COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2020-P-0075

ESSEX, SS.

COMMONWEALTH,
Appellee,

V.

BYRON SOLIS,
Appellant

ON APPEAL FROM THE ORDERS OF
THE LAWRENCE DISTRICT COURT

BRIEF FOR APPELLANT

FOR THE APPELLANT:

MURAT ERKAN, ESQ.
ERKAN & ASSOCIATES, LLC
300 HIGH STREET
ANDOVER, MA 01810
(978) 474-0054
BBO # 637507
MURAT@ERKANLAW.COM

APRIL 6, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

ISSUES PRESENTED

I. Whether the motion judge erred in denying Defendant's Second Motion to Vacate Admission to Sufficient Facts where plea counsel failed to file a likely meritorious motion to dismiss the complaint;

II. Whether the motion judge erred in denying Defendant's Second Motion to Vacate Admission to Sufficient Facts where plea counsel failed to file a likely meritorious motion to suppress evidence based on an illegal, warrantless entry into the Defendant's home, not subject to any exception to the warrant requirement;

III. Whether the motion judge erred in denying Defendant's Second Motion to Vacate Admission to Sufficient Facts where plea counsel did not correctly advise the Defendant of the immigration consequences of his pleas, and where the Defendant was prejudiced by this failure.

STATEMENT OF THE CASE

Bayron[1] Solis ("the Defendant") appeals the November 14, 2019, denial of his Second Motion to Vacate Admission to Sufficient Facts. On March 19, 2001, the Defendant was charged in the Lawrence District Court with a complaint alleging Disturbing the Peace, in accordance with G. L. c. 272, § 53, and Malicious Destruction of Property Over $250, in

[1] The complaint spells the Defendant's name "Byron Solis." His name is correctly spelled "Bayron Solis."

accordance with G. L. c. 266, § 127 (Docket No. 0118CR1495). R.A. 3-5.[2]

On August 21, 2001, the Defendant admitted to sufficient facts on both counts. R.A. 4, 66-67. The Court (Hogan, J.) continued the case without a finding for one year, and ordered unsupervised probation, a $35 victim witness fee, and, if there was no restitution, then court costs of $200. R.A. 4-5, 67. The case was dismissed after the Defendant's successful completion of probation. R.A. 4.

On January 4, 2017, the Defendant filed a Motion to Vacate Conviction, asserting that his plea counsel rendered ineffective assistance by failing to correctly advise him of the immigration consequences of his plea. R.A. 69-85. On January 9, 2017, the District Court (Hogan, J.) denied the motion without a hearing. R.A. 108. The Defendant filed a timely notice of appeal, and the Appeals Court affirmed the denial of the Defendant's motion by a Rule 1:28 Order on February 12, 2018 (2017-P-0231). R.A. 114-118; Commonwealth v. Solis, 92 Mass. App. Ct. 1127 (2018) (unpublished).

[2] The Defendant cites to the record appendix as "R.A. [page]."

Represented by new counsel, on November 8, 2019, the Defendant filed his Second Motion to Vacate Admission to Sufficient Facts.[3] R.A. 6, 10-136. On November 14, 2019, the Motion was denied by margin notation. R.A. 137. The Defendant filed a timely notice of appeal, R.A. 141, and the case was docketed in the Appeals Court on January 16, 2020. R.A. 7.

STATEMENT OF FACTS

I. Defendant's Background

At the time of his plea, the Defendant was in his early twenties, was responsible for his family's hopes and futures, and struggled with the English language and with alcoholism. R.A. 75-76, 125-129. The Defendant was raised in a small mountain village in Guatemala with his five siblings. R.A. 124. A sixth sibling, Elmer, died at age three because his mother could not afford to bring him to the doctor. R.A. 124. The Defendant was raised in such poverty that he slept in the same room as his siblings and shared a bed with his two younger siblings. R.A. 124.

[3] The motion could alternatively be viewed as a motion to reconsider the previous motion to vacate. R.A. 11.

The Defendant's father left the family when the Defendant was young, worsening the financial struggles the family faced. R.A. 124. When he was twelve, the Defendant watched helplessly as three men murdered his father. R.A. 124.

The Defendant attended school only up to the third grade. R.A. 125. School was very expensive, so the Defendant dropped out so that the money could be used to educate his siblings, and so that he could help his mother at work. R.A. 124. He also got a job planting corn. R.A. 124.

At age 14, the Defendant left home and moved to the capital city to find a better paying job so that he could help provide for his mother and younger siblings. R.A. 125. He found work as a concrete worker's apprentice assembling wooden pallets, and earned 350 quetzales (approximately $50 USD) every fifteen days. R.A. 125. There was never enough money. R.A. 125.

Further, the cities of Guatemala, including the capital, where the Defendant was living, were plagued by ruthless and violent gangs, most famously MS-13. R.A. 125. Young men were hunted, threatened, and forced to join the gangs. R.A. 125. Those who refused

were often killed. R.A. 125. The Defendant was the victim of an armed robbery carried out by three gang members, who threatened him with a knife and a gun. R.A. 125. He was afraid that worse violence would befall him in the city. R.A. 125.

The Defendant knew his only chance to make enough money and to escape the violence would be to leave Guatemala. R.A. 125. His mother mortgaged her land, about 0.01 acres, to pay the 10,000 quetzales for a coyote to help the Defendant cross the border. R.A. 125. He arrived in the United States after about a month, and entered without inspection. R.A. 126. He settled in Lawrence. R.A. 126.

The Defendant soon got a job loading trucks at the Sterilite factory, earning more in a month than he could in a year in Guatemala. R.A. 126. He was offered a permanent job at Sterilite, but he could not accept it because he did not have documentation. R.A. 126. He found work landscaping, which he has been doing for almost twenty years. R.A. 126.

