

COMMONWEALTH OF PENNSYLVANIA vs.
KENNETH L. MILLER, C.P. Franklin County Branch,
Criminal Division, No. 1253 of 1998

Commonwealth v. Miller

Withdrawal of guilty plea

1. At any time before sentencing, the trial court may permit or direct a guilty plea to be withdrawn and a plea of not guilty substituted.
2. A guilty plea may be withdrawn before sentencing if there is no substantial prejudice to the prosecution and if there is a fair and just reason.
3. A defendant who agrees to plead nolo contendere for a DUI in exchange for a sentence recommendation of thirty (30) days from the Commonwealth may not withdraw his or her guilty plea because the discovery of his undisclosed, out-of-state DUIs would likely increase the sentence despite the Commonwealth's recommendation.

T.R. Williams, Assistant District Attorney, Attorney for the Commonwealth
Deborah K. Hoff, Assistant Public Defender, Attorney for the Defendant

OPINION

Walker, P.J., June 11, 1999:

Factual and Procedural Background

On May 17, 1998, Kenneth Miller was involved in a motor vehicle accident. Following the accident, he was picked up by a police officer while walking along the side of the road. At that time, Miller offered to the officer that he had consumed one beer after the accident. The officer took him into custody and had blood taken from the defendant at Chambersburg Hospital after the appropriate warnings were given. The test showed a .13% B.A.C. Following a preliminary arraignment with an issuing authority later that evening, the defendant was released on three thousand dollars (\$3,000) bail.

The defendant was formally charged by information with operating a motor vehicle while under the influence of alcohol, along with other summary offenses. The Commonwealth negotiated a plea agreement with the defendant whereby he would plead nolo contendere to the DUI in exchange for a drop of the summary charges and a recommended sentence of thirty (30) days to the Court. On February 8, 1999, the defendant entered a plea of nolo contendere in accordance with the plea agreement. The Commonwealth stated to the Court at that time that it would proceed without a presentence report.

A plea colloquy was conducted at that time and the defendant was advised of the charge, his obligation to pay restitution, the terms of the plea agreement, the fact that the total maximum penalty for this third offense of DUI was five years imprisonment and/or a ten thousand dollar (\$10,000) fine, and that it was believed by the Commonwealth to be a first offense for mandatory sentencing purposes carrying a forty-eight (48) hour mandatory sentence. Further, it was orally confirmed on the record that the defendant read, answered, and initialed the written colloquy and that he discussed the incident and the plea agreement with his attorney.

On February 17, 1999, the defendant's attorney made a motion for a continuance of the sentencing proceeding so that a presentence report could be prepared. Earlier, the defendant had waived a presentence report. However, at the time the defendant entered his plea in accord with the plea agreement, it was not known to the Commonwealth or the defendant's attorney that the defendant had three prior DUI's in the State of New York. Because this Court believed a presentence report would be valuable in determining the defendant's sentence, the motion for a continuance was granted.

The sentencing proceeding was held on April 14, 1999, at which point the defendant made a motion to withdraw his

nolo contendere plea. His attorney explained to the court that the defendant had agreed to and fulfilled the plea agreement because he believed the New York DUI's would not be included for sentencing. Because the New York DUI's would be included for sentencing, the Commonwealth's sentence recommendation of thirty days became moot. The defendant argued that he was told he could withdraw his plea if the sentence eventually did not materialize.

This court then explained to the defendant that it would have sentenced thirty days to twenty-three months before learning of the New York DUI'S, and made it clear that the court was unaware of the New York DUI's when it accepted his plea. Further, the court reminded the defendant that the Commonwealth had agreed to drop the summary offenses and recommend a thirty day sentence, which it fulfilled. The court then denied the motion to withdraw the plea. The sentencing proceeding continued and the defendant was given an opportunity to speak. He said that he had come to believe that he was not guilty of the DUI. The court then imposed a sentence of 12 to 60 months in a state correctional institution, along with a fine of four hundred and fifty dollars (\$450.00) and the costs of prosecution. It explained to the defendant that the reason for the sentence was that the defendant had been guilty of DUI a total of six times since 1990, and that the defendant had to appreciate the seriousness of the offense and the danger of his actions to society. The defendant was then advised of his right to file post sentence motions and appeal to the Superior Court of Pennsylvania, and that he could continue to be represented by the Public Defender's office if he could not afford an attorney.

The defendant then made a motion to modify and/or withdraw the nolo contendere plea on April 28, 1999. That motion was denied. The defendant then filed a notice of appeal to the Superior Court of Pennsylvania on May 6,

1999. This court received a statement of matters complained of on appeal from the defendant on May 25, 1999 pursuant to this court's order. On appeal, the defendant argues that he should have been permitted to withdraw his nolo contendere plea before he was sentenced pursuant to Pa.R.Crim.P. 320 and that this court abused its discretion by not allowing him to do so.

