IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1314-2003 (03-11,314)**
	:	
vs.	**:**	
	:	**CRIMINAL**
DAYLE L. WHEELOCK,	**:**	
Defendant	**:**	

OPINION AND ORDER

This matter came before the Court on a remand from the Pennsylvania Superior Court to determine whether the Commonwealth would suffer substantial prejudice if Mr. Wheelock were permitted to withdraw his guilty plea. The relevant facts follow.

Defendant was residing in an apartment located in the same building as Pappa's Pizza. A co-owner of the restaurant, Greta Evans, observed a large amount of smoke coming from a back room. She believed the building was on fire and called for assistance. The dispatcher to whom she spoke asked that she attempt to evacuate the building. She grabbed a set of pass keys maintained by her father, the owner of the building, and went through the apartment area of the building, knocking on doors and doing her best to be certain that no one was inside. At two of the apartments, one of which was Defendant's, she did not receive an answer to her knock. She used the pass key to enter the apartment and went through to the other end of the apartment (Defendant's bedroom) to be certain no one was there. Along the way to Defendant's bedroom and eventually inside Defendant's bedroom, Ms. Evans observed what she felt were disturbing photographs of young boys, many of whom were nude and/or posed in sexually provocative positions. Ms. Evans quickly left the apartment as the building was on fire, and she still had to make sure that

other apartments were empty. After the fire department declared the building safe, Ms. Evans called the Pennsylvania State Police about the disturbing things she had seen in Defendant's apartment.

The police obtained a search warrant for Defendant's apartment and seized various books, photographs, pictures, paintings, pamphlets, brochures, videotapes, and magazines that the police believed depicted child pornography. Defendant was arrested and charged with four counts of possession of child pornography in violation of section 6312 (d)(1) of the Crimes Code.[1] 18 Pa.C.S. §6312(d)(1).

Defendant filed a motion to suppress evidence. The Honorable Nancy L. Butts held a hearing on this motion at which Ms. Evans and Trooper Beth Wilson testified. Judge Butts denied the motion and Defendant's request for reconsideration, and the case was scheduled for trial.

Defendant waived his right to a jury trial and a non-jury trial commenced on April 22, 2004. The Commonwealth presented testimony from Ms. Evans, her father John King, and Trooper Mike Sempler and had completed or nearly completed its direct examination of Trooper Beth Wilson when the court took its lunch recess.[2] After the lunch recess, the Court was informed Defendant wished to plead guilty. There was no agreement for a specific sentence; however, the Commonwealth agreed one of the counts would run concurrent and, as to the remaining counts, the court would determine whether they should

1 At the hearing and argument on Defendant's original motion, the Commonwealth argued that the witnesses had testified at Defendant's preliminary hearing, a suppression hearing and during the Commonwealth's case-in-chief of a non-jury trial before Defendant pled guilty. However, the docket transcript from the Magisterial District Judge reflects that, although Defendant's preliminary hearing was scheduled and continued several times, Defendant ultimately waived his preliminary hearing. Thus, it appears that witnesses may have been subpoenaed to testify at the preliminary hearing several times, but that they did not actually have to testify before the Magisterial District Judge.

2 Trooper Wilson was the Commonwealth's final witness.

run concurrent or consecutive. In its order accepting Defendant's guilty plea, the court noted there was an issue concerning Defendant's prior record score. The court also noted the Commonwealth believed the prior record score might be a four, and the defense believed it may be as low as a one or two.

The court scheduled a sentencing hearing for July 19, 2004; however, on that date defense counsel informed the court that Defendant wished to withdraw his guilty plea. The court continued the hearing and directed counsel to file a written motion regarding his client's desire to withdraw his plea.

On July 26, 2005, defense counsel filed a motion to withdraw Defendant's guilty plea. In this "original motion" Defendant raised one claim. He asserted that, at the time of his guilty plea, he believed his prior record score was either a one or a two and that, on the day of sentencing, he was informed that his prior record score was a four, which would have resulted in a sentence in excess of what Defendant initially believed he would receive. Based on this assertion, Defendant stated he no longer wished to plead guilty. On August 24, 2004, the court held a hearing on the original motion. The Commonwealth argued that Defendant did not present a fair and just reason to withdraw his plea, and the Commonwealth would be prejudiced because Defendant had the opportunity to preview the Commonwealth's entire case prior to entering his plea. The court denied Defendant's motion on October 11, 2004.