The Defendant was thrilled to be able to help support his family back in Guatemala, and both of his younger siblings graduated from high school. R.A. 126. His younger sister continued her education further and

is studying to be a nurse. R.A. 126. The Defendant was also able to pay his mother back to clear the mortgage on her land, and helped her rebuild her house after it was partially destroyed in an earthquake. R.A. 126. He sends money to his siblings back in Guatemala, so that their children can afford clothing and school supplies, and so that his sister has potable water in her home. R.A. 126-127.

Beyond the financial improvements living in the U.S. has brought, the Defendant also appreciates the feeling of safety he has here, instead of having to look over his shoulder to see if any gang members are intent on hurting him. R.A. 126.

The Defendant has been married for five years; he and his wife, Juana, have been together for about sixteen years. R.A. 127. They have a 12-year-old son, and together are raising Juana's 17-year-old daughter from a previous relationship. R.A. 127.

II. Facts of the Case

According to the Lawrence Police report submitted in support of the Defendant's Second Motion to Vacate Admission to Sufficient Facts, on March 16, 2001, police were dispatched to 20 Butler Street for a disturbance. R.A. 63. The owner of the home, Diego

Batista, reported that, about five minutes prior, the first-floor tenants were inside the apartment "drinking, yelling and throwing empty beer bottles out the window." R.A. 63-64. Police entered the first-floor apartment, where Abraham Popjoy and the Defendant denied throwing any bottles. R.A. 64. Police saw three broken Formosa brand beer bottles on the ground outside of the house. R.A. 64. Police also saw a motor vehicle parked outside with a smashed windshield. R.A. 64. Both Popjoy and the Defendant again denied involvement. R.A. 64. Police saw empty Formosa beer bottles in the apartment, so Popjoy and the Defendant were arrested. R.A. 64.

Popjoy had argued with a neighbor about a woman, and wanted to get revenge. R.A. 127. He did so by throwing bottles at the neighbor's car. R.A. 127. Popjoy had boasted that he had killed his stepfather with a machete in Guatemala, so when Popjoy told the Defendant not to tell police what happened, the Defendant obliged. R.A. 127.

The Defendant was charged with, and ultimately admitted to sufficient facts for, malicious destruction of property over $250 and disturbing the peace. R.A. 4, 66. On December 9, 2015, the

Department of Homeland Security served the Defendant with notice of removal proceedings against him, on the grounds that he was present in the U.S. without being admitted or paroled. R.A. 100-101. Had the Defendant not had this matter on his record, he would have been eligible to petition for Cancellation of Removal. R.A. 132. With the instant conviction for a crime involving moral turpitude, the Defendant was unable to apply for Cancellation of Removal and thus had no defense to the removal proceedings. R.A. 132.

III. First Motion to Vacate Plea

The Defendant moved to vacate his conviction on January 4, 2017. R.A. 5. He was represented by attorney Rhonda Selwyn Lee, who submitted affidavits from the Defendant and plea counsel, Attorney Murphy, outlining the advice plea counsel provided. R.A. 69-85. Plea counsel had no specific memory of the case, but recalled that his usual practice at the time of the Defendant's plea was to read the language of the green sheet to the client. R.A. 74. The Defendant did not recall receiving any immigration-related advice from counsel. R.A. 76. He would have remembered discussing the topic with his attorney, as he was

afraid of Immigration, and so any mention of immigration would have stood out to him. R.A. 76.

The Defendant argued that his plea counsel violated the dictates of Padilla and Commonwealth v. Clarke by failing to give him correct and detailed advice regarding the immigration consequences of his plea. R.A. 72-73. The Defendant further argued that he was prejudiced by this failure because (1) he had an available substantial ground of defense – that he lacked the specific intent necessary for the charge of malicious destruction of property because he was intoxicated at the time; and (2) he could have attempted to negotiate a different plea, where the malicious destruction charge would be dismissed and the Defendant could be ordered to alcohol treatment on the disturbing the peace charge. R.A. 73.

Judge Hogan denied the Motion, ruling that the Defendant failed to establish that his conviction created clear immigration consequences,[4] and, where his Notice to Appear charged only unlawful presence, "he

[4] The District Court adopted the Commonwealth's proposed findings of fact and rulings of law verbatim, something this Court has often criticized. However, this Court found that it is not necessarily error to do so, and the findings were supported by the record. Solis, 92 Mass. App. Ct. 1127 at *2 n.5.

is not facing deportation for this admission at all." R.A. 108, 111. Judge Hogan next found that the Defendant failed to demonstrate prejudice, as his voluntary intoxication theory was not a substantial ground of defense, the Defendant received a favorable disposition, there was no evidence that the prosecutor would have agreed to the Defendant's suggested disposition, and the Defendant had not set forth any special circumstances. R.A. 111-112.

The Appeals Court affirmed in a 1:28 decision, finding no abuse of discretion in the motion judge's determination that the Defendant had not demonstrated prejudice. R.A. 114-118; Commonwealth v. Solis, 92 Mass. App. Ct. 1127 (2018) (unpublished). The Appeals Court did not reach the issue of whether plea counsel's performance had been deficient. R.A. 116; Solis, 92 Mass. App. Ct. at *2.

IV. Second Motion to Vacate Plea

Represented by current counsel, the Defendant filed his Second Motion to Vacate Admission to Sufficient Facts. R.A. 10-136. Defendant argued that plea counsel was ineffective for failing to file a motion to dismiss or a motion to suppress evidence, both of which were likely meritorious and would have

been determinative of the case. R.A. 25-36. He further argued that the conviction had resulted in immigration consequences to the Defendant, as he was no longer eligible to seek cancellation of removal due to his plea in this matter. R.A. 36-47. Mr. Murphy's failure to advise the Defendant about cancellation of removal, and failure to seek a plea that did not result in this consequence, was ineffective. R.A. 36-47. His review of the green sheet language with the Defendant was insufficient. R.A. 45-46.

