24-P-983 Appeals Court

COMMONWEALTH vs. ALBERT J. ERLER.

No. 24-P-983.

Essex. April 9, 2025. – October 10, 2025.

Present: Ditkoff, Singh, & Smyth, JJ.

Motor Vehicle, Operating under the influence. Alcoholic Liquors, Motor vehicle. Evidence, Intoxication. Firearms. Practice, Criminal, Assistance of counsel, Plea, New trial, Motion in limine, Continuance without a finding.

Complaint received and sworn to in the Lynn Division of the District Court Department on January 6, 2022.

The case was tried before James L. LaMothe, Jr., J., and a motion for a new trial was heard by Ina Howard-Hogan, J.

Neil S. Tassel for the defendant.
Zachary D. Grube, Assistant District Attorney, for the Commonwealth.

DITKOFF, J. The defendant, Albert J. Erler, appeals from his conviction, after a jury trial in the District Court, of operating a motor vehicle while under the influence of intoxicating liquor (OUI), G. L. c. 90, § 24 (1) (a) (1), and

the denial of his motion for a new trial. We reaffirm our holding in Commonwealth v. Indelicato, 40 Mass. App. Ct. 944, 945 (1996), that failure to advise a defendant about the collateral consequences of a guilty plea on the right to possess firearms does not constitute ineffective assistance of counsel. Further, we reject the defendant's other claims of ineffective assistance of counsel. Finally, concluding that the judge acted within his discretion in admitting the name of the establishment where the defendant drank and that the evidence was sufficient to show that he was impaired, we affirm.

1. Background. At approximately 1:18 A.M. on January 6, 2022, a State trooper observed the defendant's motor vehicle, traveling on Route 1, "swerving back and forth between the right lane and the middle lane." The defendant also appeared to be sending text messages while driving. The trooper stopped the defendant.

Upon approaching the motor vehicle, the trooper "immediately smelled an overwhelming odor of intoxicating liquor." The trooper observed that the defendant "had bloodshot, glassy eyes." The trooper asked the defendant where he was coming from, and the defendant paused for approximately ten seconds and then said, "I'm trying to think." Finally, he stated that "he was out with friends getting food and drinks." Eventually he stated that he was coming from the Golden Banana,

apparently a well-known "gentlemen's club." See Cabaret Enters., Inc. v. Alcoholic Beverages Control Comm'n, 393 Mass. 13, 14 (1984). He stated that he had consumed "four to five vodka tonics." Throughout the conversation, the defendant had slurred speech, and the trooper continued to smell intoxicating liquor.

The trooper arrested the defendant and transported him to a State police barracks. When the trooper removed the defendant from his cruiser, he noticed "an overwhelming odor of intoxicating liquor that was now in my cruiser that was not in the cruiser prior to him being placed there."

After a trial, a jury convicted the defendant of OUI. Several months later, the defendant filed a motion for a new trial, alleging that defense counsel was ineffective for not advising him to consider alternatives to going to trial, such as a continuance without a finding. Defense counsel averred that he knew the defendant had a license to carry firearms and "did not discuss with him the repercussions of a conviction versus a continuance without a finding would have, particularly on his right to own firearms or maintain a license to carry firearms." The trial judge having recently retired, a different judge (motion judge) denied the motion. This appeal, from both the conviction and the denial of the motion for a new trial, followed.

2. Ineffective assistance of counsel. a. Standard of review. "[W]e review the denial of a motion for a new trial for 'a significant error of law or other abuse of discretion.'" Commonwealth v. Diaz, 100 Mass. App. Ct. 588, 592 (2022), quoting Commonwealth v. Duart, 477 Mass. 630, 634 (2017), cert. denied, 584 U.S. 938 (2018). "To prevail on a motion for a new trial claiming ineffective assistance of counsel, a defendant must show that there has been a 'serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer,' and that counsel's poor performance 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Encarnacion, 105 Mass. App. Ct. 46, 57 (2024), quoting Commonwealth v. Millien, 474 Mass. 417, 429-430 (2016). The Supreme Judicial Court has held that, "if the [plea] offer is rejected because of the ineffective assistance of counsel, the fact that the defendant subsequently receives a fair trial does not ameliorate the constitutional harm that occurred in the plea consideration process." Commonwealth v. Mahar, 442 Mass. 11, 14-15 (2004). Here, in the related context where there was no plea offer, "the defendant must demonstrate a reasonable probability that the prosecution would have made an offer, that the defendant would

have accepted it, and that the court would have approved it." Commonwealth v. Marinho, 464 Mass. 115, 129 (2013).

b. Advice about firearm licensure. "There is no doubt that counsel must provide constitutionally effective assistance when advising a defendant about the direct consequences of a guilty plea." Commonwealth v. Minon, 102 Mass. App. Ct. 244, 247 (2023). Direct consequences include the actual sentence and the waiver of rights against self-incrimination, to a jury trial, and to confront one's accusers. Id.

