

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH**

**v.**

**DEBORA ANN AUGUSTINE,  
Defendant**

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**No.: 1787-2006  
CRIMINAL DIVISION**

**OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)  
OF THE RULES OF APPELLATE PROCEDURE**

The Defendant appeals this Court's Sentencing Order dated December 2, 2008. The Court notes a Notice of Appeal was timely filed on January 2, 2009, and that the Defendant's Concise Statement of Matters Complained of on Appeal was then filed on January 16, 2009. The Defendant raises one issue in her appeal: that the Court erred in denying Defendant's oral request to withdraw her guilty plea without allowing for a hearing.

***Background***

On June 26, 2008, the day Defendant was to go to trial, she chose instead to plead guilty to two counts of each of the following: Possession With the Intent to Deliver, Possession of a Controlled Substance, and Possession of Drug Paraphernalia. Defendant appeared for sentencing on December 2, 2008, at which time Assistant Public Defender, Robin Buzas, Esquire, was handling the hearing for the Defendant's attorney, Assistant Public Defender, Robert Cronin, Esquire. Attorney Buzas advised the Court that Attorney Cronin was requesting a continuance in order to obtain the transcript of the guilty plea hearing so that he may advise the Defendant if she should try to withdraw her plea as she believed there was an agreement rather than an open plea. The Court denied both the continuance request and the oral Motion to Withdraw Guilty Plea.

## *Discussion*

Defendant asserts this Court erred by denying her oral Motion to Withdraw Guilty Plea without a hearing. At the time of sentencing, Assistant District Attorney Mary C. Kilgus, Esquire asserted that Defendant should not be allowed to withdraw her plea as she was made aware before entering her plea that there was no agreement as the jury was ready and waiting to enter the Courtroom for her trial. Attorney Kilgus also represented to the Court that she informed the Defendant at the time of the plea and filed a written notice that her office would be seeking the one year mandatory for the Possession With the Intent to Deliver offense. Furthermore, Attorney Kilgus pointed to the fact that the Defendant has had numerous continuances and that this is a 2006 case.

Pennsylvania Rule of Criminal Procedure 591 states in relevant part that “(A) At 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 . . . and the substitution of a plea of not guilty.” The Comment to the rule states that:

When the defendant orally moves to withdraw a plea of guilty . . . at the sentencing hearing, the court should conduct an on-the-record colloquy to determine whether a fair and just reason to permit the withdrawal of the plea exists. If the court finds that there is not a fair and just reason, then the motion should be denied, and the court should proceed to sentencing.”

The Pennsylvania Superior Court held that a defendant does not have an absolute right to withdraw his guilty plea. Commonwealth v. Muhammad, 794 A.2d 378,383 (Pa. Super. Ct. 2002). “[T]he decision to grant such a motion lies within the sound discretion of the trial court. Id. A request to withdraw the guilty plea before sentencing ““should be liberally allowed.”” Id. (quoting Commonwealth v. Forbes, 299 A.2d 268 (Pa. 1973)). The following two elements must be met in order for the Court to grant a “presentence motion to withdraw a plea: (1) the

defendant has provided a ‘fair and just reason’ for withdrawal of his plea; and (2) the Commonwealth will not be ‘substantially prejudiced in bringing the case to trial.’” Muhammad, 794 A.2d at 383 (quoting Forbes, 299 A.2d 268). An assertion of innocence early in the proceedings is a “fair and just” reason for withdrawal of a guilty plea. See Commonwealth v. Randolph, 718 A.2d 1242, 1244 (Pa. 1998).

The Pennsylvania Superior Court in Commonwealth v. Stork, in regards to a Motion to Withdraw Guilty Plea, determined that it would “not allow evidence to be heard to contradict the terms of the record, where the trial court’s strict adherence to the detailed procedures of the plea colloquy ensured that appellant was fully informed of the nature and results of his plea.” 737 A.2d 789, 791 (Pa. Super. Ct. 1999). The Court in Stork, also found that “[t]he trial court would have abused its discretion if it refused to hold a hearing where the motion alleged factual matters not of record which if proven, would entitle defendant to relief.” Id. at 791, n.3. See also Commonwealth v. Savilla, 487 A.2d 971 (Pa. Super. Ct. 1985) (holding that the rule does not require the court to hold a hearing on a motion to withdraw guilty plea, rather it may schedule a hearing).

The Court notes that it informed Defense Counsel at the time of sentencing that it would not entertain the oral Motion to Withdraw Guilty Plea as in a previous case, Attorney Cronin was told to file a written Motion to Withdraw Guilty Plea and failed to do so. At the time of this Defendant’s sentencing, the Court informed Defense Counsel that it would rather have a written motion so it could see what the reasons are for wanting to withdraw the plea and that it would not hold a hearing now so that a transcript of the Guilty Plea Hearing could be transcribed; Attorney Buzas concurred. Assistant DA Kilgus then reiterated that this case has been repeatedly continued, was a 2006 case, and the Commonwealth is “getting extremely prejudiced.” The

Court then denied the Motion and pointed to the fact that the case was continued for many different reasons, some of which were conceivably legitimate. Furthermore, Defense Counsel did not state any reasons for Defendant's Motion to Withdraw Guilty Plea; however, the Court believes that there would be no merit to such a motion if one were to be filed. The record clearly demonstrates that a written guilty plea colloquy was filled out, then an oral colloquy was conducted, during which it became evident the defendant understood the nature of the charges against her, the significance of pleading guilty, the rights she was giving up, and the range of the sentence, which the Court could impose. In addition, Defendant is not asserting her innocence; she is merely having second thoughts at sentencing when there is no plea agreement as to the disposition of her case. Furthermore, the Court notes that at the time of the Guilty Plea Hearing, Assistant Public Defender, Janan M.E. Tallo, Esquire, who was handling the case for Attorney Cronin, was very careful to make the Defendant fully aware there was no agreement.

Additionally, some of the testimony occurred as follows:

COURT: Now, my understanding is there's no plea agreement as to the disposition in this case so I'm going to write open down here with terms of plea agreement.

...

COURT: [D]o you wish to give up your right to a jury trial and accept responsibility for what happened on August 30, 2006?

DEFENDANT: Yes, I do.

COURT: So how do you wish to plead . . . ?

DEFENDANT: Guilty.

***Conclusion***

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that this Court's sentencing order be affirmed.

By the Court,

Dated: \_\_\_\_\_

Nancy L. Butts, Judge

xc: DA (MK)  
George E. Lepley, Jr., Esq.  
Trisha D. Hoover, Esq. (Law Clerk)  
Gary L. Weber, Esq. (LLA)