The Defendant further argued that, had he known of the immigration consequences the plea would cause, he would have insisted on proceeding to trial. R.A. 50-56. He had a substantial ground of defense, including two potentially determinative pretrial motions that were never filed, and a different plea could have been negotiated. R.A. 51-54. Finally, the Defendant had special circumstances that would have supported his decision to reject the plea, specifically that he was supporting his mother and siblings financially, and that they relied on his remaining in the United States. R.A. 54-56. He was threatened by gang members and robbed at gunpoint in his home country, and it was dangerous for him to

continue to work in the city centers of Guatemala. R.A. 55, 125. The Defendant's mother mortgaged her home so that her son could come to America for greater opportunities, despite his lack of formal education. R.A. 55, 125. He and his family relied on his staying and working in the United States. R.A. 55-56, 125-129.

The Defendant's motion was denied by margin notation reading, "Upon review of the additional information, the original decision stands. MOTION DENIED. J. Hogan." R.A. 137.

SUMMARY OF ARGUMENT

The motion judge erred in denying the Defendant's Second Motion to Vacate Admission to Sufficient Facts, as plea counsel failed to file two likely meritorious pretrial motions that would have been determinative, and because he failed to adequately inform the Defendant of the immigration consequences of his plea. This plea rendered the Defendant subject to deportation without any available defense.

In Argument II, *infra*, at pp. 23 to 28, the Defendant argues that the motion judge erred in denying his motion to vacate his admission to sufficient facts because his attorney failed to file a motion to dismiss the malicious destruction of

property charge despite there being insufficient evidence of each of the four essential elements. The police report did not establish probable cause to believe that the Defendant had been involved in the incident, that the property damage was inflicted wilfully or maliciously (as opposed to carelessly), or that the damaged windshield would cost over $250 to repair.

In Argument III, *infra*, at pp. 28 to 34, the Defendant argues that the motion judge erred in denying his motion to vacate his plea because his attorney failed to file a motion to suppress evidence where police entered his home without a warrant, not subject to any exception to the warrant requirement. The entry was not based on consent, the need to render emergency aid, or probable cause and exigent circumstances, and thus a motion to suppress would have been allowed. The Commonwealth's case would have been substantially weakened without the officers' observations from inside the home.

In Argument IV, *infra*, at pp. 34 to 53, the Defendant argues that he was deprived of his Sixth Amendment and Article 12 rights to the effective assistance of counsel where the only advice his plea

counsel provided regarding the immigration consequences of his plea was to read the warning on the green sheet. The Defendant admitted to sufficient facts for malicious destruction of property over $250, a crime involving moral turpitude. Plea counsel did not inform the Defendant that the plea would make cancellation of removal unavailable to him in the future. The Defendant was prejudiced by plea counsel's deficient advice, as he had a substantial ground of defense to the charges, there was a reasonable possibility that a different plea agreement could have been negotiated, and special circumstances exist showing that the Defendant would have placed a strong emphasis on immigration consequences in deciding whether to plead guilty. An examination of all of these factors supports the conclusion that, under the circumstances, a reasonable person would have gone to trial if given constitutionally effective advice about the immigration consequences of his plea.

ARGUMENT

I. STANDARD OF REVIEW

"A motion to withdraw a guilty plea is treated as a motion for a new trial." Commonwealth v. Henry, 88 Mass. App. Ct. 446, 451 (2015) (quoting Commonwealth

v. DeJesus, 468 Mass. 174, 178 (2014)). This Court reviews the denial of such motions "to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Cano, 87 Mass. App. Ct. 238, 240 (2015) (quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986)). A judge may grant such a motion "if it appears that justice may not have been done." Henry, 88 Mass. App. Ct. at 451; Mass. R. Crim. P. 30(b). "Justice is not done if the defendant has received ineffective assistance of counsel in deciding to plead guilty." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012) (citing Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 637-638 (2007)).

Though appellate courts "grant substantial deference" to a decision on a motion under Rule 30(b) where the motion judge was also the plea judge, Commonwealth v. Grant, 426 Mass. 667, 672 (1998), "[w]hen a new trial claim is constitutionally based, . . . 'this court will exercise its own judgment on the ultimate factual as well as legal conclusions.'" Commonwealth v. Adkinson, 80 Mass. App. Ct. 570, 584-585 (2011) (quoting Commonwealth v. Healy, 438 Mass. 672, 678 (2003)).

A defendant is entitled to the effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. In order to prevail on an ineffectiveness claim, the defendant must show "there has been serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer—and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Clarke, 460 Mass. 30, 45 (2011) (quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)). If the Saferian standard is met, the Federal test is also satisfied. Id.

II. THE MOTION JUDGE ERRED IN DENYING DEFENDANT'S SECOND MOTION TO VACATE HIS ADMISSION TO SUFFICIENT FACTS, AS PLEA COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO MOVE TO DISMISS THE COMPLAINT.

Where an ineffective assistance claim is based on a failure to file a motion to dismiss, this requires the Court to determine whether such a motion would have been allowed. Commonwealth v. Ortiz, 53 Mass. App. Ct. 168, 173-174 (2001), rev. denied, 435 Mass.