OUI is a misdemeanor punishable by up to two and one-half years in a house of correction, G. L. c. 90, § 24 (1) (a) (1), first par. For this reason, a conviction for OUI disqualifies a defendant from obtaining a firearms identification card or a license to carry firearms. G. L. c. 140, § 121F (j) (i) (B), as inserted by St. 2024, c. 135, § 32.[1] It also renders it illegal under Federal law for a defendant to possess a firearm or for anyone to sell or give one to that defendant. 18 U.S.C. §§ 921(a)(20)(B), 922(d)(1), (g)(1). After five years of the most recent punitive measure stemming from the disqualifying conviction, a defendant may petition the firearm licensing

[1] At the time of the trial, these prohibitions were in G. L. c. 140, § 129B (1) (i) (B), as amended by St. 2014, c. 284, § 30, and G. L. c. 140, § 131 (d) (i) (B), as amended by St. 2014, c. 284, § 48. This state of affairs has existed since 1998. See St. 1998, c. 180, §§ 29, 41; St. 1994, c. 25, § 3.

review board for the restoration of the ability to obtain a firearms license. G. L. c. 140, § 130B (d).[2] Accord 18 U.S.C. § 921(a)(20), second par. Conversely, a continuance without a finding does not qualify as a conviction, see G. L. c. 140, § 121; Commonwealth v. Beverly, 485 Mass. 1, 7 (2020); accord 18 U.S.C. § 921(a)(20), second par., although in theory it could be a basis for a separate finding of unsuitability to obtain either a firearms identification card or a license to carry. G. L. c. 140, § 121F (k), as inserted by St. 2024, c. 135, § 32.[3]

Here, the defendant avers that defense counsel "did not tell me that I would lose my right to possess firearms if I were convicted" and that he "would have admitted to sufficient facts and accepted a continuance without a finding had I been advised that it would ensure that I did not lose my firearm rights." Defense counsel, in turn, averred that he did not discuss the impact of the various options on the defendant's right to possess firearms. Based on this, the defendant argues that

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[2] Specifically, five years must have passed since release from incarceration and termination of parole or probation supervision. G. L. c. 140, § 130B (d) (ii). Certain misdemeanors, such as domestic assault, are excluded. G. L. c. 140, § 130B (d) (i). This statute was added in 2004. St. 2004, c. 150, § 9.

[3] At the time of trial, these provisions were in G. L. c. 140, § 129B (1 1/2), inserted by St. 2014, c. 284, § 30, and G. L. c. 140, § 131 (d), third par., as amended by St. 2022, c. 175, § 9.

defense counsel was ineffective in failing to affirmatively advise him that a conviction would cause him to lose his right to possess firearms and to advise him to seek a continuance without a finding.

We rejected this argument in Commonwealth v. Indelicato, 40 Mass. App. Ct. 944 (1996). There, the defendant pleaded guilty to assault and battery and carrying a dangerous weapon, both misdemeanors punishable by up to two and one-half years in a house of correction. Id. at 944. Plea counsel advised the defendant "that his guilty pleas 'would not preclude him from seeking a license to carry a firearm,'" id., which was true under then-existing State law. See G. L. c. 140, § 129B, first par., as amended by St. 1969, c. 799, § 7; G. L. c. 140, § 131, second par., as amended by St. 1986, c. 481, § 2. It was not, however, true under Federal law, which already prohibited individuals convicted of State misdemeanors carrying punishment of more than two years of imprisonment from possessing firearms. 18 U.S.C. §§ 921(a)(20), 922(g)(1). We stated that ineffectiveness does not generally exist where "the mistaken or incomplete advice concerns a matter that is entirely collateral to the charges pending for plea or trial," and that "the advice [defense counsel] gave to the defendant, while misleading as to a collateral consequence of the plea, does not amount to a failing that was 'grave and fundamental.'" Indelicato, supra at

945, quoting Commonwealth v. Norman, 27 Mass. App. Ct. 82, 86, S.C., 406 Mass. 1001 (1989). In doing so, we followed well-settled law that "a defendant need not be advised of contingent or collateral consequences" of a guilty plea. Commonwealth v. Hason, 27 Mass. App. Ct. 840, 843 (1989).

