

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR 917-2015
	:	
EDWARD LEONARD RIVERA, JR.,	:	
Defendant	:	

Cynthia Dyrda Hatton, Esq.	Counsel for Commonwealth Assistant District Attorney
Joseph V. Sebelin, Jr., Esq.	Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - September 13, 2019

Defendant Edward Leonard Rivera, Jr. ("Defendant" or "Mr. Rivera) has filed his July 15, 2019 Notice of Appeal from the interlocutory June 11, 2019 Order of Court entered in this matter and made final by the June 21, 2019 Order of Court wherein this Court imposed the "Sentence of the Court" attendant to Defendant's guilty plea entered in this matter. In the June 11, 2019 Order of Court, this Court denied a May 17, 2018 "Defendant's Second Motion to Withdraw Guilty Plea" filing. For the reasons set forth herein, this Court respectfully requests that the Superior Court deny the subject appeal and affirm this Court's denial of Defendant's Second Motion to Withdraw Guilty Plea and sentence imposed on June 21, 2019 as a result.

I. Factual and Procedural Posture.

A. Facts.

The Commonwealth alleges that, on or about December 4, 2014, Defendant conspired and stole various household items from Amy Burns. These items allegedly included a television, iPads, jewelry, and food. The Commonwealth has charged Defendant with Conspiracy [18 Pa.C.S.A. §903(a)], Theft By Unlawful Taking [18 Pa.C.S.A. §3921(a)], and Receiving Stolen Property [18 Pa.C.S.A. §3925(a)].

B. Procedural Posture.

On or about August 16, 2016, Defendant entered a guilty plea to one count of Receiving Stolen Property. The Court ultimately scheduled sentencing for May 15, 2017. On June 30, 2017, subsequent to the withdrawal of his then-counsel, Defendant's current counsel, Joseph V. Sebelin, Jr. Esq., filed a Motion to Withdraw Guilty Plea which this Court denied upon Defendant's failure to appear at a scheduled August 28, 2017 hearing thereupon.

Following a period of time in which Defendant had been incarcerated in Schuylkill County, this Court scheduled Defendant's sentencing for May 18, 2018. Defendant filed his Second Motion to Withdraw Guilty Plea on May 17, 2018.

This Court presided over hearing on Defendant's Second Motion to Withdraw Guilty Plea on November 6, 2018. At the November 6, 2018, Defendant maintained his innocence as to each pending charge. In addition to presenting the testimony of Amy Burns, Felicia Urbanski, and Officer Joshua Tom, the Commonwealth contended that it had been prejudiced by the death of Brian Brossman ("Mr. Brossman"), an individual contended by the Commonwealth to be a material witness and who died on November 12, 2016, approximately three months after Defendant's August 16, 2016 guilty plea.

This Court denied Defendant's Second Motion to Withdraw Guilty Plea through its June 11, 2019 Order of Court. Subsequently, this Court sentenced Defendant on June 21, 2019; Defendant thereafter, on July 15, 2019, filed this timely appeal. This Court then directed Defendant to file a concise statement of matters complained of on appeal by Order of Court dated July 16, 2019 and filed on July 17, 2019.

On July 29, 2019, Defendant filed his "1925(b) Statement of Matters Complained of on Appeal" ("Defendant's 1925(b) Statement of Matters Complained of on Appeal"). In that statement, Defendant contends that this Court:

"...committed an error of law and/or abuse of discretion by denying Defendant/Appellant, Edward Rivera, Jr.'s Motion to Withdraw Guilty Plea, by the following:

a. Misapplying the legal standard for a Defendant's request to Withdraw Guilty Plea as set forth in Commonwealth v. Carrasquillo, 115 A.3d 1284 (Pa. 2015), and more specifically, Commonwealth v. Scher, 803 A.2d 1204 (Pa. 2002), wherein [the] Pennsylvania Supreme Court held that the death of several witnesses was not sufficient to constitute 'actual prejudice[.]'

b. Specifically, by concluding that Appellant's Withdrawal of his Plea would constitute prejudice to the Commonwealth where the following facts are of record:

- i. The alleged witness (Brian Brossman died;
- ii. the alleged witness was essential to only one of the charges - conspiracy;
- iii. where the alleged witness had refused to make a statement during the officer's investigation;
- iv. where the alleged witness failed to contact the police to make a statement;
- v. where the alleged witness avoided further interaction and involvement with the Commonwealth and/or its investigating officers;
- vi. where the alleged witness had also pleaded guilty to False Reports 18 Pa.C.S. 4906, (a *crimen falsi* offense); and
- vii. where other individuals could also establish the same alleged facts which the decedent witness purportedly observed.

c. By concluding that this death of this alleged witness, and in light of all of the above facts, constituted prejudice to the Commonwealth. See Commonwealth v. Scher, 803 A.2d 1204 (Pa. 2002), wherein Pennsylvania Supreme Court held that the death of several witness[es] were not sufficient to constitute 'actual prejudice.'