1108 (2002). A complaint application which fails to establish probable cause for each element of the offense must be dismissed. E.g., Commonwealth v. Humberto H., 466 Mass. 562, 565-566 (2013). Probable cause requires "more than a suspicion of criminal involvement, something definite and substantial. . ." Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992) (quoting Commonwealth v. Rivera, 27 Mass. App. Ct. 41, 45 (1989)). A hunch is not sufficient. Commonwealth v. Patti, 31 Mass. App. Ct. 440, 442 (1991), rev. denied, 411 Mass. 1105 (1991) (reasonable suspicion requires more than a good faith hunch).

Here, to sustain the complaint, there must have been probable cause in the application to establish that: "the defendant injured or destroyed the personal property, or dwelling house or building of another; the defendant did so wilfully; the defendant did so with malice; [and] the value of the property so injured or destroyed exceeded $250." Commonwealth v. Deberry, 441 Mass. 211, 215 n.7 (2004) (citing Instruction 5.301 of the Model Jury Instruction for Use in the District Court (1995)). None of these elements are present here.

First, the evidence that the Defendant was involved in any misconduct fell short of probable cause. The only identification was the landlord's report that, about five minutes before police arrived, "the gentlemen who rent the first [floor] were inside the [apartment] drinking, yelling and throwing empty beer bottles out the window." R.A. 63-64. Police found both Abraham Popjoy and the Defendant within the first-floor apartment; both denied throwing any bottles. R.A. 64.

The landlord's report that it was the first-floor tenants who were misbehaving does not establish probable cause to believe that the Defendant was involved in the incident. It is likely that the landlord was simply directing the police to where the bottles originated from, not identifying those involved. The landlord did not identify the Defendant as a tenant. Rather, it appears officers simply assumed he was because he happened to be present in the apartment when they arrived. That the Defendant was present on the first floor when police arrived five minutes later is insufficient to establish probable cause to believe he was involved in any alleged crime. "[M]ere presence at the commission of

the wrongful act and even failure to take affirmative steps to prevent it do not render a person liable as a participant." Commonwealth v. McCarthy, 385 Mass. 160, 163-164 (1982) (quoting Commonwealth v. Benders, 361 Mass. 704, 708 (1972)).

Second, to be "wilful," the Defendant must have "intended both the conduct and its harmful consequences." Commonwealth v. Redmond, 53 Mass. App. Ct. 1, 4 n.2, rev. denied, 435 Mass. 1107 (2001). "The word 'wilful' means intentional and by design in contrast to that which is thoughtless or accidental." Commonwealth v. Gordon, 82 Mass. App. Ct. 227, 229, rev. denied, 463 Mass. 1107 (2012). The police report provides no basis to conclude that the car windshield was broken intentionally or by design.

It appears from the police report that the car was not visible from within the apartment, as Officer Panagiotakos had to leave the apartment to see the car parked under the apartment window. R.A. 64. There was no evidence that the car was damaged willfully or intentionally, rather than incidentally when someone drunkenly tossed a beer bottle out the apartment window.

Third, the malice requirement demands "a showing that the defendant's conduct was 'motivated by cruelty, hostility or revenge.'" Commonwealth v. Armand, 411 Mass. 167, 170 (1991) (quoting Commonwealth v. Schuchardt, 408 Mass. 347, 352 (1990)). "[T]he wilful commission of an unlawful or even destructive act does not, by itself, suffice to prove malice under G. L. c. 266, § 127." Commonwealth v. Woods, 94 Mass. App. Ct. 761, 769, rev. denied, 481 Mass. 1108 (2019). An act causing damage to property that is done "with a spirit of indifference or recklessness, perhaps even arrogance and insolence," is wanton destruction of property, Commonwealth v. Ruddock, 25 Mass. App. Ct. 508, 512-513 (1988), which is not a lesser included offense of malicious destruction of property. Redmond, 53 Mass. App. Ct. at 5. The police report establishes, at best, wanton destruction of property. There are no grounds whatsoever from which to infer that the windshield was broken intentionally, motivated by animus or hostility.

Finally, there was insufficient evidence to determine that the element requiring a $250 loss was met. "Where repairable damage or destruction is

caused to a portion or portions of a greater whole, the value of the property damaged or destroyed is to be measured by the reasonable cost of the repairs necessitated by the malicious conduct." Deberry, 441 Mass. at 221-222 (quoting Nichols v. United States, 343 A.2d 336, 342 (D.C. 1975)). The police report presented no evidence regarding the cost of repairing the windshield of a twelve-year-old Honda Accord. R.A. 63-64. As such, there was no probable cause to support the fourth element of the malicious destruction of property charge.

Because there was insufficient proof of each of the four elements of malicious destruction of property over $250, plea counsel provided ineffective assistance in failing to move to dismiss the complaint. The motion judge erred in denying the Defendant's Second Motion to Vacate Admission to Sufficient Facts on this basis.

III. THE MOTION JUDGE ERRED IN DENYING DEFENDANT'S SECOND MOTION TO VACATE HIS ADMISSION TO SUFFICIENT FACTS, AS PLEA COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO MOVE TO SUPPRESS EVIDENCE.

"The failure of counsel to litigate a *viable* claim of an illegal search and seizure is a denial of the defendant's Federal and State constitutional right

to the effective assistance of counsel." Commonwealth v. Pena, 31 Mass. App. Ct. 201, 204 (1991) (emphasis in original). To show that counsel was ineffective in failing to file a motion to suppress, "the defendant must show that the motion to suppress would have presented a viable claim and that 'there was a reasonable possibility that the verdict would have been different without the excludable evidence.'" Commonwealth v. Segovia, 53 Mass. App. Ct. 184, 190 (2001) (quoting Pena, 31 Mass. App. Ct. at 205). If the defendant has made such a showing, the burden shifts to the Commonwealth to show the admission of the evidence was harmless beyond a reasonable doubt. Id.

