

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
No. 10-1233

COMMONWEALTH

v.

OMAR HARRIS

DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTIONS TO DISMISS AND TO
RECONSIDER DENIAL OF MOTION TO WITHDRAW GUILTY PLEA

I. INTRODUCTION

This Court should allow the Defendant's "Motion to Dismiss Based on Prosecutorial Misconduct" and "Motion to Reconsider Denial of Motion to Withdraw Guilty Plea" because the Attorney General's failure to turn over exculpatory evidence was unconscionable and illegal. This failure was the result of egregious misconduct by two different assistant attorneys general: one who disobeyed a court order and a subpoena and another who intentionally withheld exculpatory evidence. This failure violated the Defendant's constitutional rights to due process of law and to a fair trial.

Alternatively, the Defendant is entitled to a new trial based on newly-discovered evidence of Farak's misconduct. This evidence was so staggering that it would have had a material effect on the Defendant's decision to plead guilty.

II. FACTS

On November 18, 2010, the Defendant was indicted by a

Hampden County Grand Jury on charges of Trafficking in Cocaine (14-28 grams), in violation of G.L. c. 94C, § 32E(b)(1), and Violation of a Controlled Substance Law in a School or Park Zone, in violation of G.L. c. 94C, §32J.¹

On October 6, 2010, the suspected drug sample in the Defendant's case was submitted to the Massachusetts Department of Public Health drug laboratory in Amherst [hereinafter "the lab"]. The sample was assigned to chemist Sonja J. Farak [hereinafter "Farak"] and was purportedly analyzed by her on November 16, 2010.

On September 21, 2011, the Defendant pled guilty to Trafficking in Cocaine (14-28 grams), in violation of G.L. c. 94C, § 32E(b)(1), and was sentenced, pursuant to an agreed recommendation, to 10 to 12 years in State's prison.² The Commonwealth filed a nolle prosequi on the school zone charge.

On January 18, 2013, the lab evidence officer, Sharon Salem, and the lab supervisor, James Hanchett, discovered that Farak had tampered with or stolen two drug samples that were submitted to the lab for testing. After Hanchett notified the Massachusetts State Police, which had taken over operation of the lab as of July 1, 2012, two additional samples were discovered to be adulterated or missing. On the same date, investigators seized Farak's personal vehicle and applied for a search warrant to search it.

On January 19, 2013, at 3:23 A.M., Massachusetts State Police Lieutenant Captain Robert Irwin, Sergeant Joseph

¹ The Defendant was indicted as a "habitual offender," in violation of G.L. c. 279, § 25, on each count.

² As part of the plea agreement, the Commonwealth did not proceed on the "habitual offender" portion of the indictment.

Ballou [hereinafter "Ballou"], and Trooper Randy Thomas searched Farak's personal vehicle at the State Police barracks in Northampton. They seized hundreds of documents from the trunk of the vehicle and identified them in the search warrant return and in police reports as "Assorted Lab Paperwork." The search lasted approximately an hour and a half. None of the investigators reviewed the contents of the paperwork in detail at that time.³

It was not until approximately two weeks after the search of Farak's vehicle (ostensibly February 2, 2013) that Ballou, whose responsibility as the "case officer" was to review the documents seized from the search, went through each of the documents in detail. At that time, Ballou discovered *inter alia* two documents titled "ServiceNet Diary Card," two documents titled "Emotion Regulation Worksheet," and a document featuring handwritten notes about the "pros" and "cons" of "resisting." It was clear to Ballou that these documents contained admissions by Farak regarding her drug abuse and theft of drugs from the lab.⁴ On February 14, 2013, Ballou wrote an e-mail to the Assistant Attorney General who was prosecuting Farak, Anne Kaczmarek [hereinafter "Kaczmarek"], that stated as follows:

Anne,

Here are those forms with the admission of drug use I was talking about. There are also news articles with handwritten comments about other officials being

³ On January 19, 2013, Farak was arrested charged in connection with the four samples in Eastern Hampshire District Court. She was later indicted in Hampshire County Superior Court and pled guilty on January 6, 2014. She was sentenced to eighteen months in the house of correction and five years of probation.

⁴ Although Sergeant Ballou knew that the documents contained admissions regarding Farak's drug abuse and theft of drugs from the lab, he did not know when the documents were created.

caught with drugs. All of these were found in her car inside of the lab manila envelope.

