

**IN THE COURT OF COMMON PLEAS FOR
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

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|------------------------|---|----------------------|
| COMMONWEALTH | : | |
| | : | |
| v. | : | No: 01-10,747 |
| | : | |
| BRIAN WILLIAMS, | : | |
| Defendant | : | |

OPINION AND ORDER

Before the Court is the Defendant’s Motion to Withdraw Guilty Plea, asking that he be allowed to withdraw his guilty plea to the charge of Simple Assault which was entered in the above-captioned case on September 19, 2002. Defendant alleges three reasons in support of his one request: 1) that his guilty plea was invalid because he was not advised prior to his plea that the Commonwealth would be seeking restitution on behalf of the victim; 2) that the Court failed to comply with the plea agreement when it imposed a sentence which included restitution to the victim, and 3) that he is innocent of the crime to which he pled guilty.

The plea agreement which exists in this case states that Defendant shall enter a plea of guilty to the charge of Simple Assault in exchange for a recommended sentence of “time served – 11½ months”. Cover page of guilty plea colloquy, September 19, 2002. Following his plea of guilty, Defendant was sentenced on October 21, 2002 to a period of incarceration in the Lycoming County Prison, the minimum of which is five months and the maximum of which is eleven and one half months, or a time served sentence. In addition, Defendant was ordered to pay the

costs of prosecution and restitution to the victim in the case as well as the Pennsylvania Crime Victim's Compensation Board. The Court ordered that the Defendant's restitution obligation is continuing and includes "any costs for treatment and/or counseling directly related to this incident" that might accrue in the future. Order of the Court, October 21, 2002.

There is a clear distinction between requests to withdraw a guilty plea made prior to sentencing and those that are made after sentencing. After sentencing, a "showing of prejudice on the order of manifest injustice" is required to succeed on a petition to withdraw a guilty plea since "permitting a liberal standard at this stage might encourage the entrance of a plea as a sentence testing device."

Commonwealth v. Randolph, 718 A.2d 1242, 553 Pa. 224 (Pa. 1998) citing Commonwealth v. Muntz, 630 A.2d 51, 428 Pa. Super. 99 (Pa. Super. 1993), citing Commonwealth v. Starr, 301 A.2d 592, 450 Pa. 485 (Pa. 1973). Defendant's written Motion to Withdraw Guilty Plea was filed on October 28, 2002, approximately one week after his sentencing in this case. He makes no showing or allegation of manifest injustice other than to suggest that since he did not know the restitution figure requested by victim would be so high, and since his decision to enter a guilty plea was entirely motivated by his desire to avoid paying his attorney for representation at trial, a fee which would have been less than the restitution figure, he should not be forced to pay the higher restitution fee but instead be permitted to pay the lower attorney fee. The Court refuses to classify such motivation as a desire to avoid a "manifest injustice". Therefore, if the motion to withdraw guilty plea is construed as a motion filed after the imposition of sentence, then it will be denied.

In this case, however, Defendant also made an oral motion to withdraw his guilty plea at the close of his sentencing hearing on October 21, 2002, just prior to the time that the Court dictated the Sentencing Order in this case. Pennsylvania Rule of Criminal Procedure 320 states that "at any time before sentence, the court may, in its discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted." In the seminal decision of Commonwealth v. Forbes, 299 A.2d 268, 450 Pa. 185 (Pa. 1972), the Pennsylvania Supreme Court set forth the parameters for determining when a request to withdraw a guilty plea made prior to sentencing should be granted. The Court stated that "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...should be liberally allowed." Id. The test which should be applied to determine whether a Defendant will be allowed to withdraw his guilty plea prior to sentencing is one of "fairness and justice". The trial court must first determine if the Defendant has offered a fair and just reason for the withdrawal of the plea and then, if such a reason is offered, the withdrawal of the plea will be liberally permitted unless withdrawal of the guilty plea will substantially prejudice the prosecution. Id. See also Randolph, supra.

Upon examination of the reason given by the Defendant for the withdrawal of his plea, it is clear to this Court that the Defendant sought to withdraw his guilty plea only because he had discovered that the sentence about to be imposed by the Court would include a restitution figure in excess of \$10,000. It is clear that the Defendant did not wish to financially compensate the victim for injuries which he, the defendant, had caused. This is precisely the activity that the Courts have long

sought to discourage and the reason why withdrawal of a guilty plea following sentencing is tested by a different standard. See Randolph, supra., Muntz, supra., and Starr, supra. It is clear that the Defendant in this case tested the Court's sentence, found it to be not to his liking, and attempted immediately to withdraw his plea. The Court notes that , "(a)ccording to Forbes, supra., a court must allow a pre-sentence request to withdraw a guilty plea if the defendant asserts his innocence and the withdrawal does not result in substantial prejudice to the Commonwealth." Commonwealth v. Miller, 748 A.2d 733 (Pa.Super 2000) citing Commonwealth v. Goodenow, 741 A.2d 783, (Pa. Super., 1999). However, nowhere in the transcript of the sentencing hearing does the Defendant or his attorney assert that the Motion to Withdraw Defendant's Guilty Plea is predicated upon a belief that he is in fact innocent. Although an assertion of innocence is included in his written motion, this Court finds that the written assertion of innocence is merely pro forma and no argument was offered on the issue of innocence. After review of all the facts, this Court makes a finding that the Defendant has failed to offer a fair and just reason for the withdrawal of his plea of guilty and his motion will be denied. Given this finding, there is no reason to explore whether the prosecution is prejudiced.

ORDER

AND NOW, this ____ day of May, 2003, after argument, Defendant's Motion to Withdraw Guilty Plea filed on October 28, 2002, is DENIED.

By the Court,

_____ J.

xc: DA
G. Scott Gardner, Esquire
Honorable Nancy L. Butts
Gary Weber, Esquire
Diane L. Turner, Esquire