

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

STEPHON A. CALLENS,

Appellant

No. 1712 WDA 2013

Appeal from the Order Entered October 8, 2013
In the Court of Common Pleas of Blair County
Criminal Division at No.: CP-07-CR-0000220-2013

BEFORE: BOWES, J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY JENKINS, J.

FILED JULY 03, 2014

Stephon Callens appeals from an order denying his motion to withdraw his guilty plea for aggravated assault. We affirm.

Having examined the record, the briefs of the parties, and the applicable law, and the thorough and well-reasoned opinion of the Honorable Elizabeth Doyle of the Court of Common Pleas of Blair County, we conclude that Judge Doyle's opinion accurately disposes of Callens' claim that the court erred in refusing to permit him to withdraw his guilty plea. Accordingly, we adopt her opinion as our own and affirm the order denying leave to withdraw on that basis. **See** Trial Court Opinion (finding that Callens' motion to withdraw guilty plea was "gamesmanship" and that

* Former Justice specially assigned to the Superior Court.

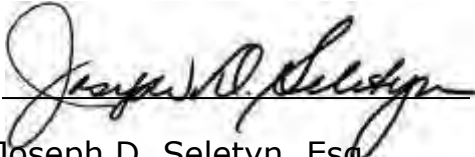
Callens did not suffer manifest injustice through court's refusal to permit him to withdraw his plea, since Callens had already litigated pretrial motions unsuccessfully through court-appointed counsel; demanded new counsel on date of jury selection on basis that he did not like counsel and did not want to select jury with him; became disruptive when court denied his continuance and was removed from courtroom; spoke with counsel and another attorney from the same office and filled out guilty plea colloquy form; stood mute when his attorney told the court that he was making intelligent and knowledgeable decision to plead guilty after discussing his situation with counsel; asserted to court that he wanted to plead guilty and accept plea offer in mitigated sentencing range; asserted to court that he understood the rights he was giving up and that he was not under influence of anything that would prevent him from understanding what was happening in the courtroom; and asserted to court that he was pleading guilty of his own free will, and that nobody was forcing him to plead guilty)¹.

Order affirmed.

¹ We make one minor observation. On page 4 of the opinion, the trial court states that Callens claimed that the written answers to questions 33 and 35 on his guilty plea colloquy form were "accurate". Similarly, on page 8 of the opinion, the trial court wrote that Callens claimed at the hearing on his motion to withdraw his guilty plea that the answers to questions 33 and 35 were "accurate". We believe that the trial court intended to write that Callens claimed that his answers were *inaccurate*, and we construe the opinion accordingly.

J-S24029-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/3/2014

EXHIBIT E

P.D.

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA
COMMONWEALTH OF PENNSYLVANIA,

v.

2013 CR 220

STEPHON CALLENS,
DEFENDANT.

ELIZABETH A. DOYLE

PRESIDING JUDGE

DISTRICT ATTORNEY'S OFFICE

COUNSEL FOR COMMONWEALTH

THEODORE KROL, ESQ.

COUNSEL FOR DEFENDANT

Opinion in Support of Order pursuant to Pa. R App. Proc. 1925

Procedural Posture

The Appellant in this case pled guilty to Aggravated Assault on September 9, 2013. He was sentenced that date to 2 to 5 years in a state correctional institution consecutive to any sentence he was currently serving. He was serving two 6-month sentences for PFA violations involving the same victim. He filed a Motion to Withdraw Guilty Plea on September 17, 2013. Hearing was held and the Motion to Withdraw Guilty Plea was denied on October 8, 2013. Appellant appeals that Order.

Concise Statement of Matters Complained of on Appeal

Appellant claims that the Court erred in not allowing him to withdraw his guilty plea.

Facts

Because of a domestic incident on January 5, 2013, the appellant was charged with Aggravated Assault, False Imprisonment, Endangering

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the Welfare of a Child, Simple Assault, Recklessly Endangering Another Person (two counts) Theft By Unlawful Taking and Receiving Stolen property. Patrolman Angermeier of the Altoona Police responded to the incident that day and saw the victim, Kirsten Wright, whose face was very bruised, swollen, and bloody. She suffered a broken tooth and had bruises up and down her arm. She reported that Appellant assaulted her.

On January 5, 2013, Appellant waived his rights and gave a statement to Altoona Police in which he admitted that he had a verbal altercation with the victim that escalated into something more serious. He stated that the victim told him she did not love him anymore and he "just blacked out, I just lost it, like I don't even remember what I was doing, I just remember swinging my arms a lot. Like, really hard and really fast, swinging my arms." He said that he was swinging his arms at the victim and he could hear his daughter and son crying and the victim yelling. He looked down and the victim was on the ground and there was blood on his hands and on his jeans. His hands were all cut up. He knew he hit the victim pretty hard. The parties' son was underneath her in a fetal position.

