk of a miscarriage of justice.

The order denying, in part, the defendant's third motion for a new trial is affirmed.

So ordered.

By the Court (Vuono, Massing &
Neyman, JJ.²),


Clerk

Entered: September 30, 2016.

² The panelists are listed in order of seniority.

Appendix 1, p. 11

WESTLAW

85 Mass.App.Ct. 1115
 Unpublished Disposition
 NOTICE: THIS IS AN UNPUBLISHED OPINION.
 Appeals Court of Massachusetts.

Com. v. Avilez

Appeals Court of Massachusetts. April 22, 2014. 85 Mass.App.Ct. 1115. 6 N.E.3d 571 (Table). 2014 WL 1583104 (Approx. 2 pages)

COMMONWEALTH

v.

Antonio AVILEZ.

No. 13-P-1117.

April 22, 2014.

By the Court (KAFKER, FECTEAU & AGNES, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant, Antonio Avilez, appeals from the denial of his second motion for a new trial in which he seeks to withdraw his pleas of guilty to multiple charges entered on October 16, 2000. In his first motion for a new trial, the defendant sought the same relief, on the basis of a nearly identical motion and affidavit, in which he essentially alleged ineffective assistance of counsel rendering his pleas of guilty involuntary and unintelligent. Noticeably lacking was an affidavit from defense counsel regarding counsel's preparation for the plea hearing, and the advice given to the defendant. See *Commonwealth v. Yardley Y.*, 464 Mass. 223, 231 (2013). On appeal from the denial of his first motion, we affirmed the judge's denial of the motion without an evidentiary hearing. See *Commonwealth v. Avilez*, 82 Mass.App.Ct. 1104 (2012).

The defendant's second motion is not supported by any additional facts or affidavits and does not raise any new legal issues. The doctrine of direct estoppel applies to issues and claims raised in a motion for a new trial, and prevents the defendant from obtaining a second determination of issues actually litigated and determined in his first motion for a new trial. See *Commonwealth v. Rodriguez*, 443 Mass. 707, 709-710 (2005). For this reason, we will not revisit the defendant's claims that his attorney was ineffective and that the plea judge did not adequately explain the elements of the kidnapping charge. As for the remaining issues, the defendant has waived any issues that he filed to raise in his first motion, see Mass.R.Crim.P. 30(c)(2), as appearing in 435 Mass. 1501 (2001); *Commonwealth v. Pisa*, 384 Mass. 362, 366 (1981), or raised for the first time on appeal, see *Commonwealth v. Marchionda*, 385 Mass. 238, 242 (1992). Even if we were to consider those arguments, our review of the record, which includes a transcript of the plea hearing, and our consideration of the comprehensive brief submitted by the Commonwealth persuade us that there was no abuse of discretion or error creating a substantial risk of a miscarriage of justice. See *Commonwealth v. Randolph*, 438 Mass. 290, 293-294 (2002).

Order entered June 25, 2013, denying motion for new trial affirmed.

All Citations

85 Mass.App.Ct. 1115, 6 N.E.3d 571 (Table), 2014 WL 1583104

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Document

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SELECTED TOPICS

Criminal Law

Post-conviction Relief
 Voluntary Dismissal of Defendant Direct
 Appeal

Secondary Sources

Consideration of, or failure to raise or consider, question on appeal from conviction or on postconviction remedy, as precluding its consideration on subsequent motion to vacate sentence under 28 U.S.C.A. sec. 2255

10 A.L.R. Fed. 724 (Originally published in 1972)

...This annotation collects and analyzes the federal cases which have involved questions concerning whether and under what circumstances the consideration of, or failure to raise or consider, a question o...

P1900 INTRODUCTION

Mandated Health Benefits - COBRA Guide
 ¶1900

...Tab 1900 provides a comprehensive list of the court decisions in which COBRA figured prominently, and the general legal principles involved in these cases. The tab includes the following sections: 1. A...

Coram Nobis Practice In Criminal Cases

18 Am. Jur. Trials 1 (Originally published in 1971)

...This article discusses the use in criminal cases of the little understood common-law remedy of coram nobis and modern statutory procedures in the nature of a common-law writ of error coram nobis. Becau...

See More Secondary Sources

Briefs

Brief for Petitioner

1987 WL 881029
 Samuel Bice JOHNSON, Petitioner, v. State of Mississippi, Respondent.
 Supreme Court of the United States
 Oct Term 1987

...FN* Counsel of Record This brief is respectfully submitted by petitioner Samuel Bice Johnson, who was sentenced to death for capital murder in Mississippi in 1982. It seeks reversal of his death senten...

Petition

1988 WL 1094306
 Richard Gerald JORDAN, Petitioner, v. State of Mississippi, Respondent.
 Supreme Court of the United States
 May 02, 1988

...FN* Counsel of Record. Richard Gerald Jordan petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi denying him post-conviction relief with respect to his convict...

