IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 03-10496**
	:	
vs.	**:**	**CRIMINAL**
	:	
GARY HINAMAN,	**:**	**Motion to Withdraw**
Defendant	**:**	**Plea**

O R D E R

AND NOW, this ___ day of October 2004, the Court GRANTS the defendant's motion to withdraw his nolo contendere plea.

One of the reasons the defendant wishes to withdraw his plea is because he claims he is not guilty. See Motion to Withdraw Guilty Plea, para. 3c. The defendant testified in support of his motion. Although the defendant admitted drinking three vodka and tonics, he asserted he was not guilty because he drank over a period of several hours and two of the drinks were consumed before he ate dinner. He testified that he stopped drinking around 9 p.m., but his blood was not drawn until approximately 10:30 p.m. He also noted a discrepancy in the paperwork, which indicated his blood was drawn a 9 p.m. before he left the restaurant or was stopped by the police. The defendant testified he didn't feel he was intoxicated and he was capable of safe driving. He stated, "I'm not guilty."

A request to withdraw a plea made before sentencing should be liberally allowed. Commonwealth v. Forbes, 450 Pa. 185, 190, 299 A.2d 268, 271 (1973). If the court finds any fair and just reason, withdrawal of the plea should be permitted unless the prosecution has been substantially prejudiced. Commonwealth v. Randolph, 553 Pa. 224, 228-229, 718 A.2d 1242, 1244 (1988); Forbes, 450 Pa. at 191, 299 A.2d at 271. The mere assertion of innocence constitutes a fair and just reason to allow withdrawal of a guilty plea

prior to sentencing. Randolph, 553 Pa. at 229, 718 A.2d at 1244; Forbes, 450 Pa. at 191-192, 299 A.2d at 272. A statement of "I'm not guilty" amounts to an assertion of innocence. Randolph, 553 Pa. at 229-230, 718 A.2d at 1244.

The defendant asserted he was not guilty of either driving under the influence charge and the Commonwealth did not present any evidence that it would suffer substantial prejudice. Therefore, under the facts of this case, the Court must permit the defendant to withdraw his plea.

The assistant district attorney conceded that the defendant could withdraw his plea to Count 1 driving under the influence of alcohol to a degree which rendered him incapable of safe driving, but he did not believe the defendant's testimony amounted to an assertion of innocence on Count 2 driving under the influence of alcohol while the amount of alcohol by weight in his blood was .10% or greater nor could it ever, even if an expert were called to testify regarding the blood alcohol content. The Court has reviewed the written plea colloquy and the Order accepting the defendant's plea. The Court also had the court reporter review her notes of the plea hearing. The defendant only entered a plea to Count 1. He did not enter a plea to Count 2. Therefore, there is no basis for the prosecutor's argument. Even if the defendant had entered a plea to Count 2, the Court would have rejected the assistant district attorney's argument and found the defendant also asserted his innocence to this count of driving under the influence.

The Deputy Court Administrator shall place this case back on the trial list. Defense counsel shall notify his client to appear for pre-trials on November 4, 2004 at 9:00a.m.

By The Court,

_____

Kenneth D. Brown, P.J.

cc: Jason Poplaski, Esquire
Kenneth Osokow, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Eileen Dgien, Deputy Court Administrator