Joe

Ballou attached four files to the e-mail: "Articles and Notes.pdf," "Emotion Regulation Homework.pdf," "Positive Morphine Test.pdf," and "Emotion Regulation Worksheet.pdf." These files contained *inter alia* the two documents titled "ServiceNet Diary Card," the two documents titled "Emotion Regulation Worksheet," and the document featuring handwritten notes about the "pros" and "cons" of "resisting."

On February 15, 2013, the Defendant filed a "Motion to Withdraw Guilty Plea," based on Farak's misconduct. On April 24, 2013, the Defendant filed a "Motion to Stay Sentence and Set Bail," which was allowed on May 17, 2013. On May 21, 2013, the Defendant posted bail and was released pending the litigation of his "Motion to Withdraw Guilty Plea."

In March 2013, Kaczmarek drafted a document titled "Prosecution Memo," in which she outlined her case against Farak and specifically referenced "items of note" that were recovered from Farak's personal vehicle, including "mental health worksheets describing how Farak feels when she uses illegal substances and the temptation of working with "urge-ful samples" (Exhib. 163). Kaczmarek concluded that sentence with a footnote, in which she stated, "These worksheets were not submitted to the grand jury out of an abundance of caution in order to protect possibly privileged information. Case law suggests, however, that the paperwork is not privileged." Kaczmarek circulated her

"Prosecution Memo" to her supervisors for review.⁵ In a handwritten edit claimed by the Attorney General's Criminal Bureau Chief and Kaczmarek's superior, John Verner, he wrote, "This paperwork NOT turned over to DA's offices yet" (emphasis in original).

On April 22, 2013, Kaczmarek provided discovery to Farak's attorney, Elaine Pourinski (Exhib. 168). That discovery included a CD labeled "Discovery #2," which included a seven-page file titled "Paperwork recovered from M/V." This paperwork included the two documents titled "ServiceNet Diary Card," the two documents titled "Emotion Regulation Worksheet," and the document featuring handwritten notes about the "pros" and "cons" of "resisting" (Exhib. 169). In a face-to-face discussion regarding these very documents, Kaczmarek told Pourinski that she (Kaczmarek) would not be turning over the documents to "defense counsel," referring to the several attorneys seeking post-conviction relief as a result of Farak's misconduct.

On August 30, 2013, Attorney Jared Olanoff, on behalf of a defendant seeking post-conviction relief in the consolidated hearing, served a subpoena *duces tecum* on Ballou that compelled his appearance to testify at the consolidated hearing and his production of "a copy of all documents and photographs pertaining to the investigation of Sonja J. Farak and the Amherst drug laboratory" [hereinafter "Ballou subpoena"] (Exhib. 183). On September 9, 2013 - the first day of the consolidated hearing, the assistant attorney general assigned to address the Ballou

⁵ The "Prosecution Memo" indicates that at least two supervisors signed-off on the document with their initials on March 27, 2013, and March 28, 2013.

subpoena, Kris Foster [hereinafter "Foster"], argued a motion to quash the subpoena on the grounds that the items in Ballou's file were privileged (Exhib. 80, p. 15-19). Judge Kinder asked Foster if she had reviewed Ballou's file, to which she replied, "No." Thereafter, Judge Kinder instructed Foster to review Ballou's file and ascertain what items, if any, she believed might be privileged, at which time he (Judge Kinder) would review them *in camera* and make a determination as to their discoverability.

On September 16, 2013, Foster wrote a letter to Judge Kinder on Attorney General stationary, in which she stated, in pertinent part:

After reviewing Sergeant Ballou's file, every document in his possession has already been disclosed. This includes grand jury minutes and exhibits, and police reports. Therefore, there is nothing for the Attorney General's Office to produce for your review on September 18, 2013.

(Exhib. 193).

After a three-day hearing that concluded on October 23, 2013, the Defendant's "Motion to Withdraw Guilty Plea" was denied. The Court found that Farak's misconduct only dated back to the "summer of 2012," which did not include the time when the Defendant's drug sample was purportedly analyzed by Farak in November 2010. The Defendant was ordered to resume serving his sentence on January 2, 2014.

