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25-P-1415

Appeals Court

COMMONWEALTH vs. GERALD PIERRE.

No. 25-P-1415.

Suffolk. September 16, 2026. - October 29, 2026.

Present: Desmond, Ditzkoff, & Toone, JJ.

Motor Vehicle, Operating under the influence. Alcoholic Liquors, Motor vehicle. Evidence, Blood alcohol test, Breathalyzer test, Field sobriety test. Practice, Criminal, Admission to sufficient facts to warrant finding, Plea, Conduct of government agents.

Complaint received and sworn to in the Dorchester Division of the Boston Municipal Court Department on April 7, 2014.

A motion to withdraw a plea of guilty, filed on August 10, 2023, was heard by Erika P. Reis, J.

Alexander Conley for the defendant.
Mackenzie Slyman, Assistant District Attorney, for the Commonwealth.

DITKOFF, J. In 2015, the defendant, Gerald Pierre, admitted to sufficient facts in the Boston Municipal Court to warrant a guilty finding on the offense of operating a motor vehicle while under the influence of intoxicating liquor (OUI),

G. L. c. 90, § 24 (1) (a) (1). In 2023, after evidence came to light of government misconduct involving the calibration of Alcotest 9510 breathalyzer devices,¹ the defendant moved to withdraw his admission, and a judge (not the plea judge) denied the motion. Concluding that the motion judge properly found that the defendant had failed to demonstrate a reasonable probability that he would not have admitted to sufficient facts had he known of the government misconduct, we affirm.

1. Background. On April 7, 2014, at approximately 2:04 A.M., the defendant passed a State trooper while driving on an Interstate Highway 93 on-ramp.² The defendant was driving at eighty-five miles per hour. The posted speed limit was fifty-five miles per hour. The trooper stopped the defendant and approached his vehicle. While the trooper stood at the side of the vehicle, the defendant lifted his foot from the brake, causing the vehicle to "jump[] forward." The trooper observed the strong odor of an alcoholic beverage coming from the

¹ For an account of the nature and discovery of the misconduct, see Commonwealth v. Hallinan, 491 Mass. 730, 733-743 (2023).

² The plea colloquy took place over eleven years ago and any record of its exact content has since been destroyed in accordance with ordinary retention procedures. See S.J.C. Rule 1:11, § 7, as appearing in 480 Mass. 1322 (2018). Accordingly, we, like the parties, take the operative facts from the application for the complaint. See Commonwealth v. Sylvester, 476 Mass. 1, 2 n.3 (2016).

defendant's vehicle and noticed the defendant's bloodshot, glassy eyes. When the defendant spoke, his speech was slurred, and the odor of alcohol grew stronger.

The trooper asked the defendant to step out of the vehicle. The defendant complied with difficulty after several requests. The defendant explained that he was coming from a bar in Boston and that he had consumed two shots of liquor between 11:30 P.M. and midnight. The defendant confirmed that he had no medical problems, was not medicated, and did not suffer from any injuries. The trooper administered five field sobriety tests to the defendant, all of which he failed to complete to the trooper's satisfaction.³ As a result, the trooper arrested the defendant and placed him into his cruiser, where he again noticed a strong odor of alcohol.

On arriving at the barracks, the defendant asked to use the restroom, where he urinated heavily. The defendant consented to a breathalyzer test, but during the observation period prior to the test, he requested a cup of water, which he drank in less than ten seconds. While waiting to take the test, the defendant

³ Specifically, in reciting the alphabet, the defendant recited the letters "in no particular order" after L. He was unable to count down from eighty-three to sixty-four. He repeatedly stepped off the line, stopped walking, and used his arms for balance in walking and turning. He fell backwards during the one-leg stand test, and it had to be terminated for his own safety. He failed to spell Massachusetts correctly.

fell asleep. The test revealed the defendant's blood alcohol content to be 0.13 percent. During booking, the defendant vomited heavily for several minutes. The trooper noted that the defendant was in possession of a \$156 nightclub receipt, as well as the payment card associated with the receipt.

The defendant was charged with the offense of OUI, as well as civil infractions of speeding and unsafe operation of a motor vehicle. On September 1, 2015, the defendant admitted to sufficient facts to warrant a guilty finding on the OUI offense. The case was continued without a finding for one year, the defendant's license was suspended for forty-five days, and the defendant was placed on probation and required to complete a program under G. L. c. 90, § 24D, as well as a substance use education program. He was found not responsible for both civil infractions. His probation was extended but ultimately completed, and the OUI charge was dismissed on January 13, 2017.

On August 10, 2023, the defendant filed a motion to withdraw his admission to sufficient facts. The defendant supported his motion with his own affidavit asserting, "If I had known that the breathalyzer results were presumptively unreliable and inadmissible, I believe that I would not have admitted to sufficient facts." He also presented an affidavit from plea counsel stating, "Had I known the extent of the issues surrounding the breath test in this matter, I would have

explained this to [the defendant], and advised him accordingly as it related to his admission." After a hearing, a judge who was not the plea judge denied the defendant's motion, finding that he had failed to demonstrate a reasonable probability that he would not have admitted to sufficient facts. This appeal followed.

2. Standard of review. "A motion to vacate an admission to sufficient facts is treated as a motion for a new trial." Commonwealth v. Muniur M., 467 Mass. 1010, 1011 (2014). "Under Mass. R. Crim. P. 30 (b)[, as appearing in 435 Mass. 1501 (2001)], a judge may grant a motion for a new trial any time it appears that justice may not have been done." Commonwealth v. Lewis, 96 Mass. App. Ct. 354, 357 (2019), quoting Commonwealth v. Williams, 89 Mass. App. Ct. 383, 387 (2016). "We review a judge's decision on such a motion 'for abuse of discretion or significant error of law.'" Commonwealth v. Crump, 105 Mass. App. Ct. 307, 312 (2025), quoting Commonwealth v. Hallinan, 491 Mass. 730, 744 (2023).