The defendant advances two reasons why we should reconsider Indelicato. First, he points out that the United States Supreme Court in Padilla v. Kentucky, 559 U.S. 356, 360 (2010), established that failure to advise a defendant of certain immigration consequences of a guilty plea constitutes ineffective assistance of counsel. The Court in Padilla, however, did not purport to eliminate the distinction between direct and collateral consequences, but rather held that "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." Id. at 366. Accordingly, the Supreme Judicial Court has "interpreted the Padilla case not as an abrogation of the direct and collateral consequence distinction, . . . but simply as clarification that deportation is not '"collateral" to the criminal justice process.'" Commonwealth v. Sylvester, 476 Mass. 1, 7 (2016), quoting Marinho, 464 Mass. at 124. Instead, it remains the case that "[a]dvice as to collateral consequences . . . has been considered outside the

ambit of the right to the effective assistance of counsel." Minon, 102 Mass. App. Ct. at 247. Accord Commonwealth v. Henry, 488 Mass. 484, 497 (2021).

Second, the defendant argues that loss of the right to possess a firearm is no longer a collateral consequence now that the United States Supreme Court has recognized an individual constitutional right to keep and bear arms.[4] See McDonald v. Chicago, 561 U.S. 742, 767-770, 778 (2010); District of Columbia v. Heller, 554 U.S. 570, 592 (2008). To be sure, the fact that deportation is a "particularly severe" penalty factored into the Supreme Court's decision that deportation was not properly classified as collateral. Padilla, 559 U.S. at 365, 373. Accord Sylvester, 476 Mass. at 10. Nonetheless, "[c]riminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable

[4] The defendant also argues in passing that loss of the right to possess firearms is not a collateral consequence because the loss is automatic. That was the case in 1996 (indeed, unlike now, then the loss was permanent), and thus is not a reason to depart from the holding in Indelicato. In any event, the Supreme Judicial Court held in Sylvester, 476 Mass. at 8-10, that an automatic consequence, such as sex offender registration, still can be collateral. What makes it a collateral consequence is that it "flows or may flow secondarily from conviction or incarceration." Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 578-579 (2001).

discharge from the Armed Forces, and loss of business or professional licenses." Minon, 102 Mass. App. Ct. at 248, quoting Padilla, 559 U.S. at 376 (Alito, J., concurring).

We recognize the importance of the constitutional right to bear arms, but all constitutional rights are lost when a noncitizen is removed from the country. The possibility of indefinite civil commitment as a sexually dangerous person is a particularly severe consequence, but it remains a collateral consequence that the defendant need not be aware of to render a voluntary and intelligent guilty plea. See Commonwealth v. Roberts, 472 Mass. 355, 363-364 (2015) ("The Sixth Amendment [to the United States Constitution] analysis in Padilla did not erode the well-settled principle that a judge's failure to inform a defendant of a collateral consequence -- such as civil confinement -- is, without more, insufficient to render a defendant's guilty plea involuntary under the due process clause"). Similarly, restrictions on earning good time, Commonwealth v. Brown, 6 Mass. App. Ct. 844, 844 (1978), or calculations of parole eligibility, Commonwealth v. Santiago, 394 Mass. 25, 30 (1985), are collateral consequences despite directly affecting a defendant's liberty. One could have a spirited debate whether the right to bear arms is more or less important than the right to vote, the right to property, or the right to pursue a livelihood, see Minon, 102 Mass. App. Ct. at

248, but the point remains that the undeniable importance of the right to keep and bear arms does not remove it from the ranks of collateral consequences that a criminal defendant need not be informed of to render a valid guilty plea. Accordingly, seeing no reason to depart from our holding in Indelicato, we affirm that a defendant need not be affirmatively informed by counsel of the consequences of a conviction on the right to possess a firearm prior to deciding whether to enter into a plea agreement.

c. Trial ineffectiveness. The defendant's argument that counsel was ineffective in failing to present the jury with the defendant's booking photograph or the video recording of the booking process falters on the fact that the defendant did not present either the photograph or the video recording to the motion judge (or to us, for that matter). Without seeing the photograph or the video recording, the motion judge had no way to assess whether either would have provided the defendant with a substantial defense. See Commonwealth v. Alvarez, 62 Mass. App. Ct. 866, 870 (2005), quoting Commonwealth v. Collins, 36 Mass. App. Ct. 25, 30 (1994) (without affidavits from witnesses not interviewed, "the judge was 'unable to rule on the question of whether [the witnesses'] testimony would likely have made a material difference'"). Accordingly, the defendant failed to show that he was prejudiced by any shortcoming in this respect.