Brief of Respondent

1986 WL 728189
 Samuel Bice JOHNSON, petitioner, v. State of Mississippi, respondent.
 Supreme Court of the United States
 Mar. 25, 1986

Att. 19

Appendix 1, p. 12

WESTLAW

82 Mass.App.Ct. 1104

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.

Com. v. Avilez

Appeals Court of Massachusetts. June 27, 2012. 82 Mass.App.Ct. 1104. 969 N.E.2d 749 (Table). 2012 WL 2401739 (Approx. 2 pages)

COMMONWEALTH

v.

Antonio AVILEZ.

No. 11-P-1021.

June 27, 2012.

By the Court (CYPHER, HANLON & CARHART, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 In October, 2000, the defendant, Antonio Avilez, pleaded guilty to multiple charges of sexualized violence involving a child under sixteen as well as kidnapping and firearms offenses. On February 22, 2011, the defendant moved to withdraw his guilty pleas. The motion was denied. The defendant then moved for an evidentiary hearing. That motion was also denied. The defendant appeals, arguing that (1) his attorney at the plea hearing was ineffective, for a variety of reasons, rendering his guilty plea involuntary, and (2) the motion judge abused his discretion by denying the defendant's motion without the benefit of the transcript. We conclude, for substantially the reasons set forth in the motion judge's order, and as amplified by the Commonwealth's brief, that the contemporaneous record of the plea demonstrates that the defendant's plea was intelligent and voluntary and that the defendant has not come forward with a credible reason to withdraw the plea that outweighs the risk of prejudice to the Commonwealth. We also conclude for essentially the same reasons that the judge did not abuse his discretion by denying the motion for an evidentiary hearing because the defendant has not made a credible and substantial showing that a substantial issue exists warranting such a hearing.

The orders denying the defendant's motion to withdraw his guilty pleas on indictment nos. 2000-00685, 2000-00686, 2000-00687, 2000-00688, 2000-00690, 2000-00691, and 2000-00693 are affirmed.

All Citations

82 Mass.App.Ct. 1104, 969 N.E.2d 749 (Table), 2012 WL 2401739

End of

Document

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SELECTED TOPICS

Criminal Law

Proof of Ground of Withdrawal of Guilty Plea

Secondary Sources

s 11:54. Withdrawal of plea

2 Orfield's Criminal Procedure Under the Federal Rules § 11:54

...Under certain conditions the court may allow the defendant to withdraw his guilty plea. There is no absolute right to withdraw a plea, withdrawal is reserved to the sound discretion of the court. The d...

s 24:1. Rule 12-Text of Rule and Reporters' Notes

30A Mass. Prac., Criminal Practice & Procedure § 24:1 (4th ed.)

...The document citation is not available at this time

s 3:32. Author's comments

Federal Postconviction Remedies & Relief Handbook with Forms § 3:32

...Rule 11(d), Fed. R. Crim. Proc., authorizes a remedy in the form of a motion to withdraw a guilty (or nolo contendere) plea, filed in the convicting court before sentencing. While technically not a pos...

See More Secondary Sources

Briefs

MARGARET BRADSHAW, Warden, Petitioner, v. JOHN DAVID STUMPF, Respondent.

2005 WL 474014

MARGARET BRADSHAW, Warden, Petitioner, v. JOHN DAVID STUMPF, Respondent.

Supreme Court of the United States Feb. 22, 2005

...FN* Counsel of Record JUDGMENT IN A CIVIL CASE Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. Decision by Court...

JOINT APPENDIX, VOL. I

2004 WL 2289701

Reginald Shepard, Petitioner, v. United States of America, Respondent. Supreme Court of the United States Aug. 27, 2004

...FN* Counsel of Record COUNT ONE: 18 U.S.C. § 922(g) (1) - Felon in Possession of a Firearm The Grand Jury charges that: On or about October 17, 1995, at Boston, in the District of Massachusetts, the de...

JOINT APPENDIX, VOL. I

2004 WL 3168571

JOHN A. PACE, Petitioner, v. DAVID DIGUGLIEMO, Superintendent, State Correctional Institution at Graterford, Respondent.

Supreme Court of the United States Dec. 16, 2004

...FN* Counsel of Record FN* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared. BEFO...

Att. 18

Supreme Judicial Court for the Commonwealth of Massachusetts

John Adams Courthouse

One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724

Telephone 617-557-1020, Fax 617-557-1145

Appendix 2

Antonio Avilez, Pro Se
MCI Norfolk W68658
P.O. Box 43
Norfolk, MA 02056

RE: Docket No. FAR-26502

COMMONWEALTH

vs.

ANTONIO AVILEZ

Hampden Superior Court No. 0079CR00685
A.C. No. 2018-P-0369

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on December 20, 2018, the above-captioned Application for Further Appellate Review was denied.

Francis V. Kenneally, Clerk

Dated: January 8, 2019

To: Katherine E. McMahon, A.D.A.
Antonio Avilez

**Additional material
from this filing is
available in the
Clerk's Office.**