

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

DEVAUN SMITH

*Defendant*

CR 1207 – 16;

CR 1208 – 16;

CR 461 – 16

OPINION AND ORDER

Before the Court is Devaun Smith's motion to withdraw his guilty plea to the charge of failure to register.<sup>1</sup> The police charged Smith with that offense after responding to a domestic violence incident on July 7, 2016. According to the police affidavit of probable cause, police learned that Smith's Megan's Law registry listed him as employed by American Customer Care even though Smith had not worked there since January 18, 2016 and was terminated on January 20, 2016. The registry was last updated on February 24, 2016. A hearing on the motion to withdraw was held on April 28, 2017.<sup>2</sup> After careful consideration and for the reasons that follow, the Court grants the motion to withdraw.

The pertinent procedural history follows. On February 1, 2015, the Commonwealth charged Smith with simple assault and harassment at Lycoming County docket number 461 – 2016. On July 6, 2017, the Commonwealth charged Smith under docket number 1208-2016 with criminal trespass and criminal mischief and under docket number 1207-2016 with two counts of failure to register. On January 26, 2017, at the time of jury selection, Smith entered a guilty plea to count 1, simple assault under docket number 461-2016, count 2, failure to register under docket number 1207 – 2016, and count 2, criminal mischief, a summary offense under docket

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<sup>1</sup> Smith pled guilty on January 26, 2017 to the offense of failure to register, a felony of the second degree, under docket number 1207-16. The criminal information was amended to reflect that the charge in Count 2 is a violation of 18 Pa. C.S.A. § 4915.1 (a)(3), a failure to provide accurate registration information, graded as a felony of the second degree. On April 28, 2017, Defense counsel confirmed that the only plea Smith sought to withdraw was the failure to register at docket number 1207- 16.

<sup>2</sup> The Court granted time for the parties to submit briefs. Smith submitted a brief to the Court on May 1, 2017. The Commonwealth submitted a brief to the Court on May 5, 2017. The matter is ripe for decision.

number 1208-2016. The remaining charges were dismissed. Sentencing was scheduled for March 13, 2017.

At the time of sentencing, Smith moved for a continuance to file a petition to withdraw his guilty plea. On March 20, 2017, Smith filed a motion to withdraw his plea. Argument was heard on April 4, 2017. The Court continued the matter so that Mr. Smith could call witnesses on his behalf.

On April 28, 2017, Smith presented the following evidence to support withdrawal of his guilty plea. Jamall Bennett testified that he worked with Devaun Smith at American Customer Care in Montoursville. Bennett testified that he left employment about the first week of January 2016 and Smith was terminated shortly after that. He further testified that in early January 2016, Bennett accompanied Smith to the police barracks in Montoursville. Bennett testified he did not know the exact date or exactly how long it was after working at Customer Care. When pressed, Bennett testified that the date could be between the eighth and tenth of January 2016. Bennett heard Smith tell a trooper that Smith was done with his employment and was going to school at Penn Tech. Bennett was in the front of the Barracks with Smith when police asked Smith for his information and then took him to a back room. Bennett did not go to the back room with them. They were at the police barracks for approximately twenty minutes. No further evidence was presented at the hearing.

#### DISCUSSION

At issue is Smith's petition to withdraw his guilty plea. The Pennsylvania Rules of Criminal Procedures provide that "[a]t any time before the imposition of sentence, the court may, in its discretion, permit, upon motion of the defendant, or direct, sua sponte, the withdrawal of a plea of guilty or nolo contendere and the substitution of a plea of not guilty." Pa. R. Crim. P.

591(a). As noted by Defense counsel, absent prejudice,<sup>3</sup> “a request to withdraw a plea made before sentencing should be liberally allowed.” *Id.* cmt., *Defendant’s Brief*, at 2, also citing, Commonwealth v. Forbes, 299 A.2d 268, 271 (Pa. 1973) and Commonwealth v. Prendes, 97 A.3d 337, 351-352 (Pa. Super 2014). In the past, case-law provided the impression that a trial court must accept a bare assertion of innocence as a fair and just reason for withdrawal regardless of whether the assertion was colorable. Commonwealth v. Carrasquillo, 631 Pa. 692, 704-05, 115 A.3d 1284, 1292 (Pa. 2015). In Carrasquillo, the Pennsylvania Supreme Court concluded “that a bare assertion of innocence is not, in and of itself, a sufficient reason to require a court to grant” a request to withdraw a guilty plea. Carrasquillo, *supra*, 631 Pa. at 694, 115 A.3d at 1285. In rejecting a per se approach to innocence claims, the Court provided the following guidance.

