

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL A. RICHARDSON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 726 MDA 2012

Appeal from the Judgment of Sentence December 16, 2011
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0000274-2011

BEFORE: BOWES, GANTMAN, and OLSON, JJ.

MEMORANDUM BY BOWES, J.:

Filed: March 19, 2013

Michael A. Richardson appeals from the December 16, 2011 judgment of sentence of twelve to twenty-four months incarceration followed by ten years of state-supervised probation. He contends that his request to withdraw his guilty plea that was leveled just prior to imposition of sentence should have been granted. We conclude that, while Appellant provided a fair and just reason to support the withdrawal of his plea, the Commonwealth is entitled to a hearing to support its position that withdrawal will substantially prejudice it. We therefore vacate the judgment of sentence and remand with instructions.

On August 6, 2011, Appellant tendered a negotiated guilty plea to aggravated indecent assault, indecent assault, corruption of a minor, and unlawful contact with a minor. In return, the Commonwealth dismissed one

count each of incest and indecent assault as well as two counts of aggravated indecent assault. It also agreed to the imposition of the above-described sentence. The charges pertained to Appellant's sexual abuse of his sister, who was four years old when the abuse occurred. The victim indicated that "on multiple occasions [Appellant] touched her privates. She [said] that his finger went both on the inside and outside of her private." N.T. Plea, 8/6/11, at 4. The record indicates that Appellant was adjudicated delinquent as a juvenile based on his sexual assault of a different sibling.

After entry of the plea, Appellant proceeded to an evaluation pursuant to the dictates of Megan's Law and was not sentenced until December 16, 2011. The Megan's Law assessment was inconclusive. Appellant failed to file a written presentence motion to withdraw his guilty plea, but at the inception of the sentencing proceeding, Appellant asserted a desire to withdraw his guilty plea. Specifically, plea counsel informed the court that Appellant had told counsel that he wanted to withdraw the plea. The trial court asked Appellant why he wanted to withdraw the guilty plea, and he responded, "[The r]eason why I want to withdraw my plea is because I was scared to go up state and spending a lot of my time in state penitentiary doing 10, 20 or 30 years **for something I didn't do.**" *Id.* at 9 (emphasis added).

Based upon the fact that it would be prejudiced by withdrawal, the Commonwealth objected. It noted, "one of the main reasons we did this plea agreement was the fact that this case for the victim is an emotionally

difficult case for her.” *Id.* at 5. It maintained that the victim was very fragile and was not being supported by the mother, who “was only concerned about [Appellant].” *Id.* at 6. The Commonwealth delineated that, “this little girl lives in a household that . . . does not support her. She was given closure in this case when this defendant . . . entered a plea in this case[.]” *Id.* It continued that it could not “emphasize enough the prejudice to the Commonwealth’s case to take this girl on an emotional roller coaster[.]” *Id.* at 7. The trial court denied Appellant’s presentence request to withdraw based on a finding of prejudice to the Commonwealth. *Id.* at 9 (“[B]ecause of the nature of the case, because of the age of the child, because of the home environment of the child, I think the Commonwealth has made out a case for substantial prejudice.”).

In this appeal, which followed imposition of the negotiated sentence, Appellant raises the following issue, “Whether the trial court erred when it denied the Appellant’s request to withdraw his plea of guilty prior to sentencing?” Appellant’s brief at 4. He claims that the Commonwealth’s representations about the witness’s state of mind did not rise to the level of prejudice required by the case law. Specifically, Appellant observes that the Commonwealth’s statements failed to indicate either that the child could not testify or that it no longer is capable of prosecuting this matter. Appellant’s brief at 9-10.

We apply the following standard of review in this situation. “A trial court’s decision as to whether to allow a guilty plea to be withdrawn [prior to

imposition of sentence] will not be disturbed absent an abuse of discretion.” *Commonwealth v. Miller*, 639 A.2d 815, 816 (Pa.Super. 1994); *see also* Pa.R.Crim.P. 591 (A) (“At any time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, . . . the withdrawal of a plea of guilty[.]”).

