NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DAVID ADAMS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 456 EDA 2011

Appeal from the Judgment of Sentence of January 18, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-009444-2010

BEFORE: OLSON, J., WECHT, J., and COLVILLE, J.*

CONCURRING MEMORANDUM BY WECHT, J. **FILED JUNE 04, 2013**

I concur in the result reached by the learned majority. I agree that Appellant failed to preserve the claim that his *nolo contendere* plea was not entered knowingly, intelligently, and voluntarily. I write separately to note my disagreement with some of the statements made by the trial court during the plea colloquy. Had Appellant's issue properly been preserved, I would ultimately agree with the majority that Appellant's plea was entered knowingly, intelligently, and voluntarily because the trial court's mistakes did not rise to the level of rendering Appellant's plea invalid.

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* Retired Senior Judge assigned to the Superior Court.

In order for a plea to be entered knowingly, it is imperative that a defendant have a basic understanding of the legal framework within which he is acting. ***See Commonwealth v. Flanagan***, 854 A.2d 489, 502 (Pa. 2004) (plea entered unknowingly because trial court inaccurately explained accomplice liability); ***see also Commonwealth v. West***, 378 A.2d 1298, 1292 (Pa. Super. 1977) ("[T]he defendant must be informed of the nature of the offense with which he is charged, the procedural safeguards that he will lose if he enters his plea, and the terms of the negotiated plea bargain."). Here the trial court made several statements which did not accurately convey the law to Appellant.

In explaining the choice to Appellant between a plea and a trial, the trial court erroneously stated to Appellant that in a trial "you have to present your information and your facts to me, and I have to weigh all the facts." Notes of Testimony ["N.T."], 1/18/11, at 5. This account of criminal proceedings is wholly inaccurate. A defendant has the right, not the obligation, to present his account of the facts to the trial court. "The right of an accused to testify on his own behalf is a fundamental tenet of American jurisprudence and is explicitly guaranteed by Article I, Section 9 of the Pennsylvania Constitution." ***Commonwealth. v. Baldwin***, 8 A.3d 901, 902-03 (Pa. Super. 2010), *aff'd,* 58 A.3d 754 (Pa. 2012). A defendant has the right not to testify. "The guarantee against self-incrimination is absolute. [A defendant] cannot be compelled to give evidence against himself." ***Commonwealth v. Reese***, 354 A.2d 573, 575 (Pa. 1976). The

Commonwealth has the burden. The trial court's comment notwithstanding, the defendant emphatically does not "have to present [his] information and [his] facts. . . ." N.T. at 5. He enjoys the unqualified constitutional right to remain silent and to put the Commonwealth to its proof on each element of each count charged. The trial court should have told Appellant that he was not required to present evidence, but that, if he chose to do so, that evidence would be considered like all other evidence.

Similarly, the trial court misstated its role during a criminal trial. The trial court informed Appellant: "That's what you do when you are the trier of the fact, you see which side weighs – the truth weighs more on." N.T. at 5, 7. Plainly, the trial court was mistaken. It erroneously invoked the burden of proof applicable to civil cases. A criminal defendant is under no obligation whatsoever to present any evidence to the fact-finder. In a criminal case, the trial court does not weigh the facts of one party against those presented by the opposing party. The Commonwealth has the sole burden of proving a defendant guilty. There is a "never-shifting burden upon the Commonwealth to prove every essential element of the charge it makes against the defendant." ***Commonwealth v. Rose***, 321 A.2d 880, 883 (Pa. 1974) (citation omitted). The fact-finder's role is to determine whether the Commonwealth has met its burden to prove the defendant guilty beyond a reasonable doubt. If a defendant chooses to present evidence to the trial court, that evidence should be considered along with the Commonwealth's evidence, but the burden always remains with the Commonwealth.

Finally, the trial court erroneously stated that "a no contest plea says, I'm not guilty." N.T. at 8. While the trial court did much to correct this mistake by further explaining the effects of a no contest plea, I would caution it to state the law with more precision. ***Id.*** at 8-10. The trial court's statement was incorrect and misleading. Only a not guilty plea conveys a denial of guilt. A no contest plea indicates neither an admission nor a denial of guilt. Rather, the plea indicates that the defendant "does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for the purposes of the case to treat him as if he were guilty." ***Commonwealth v. Boyd***, 292 A.2d 434, 435 (Pa. Super. 1972) (quoting ***Hudson v. United States***, 272 U.S. 451 (1926)).

These inaccuracies notwithstanding, had Appellant's claim not been waived, I would agree that the plea was made knowingly, intelligently, and voluntarily based upon the totality of the circumstances, as explained by the majority and by the trial court opinion that the majority adopted. Nonetheless, and particularly in view of the stakes involved, I would take the opportunity to remind and encourage trial courts to state the law accurately when addressing the accused during a plea colloquy.