

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-174

COMMONWEALTH

VS.

ANGELO WEST.

MEMORANDUM AND ORDER

The defendant, Angelo West, was convicted by a jury of unlawful possession of a firearm and ammunition, resisting arrest, and two counts of assault by means of a dangerous weapon.<sup>1</sup> The defendant subsequently pleaded guilty to so much of the unlawful possession of a firearm indictment as charged a subsequent firearm offense. The charges arose out of a police stop in Boston's theater district.

The defendant filed a notice of appeal, which was temporarily stayed while he pursued a motion for a new trial on the grounds that his trial attorney was constitutionally ineffective for failing to file a motion to suppress. After a nonevidentiary hearing, that motion was denied in December, 2005, by the same judge who presided over the trial. The appeal from that denial was consolidated with the defendant's direct appeal. In the consolidated appeal, the defendant argues that (1) trial

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<sup>1</sup> The defendant was tried with a codefendant, Brent Stevenson, after the trial judge, upon hearing, denied the codefendant's motion for relief from prejudicial joinder. (RA 10-11)

counsel was ineffective for failing (a) to file a motion to suppress, (b) to appear for two hearings regarding that motion, (c) to interview the defendant's girl friend, who witnessed the incident, and (d) to object when the trial judge unilaterally modified the firearm possession indictment to charge a third subsequent offense and sentenced the defendant accordingly; and (2) the trial judge erred in ruling, on the defendant's motion for a new trial, that the defendant would not have been successful had a motion to suppress been filed and that trial counsel's misstatement concerning the intent standard relating to the assault by means of a dangerous weapon charge was irrelevant. We remand the case for, at a minimum, findings of fact that will assist in our review of these alleged errors.

Discussion. In his decision on the new trial motion, the judge specifically found that the actions of the police did not violate the defendant's rights under the Fourth Amendment to the United States Constitution; that therefore the weapon would not have been suppressed; and that, applying the well-known analysis of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), the defendant was "not deprived of an available, substantial ground of defense by his trial counsel's failure to advance the motion." (RA 29) In addition, the judge also concluded that defense counsel's misstatement of the intent element of the assault by means of a dangerous weapon charge during his closing statement

did not constitute ineffective assistance of counsel. (RA 29-30)

The judge determined that because the jury were instructed that closing arguments do not constitute evidence and were provided with curative instructions, defense counsel's misstatement was "irrelevant" and the defendant failed to demonstrate that "justice may not have been done" at the trial. (RA 30)

Pursuant to Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001), we review the motion judge's decision denying a motion for a new trial "only to determine whether there has been a significant error of law or other abuse of discretion."

Commonwealth v. Acevedo, 446 Mass. 435, 441 (2006), quoting from Commonwealth v. Grace, 397 Mass. 303, 307 (1986). "A motion for a new trial 'is addressed to the sound discretion of the trial judge, and . . . will not be reversed unless it is manifestly unjust, or unless the trial was infected with prejudicial constitutional error.'" Acevedo, 446 Mass. at 441, quoting from Commonwealth v. Tennison, 440 Mass. 553, 566 (2003). This appellate court is required to "make [its] own independent determination on the correctness of the judge's 'application of constitutional principles to the facts as found . . . .'"

Commonwealth v. Haas, 373 Mass. 545, 550 (1977), quoting from Brewer v. Williams, 430 U.S. 387, 403 (1977). Our review of the record in considering this appeal, however, is primarily focused on defense counsel's conduct before and during trial, including

his inexplicable failure to contact a potentially exculpatory witness, failure to file a motion to suppress after scheduling hearing dates and then failing to show up, concession of three of the five charges against his client, and failure to pursue inconsistencies between the officers' testimonies. All of these matters were conspicuously absent from the judge's findings of fact in his decision denying the defendant's motion for a new trial.