In *Commonwealth v. Forbes*, 299 A.2d 268 (Pa. 1973), the defendant pled guilty to murder, burglary, aggravated robbery, and other offenses based on his participation in a robbery, assault, and death of a woman in her home. A three-judge panel was convened in order to determine if Appellant was guilty of first-degree murder. At that proceeding, the defendant “expressed a desire to withdraw his guilty plea because, as he stated, ‘I don't want to plead guilty to nothing I didn't do.’” *Id.* at 269. The degree-of-guilt hearing was postponed, and a hearing was conducted on the request to withdraw the guilty plea. Then, at that hearing, the defendant retracted his request to withdraw the guilty plea. When the three-judge panel reconvened to determine the degree of homicide in question, “it became apparent that [the defendant's] decision to abandon his withdrawal request was the result of defense counsel's threat to withdraw from the case.” *Id.* at 270. Nevertheless, the case proceeded before the panel, and the defendant was adjudged guilty of first-degree murder and sentenced to life imprisonment.

On appeal, the defendant averred that his plea counsel obstructed his pre-sentence request to withdraw and that it should have been granted by the trial court. Our Supreme Court agreed that defendant's decision to abandon his request to retract the plea resulted from coercion by counsel and observed that the defendant was not informed of his right to "persist in his request for withdrawal of the plea—in the face of counsel's comment—and have new counsel appointed." *Id.* The **Forbes** Court ruled that the decision to forsake the request to withdraw the plea was involuntary.

It then concluded, "Although 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—here, that request was made at even an earlier stage—should be liberally allowed." *Id.* at 271. The Court held that, prior to sentencing, "the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." *Id.* Thus, **Forbes** announced the rule that the defendant's "assertion of innocence—so early in the proceedings—offered a 'fair and just' reason for withdrawal of his plea," and noted that there was no evidence of record that would indicate that the Commonwealth would have been prejudiced by the retraction of the guilty plea. *Id.* at 272. Hence, the Court granted Forbes relief.

The precepts of *Forbes* were reaffirmed in *Commonwealth v. Randolph*, 718 A.2d 1242 (Pa. 1988). Therein, Randolph complained about our decision to affirm the trial court's refusal to permit him to retract his guilty plea, which was tendered after he confessed to police to thirteen counts of burglary and one count each of aggravated assault and carrying an unlicensed firearm. On the date of his scheduled sentencing, Randolph informed his counsel that he wished to withdraw his guilty pleas, and, prior to sentencing, counsel told the court about this desire.

When asked why he wanted to take this action, Randolph responded that he was not guilty of several of the burglaries and explained that his confession to police was made while he was ill and under duress. Randolph detailed, "[The police] told me the sooner I gave these statements, the sooner I would be taken to a county facility and be treated. They called paramedics, but they kept questioning me and questioning me. I answered all the questions that they wanted me to answer because I wanted medical treatment." *Id.* at 1243.

The trial court refused Randolph's request by focusing on the validity of the guilty plea colloquy. In reversing, the Supreme Court noted that the record revealed that Randolph made "a clear assertion of his innocence before the trial court as the basis for his [presentence] requested withdrawal of his guilty pleas." *Id.* at 1244. It also noted that the Commonwealth failed to assert that it would suffer prejudice. *Id.* at n.3. Our Supreme

Court ruled, "Thus, based on our decision in *Forbes*, [the defendant] offered a fair and just reason for withdrawing his guilty pleas made prior to sentencing, and, accordingly, his request in this regard should have been permitted." *Id.*

Currently, therefore, it is a well-ensconced principle in this Commonwealth that if, before being sentenced, a defendant asserts his innocence as a basis for withdrawal of a guilty plea, that request must be granted unless the Commonwealth would be prejudiced. *See Commonwealth v. Katonka*, 33 A.3d 44 (Pa.Super. 2011) (*en banc*). In this case, in its opinion in support of its ruling, the trial court focused on the validity of the guilty plea colloquy. Trial Court Opinion, 4/5/12, at 2, 3. Under *Randolph*, however, it is clear that this type of analysis cannot be employed.