On October 30, 2014, Attorney Luke Ryan, on behalf of a defendant named Rolando Penate, was granted court-approval to view the evidence seized from the trunk of Farak's personal vehicle, after requesting such approval for more than a year. Upon his review of this evidence, he discovered the two documents titled "ServiceNet Diary Card," the two documents titled "Emotion Regulation Worksheet," and the document featuring handwritten notes

about the “pros” and “cons” of “resisting.”

On April 8, 2015, the Supreme Judicial Court decided Commonwealth v. Cotto, 471 Mass. 97 (2015), in which it held that the Commonwealth failed to investigate the full scope of Ms. Farak’s misconduct and ordered the Attorney General to conduct a thorough investigation. In May 2016, the Attorney General completed its further investigation, which revealed that Ms. Farak committed egregious misconduct at the lab from the inception of her employment there in 2004 to the date of her arrest on January 19, 2013.

On July 24, 2015, the Defendant filed a “Motion to Reconsider Denial of Motion to Withdraw Guilty Plea,” based on the newly-discovered evidence that Farak committed egregious misconduct at the lab during her entire eight years of employment there. The Defendant also filed a second “Motion to Stay Sentence and Set Bail,” which was allowed on July 29, 2015. On September 19, 2016, the Defendant filed a “Motion to Dismiss Based on Prosecutorial Misconduct,” based on the Attorney General’s intentional withholding of exculpatory evidence regarding Farak’s drug abuse and drug theft at the lab.

III. ARGUMENT

A. THE DEFENDANT IS ENTITLED TO DISMISSAL BECAUSE THE ATTORNEY GENERAL’S FAILURE TO DISCLOSE FARAK’S ADMISSIONS OF DRUG ABUSE AND THEFT WAS UNCONSCIONABLE AND ILLEGAL.

1. The Attorney General’s Failure To Disclose Farak’s Admissions Of Drug Abuse And Theft Violated A Court Order And A Subpoena.

Dismissal with prejudice is appropriate in cases of egregious prosecutorial misconduct or on a showing of

prejudice (or a substantial threat thereof), or “irremediable harm” to the defendant’s opportunity to obtain a fair trial. See Commonwealth v. Jacobsen, 419 Mass. 269, 276 (1995) (“egregious misconduct or at least a serious threat of prejudice”), quoting Commonwealth v. Cinelli, 389 Mass. 197, 210 (1983); accord Commonwealth v. Connelly, 418 Mass. 37, 38 (1994); see also Commonwealth v. Lewin, 405 Mass. 566, 579 (1989) (“showing of irremediable harm” or “prosecutorial misconduct that is egregious, deliberate, and intentional”), quoting Commonwealth v. Cronk, 396 Mass. 194, 198-99 (1985). In such cases, the Supreme Judicial Court has held that, before dismissing the indictment, the judge needs to make a finding as to “whether the prosecutor’s...response to discovery orders caused such irreparable prejudice that the defendant could not receive a fair trial if the [indictment] were reinstated.” Cronk, 396 Mass. at 201.

a. Kris Foster.

The egregiousness of the prosecutorial misconduct in this case was extreme. On the first day of the consolidated hearing in 2013, in which the Defendant was joined as a party, Judge Kinder explicitly ordered Foster to review Ballou’s file and identify which documents, if any, she believed were privileged and discoverable by the defense (Exhib. 80, p. 15-19). In a letter to Judge Kinder dated September 16, 2013, Foster wrote that she had reviewed Ballou’s file and determined that everything in the file had already been turned over to the defense (Exhib. 193). Both of Foster’s representations were completely false. On December 13, 2016, Foster testified that, despite Judge Kinder’s order, she never reviewed

Ballou's file. And in actuality, everything in Ballou's file had NOT been turned over. The items that had not been not turned over were the most significant and exculpatory evidence in the investigation: Farak's "mental health worksheets."

Foster testified that her supervisor, Appeals Division Chief Randall Ravitz, told her that everything in Ballou's file had already been turned over. She further claimed that Ravitz and two other superiors, Criminal Bureau Chief John Verner and Chief of the Enterprise and Major Crimes Unit Dean Mazzone, told her there was no need to look at the file. However, Ravitz, Verner, and Mazzone all denied saying any such things to Foster. If this Court were to credit Foster's testimony that Ravitz, Verner, and Mazzone all told her that she did not have to review Ballou's file, then this Court would therefore have to find that Ravitz, Verner, and Mazzone all committed perjury when they testified that they never said any such things to her. Therefore, it is highly likely that Foster testified falsely when she claimed that all of her superiors told her that she did not have to review the file.

