IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 03-11314**
	:	
vs.	**:**	**CRIMINAL**
	:	
DAYLE WHEELOCK,	**:**	**Motion to Withdraw**
Defendant	**:**	**Guilty Plea**

OPINION AND ORDER

This matter came before the Court on the Defendant's Motion to Withdraw Guilty Plea filed on July 26, 2004. The Defendant is charged with four counts of Sexual Abuse of children, each count being a felony of the third degree. The Defendant waived his right to a jury trial and a non-jury trial was begun on April 22, 2004.

During the morning of the non-jury trial, the Commonwealth called three civilian witnesses and one police witness. The Court believes sometime in the afternoon Defendant's attorney announced that the Defendant wished to change his plea to guilty. At that time, the Defendant pled guilty to all four (4) counts. The guilty plea was an open plea, which meant that there was no agreement to the sentence that the Court would impose. The Court believes the Commonwealth indicated on the record that they would recommend a concurrent sentence on one of the four (4) counts, but otherwise, the Commonwealth would be free to argue for consecutive sentences on the three (3) other counts.

The Defendant was advised that the maximum sentence for each count was seven (7) years incarceration.

At the time of the guilty plea, the Defendant was aware that he had a prior conviction in Owego, New York in 1989 for a felony offense of sodomy (deviate sexual intercourse). The Defendant served a sentence of four to twelve (4-12) years incarceration in

a New York State Prison for that offense.

At the time of the guilty plea the parties were not sure of the Defendant's prior record score because the conviction was from another state. The Court scheduled sentencing for July 19, 2004. The Court ordered the Lycoming County Adult Probation Office to prepare a pre-sentence investigation.

On July 19, 2004, at the time scheduled for sentencing, Defendant's counsel announced that the Defendant wanted to withdraw his guilty plea. The pre-sentence investigation listed the New York State conviction as a Class D Felony, which carries a maximum sentence of seven years, but listed the sentence as 4-12 years incarceration. The Court informed the parties that it had requested the Adult Probation office to obtain written verification from New York authorities as to the grade of the felony so there would not be an issue at the sentencing hearing regarding the appropriate prior record score. Sometime prior to the sentencing hearing, the Court provided the written verification to defense counsel and counsel for the Commonwealth. The written verification from New York State was certified by the Tioga County New York Court Clerk and showed that the conviction was for sodomy in the First Degree, a Class B Felony. See Attachment 3.

To calculate the Defendant's prior record score, the Court had to determine whether there was a current equivalent Pennsylvania offense to New York's offense of sodomy in the first degree. 204 Pa.Code §303.8(f). "An equivalent offense is that which is substantially identical in nature and definition as the out-of-state or federal offense when compared to the Pennsylvania offense." Commonwealth v. Bolden, 367 Pa. Super. 333, 339, 532 A.2d 1172, 1176 (1987). The Court compared the elements of the New York crime of sodomy in the first degree (see Attachment 1) and determined that the crime of involuntary

deviate sexual intercourse (18 Pa.C.S.A. §3123) was the Pennsylvania equivalent offense. A conviction for involuntary deviate sexual intercourse gives the Defendant a prior record score of four (4).[1] 204 Pa.Code §§303.7(a), 303.15.

The Defendant asserts in his motion to withdraw that the reason he wants to withdraw his plea is because he believed the New York conviction was a Class D Felony. Therefore, he thought his prior record score would have been a one (1) or a two (2), and the standard range sentence for his guilty plea would have been one to twelve (1-12) months or three to fourteen (3-14) months, respectively. With a prior record score of four (4) the standard range would nine to sixteen (9-16) months. The Defendant claims that he believes he will receive a more significant sentence in light of the prior record score of four (4) than he anticipated when he pled guilty. In light of that realization he now wants to withdraw his plea of guilty and stand trial.

The Court finds it noteworthy that the Defendant does not assert his innocence as a basis for withdrawal of his guilty plea.

As argued by the Commonwealth at the hearing on the Defendant's motion, it should also be noted that the Commonwealth presented nearly its entire case at the non-jury trial before the Defendant pled guilty. This gave the Defendant the opportunity to view the Commonwealth's case against him. Also, the prosecution pointed out that the witnesses had testified three times already: (1) at the Preliminary Hearing; (2) at a Suppression Hearing;

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1 Even assuming sodomy in the first degree is not the equivalent of involuntary deviate sexual intercourse, the defendant's prior record score still would not be a one (1) or two (2). When there is no current equivalent Pennsylvania offense, the Court must determine the current equivalent Pennsylvania grad of the offense based on the maximum sentence permitted. 204 Pa.Code §303.8(f)(2). In New York, the maximum sentence for a class B felony is twenty-five years. See Attachment 2. Therefore, a class B felony in New York is the equivalent of a felony of the first degree in Pennsylvania, which would give the Defendant a prior record score of three (3). Therefore, although the Court found sodomy of the first degree was the equivalent of involuntary deviate sexual intercourse giving the Defendant a prior record score of four(4), the lowest the Defendant's prior

and (3) at the non-jury trial. If the Court would permit the Defendant to withdraw his plea, the witnesses would have to appear for a fourth time to testify in this case.

