

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37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 entered January 18, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-009444-2010.

BEFORE: OLSON, WECHT AND COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.:

FILED JUNE 04, 2013

Appellant, David Adams, appeals from the judgment of sentence entered on January 18, 2011 in the Criminal Division of the Court of Common Pleas of Philadelphia County. We affirm.

On January 18, 2011, Appellant entered a plea of *nolo contendere* to burglary, 18 Pa.C.S.A. § 3502(a), and terroristic threats, 18 Pa.C.S.A. § 2706(a)(1). Immediately thereafter, the trial court sentenced Appellant to a mitigated sentence of one to two years' incarceration, together with a consecutive term of two years' reporting probation.

The trial court aptly summarized the relevant facts as follows:

On January 18, 2011, before entering the plea of *nolo contendere* in open court, [Appellant] read and discussed a written colloquy with his attorney. The colloquy detailed the

*Retired Senior Judge assigned to the Superior Court.

charges, the maximum sentence and his rights at trial. The colloquy also required [Appellant] to sign in confirmation that he was not threatened or promised anything, and he agreed to go forward with his no contest plea with no plea bargain agreement of any kind. When [Appellant's] case was called that morning, he was undecided on whether to proceed with a plea or waiver trial indicating, "I'm not really sure if I should take this matter to trial, what the outcome would be, because you know I really feel as though that I did not burglarize anyone." The court explained and compared the difference between a trial [and] a *nolo contendere* plea. [Appellant] was informed that [a no contest plea meant he was not admitting guilt but that he would not contest] the Commonwealth's assertions. The [trial c]ourt further clarified that if she only hears one side of the story she will believe that side, and with a plea of no contest she would find [Appellant] guilty. [Appellant's] matter was placed on hold and several other cases were heard. Following a discussion with his counsel, during this period, [Appellant] determined he would go forward with a no contest plea. Later that afternoon, following another discussion with his attorney, [Appellant] decided [] instead to proceed with a waiver trial.

The [trial c]ourt began to colloquy [Appellant] for a waiver trial, explaining the difference between a jury and a bench trial. When [Appellant] was asked for assurance that he wanted a waiver trial, he initially confirmed he wanted the [trial] judge to decide for him, but later indicated he was, "not really sure." The [trial c]ourt explained the judicial process further to [Appellant] and told him that he would need to make a decision. The [trial c]ourt reminded [Appellant] it was now 4:30 p.m. and he spent the entire day considering his options while discussing the matter with his attorney. [Appellant] then stated, "I'll just take the plea. Is it too late for that?" The [trial c]ourt responded that it was not too late, but a decision was needed on what [Appellant] wanted to do. [Appellant] stated, "Judge, I want you to hear the case, but what [my attorney] is telling me is --." The [trial c]ourt emphasized to [Appellant] that his attorney was there to give him advice, but the decision is ultimately up to him.

Following a third or fourth discussion with his attorney, [Appellant] again decided to enter a plea of no contest. The [trial j]udge began another colloquy for the plea, asking [Appellant] **twice** whether he was definitely entering a plea of

no contest. After the colloquy[,] the [trial c]ourt determined [that Appellant] entered his plea knowingly, voluntarily, and intelligently. The Commonwealth read the facts of the case into [the record]. The [trial c]ourt asked [Appellant] if he contested the facts. After again conferring with counsel, [Appellant] replied, "I do not contest."

The [c]ourt [c]rier proceeded to arraign [Appellant] who initially pleaded "not guilty" to charges of [t]erroristic [t]hreats and [b]urglary, then subsequently with further questioning pleaded "no contest" to both charges. During his allocution, [Appellant] expressed displeasure with his decision and said he took the wrong type of plea, denying all allegations against him.

Trial Court Opinion, 4/25/12, at 1-3 (record citations omitted).

Appellant did not seek reconsideration of his sentence or request any other form of post-sentence relief. Instead, on January 28, 2011, Appellant filed a timely notice of appeal. Pursuant to an order issued by the trial court, Appellant filed a concise statement of errors complained of on appeal on September 28, 2011. The trial court issued its Rule 1925(a) opinion on April 25, 2012.

Appellant's brief asks us to consider the following issue:

Did the trial court err when it found that Appellant entered his *nolo contendere* plea knowingly, intelligently and voluntarily?

Appellant's Brief at 2 (block capitalization omitted).

We conclude that Appellant is not entitled to relief. As a preliminary matter, in failing to raise an objection at the plea hearing or by way of post-sentence motion, Appellant has waived appellate review of the validity of his *nolo contendere* plea. ***Commonwealth v. Tareila***, 895 A.2d 1266, 1270 (Pa. super. 2006) ("Where an appellant fails to challenge his guilty plea in

the trial court, he may not do so on appeal.”); **Commonwealth v. Watson**, 835 A.2d 786, 791 (Pa. Super. 2003) (same); **Commonwealth v. D’Collanfield**, 805 A.2d 1244, 1246 (Pa. Super. 2002) (“In order to preserve an issue related to the guilty plea, an appellant must either object[] at the sentence colloquy or otherwise rais[e] the issue at the sentencing hearing or through a post-sentence motion.”).