See 1925(b) Statement of Matters Complained of on Appeal. In short, Defendant contends solely that the Commonwealth will not be prejudiced by either Defendant's withdrawal of his guilty

plea or by having to go to trial without a witness who passed away.

II. Legal Discussion.

A. Defendant Has Demonstrated a Fair and Just Reason for the Withdrawal of His Guilty Plea and the Existence of an Plausible Defense.

Rule 591 of the Pennsylvania Rules of Criminal Procedure provides that "at [a]ny time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, or direct, sua sponte, the withdrawal of a plea of guilty or nolo contendere and the substitution of a plea of not guilty." See Pa.R.Crim.P. 591(A). See also Pa.R.Crim.P. 591(A), Comment, citing *Commonwealth v. Randolph*, 718 A.2d 1242 (1998); *Commonwealth v. Forbes*, 299 A.2d 268 (1973) ("After the attorney for the Commonwealth has had an opportunity to respond, a request to withdraw a plea made before sentencing should be liberally allowed.").

"[T]here is no absolute right to withdraw a guilty plea; trial courts have discretion in determining whether a withdrawal request will be granted; such discretion is to be administered liberally in favor of the accused; and any determination by a defendant of a fair-and-just reason will suffice to support a grant, unless withdrawal would work substantial prejudice to the Commonwealth." See *Commonwealth v. Carrasquillo*, 115 A.3d 1284, 1292 (Pa. 2015)

citing *Commonwealth v. Forbes*, 299 A.2d at 271. Under this formulation, this Court must undertake a two-part analysis that addresses (1) whether a defendant has demonstrated a fair and just reason for the withdrawal of his guilty plea along with a plausible defense and (2) whether withdrawal of a defendant's guilty plea would substantially prejudice the Commonwealth.

"The trial courts in exercising their discretion must recognize that before judgment, the courts should show solicitude for a defendant who wishes to undo a waiver of all constitutional rights that surround the right to a trial - perhaps the most devastating waiver possible under our constitution." See *Commonwealth v. Islas*, 156 A.3d 1185, 1187 (Pa.Super. 2017) quoting *Commonwealth v. Elia*, 83 A.3d 254, 262 (Pa.Super. 2013) (further citation omitted).

"[T]he proper inquiry on consideration of such a withdrawal motion is whether the accused has made some colorable demonstration, under the circumstances, such that permitting withdrawal of the plea would promote fairness and justice. The policy of liberality remains extant but has its limits, consistent with the affordance of a degree of discretion to the common pleas courts." See *Commonwealth v. Carrasquillo*, 115 A.3d at 1292. "[A] bare assertion of innocence is not, in and of itself, a sufficient reason to require a court to grant such a request." See *Id.* at

1285. "A defendant seeking to withdraw his or her plea before sentencing need not prove his or her innocence. The defendant need only proffer a 'colorable' or 'plausible' claim of innocence..." See *Commonwealth v. Islas*, 156 A.3d at 1191.

In *Carrasquillo*, the Court:

- "...squarely rejected a *per se* approach in which any presentence motion to withdraw a guilty plea based on a claim of innocence must be granted..."
- did not "suggest[] that the Court intended the pendulum to swing fully in the other direction - from automatic grants to automatic denials of pre-sentence motions to withdraw..."
- "directed trial courts to distinguish between 'mere, bare, or non-colorable' assertions of innocence on the one hand and those that are 'at least plausible' on the other..." and
- to consider, when so distinguishing, "both the timing and the nature of the innocence claim, along with the relationship of that claim to the strength of the government's evidence [.]"

See *Commonwealth v. Islas*, 156 A.3d at 1190.

In the instant matter, the Court must exercise its discretion liberally in favor of Defendant. In so doing, this Court notes that that Defendant has satisfied his burden of demonstrating a fair and just reason for the withdrawal of his plea and the existence of a plausible defense. Defendant has provided the Court with more than just a bare assertion of innocence. See Defendant's Memorandum of Law in Support of His Motion to Withdraw Guilty Plea

at 3-8. See also *Commonwealth v. Carrasquillo*, 115 A.3d 1284 (Pa. 2015).

B. The Commonwealth will be Prejudiced by Defendant's Withdrawal of His Guilty Plea.

Notwithstanding the Court's finding that finds that Defendant has satisfied his burden of demonstrating a fair and just reason for the withdrawal of his plea and the existence of a plausible defense, the Court further finds, however, that, by virtue of the November 12, 2016 death of material Commonwealth witness - Mr. Brossman - the Commonwealth will be prejudiced by Defendant's withdrawal of his guilty plea. See generally Commonwealth's Memorandum of Law Contra Defendant's Motion to Withdraw Guilty Plea ("Commonwealth's Memorandum of Law").