Discussion

Rule 320 of the Pennsylvania Rules of Criminal Procedure states that "[a]t any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted." The decision by a trial court on whether or not to permit a defendant to withdraw a guilty plea will be undisturbed absent an abuse of discretion. *Commonwealth v. Boatwright*, 404 Pa. Super. 159, 566 A.2d 893, 894 (1989), alloc. denied, 525 Pa. 632, 578 A.2d 926 (1990). The current standard in Pennsylvania governing withdrawal of guilty pleas before sentencing allows withdrawal only when there is no substantial prejudice to the prosecution and if there is a "fair and just reason. *Commonwealth v. Forbes*, 450 PA 185, 299 A.2d 268 (1973). This standard from *Forbes* is to be applied liberally to help facilitate the efficient administration of justice. *Id.*

In *Forbes*, however, the defendant had no plea agreement with the Commonwealth. The instant case is distinguishable from the *Forbes* precedent because the defendant in that case had plead guilty to the crime and had made assertions of his innocence very early in the proceedings. *Id.* at 192. Here, the defendant did not assert his innocence until the day he appeared in this court for his sentencing. This court had previously accepted his plea of nolo contendere and found that it was 'voluntarily and intelligently made' after a colloquy was made pursuant to Rule 319 of the Pennsylvania Rules of Criminal Procedure. During the colloquy, the defendant was asked if he

understood that it was his overall third offense and first offense for mandatory sentencing purposes. Instead of forthrightly informing this court that he had three other DUI's in New York, the defendant deceitfully concealed them and simply answered affirmatively. However, in the time between the defendant's plea and his sentencing, information from NCIC regarding the defendant's prior record of DUI's in New York state surfaced.

The defendant had not disclosed the information of his New York DUI's to this court, the Commonwealth or even his own attorney at any time. This court believes that he obviously agreed to the terms of the plea agreement at the time because he felt he was getting an advantageous opportunity. He knew of the New York DUI's and he also knew that the Commonwealth did not have knowledge of them at that time. Therefore, a thirty day sentence recommendation was very favorable to the defendant. He entered a plea of nolo contendere while knowingly concealing the existence of his New York offenses. Then, when he learned that the Commonwealth had information on the New York offenses that would increase his sentence and make the Commonwealth's recommendation of thirty days inconsequential, he discovered that he had been innocent of the charge the entire time. Nonetheless, the Commonwealth fulfilled its part of the plea agreement by recommending thirty days as the appropriate sentence.

While in *Forbes* a mere assertion of innocence was a 'fair and just' reason to withdraw a guilty plea prior to sentencing, its erudition has not been without question. However, this court does not have to question the soundness of *Forbes* because it may be factually distinguished in cases where the defendant is clearly using a plea withdrawal in an attempt at chicanery. For example, in *Commonwealth v. Cole*, the court decided a case in which a defendant elected to withdraw his plea of guilty before sentencing when he learned that one of the witnesses for the

prosecution was not available to testify against him. The court stated that "A criminal defendant will not be permitted to play fast and loose with the guilty plea process in order to delay prosecution or jeopardize the Commonwealth's ability to prove guilt...To permit him to withdraw his guilty plea after the witness had returned to her home in Georgia would be to permit appellant to use his motion to withdraw for the improper purpose of gambling on the Commonwealth's ability to produce the witness for a second trial. This is the type of prejudice to the Commonwealth against which the rule was intended to protect." *Commonwealth v. Cole*, 387 Pa. Super. 328, 334, 564 A.2d 203 (1989).

The type of gamesmanship attempted in *Cole* was also at work in the instant case as the defendant hoped nobody would discover his out of state DUI's. Based on his knowing, deliberate deception of this court and the Commonwealth, the defendant hoped to subvert the criminal justice system. The defendant wanted to withdraw his nolo contendere plea solely because he learned that his New York DUI's were discovered by the Probation Department and that it recommended a twelve month sentence.

Given these facts, this court cannot agree with that the 'fair and just' determination of the court should have been to allow him to withdraw his plea. The defendant, a six time offender of DUI, should not be rewarded for his failed attempt to brazenly deceive the court. The defendant had the *opportunity* to withdraw his plea, but after consideration of the facts surrounding the withdrawal, this court did not grant it. In addition, because there has not been a hearing to this point, there would be substantial prejudice against the Commonwealth given the lapse in time from the offense to any subsequent hearing. The offense having occurred in May of 1998, any witnesses available to the prosecution at

this point have had over one year to forget details of the incident.

A copy of the pre-sentence report is attached to this opinion and made a part of the record.

Wherefore, this court would respectfully request the Superior Court to dismiss appellant's appeal.

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