In an incident involving a possible violation of the defendant's Fourth Amendment guarantee of freedom from an unlawful search and seizure, it would assist this reviewing court to have a complete record available, including testimony or an affidavit from defense counsel as to his failure to file a motion to suppress. The record shows that defense counsel recognized the importance of filing a motion to suppress and informed the defendant of his intention to do so,<sup>2</sup> yet defense counsel failed

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<sup>2</sup> In his affidavit in support of his motion for a new trial, the defendant states that when defense counsel met with him at MCI-Concord to discuss the incident, defense counsel told him that he would file a motion to suppress and send the defendant a copy. (RA 21) The defendant also gave defense counsel the telephone number of his girl friend, Lydia Mann, who witnessed the incident, so that defense counsel could contact her, which he never did. (RA 19, 21) The defendant neither received the motion to suppress (or anything else) nor heard from defense counsel again until April, 2003, when the defendant was brought to Superior Court, for what he thought was a hearing on his motion to suppress. (RA 21) Defense counsel then informed the defendant that the judge would not allow any more continuances for a motion to suppress and that they were, to the defendant's surprise, proceeding to trial. (RA 21)

not only to file the motion but also to attend two related court proceedings.<sup>3</sup> (RA 10-13)

During trial, defense counsel's inexplicable behavior continued when he specifically agreed with the Commonwealth's theory of the case, namely that the defendant obtained the handgun from a trash can after codefendant Stevenson discarded it there moments earlier.<sup>4</sup> Trial counsel conceded guilt on the

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<sup>3</sup> We have obtained the clerk's minutes from the trial court. The clerk's minutes dated January 6, 2003, state, "Cont. to 01/29/03 by agreement C/M Session [regarding] submission + scheduling of motion to suppress." The clerk's minutes dated January 29, 2003, state, "Not in court. Continued to 2-14-03 by order of court; C/M session [regarding] scheduling of motion to suppress. Notify both counsel." Then, on the date of the continuance, the clerk's minutes reflect that "[defense counsel] [n]ot in [c]ourt. [Attorney] failing to appear on last 2 dates. Case referred to Spurlock, J. for appropriate action. Case scheduled for 2-20-03 by order of [c]ourt . . . Session [hearing] [regarding] [t]rial [a]ssignment + show/cause hearing (as to Attorney's failure to appear last 2 dates)." (See also RA 10-11, 13)

<sup>4</sup> Trial counsel began his opening statement as follows:

"Good morning, ladies and gentlemen. Thank you for your patience. What am I going to do with that? He had the gun in his hand. The gun went off. No argument. You're in possession of a handgun. Not much dispute. We have some area of commonality [with the Commonwealth's theory]. Certainly there was one discharged round and six undischarged rounds in the magazine clip of that little 22. Not much dispute about that. Possession of ammunition. Certainly, Trooper Young grabbed him and they started to struggle. Mr. West resisted. Resisting arrest. Not much dispute about that." (Tr. II at 60)

Trial counsel similarly began his closing statement:

"Mr. Angelo West was resisting arrest. He did not want to be in that policeman's arms; he was trying to get away. On

charges of possession of a handgun, possession of ammunition, and resisting arrest.<sup>5</sup> The record also shows the trial judge's concern regarding counsel's defense strategies during trial.<sup>6</sup>

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the issue of possession of ammunition, there's no question that the gun was loaded. On the issue of possession of a firearm, the firearm, at least at one point, was in his hand and in his possession. We have no real quarrel with the Commonwealth's case that there was a perpetrator who was being chased and that he dumped something into a barrel that Mr. West took out of the barrel, like that. . . . He made a bad mistake, and he's willing to pay for it; but what he didn't do, what you can't convict him of, is the intentional assault with that dangerous weapon, because he didn't do that. . . . Resisting arrest, I'll give you that. Possession of a firearm and possession of ammunition are very serious charges for which he's going to pay. You don't have to waste a lot of time." (Tr. III at 87, 94, 98-99)

<sup>5</sup> Trial counsel ended his opening statement by stating:

"When it's all said and done, you're going to find Angelo West guilty of possession of a firearm; you're going to find him guilty of possession of ammunition; you're going to find him guilty of resisting arrest. Assault and battery on a policeman, that charge you will be required -- your oath will require you to acquit him." (Tr. II at 64-65)

The defendant states in his affidavit:

"My attorney never spoke to me about what he was going to say to the jury. After his opening statement I asked him what he was doing because he told the jury to find me guilty on almost all of the charges and told the jury that I grabbed a gun from a trash can. He just said, 'I know what I am doing.' I had already told him that I never grabbed anything from a trash can and I wasn't going to falsely make Brent Stevenson look guilty." (West Aff. para. 11; RA 22)

<sup>6</sup> At a sidebar conference upon codefendant's counsel's objection during counsel's closing argument, the trial judge repeatedly questioned counsel about his theory and whether his statements would help his client:

"[DEFENSE COUNSEL]: Where am I in error in stating the

While the decision to concede these charges may have been a trial tactic to advance some kind of argument on the defendant's behalf on the more serious charges of assault by means of a dangerous

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Commonwealth's theory of the case?