Appellant was given court-appointed counsel who filed a suppression motion alleging that he had been coerced into giving that statement. Hearing was held on the Motion and the Court, the Honorable Timothy S. Sullivan, denied the motion. The matter came before the Court for jury selection. Appellant said he wanted a continuance to get new

counsel. He did not have alternate counsel available on jury selection day, and he did not make any credible assertion that he would be able to afford or obtain private counsel if the Court continued the matter. He merely stated that he did not like his present counsel and did not want to select a jury with him. The Court denied his continuance and told him that he could proceed to jury selection with current counsel or proceed as a self-represented litigant. Appellant became disruptive, loud, and uttered obscenities. He was removed. When he returned at least 20 minutes later, he spoke to his court appointed counsel and another attorney from the same office. He filled out a guilty plea colloquy form. His counsel stated on the record that he and another attorney had discussed with Appellant the details of the case and the advantages and disadvantages of going to trial versus taking a plea, and that he believed Appellant was making an intelligent and knowledgeable decision. Appellant did not contradict this.

Appellant was then colloquied by the Court. He asserted in his oral colloquy that he wanted to plead guilty and accept the Commonwealth's plea offer, which was in the mitigated range of sentencing. He asserted that he was not under the influence of anything that would prevent him from understanding what was happening in the courtroom that day. He said he understood his right to jury trial, that by pleading guilty he understood he was giving up that right, and that knew he was presumed innocent and had the right to remain silent. He said he knew the range of

penalties for the offense. He said he was pleading guilty of his own free will. He said he understood what the crime of Aggravated Assault was and that he was pleading guilty to that crime. The Court accepted his guilty plea and sentenced according to the plea agreement. At hearing about whether he could withdraw his guilty plea, he said that the written answers to questions 33 and 35 in his guilty plea colloquy form were accurate in that someone had used force or threat against him to have him plead guilty and that he did not plead guilty of his own free will. He admitted that he was colloquied verbally after he filled out the written guilty plea colloquy form and did not tell the Court that he felt or was coerced in any way to plead guilty. He never asserted actual innocence. Rather, the reason he gave for wanting to withdraw the guilty plea was that he felt he could win at trial.

Discussion

Appellant claims that the Court erred in not allowing him to withdraw his guilty plea. Appellant's request to withdraw his guilty plea came after sentencing. A defendant has no right to withdraw a guilty plea; rather, the decision to grant such a motion lies within the sound discretion of the trial court. Commonwealth v. Hutchins, 453 Pa.Super. 209, 683 A.2d 674, 675 (1996). In the case of Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973), the Supreme Court set forth the standard for determining when a motion to withdraw a guilty plea prior to sentencing should be granted. The Court stated that "[a]lthough there is

no absolute right to withdraw a guilty plea, properly received by the trial court, it is clear that a request made before sentencing ... should be liberally allowed." 450 Pa. at 190, 299 A.2d at 271. The Court then outlined the now well-established two prong test for determining when to grant a pre-sentence motion to withdraw a plea: (1) the defendant has provided a "fair and just reason" for withdrawal of his plea; and (2) the Commonwealth will not be "substantially prejudiced in bringing the case to trial." *Id.*

The standard for withdrawal of a guilty plea after imposition of sentence is much higher; a "showing of prejudice on the order of manifest injustice is required before withdrawal is properly justified." *Commonwealth v. Carpenter*, 555 Pa. 434, 454, 725 A.2d 154, 164 (1999) (quoting *Commonwealth v. Shaffer*, 498 Pa. 342, 346, 446 A.2d 591, 593 (1982)). "A plea rises to the level of manifest injustice when it was entered into involuntarily, unknowingly, or unintelligently." *Commonwealth v. Stork*, 737 A.2d 789, 790 (Pa.Super.1999) (citation omitted).

A showing of manifest injustice is required after imposition of sentence since, at this stage of the proceeding, permitting the liberal standard enunciated in *Forbes* might encourage the entrance of a plea as a "sentence testing device." *Commonwealth v. Muntz*, 428 Pa.Super. 991, 630 A.2d 51, 53 (1993) (citing *Commonwealth v. Starr*, 450 Pa. 485, 489, 301 A.2d 592, 594 (1973)). If a plea of guilty could be retracted with

ease after sentencing, the accused might be encouraged to plea guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe.