In this matter, Defendant entered his guilty plea on August 16, 2016 and Mr. Brossman died approximately three months later on November 12, 2016. The Commonwealth credibly submits to this Court that Mr. Brossman would have supplied the testimony as to the following facts:

- "...that the victim, Amy Burns, never gave anyone permission to enter her home or take anything from her residence[;]"
- "...that Edward Rivera, Felicia Urbanski, and Charles Grant, while inside his [Brossman's] apartment, planned and carried out the idea to burglarize the victim's house while she was out trying to get the money she owed to Rivera[;]"

- "...that the above listed individuals left his [Brossman's] house and drove to the victim's home[;]"
- "...that Felicia Urbanski was the driver/look-out and Edward Rivera and Charles Grant would enter the [Burns] home and remove whatever they could find[;]"
- "...that the three returned to his home with a number of stolen items ranging from food, iPads, a television, and jewelry[;]"
- "...that upon completing their task, the three of them attempted to bring the stolen goods back to his [Brossman's] house and he [Brossman] wanted no part of their actions and advised them to leave[;] and
- "...that the stolen items were transported to Philadelphia by Edward Rivera, the Defendant, and Felicia Urbanski."

See Commonwealth's Memorandum of Law at [un-numbered] 4-5.

Summarily put, the Commonwealth contends that "...Brian Brossman would have supplied the necessary testimony to prove elements for the charges of Burglary, Conspiracy, Theft by Unlawful Taking, Receiving Stolen Property, and would also corroborate the testimony of the victim, Amy Burns." See Id. at [un-numbered] 5.

As delineated above, under prevailing Pennsylvania judicial pronouncements, once a defendant has met the burden of setting forth a plausible defense, this Court must consider whether the granting of a petition to withdraw a guilty plea would

substantially prejudice the Commonwealth. See *Commonwealth v. Forbes*, 299 A.2d at 271 (Withdrawal of a guilty plea not permitted if Commonwealth would be substantially prejudiced notwithstanding the existence of fair and just reason to permit such withdrawal). "Prejudice" in the context of a withdrawal of a guilty plea exists when the Commonwealth would be placed in a worse position than it would have been had the trial taken place as scheduled. See *Commonwealth v. Kirsch*, 930 A.2d 1282, 1286 (Pa.Super. 2007). See also *Commonwealth v. Blango*, 150 A.3d 45, 51 (Pa.Super. 2016); *Commonwealth v. Prendes*, 97 A.3d 337, 353 (Pa.Super. 2014).

This Court finds the Commonwealth's extensive and detailed contentions to be compelling and credible. In contrast, Defendant's contentions that the Commonwealth would not be prejudiced by Mr. Brossman's untimely death consist essentially of assertions that Mr. Brossman had not actively participated in police investigation of the facts in this matter and that he would be vulnerable under cross-examination at trial. See Defendant's Memorandum of Law in Support of His Motion to Withdraw Guilty Plea ("Defendant's Memorandum of Law") at [un-numbered] 9-10. Neither of Defendant's arguments squarely address nor refute the Commonwealth's contentions.

Additionally, Defendant places misplaced reliance upon *Commonwealth v. Scher*, 803 A.2d 1204 (Pa. 2002). Defendant cites this Pennsylvania Supreme Court case for the propositions that "[a]s to the death of a potential witness, the Pennsylvania Supreme Court has held that the death does not automatically constitute prejudice" and "that the death of several witness[es] were not sufficient to constitute 'actual prejudice.'" See Defendant's Memorandum of Law at [un-numbered] 9-10.¹

Defendant's characterization of *Commonwealth v. Scher*, which did not involve guilty plea withdrawal, over-reaches. The Pennsylvania Supreme Court in *Commonwealth v. Scher* did not broadly hold, as Defendant suggests, that the death of a witness does not constitute prejudice to a party. Rather, the Pennsylvania Supreme Court held that a party did not suffer prejudice by the death of a witness **who would not testify in that party's favor**. See *Commonwealth v. Scher*, 803 A.2d at 319-320. Phrased colloquially, *Commonwealth v. Scher*, on this point, stands only for the proposition that a party does not suffer prejudice as a result of the death of a witness who would

¹ Defendant also cites *Commonwealth v. Scher* for the proposition that "[a] claim of prejudice based on loss of evidence must show that the lost testimony or information is not available through other means." See Defendant's Memorandum of Law at [un-numbered] at 9. That Mr. Brossman provides a unique source for the testimony proffered by the Commonwealth stands implicit in the Commonwealth's argument that it would be prejudiced by the withdrawal of Defendant's guilty plea. See Commonwealth's Memorandum of Law at [un-numbered] 4-5.

testify against that party's interests. The matter before this Court, in stark contrast, involves a party prejudiced by the death of a witness *who would testify in that party's favor.*

III. Conclusion.

For the reasons set forth herein, this Court respectfully requests that the Superior Court deny the subject appeal and affirm this Court's denial, through its June 11, 2019 Order of Court, of Defendant's Second Motion to Withdraw Guilty Plea and sentenced imposed on June 21, 2019 as a result.

BY THE COURT:



Joseph J. Matika, J.

2019 SEP 13 A 04:55
CLERK OF COURT