Due to the nature of the crimes to which Defendant pled guilty, the court ordered Defendant to be assessed by the Sexual Offender Assessment Board. On February 16, 2005, the Commonwealth officially filed a praecipe for a Megan's Law hearing. The court scheduled the Megan's Law hearing and sentencing to occur on March 3, 2005 at 2:45

p.m.

At 1:39 p.m. on March 3, 2005, defense counsel filed a written motion which he styled as a request for reconsideration of the original motion to withdraw his guilty plea. In this motion, Defendant averred "his plea of guilty was not knowing and intelligent" and that he was "innocent of the charges in that the admitted acts arguably do not constitute the criminal offense." The court denied this motion and proceeded with the Megan's Law hearing and sentencing. The court sentenced Defendant to an aggregate term of three years to twenty-one years incarceration in a state correctional institution.

Defendant filed an appeal alleging that the court erred in denying his motion to withdraw his guilty plea. The Pennsylvania Superior Court found that Defendant had presented a fair and just reason to withdraw his plea, but remanded the case for the court to hold a hearing to allow the Commonwealth to present evidence on the issue of whether it would be substantially prejudiced if Defendant would be permitted to withdraw his plea.

At the remand hearing, the Commonwealth argued that it would be substantially prejudice if Defendant was permitted to withdraw his plea because of the following: (1) due to the passage of time and/or lapse of memory the witness's testimony could be inconsistent; (2) the witnesses had testified several times; (3) Trooper Wilson had since retired from the Pennsylvania State Police; (4) the significant increase in the Commonwealth's caseload; and (5) Defendant had an unfair advantage because he got a preview of the Commonwealth's case when he pled guilty after the Commonwealth presented most of its evidence at the non-jury trial.[3] The Commonwealth candidly admitted,

3 Although information regarding items 2 and 5 can be gleaned from the record of the previous proceedings in this case, the Commonwealth did not present any testimony to support the other items.

however, that to the best of its knowledge the witnesses would still be available if Defendant would be permitted to withdraw his plea and the case had to be tried. Based on the record (or lack thereof) and appellate case law, the court is constrained to find that the Commonwealth will not suffer substantial prejudice if Defendant is permitted to withdraw his plea.

The Pennsylvania Supreme Court has held Commonwealth contentions that witnesses may suffer memory lapses or that their testimony may be inconsistent at a subsequent trial were mere speculation and do not demonstrate substantial prejudice to the Commonwealth. Commonwealth v. Middleton, 504 Pa. 352, 357, 473 A.2d 1358, 1360 (Pa. 1984); Commonwealth v. McLaughlin, 469 Pa. 407, 413-14, 366 A.2d 238, 241 (Pa. 1976). Therefore, this argument by the Commonwealth also must be rejected here.

The Commonwealth also claimed it would be prejudiced because the witnesses had testified several times already. Although the court indicated it believed the witnesses had testified at least three times previously when ruling on Defendant's original motion to withdraw his guilty plea, upon further review of the record the court was mistaken. From the Magisterial District Judge's docket transcript, it appears that the preliminary hearing was rescheduled several times but, ultimately, Defendant waived his preliminary hearing. While it is likely the Commonwealth's witnesses were subpoenaed several times for the purposes of testifying at the preliminary hearing, it does not appear that anyone actually testified at a preliminary hearing in this case. Ms. Evans is the only witness completed her testimony at more than one hearing: the suppression hearing and the incomplete non-jury trial. John King and Trooper Sempler testified only at the incomplete non-jury trial. Trooper Beth Wilson testified at the suppression hearing and the Commonwealth conducted its direct examination of her at the non-jury trial before Defendant elected to plead guilty. The court is

cognizant of the inconvenience being a witness can be. Often times it requires missing work or school or rescheduling other obligations and commitments. While the court is sympathetic to the witnesses, it does not believe the inconvenience of having to testify again rises to the level of substantial prejudice. The court believes this standard contemplates the unavailability of witnesses and not simply inconvenience; otherwise, there would never be a re-trial regardless of the reason.[4]

Although the Commonwealth asserted it was prejudiced because Trooper Wilson retired from the State Police, it did not support this assertion with any evidence. There was no testimony or other evidence that Trooper Wilson would be unavailable to testify if Defendant were permitted to withdraw his guilty plea. In fact, the Commonwealth acknowledged that it believed Trooper Wilson still resided in the area and, to the best of its knowledge, she would be available.