A. A Motion to Suppress Would Have Succeeded, As Police Entered The Defendant's Home Without a Warrant, Probable Cause, Consent, or a Need for Emergency Aid.

Here, officers entered the first-floor apartment without consent or probable cause and exigent circumstances. Pursuant to the Fourth Amendment and article 14, the police may not enter a home without a warrant "unless they act on the basis of (1) voluntary consent, (2) probable cause and exigent circumstances, or (3) an objectively reasonable belief

that there is an injured person or a person in imminent danger of physical harm inside the home who requires immediate assistance." Commonwealth v. Suters, 90 Mass. App. Ct. 449, 452 (2016) (internal citations and footnotes omitted). "[A] warrantless entry into a home constitutes a search in the constitutional sense[.]" Commonwealth v. Lopez, 458 Mass. 383, 394 (2010). The Commonwealth bears the burden of showing that a warrantless entry "fell within the narrow, jealously guarded exceptions to the general rule." Commonwealth v. Kiser, 48 Mass. App. Ct. 647, 648 (2000). These exceptions do not apply here.

Exigent circumstances require that officers have "reasonable grounds to believe that obtaining a warrant would be impracticable under the circumstances[,]" either because the delay would "create 'a significant risk' that 'the suspect may flee,' 'evidence may be destroyed,' or 'the safety of the police or others may be endangered.'" Commonwealth v. Arias, 481 Mass. 604, 616 (2019) (quoting Commonwealth v. Figueroa, 468 Mass. 204, 213 (2014)). "The investigation of a crime, even a serious crime . . . , does not itself establish an exigency."

Id. at 617. There were no indications of exigency to excuse a warrantless and nonconsensual entry into a home in this case.

Similarly, the entry was not based on consent. To show a consent entry, "the Commonwealth must show 'consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority.'" Commonwealth v. Rogers, 444 Mass. 234, 237 (2005) (quoting Commonwealth v. Voisine, 414 Mass. 772, 783 (1993)). "In meeting its burden of establishing voluntary consent to enter, the Commonwealth must provide us with more than an ambiguous set of facts that leaves us guessing about the meaning of this interaction and, ultimately, the occupant's words or actions." Id. at 238.

The police report does not contain any indicia of consent, stating only that "At that time Officers ... arrived on scene and we entered the first fl. apt. Were met by Suspect (1) Abraham Popjoy. . ." R.A. 64. Stated simply, if police obtained consent to enter, the reasonable and natural place to document that would be in the police report. Not only does the set of facts outlined in the police report fail to establish voluntary consent, it points towards a lack

of consent. Both the presence of several uniformed police officers and the occupants' alcohol impairment have been found to suggest an absence of voluntary consent. Commonwealth v. Harmond, 376 Mass. 557, 561-562 (1978) ("Although the presence of several uniformed officers or the impairment of the defendant's understanding by reason of drinking may suggest the absence of consent, neither fact alone necessarily compels such a finding.").

Finally, the emergency exception did not apply. That doctrine permits a warrantless entry when an officer reasonably believes, based on specific, articulable facts, that someone is inside the home who needs immediate help due to an imminent threat of death or serious injury, or that entry "is necessary to prevent a threatened fire, explosion, or other destructive accident." Commonwealth v. DiGeronimo, 38 Mass. App. Ct. 714, 722-723 (1995). There must be "an objectively reasonable basis" for the officers' belief that there is an emergency, and the search must be confined to the scope of the emergency. Arias, 481 Mass. at 610. The exception is "narrowly construed[,]" and it is the Commonwealth's burden to show it applies. Id.

The entry here is clearly outside the scope of the emergency exception. In Commonwealth v. Kirschner, 67 Mass. App. Ct. 836, 842 (2006), this Court held that the emergency exception was inapplicable to officers' entry into a property's curtilage to investigate a report that fireworks had been set off there previously. The Court found, "even granting that the setting off of fireworks is an activity that carries some degree of danger, the situation faced by the police did not rise to the level of an emergency." Id. This situation is the same; though drunkenly tossing bottles from a first-floor apartment to the street may carry some degree of danger, it is no more hazardous than setting off illegal fireworks, and it did not create an emergency.

B. There is a Reasonable Possibility That The Verdict Would Have Been Different Without the Excludable Evidence.

Police identified the Defendant and observed bottles similar to those which damaged the victim's car as a product of the illegal entry into the Defendant's home. Without this evidence, the Commonwealth's case consisted of broken bottles near a car parked outside of a triple decker apartment building, and a report that those bottles were thrown

from the first-floor apartment. A motion to suppress would have been determinative in this case. Wong Sun v. United States, 371 U.S. 471, 487 (1963); Commonwealth v. Censullo, 40 Mass. App. Ct. 65, 69 (1996). The failure to file such a motion constituted ineffective assistance of counsel.

IV. THE MOTION JUDGE ERRED IN DENYING DEFENDANT'S SECOND MOTION TO VACATE HIS ADMISSION TO SUFFICIENT FACTS BECAUSE THE DEFENDANT RELIED ON PLEA COUNSEL'S INCOMPLETE ADVICE REGARDING THE IMMIGRATION CONSEQUENCES OF HIS PLEA.

A. Plea Counsel Did Not Adequately Advise The Defendant Of The Immigration Consequences Of His Plea.

The Sixth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights secure a defendant's rights to the effective assistance of counsel. Padilla v. Kentucky, 559 U.S. 356, 374 (2010); Commonwealth v. Sylvain, 466 Mass. 422, 436 (2013). In cases brought pursuant to Padilla and Commonwealth v. Clarke, 460 Mass. 30 (2011), "the defendant must show that counsel failed to adequately advise the defendant of the immigration consequences of his pleas and, as a result, the defendant was prejudiced." Commonwealth v. Balthazar, 86 Mass. App. Ct. 438, 440 (2014).