3. Application. "Under Hallinan, 491 Mass. at 731, 'defendants [charged with OUI] who pleaded guilty or who were convicted after trial, and the evidence against whom included breath test results from an Alcotest 9510 device last calibrated and certified prior to April 18, 2019, . . . are entitled to a conclusive presumption of egregious government misconduct' and

the exclusion of the breath test results from trial." Crump, 105 Mass. App. Ct. at 312, quoting Hallinan, supra. "Such a defendant is permitted to rely on that presumption in a motion to withdraw a guilty plea or for a new trial." Crump, supra. To obtain relief, the defendant must "demonstrate a reasonable probability that [the defendant] would not have pleaded guilty had [the defendant] known of [the government] misconduct." Id., quoting Hallinan, supra at 750. "'Establishing such a reasonable probability requires examining the totality of the circumstances,' guided by several factors, which include

'(1) whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea, (2) whether the evidence could have been used to impeach a witness whose credibility may have been outcome-determinative, (3) whether the evidence is cumulative of other evidence already in the defendant's possession, (4) whether the evidence would have influenced counsel's recommendation as to whether to accept a particular plea offer, and (5) whether the value of the evidence was outweighed by the benefits of entering into the plea agreement.'"

Crump, supra, quoting Hallinan, supra.

We agree with the defendant that an excessive focus on whether the breathalyzer was the "crown jewel," Hallinan, 491 Mass. at 750, or, as the motion judge put it, the "center piece" of the Commonwealth's case is not particularly helpful. As we stated in Crump, 105 Mass. App. Ct. at 313, "While the breathalyzer test result may have been the 'crown jewel' in Hallinan, that is not the standard that every defendant must

meet." The proper focus is on whether, in light of the disposition and the nonbreathalyzer evidence, there is a reasonable probability that the defendant would not have admitted to sufficient facts had he known that the breathalyzer results were inadmissible. The regal jewelry status of the breathalyzer results is merely one factor to be considered in making this determination.

Here, the motion judge properly concluded that the defendant had not established such a reasonable probability. Even without the breathalyzer evidence, the evidence of intoxication was overwhelming. The defendant was driving thirty miles per hour over the speed limit on an on-ramp and failed at first to stop his vehicle fully. He had bloodshot, glassy eyes, slurred his speech, and gave off an odor of alcoholic beverage. He had difficulty balancing, counting, spelling, and reciting the alphabet. He admitted to drinking two shots of liquor, and a nightclub receipt showing purchases of \$156 was found on his person. Once arrested, he urinated heavily, drank water profusely, fell asleep, and then vomited for several minutes.

See Commonwealth v. Canty, 466 Mass. 535, 545 (2013)

(overwhelming evidence based on "observations of the defendant's erratic driving, his bloodshot eyes, the odor of alcohol, his apparent inability to put his vehicle in 'park,' his poor performance on the field sobriety test, his admission that he

had been drinking alcohol, and the discovery of a half-empty bottle of liquor in his vehicle"). Accord Commonwealth v. Gallagher, 91 Mass. App. Ct. 385, 390-391 (2017). Contrast Commonwealth v. Baez, 106 Mass. App. Ct. 219, 221, 224 (2025) (not overwhelming evidence where defendant ran red light after coming to complete stop, stepped off line during walk and turn test, admitted to drinking alcohol, and had slurred speech and odor of alcohol, and booking video showed defendant was alert, attentive, and compliant with directions). In light of this overwhelming evidence, there was no reasonable probability that the defendant would not have admitted to sufficient facts if he had known the breathalyzer evidence was inadmissible. See Crump, 105 Mass. App. Ct. at 316 (listing factors this court has considered when assessing strength of Commonwealth's case).

The ambiguous affidavits submitted by the defendant reflect this reality. Plea counsel's affidavit recites, "Had I known the extent of the issues surrounding the breath test in this matter, I would have explained this to [the defendant], and advised him accordingly as it related to his admission." The affidavit does not "state[] unequivocally" (or even equivocally) that plea counsel "would have advised the defendant to proceed to trial," as was the case in Hallinan. Crump, 105 Mass. App. Ct. at 316, quoting Hallinan, 491 Mass. at 751. It is telling that the evidence against the defendant was so strong that plea

counsel could not assert that the absence of the breathalyzer test result would have resulted in his advising a different course of action.

As for the defendant's affidavit, it states that he "believe[s] that [he] would not have admitted to sufficient facts." Even setting aside the equivocal nature of that statement, the defendant's subjective belief is not determinative. "'[B]ecause a judge cannot evaluate whether the defendant is telling the truth about a decision the defendant never made,' the court is required to 'evaluate [the defendant's] assertion under a reasonable person standard.'" Crump, 105 Mass. App. Ct. at 317, quoting Commonwealth v. Lavrinenko, 473 Mass. 42, 55 n.16 (2015). In light of the overwhelming evidence against the defendant, the motion judge here did not err in discrediting his "self-serving affidavit." Commonwealth v. McWilliams, 473 Mass. 606, 621 (2016), quoting Commonwealth v. Colon, 439 Mass. 519, 530 (2003).

Order denying motion to
withdraw admission to
sufficient facts affirmed.