Moreover, even if we were to reach the merits of Appellant’s claim, we would deny relief. We reach this conclusion after careful review of the certified record, including the parties’ appellate submissions, the opinion of the trial court, the notes of testimony from Appellant’s plea hearing, and the filings made before the trial court. Based upon our review, we find that the trial court has adequately and accurately addressed the issue raised by Appellant. Accordingly, we adopt the trial court’s opinion as our own. The parties are directed to include a copy of the trial court’s opinion with all future filings related to our disposition in this appeal.

Judgment of sentence affirmed.

Wecht, J., files a Concurring Memorandum.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Sambeth", written over a horizontal line.

Prothonotary

Date: 6/4/2013

APPEALS

APR 27 2012

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA-PHILADELPHIA DISTRICT ATTORNEY'S OFFICE
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0009444-2010
 :
 v. : 456 EDA 2011
 :
 DAVID ADAMS :
 :

OPINION

FILED

APR 25 2012

Criminal Appeals Unit
First Judicial District of PA

COVINGTON, J.

PROCEDURAL HISTORY

On January 18, 2011, the Defendant was found guilty, following a Nolo Contendre plea, of Burglary (18 §3502 §A) and Terroristic Threats (18 §2706 §A1). Defendant was sentenced to one (1) to two (2) years incarceration followed by two (2) years probation.

On February 18, 2011, the defendant filed a timely appeal. The defendant filed a 1925(b) statement with the Court on September 28, 2011. The following opinion is based upon the defendant's appeal.

FACTUAL HISTORY

On January 18, 2011, before entering the plea of nolo contendere in open court, the Defendant read and discussed a written colloquy with is attorney. N. T. 1/18/2011 p 21. The colloquy detailed the charges, the maximum sentence and his rights at trial. The colloquy also required the Defendant to sign in confirmation that he was not threatened or promised anything, and he agreed to go forward with his no contest plea with no plea bargain agreement of any kind. When the Defendant's case was called that morning, he was undecided on whether to proceed

with a plea or waiver trial indicating, "I'm not really sure if I should take this matter to trial, what the outcome would be, because you know I really feel as though that I did not burglarize anyone." N. T. 1/18/2011 pp. 3-4. The court explained and compared the difference between a trial to a nolo contendere plea. *Id.* At 4-5. Defendant was informed he would not be able to defend himself against the Commonwealth's assertions. *Id.* At 6-9. The Court further clarified that if she only hears one side of the story she will believe that side, and with a plea of no contest she would find the Defendant guilty. *Id.* At 9. Defendant's matter was placed on hold and several other cases were heard. Following a discussion with his counsel, during this period, Defendant determined he would go forward with a no contest plea. *Id.* At 10. Later that afternoon, following another discussion with his attorney, Defendant decided to instead to proceed with a waiver trial. *Id.* At 10.

The Court began to colloquy the Defendant for a waiver trial, explaining the difference between a jury and a bench trial. N. T. 1/18/2011 at 11. When the Defendant was asked for assurance that he wanted a waiver trial, he initially confirmed he wanted the Judge to decide for him, but later indicated he was, "not really sure." *Id.* at 12. The Court explained the judicial process further to Defendant and told him that he would need to make a decision. *Id.* 15-18. The Court reminded the Defendant it was now 4:30 P.M. and he spent the entire day considering his options while discussing the matter with his attorney. *Id.* at 17. Defendant then stated, "I'll just take the plea. Is it too late for that?" *Id.* at 18. The Court responded that it was not too late, but a decision was needed on what the Defendant wanted to do. *Id.* Defendant stated, "Judge, I want you to hear the case, but what [my attorney] is telling me is - - ." *Id.* The Court emphasized to Defendant that his attorney was there to give him advice, but the decision is ultimately up to him. *Id.* at 18-19.

Following a third or fourth discussion with his attorney, the Defendant again decided to enter a plea of no contest. *Id.* The Judge began another colloquy for the plea, asking the Defendant twice whether he was definitely entering a plea of no contest. *Id.* at 20-22. After the colloquy the Court determined the defendant entered his plea knowingly, voluntarily, and intelligently. *Id.* at 24-29. The Commonwealth read the facts of the case into evidence. *Id.* at 29. The Court asked Defendant if he contested the facts. After again conferring with counsel, Defendant replied, "I do not contest." *Id.* at p. 30 lines 10-11.

