

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

RULE 12(b)(6)

Reporter's Notes--2019

Subdivision (b)(6) is added in response to a referral in Commonwealth v. Gomez, 480 Mass. 240 (2018), requesting that the Committee propose a rule providing for conditional guilty pleas in Massachusetts. Like the federal rules and the rules of many states, it enables a defendant to enter a plea reserving a right to appeal (commonly called a “conditional plea”). Under this rule, a defendant may, with the prosecutor’s agreement, plead guilty (or in District or Juvenile Courts admit to sufficient facts), appeal a ruling the defendant believes is erroneous and, if successful on appeal, withdraw the plea (or the admission to sufficient facts) and presumptively obtain dismissal of the charge. A guilty plea or admission to sufficient facts reserving appellate review of a specified ruling or rulings may be tendered under either Mass. R. Crim. P. 12(c) or 12(d). In all respects other than reserving the right to appeal, this subdivision works no change in existing rules governing pleas, sentencing, or appeal.

A guilty plea, voluntarily and intelligently made, ordinarily “waives all nonjurisdictional defects.” Commonwealth v. Cabrera, 449 Mass. 825, 830 (2007) (*citing* Garvin v. Commonwealth, 351 Mass. 661, 663-664 (1967)). Adverse rulings thus cannot be appealed, even by a defendant who might otherwise plead guilty, without the time and expense of a trial. As the Supreme Judicial Court recognized in Commonwealth v. Gomez, 480 Mass. 240 (2018), the Federal Rules of Criminal Procedure and the law of most states permit defendants to enter a guilty plea conditioned on the right to appeal a specified ruling of the court. *See, e.g.*, Fed. R. Crim. P. 11(a)(2). In Gomez, the Court exercised its superintendence authority under G.L. c. 211, § 3 to authorize conditional guilty pleas provided the Commonwealth and the court agreed, and the defendant specified the ruling on which appellate review was sought. *Gomez, supra* at

252. This subdivision implements Gomez by permitting guilty pleas or admissions to sufficient facts in which the defendant reserves for appellate review one or more rulings.

This procedure facilitates plea bargaining and conserves judicial resources. These savings are greatest when the rulings reserved for appeal effectively dispose of the case; thus, the procedure requires that the Commonwealth agree that reversal of the ruling subject to appeal would render its case on the specified charge or charges not viable. While most conditional pleas involve legally dispositive rulings, even certain non-dispositive rulings can be subject to conditional pleas. See *Gomez*, 480 Mass. at 252. The rule thus extends to situations in which, should the reserved ruling be reversed, the Commonwealth would choose not to proceed because the case would no longer be viable for prosecution. The viability standard also appears in S.J.C. Order regarding Applications to a Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2) (June 8, 2016) (applications for interlocutory appeal by the Commonwealth must include a “statement whether the Commonwealth has a viable case without the suppressed evidence, and the strength of that case, if viable”).

This rule requires the parties to specify, by written agreement, the ruling or rulings reserved for appeal, and the charge or charges that would presumptively be dismissed if the defendant prevails on appeal and chooses to withdraw the guilty plea or admission to sufficient facts. The ruling or rulings should be identified by stating the name of the motion or pleading ruled upon, the date of the ruling or rulings, and the judge who issued the ruling. The charge or charges should be identified by reference to the complaint and offense or count of the indictment. The written agreement should be filed with the court and become part of the record for appeal. A guilty plea or admission to sufficient facts reserving appellate review of a specified ruling or rulings may be tendered under either Mass. R. Crim. P. 12(c) or 12(d). As with any guilty plea,

the judge has discretion to refuse to accept a plea reserving appellate review. *See* Mass. R. Crim. P. 12(a)(3). While a plea that does not result in a conviction would ordinarily not merit appeal, in special circumstances the collateral consequences of even a continuance without a finding may warrant a defendant pursuing an appeal. *See, e.g., Commonwealth v. Henry*, 88 Mass. App. Ct. 446 (2015) (admission to sufficient facts and continuance without a finding equivalent to a guilty plea in evaluating immigration consequences, *citing Commonwealth v. Grannum*, 457 Mass. 128, 130 n. 4 (2010)); *Burke v. Bd. of Appeal on Motor Vehicle Liability Policies and Bonds*, 90 Mass. App. Ct. 203, rev. denied 476 Mass. 1101 (2016) (admission to sufficient facts in connection with continuance without a finding on first offense operating under the influence could qualify as a conviction for purposes of lifetime revocation of driver's license pursuant to G.L. c. 90 § 24(1)(d)). The process for taking appellate review of the specified ruling or rulings is governed by the Massachusetts Rules of Appellate Procedure, provided that the notice of appeal is filed within thirty days of the acceptance of the plea.

If the defendant prevails in whole or in part on appeal, the defendant has the choice whether to withdraw the guilty plea, or the admission to sufficient facts, on the specified charge or charges. If the defendant elects to withdraw the plea or admission, dismissal of the specified charge or charges, which the Commonwealth previously agreed would not be viable should the defendant prevail on appeal, is presumptively appropriate. In cases in which, for example, the defendant prevails on appeal in part (e.g., the appellate court suppresses some but not all the evidence which the defendant sought to exclude), the Commonwealth has an opportunity to show good cause that the court should not dismiss the charge or charges. If the judge does not intend to dismiss the specified charge or charges, the judge should indicate that intention to the defendant before the defendant withdraws the guilty plea or admission to sufficient facts.

Appellate relief for the defendant may necessitate re-sentencing. As when a conviction or sentencing provision is vacated, in the normal course the trial judge has an opportunity to reassess the sentence given the remaining convictions and sentencing options. Commonwealth v. Sallop, 472 Mass. 568, 570 (2015); Commonwealth v. Kruah, 47 Mass. App. Ct. 341, 348 (1999); Commonwealth v. Clermy, 37 Mass. App. Ct. 774, 779, aff'd, 421 Mass. 325 (1995).