To render constitutionally sufficient representation, defense counsel must advise a non-citizen client of the *specific* immigration consequences of a plea. E.g., Commonwealth v. Lavrinenko, 473 Mass. 42, 54 (2015). A general warning that a plea may carry immigration consequences is insufficient. Padilla, 559 U.S. at 369; Commonwealth v. DeJesus, 468 Mass. at 177 n.3. An attorney's reading the language on the Tender of Plea or Admission Waiver of Rights form to his client, which defense counsel did here, is also insufficient. E.g., Commonwealth v. Henry, 88 Mass. App. Ct. 446, 454 (2015).

The motion judge erroneously found that counsel's advice to the Defendant that his plea "may have consequences of deportation" was sufficient under Padilla because the Defendant faced deportation because he entered the country illegally, not because of his admission in this case. R.A. 111. Though some courts have held that undocumented immigrants are unable to show prejudice under similar circumstances because the individual was deportable due to his status regardless of the conviction, the Supreme Judicial Court has expressly stated that

"consideration of the defendant's undocumented status in no way implies that an undocumented defendant can never successfully state a claim of ineffective assistance of counsel." Commonwealth v. Marinho, 464 Mass. 115, 130 n.21 (2013). What is required, however, is that undocumented defendants should "address the issue of their particular status and how different performance of counsel could have led to a better outcome." Id.

The motion judge is correct that at the time of the Defendant's plea, he was subject to removal from the United States because he was present in the country unlawfully. 8 U.S.C. § 1227(a)(1). However, an undocumented alien may apply for Cancellation of Removal and receive lawful permanent resident status if he can establish that: 1) he has been continuously physically present in the United States for at least ten years; 2) he has been of good moral character for that period; 3) he has not been convicted of certain crimes; and 4) his removal would result in exceptional and unusual hardship to his citizen or legal permanent resident spouse, parent, or child. 8 U.S.C. § 1229b(b). This Court "consider[s] the opportunity for such a petition . . . to be a serious benefit."

Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 596 n.2 (2012).

The Defendant's plea in this matter resulted in his inability to petition for Cancellation of Removal, and thus deprived him of his only pathway to legal status. 8 U.S.C. § 1229b(b); 8 U.S.C. § 1182(a)(2). Though, as in Gordon, the consequences of the Defendant's plea may not have been as obvious as those in Padilla or Clarke because the determination required the review of several federal statutes, "the issue is not so complex or confused that a reasonably competent attorney would be uncertain of the consequences of the plea." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 399 (2012) (defense counsel should have advised the defendant that his plea to an aggravated felony would result in, among other consequences, the inability to petition for cancellation of removal). "The issue is also highly significant, as it renders removal certain." Id. In fact, "'preserving the possibility of' discretionary relief from deportation . . .' would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed

to trial.'" Padilla, 559 U.S. at 368 (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001)).

Had defense counsel researched this issue, he could have easily determined that malicious destruction of property is a crime involving moral turpitude ("CIMT"). Matter of R, 5 I&N Dec. 612 (B.I.A. 1954) ("wanton and malicious destruction of property is a crime involving moral turpitude"). Further, any competent defense attorney should be aware that an admission to sufficient facts is treated as a conviction for federal immigration purposes.[5]

The Supreme Court has recognized that the ABA Standards, though not "inexorable commands," "may be valuable measures of the prevailing professional norms of effective representation. . ." Padilla, 559 U.S. at 367. The ABA Standard in effect at the time of the Defendant's plea advises defense counsel, "[t]o the

[5] An admission to sufficient facts is considered a conviction under federal immigration law because it involves a finding or admission to facts sufficient to warrant a finding of guilt, for which some form of punishment or restraint on liberty has been imposed. See 8 U.S.C. § 1101(a)(48)(A); Henry, 88 Mass. App. Ct. at 447 n.3 ("In evaluating immigration consequences, 'it remains appropriate to treat an admission to sufficient facts as the equivalent of a plea of guilty,' and we do so here.") (quoting Commonwealth v. Grannum, 457 Mass. 128, 130 n.3 (2010)).

extent possible," to "determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." Margaret Colgate Love, Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations, 39 Fordham Urb. L.J. 147, 161 (2011) (quoting ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f) (3d ed. 1999)). The Commentary accompanying this Standard states that counsel should "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces," and to "be active rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." Id. (quoting ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), cmt. (3d ed. 1999)).

Plea counsel's affidavit discloses that he made no such inquiry, stating that his standard practice was only to review the green sheet with his clients. R.A. 74. This failure alone is "sufficient to satisfy the deficient performance prong of the ineffective

assistance analysis." Lavrinenko, 473 Mass. at 53 (failure to ask client about his citizenship and immigration status constitutes deficient performance). Had counsel made the required inquiry, he would have understood that the Defendant was undocumented, and that his first priority was to remain in the United States so that he could continue to support his family. The Defendant's mother risked her home to provide her son a future in America. R.A. 125. The Defendant's younger siblings depended on him to fund their schooling and other necessities. R.A. 126. The Defendant also was determined to escape the violent gangs that controlled the city centers in his home country. R.A. 125-126. "Without making a reasonable inquiry of the client's immigration status, defense counsel [was] not in an adequate position to determine what advice [was] available." Lavrinenko, 473 Mass. at 53.

It does not matter that, at the time of the plea, the Defendant was not yet eligible for Cancellation of Removal. Prior to his plea, the Defendant had no impediment toward his eventual eligibility for Cancellation of Removal. It was not for the plea lawyer to conclude that this consequence was too

speculative to merit mention, despite its vital importance to his client. Plea counsel's role is to learn his client's priorities, to actively research the potential effects of the plea on those priorities, and to explain his findings to his client in language that the client can understand.