The Court Crier proceeded to arraign the Defendant who initially pleaded "not guilty" to charges of Terroristic Threats and Burglary, then subsequently with further questioning pleaded "no contest" to both charges. N.T. 1/18/2011 at 30. During his allocution, Defendant expressed displeasure with his decision and said he took the wrong type of plea, denying all allegations against him. *Id.* at 42.

DISCUSSION

Pursuant to the 1925(b) Statement of Errors Complained of on Appeal, the defendant asserts that the Court erred by finding the Defendant entered into his nolo contendere plea knowingly, intelligently, and voluntarily.

The above facts show Defendant's guilty plea entered on January 28, 2011 was knowing, intelligent, and voluntary. In terms of its effect upon a case, a plea of nolo contendere is treated the same as a guilty plea. *Commonwealth v. Winston*, 791 A.2d 1227, 1230 (Pa. Super 2001) (quoting *Commonwealth v. Miller*, 748 A.2d 733, 735 (Pa. Super. 2000)). Once a defendant has pleaded guilty, it is presumed that he was aware of what he was doing and the burden of proving involuntariness is upon him. *Commonwealth v. Owens*, 627 A.2d 1159, 1163 (Pa. Super. 1983).

The law does not require that the defendant be pleased with the outcome of the decision to enter a plea, only that it be knowingly, voluntarily, and intelligently made. *Commonwealth v. Meyers*, 642 A.2d 1103, 1105 (Pa. Super. 1994). An analysis of the voluntariness of a plea warrants consideration of the totality of the circumstances surrounding the entry of the guilty plea. *Commonwealth v. Shekerko*, 639 A.2d 810, 813 (Pa. Super. 1994).

The totality of the circumstances in this case compels the court to find that the plea was made knowingly, intelligently, and voluntarily, finding that Defendant was simply unhappy with the outcome of his case. Defendant participated in a written no contest plea colloquy on January 18, 2011. This written colloquy has been approved as proof of voluntariness by the Supreme Court of Pennsylvania. Beyond this, the trial Judge went into laborious detail explaining to the Defendant the meaning of a waiver trial and a nolo contendere plea.

In order to ascertain the voluntariness of a Defendant's plea the court must, at minimum, inquire into six questions: "(1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or nolo contendere? (2) Is there a factual basis to the plea? (3) Does the defendant understand that he or she has a right to trial by jury? (4) Does the defendant understand he or she is presumed innocent until found guilty? (5) Is the defendant aware of the permissible range of sentences and/or fines for the offense charged? (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?" Pa. R. Crimp. P. 590, Comment. The sixth question is only relevant to guilty pleas which include a plea agreement. *Id.*

All of the essential inquiries to voluntariness are easily met. At no point did the Defendant indicate he did not understand the nature of the charges against him. Defendant was properly advised of, and arraigned on, the specific offenses and gradations of Burglary and

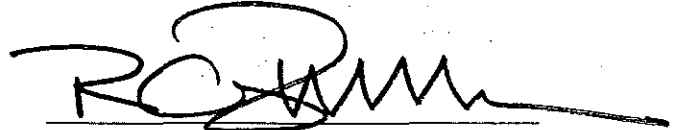
Terroristic Threats. Additionally, there was a defined factual basis to the plea, as the Commonwealth read the facts of the case fully into the record. The Court clearly explained to Defendant his right to a trial by jury, confirming he understood the benefits of a trial, in lieu of a plea. The Court also reiterated to the Defendant on several occasions that he was innocent until proven guilty as the facts of the case were unknown. Finally, Defendant was fully aware of the ranges in sentencing as he signed the written colloquy containing this information, on which he was further questioned by the Court.

Although Defendant changed his mind several times, his decision to ultimately enter into a nolo contendere plea remained voluntary. The Defendant entered into the plea at 4:30 P.M., having the entire day to contemplate his decision and further discuss with his attorney. Even though the Court encouraged him to make up his mind, this did not make his decision any less voluntary. "The mere fact that a defendant was 'under pressure' at the time he entered a guilty plea will not invalidate the plea, absent proof that he was incompetent at the time the plea was entered." *Commonwealth v. Myers*, 642 A.2d 1103, 1107 (Pa. Super. 1994) (citing *Commonwealth v. Egan*, 469 A.2d 186, 189 (Pa. Super. 1983)). As in *Myers*, this Defendant wilfully signed a document expressly stating he was entering the plea voluntarily, as such he must demonstrate more than mere pressure to enter into the agreement or make a decision to invalidate the plea.

CONCLUSION

All evidence shows Defendant entered into this Nolo Contendre plea knowingly, intelligently, and voluntarily. For the foregoing reasons, it is respectfully requested the Trial Court's determination of guilt be upheld.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'ROXANNE', with a long horizontal flourish extending to the right.

Roxanne E. Covington
April 20, 2012