Regardless of whether or not her supervisors told her that she did not have to review the file, the bottom line is that a judge ordered her to do so. At the end of the day, the onus was on her, not her supervisors, to comply with the judge's order. She was the one who was appearing in court and making written representations to the judge regarding Ballou's file. Foster's defiance of the court order, which the Commonwealth attempts to excuse due to inexperience, is inexcusable. Regardless of how long one has been practicing law, any diligent and competent attorney knows that the blatant disregard of a judge's

order is unlawful.

In addition to violating a court order, Foster failed to comply with the subpoena, which also carries the full effect of the law. Her defiance was intentional. That is, she consciously and deliberately decided not to review Ballou's file and nonetheless make knowingly false representations to the Court about having done so and about how the entire file had already been turned over. Had Foster not defied this Court's order, she would have likely discovered the "mental health worksheets" that were in Ballou's file and which he had specifically earmarked as being significant to the case.

b. Anne Kaczmarek.

Foster was not the only assistant attorney general who committed egregious misconduct with respect to the exculpatory evidence in this case. Anne Kaczmarek intentionally withheld the "mental health worksheets" from defense lawyers who were seeking post-conviction relief based on Farak's misconduct.

There is no dispute that the Massachusetts State Police and, by extension, the Attorney General's Office possessed Farak's "mental health worksheets" once they were seized from her vehicle pursuant to a search warrant on January 19, 2013. Further, there is no dispute that these documents were highly exculpatory. See Commonwealth v. Murray, 461 Mass. 10 (2011) (evidence is exculpatory if it could have impeached a witness for bias or challenged the credibility of key prosecution witnesses). The "worksheets" contained explicit admissions by Farak regarding her drug abuse and drug theft at the lab that, upon diligent review, revealed years of misconduct.

Finally, there is no dispute that the Attorney General failed to provide this evidence to the Defendant when it was subpoenaed and ordered to be produced at the consolidated hearing in September and October 2013.

There are two pieces of evidence that prove the intentional nature of her conduct. The first is her "Prosecution Memo," in which she specifically references the "mental health worksheets" and her legal conclusion that they were probably not privileged. A handwritten edit by John Verner, which she had to have reviewed following her superiors' approvals, clearly states that the "mental health worksheets" had "NOT" been turned over to the district attorneys (emphasis in original).

The second piece of evidence that proves Kaczmarek's failure to disclose the worksheets was intentional was her conversation with Farak's attorney, Elaine Pourinski, in which she explicitly stated that she would not be turning them over to "defense counsel," referring to those lawyers representing defendants who were potentially aggrieved by Farak's misconduct.

Kaczmarek's responsibility with respect to providing discovery to district attorneys regarding the Farak scandal was the same as it was in the Annie Dookhan scandal. On December 16, 2016, Kaczmarek admitted that she was the sole person in charge of furnishing the Farak discovery to the district attorneys and, by extension, the defense lawyers representing affected clients.

Kaczmarek's refusal to turn over the mental health worksheets constituted prosecutorial misconduct. It was so egregious that there is no appropriate remedy other than dismissal. The Defendant is part of a particularly aggrieved group of defendants who litigated motions for new

trials in 2013 and should have had received this evidence at that time. This group specifically requested this evidence by way of the Ballou subpoena. Moreover, Judge Kinder specifically sought to enforce the Ballou subpoena by ordering the Attorney General to review its file and turn it over. Had the Attorney General done either of those things, as it was legally and ethically required to do, the Defendant would not been wrongfully and needlessly deprived of his liberty. In this case alone, the Defendant has been sentenced to State's prison, released, sent back to State's prison, and then released again.

Will the Commonwealth not feel whole until the Defendant is sent back to State's prison for a third time, even in light of the misconduct committed by Farak and the Attorney General? There is no virtue in permitting the government and its agents to commit egregious misconduct such as that which was committed in this case and then allow them to carry on as if nothing happened. It was one thing for Farak to commit misconduct at the lab and compromise every drug sample that she ever touched. It was quite another for the Attorney General to withhold the very evidence that proved it. It cannot be said that justice was done.

B. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE NEWLY-DISCOVERED EVIDENCE REGARDING THE NATURE AND SCOPE OF FARAK'S MISCONDUCT WOULD HAVE HAD A MATERIAL EFFECT ON THE DEFENDANT'S DECISION TO PLEAD GUILTY.

1. The Defendant Has Satisfied Prong One Of The Scott Analysis.

In Commonwealth v. Scott, 467 Mass. 336 (2014), the Supreme Judicial Court (SJC) approved of the analytical framework set forth in Ferrara v. United States in cases of

pleas induced through egregious government misconduct. Id. at 346; Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). Under the Ferrara test applied in Scott, in order to vacate a guilty plea, a defendant must show: (1) egregious misconduct by the government that occurred in his case; and (2) that the misconduct materially influenced his decision to plead guilty. See Commonwealth v. Scott, 467 Mass. at 346; Ferrara v. United States, 456 F.3d at 290.

On April 8, 2015, the SJC issued its ruling in Commonwealth v. Cotto, 471 Mass. 97 (2015). In that case, the SJC held that Farak engaged in egregious misconduct and her misconduct was attributable to the government. Id. at 108. However, the SJC remanded Mr. Cotto's case for further findings on the timing and scope of Farak's misconduct. Id. at 114-115, 120.

As amply demonstrated in the Proposed Findings, Farak's misconduct predates both the purported testing date in this case, November 16, 2010, as well as the date of the Defendant's plea, September 21, 2011. In fact, Farak reported to her therapist that she used multiple substances between September 22 to September 29, 2009 (Exhib. 55, p. 229). All of the deficiencies at the lab, which render the results further unreliable, also existed before the testing in this case. Thus, the Defendant has met the first prong of the Scott/Ferrara test.

Moreover, the Commonwealth has agreed to a prong one conclusive presumption of misconduct for all cases in which Farak signed a certificate of drug analysis while employed at the Amherst Drug Lab (Exhib. 164). As the Defendant falls in this class, the Commonwealth does not contest that prong one has been met. Id.

2. The Defendant Has Satisfied Prong Two Of The Scott Analysis.

Prong two of the Scott analysis requires that the defendant demonstrate "a reasonable probability that he would not have pleaded guilty had he known of [Farak's] misconduct." Scott, 467 Mass. at 355. See also Commonwealth v. Clarke, 460 Mass. 30, 47 (2011) (defendant must convince court that decision to reject plea bargain would have been rational under the circumstances). To start, Farak was using drugs and stealing drugs from the lab at the time she purportedly tested the substances in this case and at the time of his plea (Proposed Findings at ¶¶ 101, 148). And, as stated above, Farak reported to her therapist that she used multiple substances during the time she purportedly analyzed the drug sample in the Defendant's case (Exhib. 55, p. 229; exhib. 236). The Defendant's drug sample was also ripe for tampering because it was a cocaine sample of substantial weight. Indeed, the sample weighed almost four grams less when it was retested by the Massachusetts State Police on June 22, 2015.⁶

The Defendant did receive a charge concession and was, therefore, eligible for a lower sentence than he otherwise would have been had he been convicted after trial. However, had Farak's misconduct been known to the Defendant and his attorney, especially the evidence of use of multiple substances during the timeframe she was purportedly conducting the testing in his case, it would have been reasonable to forego a plea. It is certainly reasonable to believe that he might have received a better

⁶ Given the amount of drugs that are now missing from the sample in the Defendant's case, he would no longer be prosecuted for Trafficking in Cocaine.

deal.

IV. CONCLUSION

For all the reasons set forth above, the Defendant's "Motion to Dismiss Based on Prosecutorial Misconduct" and "Motion to Reconsider Denial of Motion to Withdraw Guilty Plea" should be allowed.

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By his attorney,

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Dated: February 1, 2017

CERTIFICATE OF SERVICE

I, Jared Olanoff, hereby certify that on February 1, 2017, a true copy of the foregoing "Defendant's Memorandum in Support of Motions to Dismiss and to Withdraw Guilty Plea" was served upon Assistant District Attorney Deborah Ahlstrom by leaving a copy with her secretary at her office on 50 State Street, Springfield, MA 01103.

Jared L. Olanoff
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