Presently, we are persuaded by the approach of other jurisdictions which require that a defendant's innocence claim must be at least plausible to demonstrate, in and of itself, a fair and just reason for presentence withdrawal of a plea. See *supra* note 6 (citing cases). More broadly, the proper inquiry on consideration of such a withdrawal motion is whether the accused has **made some colorable demonstration, under the circumstances**, such that permitting withdrawal of the plea would promote fairness and justice. The policy of liberality remains extant but has its limits, consistent with the affordance of a degree of discretion to the common pleas courts. Carrasquillo, *supra*, 631 Pa. at 705-06, 115 A.3d at 1292. (emphasis added)

In the present case, the Court finds that Smith made some colorable demonstration, under the circumstances, such that permitting withdrawal of the plea would promote fairness and justice. In his motion to withdraw, Smith submitted that new evidence came to light that would demonstrate a colorable assertion of innocence and would corroborate Defendant’s testimony at

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<sup>3</sup> There was no evidence presented that the withdrawal of the plea would substantially prejudice the Commonwealth. “It is settled law that “prejudice,” in the withdrawal of a guilty plea context, requires a showing that, due to events occurring after the plea was entered, the Commonwealth is placed in a worse position than it would have been had trial taken place as scheduled.” *Commonwealth v. Blango*, 2016 PA Super 234, 150 A.3d 45, 51 (Pa. Super. 2016), citing, *Commonwealth v. Kirsch*, 2007 PA Super 240, 930 A.2d 1282, 1286 (Pa. Super. 2007).

trial. Mr. Smith presented Mr. Bennett as a witness. Mr. Bennett testified that he accompanied Smith to the police barracks in the same month in which Smith was terminated. Bennett heard and saw Smith tell a state trooper that Smith was done with his employment and was going to school at Penn Tech. Bennett observed Smith go to a back room with a trooper. The Court finds that this evidence demonstrates a colorable assertion of innocence even though the Defendant did not testify. Granted, as the Commonwealth submits, the timing of the motion raises some question as to whether the motion to withdraw is part of a manipulation of the court system. However, Smith has a prior record score of zero, this is his first withdrawal of a plea, and Smith has presented a witness in support of his defense. “Our jurisprudence has stressed that the individual's fundamental right to a trial requires a liberal granting of pre-sentence motions to withdraw guilty plea.” Commonwealth v. Tennison, 969 A.2d 572, 578 (Pa. Super. 2009). Moreover, federal and state protection against self-incrimination is a fundamental right. U.S. Const. amend. V and Pa. Const. art. I, § 9. With this in mind, the Court believes that Smith has made sufficient colorable demonstration of a plausible claim of innocence under the legal precedent to permit him to withdraw his plea.

Accordingly, the Court enters the following Order.

#### ORDER

AND NOW, this 15<sup>th</sup> day of **May 2017**, for the reasons stated, it is ORDERED and DIRECTED that Devaun Smith’s motion to withdraw his plea of guilty to the offense of failure to register, a felony of the second degree, count 2 at docket number 1207-16, is **GRANTED**.

1. Criminal pre-trial for docket number 1207 – 16 is scheduled for May 16, 2017.

2. **June 6, 2017 at 8:30 a.m.** in Courtroom **No. 1** is the date and time to appear for CALL OF THE LIST. The Defendant must be present unless otherwise directed by the Court or Defense Counsel.

3. Sentencing for docket numbers 1208-16 and 461 – 26 remain scheduled for June 15, 2017 in Courtroom No. 3. The Defendant must be present unless otherwise directed by the Court or Defense Counsel.

BY THE COURT,

May 15, 2017  
Date

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Richard A. Gray, J.

c: DA (KO/NI)  
PD (RM)  
April McDonald, CST; DCA  
Files: CR 1207 – 16; CR 1208 – 16; CR 461 – 16