

COMMONWEALTH OF PENNSYLVANIA
v. HOWARD SMITH, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action, No. 93-2003

Pre-sentence motion to withdraw guilty plea denied

1. The court should grant a pre-sentence motion to withdraw a guilty plea if any fair and just reason exists for such relief, unless this causes substantial prejudice to the Commonwealth.
2. A defendant is bound by statements he makes under oath during his guilty plea colloquy, and cannot assert grounds for withdrawing the plea which contradict statements he made when he pled.
3. A defendant need not be advised of the suggested minimum sentences set out in the sentencing guidelines.
4. A defendant need not be informed of a deadly weapon enhancement before entering his plea because the enhancement is a sentencing guideline provision which affects the discretionary aspects of the sentence; it is not mandatory sentencing provision.
5. Where the record showed that the defendant pled guilty knowingly and voluntarily, that he knew the enhancement applied to his case, and where he never asserted his innocence, no fair and just reason existed to permit him to withdraw his plea.

Appearances:

Dwight C. Harvey, Esq., *District Attorney*

Thomas M. Dickey, Esq., *Counsel for Defendant*

OPINION

Herman, J., August 19, 2004

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Introduction

Before the court is the defendant's motion to withdraw his guilty plea. The Commonwealth filed an answer to the motion, and the court heard argument on July 13, 2004. Counsel have filed letter briefs as directed. The matter is ready for decision.

Background

The defendant was charged with aggravated assault, three counts of recklessly endangering, and three counts of simple assault in connection with an incident which occurred on May 25, 2003. He pled guilty on January 20, 2004 to the three counts of recklessly endangering as second-degree misdemeanors, with the other charges to be dismissed. He initialed the written plea colloquy and engaged in an oral colloquy with the court on that date concerning the charges. That proceeding has been transcribed and is part of the record.

During the oral colloquy, the court stated in the presence of the defendant: "And it appears as though this might be a case where the guidelines would trigger a deadly weapons enhancement?" Mr.

Harvey: "That's - I would guess that that is correct. That would be my understanding, yes." (N.T. Proceedings of Guilty Plea Colloquy, January 20, 2004, pp. 3-4.) The defendant then testified to having read the written colloquy and understood it. Specifically, he stated he understood the maximum penalty was up to two years on each charge, for a total sentence of up to six years in jail and a \$15,000 fine. The defendant also stated that he and his counsel had reviewed the sentencing guidelines, he understood the guidelines may be affected by the fact that a weapon was used, and that no one had promised him a particular sentence. Finally, in both the written and oral colloquies, the defendant indicated he was satisfied with counsel's representation. (N.T. pp. 6-8.)

As to the facts giving rise to the charges, the defendant admitted to the court under oath that he deliberately fired his shotgun in the direction of a vehicle, near to which stood his girlfriend, her son and his niece. His girlfriend's son was slightly injured with pellet wounds to the leg and a cut to his finger. The defendant told the court he understood this created a danger to those three individuals. (N.T. pp. 8-9.)

The defendant appeared for sentencing on February 24, 2004, at which point he stated his desire to withdraw his plea. He filed a formal motion on March 8, 2004, alleging he had been misled into believing the Commonwealth would not seek a deadly weapons enhancement. "The defendant entered his plea not being aware that a weapons enhancement could apply; therefore, the defendant did not enter a knowing plea." (Motion to Withdraw, ¶ 4.)

At the hearing on this motion, it was the defendant's contention that his counsel at the preliminary hearing told him he would likely receive a 30-day sentence, and this was the reason he pled guilty. He argues that if he knew he could receive a longer sentence because of the weapons enhancement, he would have taken the case to trial.

Discussion

The court may permit a defendant to withdraw his guilty plea any time before sentence is imposed. Pa.R.Crim.P. 591. The court should grant such a pre-sentence request if any fair and just reason exists for the withdrawal, unless this would cause substantial prejudice to the prosecution. Commonwealth v. Miller, 748 A.2d 733 (Pa.Super. 2000), citing Commonwealth v. Forbes, 299 A.2d 268 (Pa. 1973). A defendant's assertion of innocence has been held to be a fair and just reason for withdrawal of a guilty plea. Commonwealth v. Randolph, 718 A.2d 1242 (Pa. 1998). At the same time, a defendant is bound by the statements he makes under oath during his guilty plea colloquy, and cannot assert grounds for withdrawing the plea which contradict statements he made when he pled. Commonwealth v. Stork, 737 A.2d 789 (Pa.Super. 1999).

To determine whether a plea was entered voluntarily and in a knowing and intelligent manner, the court must inquire into the following: (1) does the defendant understand the nature of the charges to which he is pleading guilty; (2) is there a factual basis for the plea; (3) does the defendant understand that he has the right to a jury trial; (4) does the defendant understand that he is presumed innocent until proven guilty; (5) is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged; and (6) is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such an agreement. Commonwealth v. Young, 695 A.2d 414 (Pa.Super. 1997); Commonwealth v. Willis, 369 A.2d 1189 (Pa. 1977); Pa.R.Crim.P. 590. We find the defendant has failed to show a fair and just reason for this court to permit him to withdraw his guilty plea.

As is clear from the written and oral colloquies, as well as his testimony at the hearing on this motion, the defendant knew when he entered his plea that the court could impose a sentence of up to two years on each charge. Also, he acknowledged in his written plea colloquy and testified during the oral colloquy that no one promised him a particular sentence. At the instant hearing, the defendant conceded that neither his counsel, the court, nor counsel for the Commonwealth guaranteed him a 30-day sentence, or a sentence of any other length for that matter.

It is well-established that the defendant need not be advised of the suggested minimum sentences set out in the sentencing guidelines. Commonwealth v. Wilson, 829 A.2d 1194 (Pa.Super. 2003); Commonwealth v. Kreiser, 582 A.2d 387 (Pa.Super. 1990); Commonwealth v. Septak, 518 A.2d 1284 (Pa.Super. 1986). Furthermore, there is no requirement that the defendant be informed about the deadly weapons enhancement before entering his plea because that enhancement is a sentencing guideline provision which affects the discretionary aspects of the sentence; it is not a mandatory sentencing provision. Id. In any event, it is clear from the record of the plea proceeding that the defendant knew before he pled guilty that the enhancement was at play in this case.

Finally, the defendant has not asserted he is innocent of the three counts of recklessly endangering. Miller, *supra*. It is wholly disingenuous for him now to try to disown representations he made under oath to the court at the plea proceeding as to his voluntary and knowing plea and the facts

underlying these charges. Young, *supra*; Stork, *supra*.

ORDER OF COURT

Now this 19th day of August 2004, the court denies the defendant's motion to withdraw his guilty plea.