"[T]he standard practice for defense counsel in Massachusetts is to consider the immigration consequences that may attach to a sentence and to 'zealously advocate the best possible disposition' for the client." Marinho, 464 Mass. at 128 (quoting Committee for Public Counsel Services, Assigned Counsel Manual c. 4, at 22-24 (rev. June 2011)). The Supreme Court has recognized that

> [c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.

Padilla, 559 U.S. at 373. However, this was not done in this case. Instead of advocating for the best possible disposition, defense counsel's recommended resolution denied the Defendant any chance of

remaining in the country, and the Defendant was unaware of the sacrifice he was making.

B. The Defendant Was Prejudiced By His Attorney's Failure To Provide Accurate Advice About The Immigration Consequences Of His Plea.

To satisfy the prejudice prong of the Saferian test, the Defendant must show that, "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Clarke, 460 Mass. at 47 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). To do so, the defendant must show:

> (1) he had an available, substantial ground of defence . . . that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of special circumstances that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.

Id. at 47-48 (internal citations, footnotes, and quotations omitted).

If the Defendant is able to establish at least one of these factors, the Court is to next determine "whether, under the totality of the circumstances,

there is a reasonable probability that a reasonable person in the defendant's circumstances would have gone to trial if given constitutionally effective advice." Commonwealth v. Lys, 481 Mass. 1, 7-8 (2018).

Though proving just one of the three Clarke factors would be sufficient, here, the Defendant can meet this burden in all three ways.

1. The Defendant had an available, substantial ground of defense.

First, as described above, the Commonwealth would have been unable to proceed to trial had defense counsel filed a motion to dismiss or a motion to suppress. See supra at pp. 23-34.

Second, even in the absence of a motion to dismiss or a motion to suppress, the Defendant would have had a strong defense at trial. The Commonwealth's case rested on the allegation that the Defendant was present in an apartment that contained beer bottles of the same brand that appeared to have broken the windshield of a nearby car. There was no evidence that the Defendant had thrown anything, or that he was involved in a joint venture to do so. At best, the Commonwealth could only establish mere presence, which would be insufficient evidence for

conviction. "Mere presence at the commission of the wrongful act and even failure to take affirmative steps to prevent it do not render a person liable as a participant." Commonwealth v. McCarthy, 385 Mass. 160, 163-164 (1982) (quoting Commonwealth v. Benders, 361 Mass. 704, 708 (1972)).

The Defendant would have been reasonable in proceeding to trial and relying on the Commonwealth's inability to present sufficient evidence to establish not only that he was the one who threw the bottles, but also that the throwing was done wilfully and maliciously, and caused more than $250 in damage. Further, the Defendant need not show that he would have been acquitted at trial if he had relied on these defenses; he simply needs to establish that a substantial defense was available to him. Lavrinenko, 473 Mass. at 57 n.19 ("To show that a 'substantial defense' was available, the defendant need not show that it was more likely than not that such a defense would have resulted in acquittal."). It would have been rational for the Defendant to proceed to trial and to rely on these defenses, rather than to admit to sufficient facts and lose his ability to seek Cancellation of Removal.

2. There is a reasonable probability that a different plea bargain could have been negotiated.

"[A] defendant may show prejudice by demonstrating 'a reasonable probability that a different plea bargain (absent [the dire immigration] consequences) could have been negotiated at the time.'" Gordon, 82 Mass. App. Ct. at 400 (quoting Clarke, 460 Mass. at 47) (brackets in original).

The motion judge erred in finding that, because the Defendant "received a very favorable disposition of a CWOF for an unsupervised probationary period[,]" and the Commonwealth would have been unlikely to dismiss the case outright, the Defendant cannot show a better plea could have been negotiated. R.A. 140. Though the motion judge is correct that the disposition would have been "very favorable" for a citizen, "[i]f an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen." DeJesus, 468 Mass. at 184. As described above, the CWOF on the malicious destruction of property charge resulted in

the Defendant's ineligibility for Cancellation of Removal.

This consequence could have been spared had the Defendant requested that the Court guilty file the malicious destruction of property charge and sentence him to the same (or even more severe) conditions on the disturbing the peace charge. A guilty filed disposition would not have resulted in a conviction for federal immigration purposes. See 8 U.S.C. § 1101(a)(48) (defining conviction to require punishment, penalty, or restraint on liberty); Griffiths v. I.N.S., 243 F.3d 45 (1st Cir. 2001) ("guilty filed" disposition does not create a conviction where the court imposes no punishment, penalty, or restraint on liberty). The Commonwealth urged the Court to guilty-file the disturbing the peace charge and to find the Defendant guilty of malicious destruction of property and sentence him to one year of probation. The Defendant would have agreed to a higher fine, a longer term of probation, or even jail time, to preserve his ability to stay in the United States. R.A. 129. Where a defendant is willing to accept committed time in exchange for avoiding deportation consequences, this "suggests some

possibility that a different plea agreement could have been negotiated." Commonwealth v. Mohammed, 94 Mass. App. Ct. 1115, *2 (2019) (unpublished).

The plea judge would have likely accepted such a disposition. The judge accepted the Defendant's recommendation of a CWOF, which was more lenient than the Commonwealth's request and would have been highly favorable to the Defendant but for the immigration consequences. The Court would likely have been amenable to a harsher disposition that would have spared the Defendant from the catastrophic immigration consequences. See Marinho, 464 Mass. at 128 n.19 ("our precedent that a trial judge cannot factor immigration consequences into sentencing is no longer good law").