"THE COURT: No, but why does that help your client to say that you agree that a perpetrator dumped the gun in there. I don't understand where you're going on that. . . .

"THE COURT: I don't see how it helps Mr. West to side with the Commonwealth's version of taking the weapon out of the -- I don't understand why you need that. What's the point of it?

"[DEFENSE COUNSEL]: Because it has -- other than that, Judge, then he's a perpetrator downtown with a gun on his person looking for prey at 3 o'clock in the morning. I have to make this a moment's bad decision. He sees -- what triggers his decision to go look in the barrel is the fact that he sees Mr. Stevenson being chased by the police. Mr. Stevenson dumps swag, something, into the barrel. He goes and checks it out.

"THE COURT: How does that get your client off the hook for possession of a firearm?

"[DEFENSE COUNSEL]: It does not.

"THE COURT: How does it help your client?

"[DEFENSE COUNSEL]: It does not, Your Honor, but it explains that he's not down there with the gun -- knowingly, intentionally, holding onto the weapon. . . .

"THE COURT: I'm going to let the Commonwealth argue it, and I guess I can -- since [defense counsel] seems to have a theory -- I don't quite see the benefit to his client, but --

"[CODEFENDANT'S COUNSEL]: Then I'm going to renew my motion for severance, Judge.

"THE COURT: All right. Denied."

(Tr. III at 88-91)

weapon,<sup>7</sup> see Commonwealth v. Stoute, 10 Mass. App. Ct. 932, 933 (1980) (conceding guilt on assault charge, in effort to persuade jury to mitigate punishment by acquitting on kidnaping charge, did not constitute ineffective assistance of counsel); Commonwealth v. Durakowski, 58 Mass. App. Ct. 92, 93-94 (2003), we conclude that it is difficult for this reviewing court to make that determination absent an affidavit of trial counsel explaining his trial strategies or tactics. See Commonwealth v. McCormick, 48 Mass. App. Ct. 106, 107 (1999) (stressing importance of a complete record for this court's review under Saferian). Defense counsel's failure to file a motion to suppress may have left him no other tactical option at trial but to concede his client's guilt on three of the five charges against him.<sup>8</sup>

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<sup>7</sup> The bulk of the defendant's sentence, however, was a minimum of seven years and a maximum of ten years (the mandatory minimum) for the offense of a third subsequent possession of a firearm, which was agreed upon in the plea arrangement. On the additional charges, he was sentenced to a concurrent term of a four-year minimum and five-year maximum, plus probation of three years. (Tr. IV at 20-22)

<sup>8</sup> Even if defense counsel had a "strategy" of conceding guilt on the less serious charges in an effort to persuade the jury to acquit the defendant on the more serious charges of assault by means of a dangerous weapon, any merit to the "strategy" is questionable because of defense counsel's obvious, and perhaps prejudicial, misstatement during closing argument regarding the law of intent on those charges. Defense counsel argued to the jury that under the law of intention, "[y]ou've got to mean to do it; you've got to mean to hurt, for assault with a dangerous weapon. An intentional crime. The judge will tell you about intentional crimes, and do a better job than I could."