We also discern no ineffectiveness in counsel's handling of the defendant's admitted drinking. During attorney-conducted voir dire of the jury venire, counsel asked several of the prospective jurors some version of whether they would convict solely on evidence that the defendant had "had a couple of drinks." When one juror asked for clarification regarding what he meant, counsel said, "two, three, four." Although the primary meaning of "couple" is exactly two, the word also can mean "[a] few." Merriam-Webster's Collegiate Dictionary 286 (11th ed. 2020). This tactic was a reasonable part of defense counsel's strategy to minimize the impact of the defendant's admitted drinking. After the trooper testified that the defendant admitted to having four to five drinks, counsel elicited that the trooper did not ask the defendant when he had those drinks and that it could have been as much as seven hours before the stop. Counsel asserted both in his opening statement and his closing argument that the evidence had little relevance because of the indefinite time frame. Seeking to eliminate jurors who would not be receptive to counsel's efforts to minimize the impact of the admitted drinking was not "manifestly unreasonable." Commonwealth v. Robinson, 493 Mass. 775, 789 (2024), quoting Commonwealth v. Henderson, 486 Mass. 296, 302 (2020).

Finally, we discern no prejudice from counsel's failure to introduce evidence that the defendant had a pierced tongue and stud at the time of the stop. Counsel elicited from the trooper that he had "no idea how [the defendant] speaks normally" and that he "do[es] not know if he speaks slurred prior" to drinking. Putting aside the fact that the defendant has identified no way in which he could have established that the defendant had a pierced tongue and stud at the time of the stop, that fact would have added little to the defense. See Commonwealth v. Brown, 71 Mass. App. Ct. 743, 747 (2008) (no ineffectiveness in failure to present cumulative evidence).

3. Prejudicial evidence. The trial judge denied the defendant's motion in limine to exclude testimony that the establishment at which the defendant had consumed alcohol was the Golden Banana. Accordingly, the issue is preserved. See Commonwealth v. Bohigian, 486 Mass. 209, 219 (2020). "[W]hether evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge's broad discretion and are not disturbed absent palpable error." Commonwealth v. Pardee, 105 Mass. App. Ct. 496, 498 (2025), quoting Commonwealth v. Sylvia, 456 Mass. 182, 192 (2010). A defendant's report of the number of alcoholic drinks consumed is relevant to show the source and possible degree of intoxication, and details such as the

location add to the credibility of the report. See, e.g., Commonwealth v. Wolfe, 478 Mass. 142, 143 (2017) ("defendant admitted that he had been at a nightclub where he had consumed 'a few' drinks"); Commonwealth v. Palacios, 90 Mass. App. Ct. 722, 723 (2016) (defendant reported having "two to three drinks"); Commonwealth v. Bigley, 85 Mass. App. Ct. 507, 510 (2014) (defendant reported having "a few drinks" at "the Riviera Café on Crapo Street in Bridgewater"). The trial judge here addressed the possible prejudice from the use of "Golden Banana" by asking the prospective jurors whether they "have any moral objections to gentlemen's clubs in particular or perceive them to be immoral." Minimizing the prejudicial nature of evidence through voir dire questions is a tried and true method for judges to address such issues. See, e.g., Commonwealth v. Phim, 462 Mass. 470, 477-478 (2012); Commonwealth v. Swafford, 441 Mass. 329, 332 (2004). We discern no palpable error in the trial judge's handling of this evidence.

4. Sufficiency of the evidence. "[W]e consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Lagotic, 102 Mass. App. Ct. 405, 407 (2023), quoting Commonwealth v. Tsonis, 96 Mass. App. Ct. 214, 216 (2019). "The inferences that support a conviction

'need only be reasonable and possible; [they] need not be necessary or inescapable.'" Commonwealth v. Quinones, 95 Mass. App. Ct. 156, 162 (2019), quoting Commonwealth v. Waller, 90 Mass. App. Ct. 295, 303 (2016).

Here, the trooper testified that the defendant was driving erratically, swerving between lanes. See Tsonis, 96 Mass. App. Ct. at 219 (erratic driving was evidence of impairment). He had "an overwhelming odor of intoxicating liquor" and "bloodshot, glassy eyes." See Commonwealth v. Rarick, 87 Mass. App. Ct. 349, 350, 354 (2015) (glassy, bloodshot eyes and strong odor of alcohol were evidence of impairment); Commonwealth v. Lavendier, 79 Mass. App. Ct. 501, 506-507 (2011) ("slurred speech, belligerent demeanor, strong odor of alcohol, poor balance, and glassy, bloodshot eyes" were evidence of impairment). That there was a possible alternative explanation for the defendant's erratic driving does not defeat sufficiency, as the jury could reasonably infer that the erratic driving was caused by the defendant's admitted alcohol consumption. See Commonwealth v. Burgos, 462 Mass. 53, 67-68, cert. denied, 568 U.S. 1072 (2012). In combination, the evidence was sufficient to permit the jury

to find that the defendant was impaired. See Commonwealth v. Gallagher, 91 Mass. App. Ct. 385, 392-393 (2017).

Judgment affirmed.

Order denying motion for a new trial affirmed.