Accordingly, we proceed to examine whether Appellant's statement should be viewed as an assertion of innocence. In this connection, the Commonwealth maintains that Appellant did not level a claim that he was not guilty. It concentrates on Appellant's representation that he did not want to go to state prison and pinpoints that as the basis for his withdrawal request. Commonwealth's brief at 5-6. However, Appellant indicated that he did not want to spend time in state prison for something that he did not do, which is a claim that he did not commit the crimes in question and must be characterized as an assertion of innocence. *See Commonwealth v.*

Kirsch, 930 A.2d 1282, 1285 (Pa.Super. 2007) (defendant's "indications that he did not believe he was guilty of the offenses . . . and his assertion that he pled guilty to 'put the matter behind him,'" were assertions of innocence sufficient to fall within the parameters of **Forbes** and **Randolph**); **Commonwealth v. Clinger**, 833 A.2d 792, 794 (Pa.Super. 2003) (assertion of innocence present when defendant answered, "No, I feel that I didn't," in response to inquiry as to whether he thought he committed the offense in question); *cf.* **Commonwealth v. Tennison**, 969 A.2d 572 (Pa.Super. 2009) (as basis for withdrawal request, defendant proffered concerns about effect of plea on pending federal matter rather than clearly assert he was innocent). Hence, absent a showing of prejudice, the presentence request should have been granted in this matter.

Regarding the Commonwealth's averment of prejudice, we observe the following. If, in fact, the victim would be unable to testify due to trauma or if she could no longer recall the abuse due to the passage of time, substantial prejudice would be present. **See Commonwealth v. Walker**, 26 A.3d 525, 531 (Pa.Super. 2011) (accepting Commonwealth's proposition that a lapse of time between crime and withdrawal would have "degraded the memory of witnesses," and finding that the Commonwealth thereby established substantial prejudice); *see also Commonwealth v. Ross*, 447 A.2d 943 (Pa. 1982) (where Commonwealth dismissed a number of Commonwealth witnesses in reliance on entry of guilty plea, it would have

been substantially prejudiced if presentence motion to withdraw was granted); ***Commonwealth v. Cole***, 564 A.2d 203 (Pa.Super. 1989) (presentence motion to withdraw properly denied based upon Commonwealth's assertion of prejudice when Commonwealth had produced witness from Georgia before defendant entered his guilty plea).

Nevertheless, on the basis of the record herein, we are unable to discern whether the victim can actually testify. The Commonwealth made a preliminary showing that suggests that this may be the case but the representations fell short of establishing this fact. Specifically, the Commonwealth indicated that the victim was fragile, that the case was emotionally difficult for her, that her mother was not supporting her, and that she had received closure due to entry of the guilty plea. While these averments raise the potential that the girl might not be able to take the stand against Appellant, they do not conclusively prove that she was incapable of being a witness.

In light of the procedural posture of this matter, we find that a hearing on the issue of prejudice is warranted. Appellant did not file a written presentence motion to withdraw, and there is no indication that the Commonwealth was aware that Appellant would be making such a request. It essentially was blindsided when it appeared for a sentencing proceeding and, instead, was faced with Appellant's allegation that he did not commit the crimes in question. Against this backdrop, the Commonwealth should be

afforded an opportunity to substantiate its potentially valid claim of prejudice.

Our recent decision in *Commonwealth v. Katonka*, 33 A.3d 44 (Pa.Super. 2011) (*en banc*), is instructive. In that case, the defendant tendered a negotiated guilty plea to a number of offenses after he sexually abused his stepdaughter. As in this case, sentencing was deferred until after the defendant's assessment by the Sexual Offenders Assessment Board. Before sentence was imposed, the defendant asked to withdraw his guilty plea on the grounds that he was not guilty. The trial court refused to believe the defendant's claim that he was innocent and denied the motion.

On appeal, we concluded that the trial court erred in resolving the matter by focusing on whether the defendant's assertion of innocence was credible. We held that the defendant had presented a fair and just reason for withdrawal of the plea. We then noted that, based on its refusal to find a fair and just reason for withdrawal, the trial court had not resolved the question of whether the Commonwealth would be prejudiced by the withdrawal. Since the record was incomplete regarding that issue, we remanded for a hearing and determination in that respect.

In this case, the record is incomplete, and the Commonwealth should be accorded the opportunity to prove its position. Given the fact that there was no hearing on the withdrawal request and no opportunity for the Commonwealth to present evidence on that issue, we believe that a hearing

is warranted. If the Commonwealth proves the existence of prejudice, the trial court can reaffirm its decision to deny withdrawal and reinstate the judgment of sentence. *Id.*

Judgment of sentence vacated. Case remanded for a hearing. Jurisdiction relinquished.