We note that disappointment by a defendant in the sentence actually imposed does not represent manifest injustice. See Commonwealth v. Munson, 419 Pa.Super. 238, 615 A.2d 343 (1992). In Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973), the Supreme Court of Pennsylvania held that a mere claim of innocence constitutes a "fair and just reason" for the pre-sentence withdrawal of a guilty plea unless there is substantial prejudice to the Commonwealth. "The rule in *Forbes* is made, perhaps oversolicitously, in favor of justice, to protect against the possibility that an innocent defendant will erroneously plead guilty." Commonwealth v. Iseley, 419 Pa.Super. 364, 375, 615 A.2d 408, 413 (1992). The goal of the rule, however, was not to facilitate "gamesmanship and cyclical manipulation" by an accused. *Id.* at 375, 615 A.2d at 413-14. Therefore, "[a] criminal defendant will not be permitted to play fast and loose with the guilty plea process...." Commonwealth v. Cole, 387 Pa.Super. 328, 334, 564 A.2d 203, 206 (1989).

In this case, the totality of the record shows that Appellant in this case has engaged in gamesmanship. He was provided counsel who litigated pretrial motions on his behalf. When the matter came before the Court for jury selection, Appellant said he wanted a continuance to get new counsel. He did not have alternate counsel available on jury selection

day, and he did not make any credible assertion that he would be able to afford or obtain private counsel if the Court continued the matter. He merely stated that he did not like his present counsel and did not want to select a jury with him. The matter had been previously continued. The Court denied his continuance and told him that he could proceed to jury selection with current counsel or proceed as a self represented litigant.

Appellant became disruptive, loud, and uttered obscenities. He was removed. When he returned at least 20 minutes later, he spoke to his court appointed counsel and another attorney from the same office. He filled out a guilty plea colloquy form. He stood mute and did not contradict his attorney when his attorney told the Court that he believed Appellant was making an intelligent and knowledgeable decision to plead guilty after discussing the advantages and disadvantages of going to trial with his counsel. Appellant was colloquied by the Court. He asserted in his oral colloquy that he wanted to plead guilty and accept the Commonwealth's plea offer, which was in the mitigated range of sentencing. He asserted that he was not under the influence of anything that would prevent him from understanding what was happening in the courtroom that day. He said he understood his right to jury trial, that by pleading guilty he understood he was giving up that right, and that knew he was presumed innocent and had the right to remain silent. He said he knew the range of penalties for the offense. He said he was pleading guilty of his own free will. He said he understood what the crime of

Aggravated Assault was and that he was pleading guilty to that crime. The Court accepted his guilty plea and sentenced according to the plea agreement, in the mitigated range.

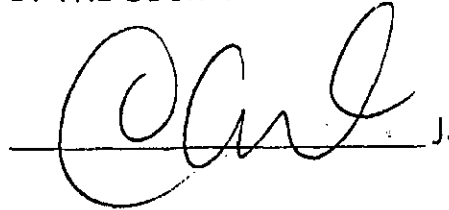
At hearing about whether he could withdraw his guilty plea, he said that the written answers to questions 33 and 35 in his guilty plea colloquy form were accurate in that someone had used force or threat against him to have him plead guilty and that he did not plead guilty of his own free will. He admitted that he was colloquied verbally after he filled out the written guilty plea colloquy form and did not tell the Court that he felt or was coerced in any way to plead guilty during the totality of the colloquy, before the colloquy, or after the colloquy. He never asserted actual innocence. Rather, the reason he gave for wanting to withdraw the guilty plea was that he felt he could win at trial.

This is gamesmanship in the nature of "buyer's remorse", not a manifest injustice to Appellant warranting permission to withdraw his guilty plea. Appellant does not succeed in his burden of showing that the plea was involuntary or entered without knowledge of the charge. His oral colloquy, in which he specifically stated that no one was forcing him to plead guilty against his will, and his action in standing mute and not challenging his counsel when he asserted Appellant had been informed of his choices and the advantages and disadvantages of going to trial versus a plea, belie his later gamesmanship of pointing out different answers in his previous written colloquy and asserting he could win at trial.

Conclusion

The Court acted in its discretion in refusing to allow Appellant to withdraw his guilty plea after sentencing. This was not an abuse of discretion because Appellant was engaging in gamesmanship with the plea process and did not suffer manifest injustice. His plea was counseled and entered knowingly, voluntarily, and intelligently. He received the benefit of the plea bargain, under which he received a mitigated range sentence. He did not assert actual innocence. Based on the law and the record, his appeal should be dismissed.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Carl J.", is written over a horizontal line.

Date: 11-7-13