Any tactical merit to defense counsel's concession theory is even more dubious when compared with the theory and outcome of his codefendant's case. Codefendant's counsel began his opening statement by stating, "[West's counsel] may be willing to concede some things to you about this crime. I'm not going to concede, and you won't hear any confessions on behalf of Mr. Stevenson." (Tr. II at 65) As to the final disposition of Stevenson's case, where his defense counsel did not concede any charges against him, a required finding of not guilty was entered by the court on the charges of resisting arrest and the jury acquitted him on the charges of possessing a firearm and ammunition. (Tr. III at 60, 182)

The judge's decision on the new trial motion also fails to

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(Tr. III at 95)

Upon the Commonwealth's objection to this misstatement, the trial judge told defense counsel:

"You did kind of mix up a few things. Intent to hurt is really not quite the same intent as required for that crime of assault with a dangerous weapon. What you're -- you're kind of confusing notions of specific intent and general intent. You don't have to intend the consequence; you have to intend the act of attempting to intent to commit a battery. You don't have to intend that anybody get hurt. So it's a distinction that -- you were kind of merging -- whether you were doing it on purpose, I don't know, but it wasn't quite accurate."

(Tr. III at 115) Notably, in discussing trial counsel's closing argument in the memorandum on the new trial motion, the judge omitted reference to this explicit questioning by him at trial of trial counsel's intent in misstating the law of intention.

include findings of fact regarding Lydia Mann's observations and possible testimony (at a hearing on a motion to suppress, at trial, or both). Mann submitted an affidavit in support of the defendant's motion for a new trial in which she detailed her direct observations of the incident and stated that she expected defense counsel to contact her. The judge made no findings of fact regarding the importance and credibility of this witness. Further, not only did defense counsel not contact this potentially exculpatory witness, the judge also failed to make a finding whether defense counsel's failure to contact her constituted ineffective assistance of counsel under Saferian. See Commonwealth v. Hill, 432 Mass. 704, 718-719 (2000).

Lastly, the judge's decision on the motion contains inconsistencies regarding the testimonies of the officers. In his findings of fact, the judge quotes Trooper Young's testimony that he saw the defendant "running away from that trash can, looking over his shoulder, and moving his hands in this direction as that trash can was falling over." (RA 25, quoting from Tr. II at 101) Later in the discussion, the judge states, "Trooper Murray eventually also saw the defendant, with his hands still at his waistband, walking away with his back toward the trooper." (RA 28) Whether the defendant was "running" or "walking" is particularly important given that the affidavits submitted by Mann and the defendant claim that the defendant is physically

disabled and incapable of running. (RA 18, 20) The defendant's affidavit details how he had previously received numerous gunshot injuries that resulted in physical disabilities, how a rod had been placed in his right leg, and how on the day of the incident he walked with a brace on his right leg. (RA 20) Not only did the judge fail to make findings regarding this issue, he may have confused the issue by including observations that the defendant was both "walking" and "running" from the officers.

Given the totality of the circumstances, including the lack of an affidavit of trial counsel and the lack of findings regarding Mann's and the defendant's affidavits, we remand the case for, at a minimum, specific findings on these issues. We shall retain jurisdiction of the appeal pending action by the trial court on remand. We do not at this time opine on the merits of the judge's determinations, including that no substantial issue requiring an evidentiary hearing was presented by the new trial motion<sup>9</sup> and that a motion to suppress would not have succeeded, both of which appear likely to us to be close questions. On remand, the court may revisit any of its determinations, and conduct evidentiary and nonevidentiary

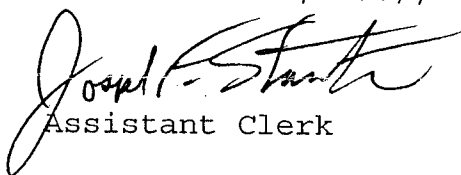
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<sup>9</sup> "An evidentiary hearing is required if the defendant's motion and affidavits raise a substantial issue. Mass.R.Crim.P. 30(c)(3), as amended, 435 Mass. 1502 (2001). 'Whether a substantial issue has been raised depends on the seriousness of the issue and the adequacy of the defendant's showing.' Commonwealth v. Britto, 433 Mass. 596, 608 (2001)." Commonwealth v. Delong, 60 Mass. App. Ct. 122, 137 (2003).

hearings in connection therewith. The appellant shall file a status report with this court thirty days from the date of this order and every thirty days thereafter until the completion of proceedings on remand.

So ordered.

By the Court (Kantrowitz, Trainor  
& Katzmann, JJ.),

  
Assistant Clerk

Entered: August 1, 2007.