Rule 591 of the Pennsylvania Rules of Criminal Procedure permits the Court, in its discretion, to allow a defendant to withdraw a plea of guilty. Case law is clear that in determining whether to grant a pre-sentence motion for withdrawal of a guilty plea, the test to be applied by the trial court is fairness and justice. If the Court finds any fair and just reason, withdrawal of the plea before sentence should be freely permitted, unless the prosecution has been substantially prejudiced. See Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973); Commonwealth v. Robinson, 228 Pa.Super. 179, 324 A.2d 790 (1974).

The Court does not believe the Defendant stated a fair and just reason to permit withdrawal of his guilty plea. The Defendant does not assert his innocence. Rather, the Defendant contends only that his only prior record score is higher than he expected it to be.[2]

The Court notes the Defendant was aware of the maximum sentence for each count to which he was pleading guilty. The Defendant also was aware the Court could sentence consecutively on three (3) of the counts. Further, at the time of guilty pleas the Defendant was not told in any way that his prior record score was a one (1) or two (2), as

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record score could be is a three (3).

2 The Defendant did not testify at the hearing on his Motion Withdraw the Guilty Plea. However, at the hearing, the Commonwealth agreed that the Defendant would testify as claimed in his motion that he believed his prior record score would be a one (1) or a two (2), as opposed to a four (4).

opposed to a higher score number. Thus, he knew the Court would need to obtain further information from New York State to determine the correct prior record score. This is in fact what occurred.

On the other hand, by proceeding to a non-jury trial for approximately the entire morning and into the afternoon, the Defendant has had the benefit of seeing most of the Commonwealth's case. He also caused most of the Commonwealth witnesses to appear and testify at trial. Apparently these witnesses have testified three (3) separate times in this case.

In the case of Commonwealth v. Robinson, supra, a defendant changed her plea to guilty just after selection of the jury. The jury was discharged. When the Defendant was called for sentencing she then indicated a desire to change her plea back to not guilty. At the hearing on her Petition to Withdraw her guilty plea, the trial court noted the reason for her desire to withdraw her guilty pleas was not an assertion of innocence, but rather, her disappointment that the sentence recommended by the Chief Parole Officer was greater than her hopes and expectations, even though there was no agreement on the sentence she would receive. The trial court rejected her motion to withdraw the guilty plea. The Superior Court upheld the trial court's decision and noted:

> The Commonwealth was ready to try its case. The witnesses where ready and costly time consumed when she decided to enter her plea of guilty. If her Petition to change her plea is permitted, the whole thing starts all over again with a further deterioration of the judicial capacity to try cases.

Id. at 182, 324 A.2d at 791. See also Commonwealth v. Carelli, 308 Pa.Super. 522, 533, 454 A.2d 1020, 1026 (1982)(the trial court did not err in denying the defendant's petition to

withdraw his plea where the defendant did not assert his innocence and the Commonwealth witnesses had traveled great distances or took leave from employment to attend the first day of trial).

In conclusion, the Court does not believe that the Defendant has stated a fair and just reason to withdraw her plea of guilty. The sentencing guideline range is higher than the Defendant hoped it would be. However, he was fully aware of the maximum sentence for each count and knew the Court had the option for consecutive sentencing on three (3) of the counts before the Court. On this basis, the Defendant should not be permitted to test drive the Commonwealth's case and require the witnesses in this case to once again return to Court to begin the entire trial process over. For these reasons, the Court will deny the Defendant's motion.

O R D E R

AND NOW, this ___ day of October 2004, the Defendant's Motion Withdraw his Guilty Pleas is **DENIED. Sentencing is scheduled for November 12, 2004 at 1:30 p.m. in Courtroom #1.** Defense counsel shall notify his client of the date and time of sentencing.

By The Court,

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Kenneth D. Brown, P.J.

cc: James Cleland, Esquire (APD)

Robert Ferrell, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)

SODOMY IN THE FIRST degree

S 130.50 Sodomy in the first degree.

A person is guilty of sodomy in the first degree when he or she engages in deviate sexual intercourse with another person:

1. By forcible compulsion; or

2. Who is incapable of consent by reason of being physically helpless; or

3. Who is less than eleven years old; or

4. Who is less than thirteen years old and the actor is eighteen years old or more.

Sodomy in the first degree is a class B felony.

Attachment 1

- New York State Consolidated Laws
  - Penal

ARTICLE 70
SENTENCES OF IMPRISONMENT

S 70.00 Sentence of imprisonment for felony.

* 1. Indeterminate sentence. Except as provided in subdivisions four, five and six, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

* NB Effective until September 30, 2005

* 1. Indeterminate sentence. Except as provided in subdivisions four and five, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

* NB Effective September 30, 2005

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

(a) For a class A felony, the term shall be life imprisonment;

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years; provided, however, that where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the maximum term must be at least six years and must not exceed twenty-five years;

ATTACHMENT 2

(c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;
(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and
(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

State of New York : County of Tioga

County Court

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Dayle L. Wheelock

DOB: 6/7/50

CERTIFICATE OF CONVICTION
IND. #89-0019

This is to certify that on the 11th day of September, 1989 before the Hon. Andrew F. Siedleckl, a Judge of this Court, the above named Defendant was convicted by plea of the offense of:

Sodomy in the First Degree , in violation of PL-130.50(3), a Class B Felony (One Count)

and on September 15, 1989 a Judgment of Conviction was entered in this Court and sentence was imposed as follows:

To an indeterminate sentence of imprisonment which shall have a maximum of twelve (12) years and a minimum of four (4) years and court costs of $100.00.

Dated at:

Owego, New York

this 16th day of July , 2004.

JoAnn Peet
COURT CLERK

Attachment 3