The Commonwealth also asserted it would be prejudiced because of its increase in caseload and the difficulty this increase has on meeting Rule 600 deadlines. The Commonwealth did not present any evidence to support this contention.

The Commonwealth's final contention is that it is substantially prejudiced because Defendant entered his guilty plea after his non-jury trial commenced, and, as a result, Defendant obtained an unfair advantage by getting a full preview of the Commonwealth's evidence. The court would like to find that this constitutes substantial prejudice, but believes it is constrained to find otherwise due to the cases of Commonwealth v. Middleton, 504 Pa. 352, 473 A.2d 1358 (Pa. 1984) and Commonwealth v. McLaughlin,

4 The court anticipates that the Commonwealth would argue that most re-trials are due to errors made during the trial and not circumstances like this one where the Commonwealth is blameless. This argument, however, would fail to consider circumstances such as after-discovered evidence where witnesses would be

469 Pa. 407, 366 A.2d 238 (Pa. 1976). In Middleton and McLaughlin the Commonwealth argued that it would be substantially prejudiced because the appellant had a full preview of its case when it presented its witnesses at a degree of guilty hearing; the Commonwealth in those cases relied on Commonwealth v. Whelan, 481 Pa. 418, 392 A.2d 1362 (1978) and Commonwealth v. Morales, 452 Pa. 53, 305 A.2d 11 (1973), respectively. The Pennsylvania Supreme Court, however, rejected the Commonwealth's argument and distinguished Whelan and Morales. The Court noted that Whelan and Morales both involved defendants who pled guilty after the commencement of a jury trial;[5] thus, there were concerns of possible jury testing. The Court in Whelan also stated that a full preview of the Commonwealth's evidence, in itself, does not constitute substantial prejudice. 504 Pa. at 357, 473 A.2d 1360. Although the court has some concerns that Defendant and/or his attorneys have been manipulating the judicial system with their last minute motions to withdraw Defendant's guilty plea,[6] here, as in Middleton and McLaughlin, the concerns of possible jury testing do not exist.

Accordingly, the following order is entered:

COMMONWEALTH	**:**	**No. CR-1314-2003 (03-11,314)**
	:	
vs.	**:**	
	:	**CRIMINAL**
DAYLE L. WHEELOCK,	**:**	

inconvenienced by having to testify through no fault of the Commonwealth.

5 Whelan pled guilty after the Commonwealth presented its case-in-chief and appellant and his co-defendant placed their cases into evidence. Morales pled guilty after the Commonwealth presented its case-in-chief.

6 Defendant or his counsel waited until the commencement of the original sentencing hearing to orally request that Defendant be permitted to withdraw his plea. The court continued the sentencing hearing and directed counsel to file a written motion. At that time Defendant did not assert his innocence. After the court denied this motion, finding Defendant's issues with his prior record score were not a fair and just reason and noting that Defendant had not asserted a claim of innocence, Defendant or his counsel waited until approximately one hour before the Megan's Law hearing and re-scheduled sentencing hearing to file a motion asserting his innocence. This assertion, notably, did not dispute that Defendant possessed the materials in question, but only claimed that the materials were not child pornography.

Defendant :

ORDER

AND NOW, this day of July 2007, based on the record in this case, the court finds the Commonwealth will not suffer substantial prejudice if Defendant is permitted to withdraw his guilty plea. Therefore, in accordance with the instructions of the Pennsylvania Superior Court, Defendant's guilty plea is withdrawn, his judgment of sentence and sexually violent predator status are vacated and this case shall be placed back on the trial list. If Defendant has not already been transferred from the state correctional institution to Lycoming County Prison, the Lycoming County Sheriff shall do so at the earliest possible date.[7]

By The Court,

_____
Kenneth D. Brown, P.J.

cc: Jay Stillman, Esq.
Kenneth Osokow, Esq. (ADA)
Eileen Dgien, Deputy Court Administrator
Sheriff
Records Department, SCI-Camp Hill
PO Box 8837,Camp Hill Pa 17001-8837
Gary Weber, Esquire (Lycoming Reporter)
Work File

7 The last information the court had was that Defendant (Inmate #GD6221) was confined in SCI-Camp Hill.