The Defendant must show only a "*reasonable probability* that a different plea bargain (absent such consequences) could have been negotiated at the time[,]" Clarke, 460 Mass. at 47 (emphasis added), not that he definitely would have been able to devise a plea agreement with the Commonwealth's assent that would avoid deportation consequences. He has made this showing.

3. The Defendant demonstrated special circumstances that support the conclusion that he would have placed particular emphasis on immigration consequences in deciding whether to admit to sufficient facts.

"In evaluating whether the defendant has established the existence of special circumstances, a judge must consider collectively all of the factors supporting the conclusion that the defendant 'placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.'" Lys, 481 Mass. at 8 (quoting Clarke, 460 Mass. at 47-48). The motion judge found that the Defendant did not establish special circumstances in his 2017 Motion to Vacate Conviction, as he failed to "describe any employment or ties to the community at the time of his plea" other than having a girlfriend and having lived in the United States for less than two and a half years. R.A. 112.

The Defendant's 2019 affidavit makes clear that, at the time of the Defendant's plea, he was responsible for his siblings' education, his family's home, and not only his own future, but that of his siblings and mother as well. R.A. 124-129. The Defendant's family had mortgaged their land and family

home to pay for his journey to the United States. R.A. 125. The Defendant was the only hope the family had for the future. Despite his risking his safety to move to the capital city to work, the Defendant was still not able to make enough money. He was also physically threatened by gang members and his life was in danger. The Defendant followed his dream to the United States, where he worked hard and, despite his lack of formal education, was able to earn more in his first pay cycle than he could in an entire year in Guatemala. R.A. 126. He used this money to pay his mother back for the mortgage on her property, for his siblings' education, and to provide clothing and school materials for his nieces and nephews. The Defendant's future, and the education, health, and safety of his family members, depended on his ability to stay and work in the United States.

Defendants with similar backgrounds have been determined to have demonstrated special circumstances. E.g., Commonwealth v. Garcia, 85 Mass. App. Ct. 1123, *2 (2014) (unpublished) (special circumstances found where, among other factors, the defendant's priority at the time of his plea was to be released from custody so that he could support his family members).

Also, the danger the Defendant faced in Guatemala is an important factor. In Lavrinenko, the Supreme Judicial Court instructed that, if the defendant is a refugee, courts must consider that "the defendant might fervently desire to remain in the United States because of what he or she might face if deported, that is, the risk of persecution in his or her country of origin . . ." Lavrinenko, 473 Mass. at 58. Here, though the Defendant was not endowed with official refugee status, he credibly attested that he was afraid of the violent gangs that infested the streets of Guatemala. R.A. 124. He had witnessed his father's murder, and was himself the victim of an armed robbery at gunpoint by gang members. R.A. 123, 124. Though the Defendant did not have refugee status, the Court should have considered his fear of returning to Guatemala and again facing violence in determining if he demonstrated special circumstances. The Defendant sufficiently demonstrated that special circumstances existed at the time of his plea that showed that he would have placed a strong emphasis on immigration consequences in deciding whether to accept a plea.

4. There is a reasonable probability, under the totality of the circumstances the Defendant faced, that a reasonable person would have gone to trial if given constitutionally effective advice.

The ultimate prejudice determination asks if, "under the totality of the circumstances, there is a reasonable probability that a reasonable person in the defendant's circumstances would have gone to trial if given constitutionally effective advice." Lys, 481 Mass. at 7-8. This inquiry "rests on the totality of the circumstances, in which special circumstances regarding immigration consequences should be given substantial weight." Lavrinenko, 473 Mass. at 59.

A reasonable person in the Defendant's position, had he known he was sacrificing his only avenue to avoid deportation by admitting to sufficient facts, would not have done so under these circumstances. He was not facing a substantial sentence of incarceration if he had proceeded to trial and lost; the Commonwealth's case was flimsy; and the ability to stay in the United States and earn money to send back to his family in Guatemala was of paramount importance to the Defendant.

As the Iowa Supreme Court recently recognized, "[t]here is a vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that subjects an unauthorized alien to automatic, mandatory, and irreversible removal." Diaz v. State, 896 N.W.2d 723, 733 (Iowa 2017). Because of changes in immigration policy and enforcement, and because of the ability to seek cancellation of removal, deportation is not a "foregone conclusion" for every unauthorized person. Id. Here, however, because of the Defendant's plea, his removal became automatic and irreversible.

The Defendant had two viable pretrial motions that would have ended the case before any trial or plea. In the event that those motions were pursued and somehow failed, the Defendant still had a very strong defense to the charges, and, as a non-citizen, there was no advantage to receiving a CWOF instead of a guilty verdict. The Defendant admitted to sufficient facts because he was unaware that it would permanently deprive him of his shot at the American dream. The Defendant most certainly would have insisted on pursuing a motion to suppress and a motion

to dismiss, and then a trial, had he known what was really at stake.

CONCLUSION

For the foregoing reasons, Mr. Solis respectfully requests that this Court reverse the motion judge's denial of the Defendant's Second Motion to Vacate Admission to Sufficient Facts and remand the case to the District Court for a new trial, or, in the alternative, remand the case to the District Court for an evidentiary hearing on his Motion to Vacate.

Respectfully submitted,
Byron Solis
By his Attorney,

/s/ Murat Erkan
Murat Erkan, Esq.
Erkan & Associates, LLC
300 High Street
Andover, MA 01810
(978) 474-0054
BBO# 637507
murat@erkanlaw.com

Date: April 6, 2020

Rule 16(k) Certification

I, Murat Erkan, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains 46 total non-excluded pages.

/s/ Murat Erkan
Murat Erkan, Esq.