IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	**:**	
vs.	**:**	**No. CR-1464-2009**
	:	
EMIL COOPER,	**:**	
Defendant	**:**	

OPINION AND ORDER

Before the Court is Defendant's Motion to Withdraw Guilty Plea. By Information filed on October 7, 2009, Defendant was charged with Criminal Attempt to Commit Homicide, two counts of Aggravated Assault, two counts of Simple Assault and Possessing Instruments of a Crime. On August 4, 2010, following a hearing and pursuant to a plea agreement negotiated between the Commonwealth and Defendant, the Court accepted Defendant's pleas of guilty to Count 3, Aggravated Assault with a Deadly Weapon, a felony of the second degree, and Count 6, Possession of Instruments of a Crime, a misdemeanor of the first degree.

Defendant's sentencing was scheduled for September 8, 2010. At Defendant's September 8, 2010 sentencing, he expressed a possible desire to withdraw his plea. Accordingly, upon Motion of the Defendant over objection of the Commonwealth, the Court granted the Defendant a continuance to September 28, 2010. On September 27, 2010, Defendant filed a written Motion to Withdraw his Guilty Plea. The initial hearing on Defendant's Motion to Withdraw his Guilty Plea was scheduled for October 29, 2010. At said hearing, Defendant initially testified that he "had to say" that he was guilty "to get that deal." He testified further that if he "wanted the plea," he "had to say" that he "had a knife."

The Court entered an Order noting that following some very brief testimony by the Defendant and it appearing to the Court that the Public Defender's office had a conflict in connection with the continued representation of Mr. Cooper, Don Martino, Esquire was appointed to represented Mr. Cooper further in the matter. The continued hearing was scheduled for November 23, 2010.

This hearing was continued at the request of the Defendant. Another hearing was scheduled for December 17, 2010 but that hearing was continued at the request of the Commonwealth.

The hearing on Defendant's Motion to Withdraw his Guilty Plea was held on January 6, 2011. The Defendant first testified on his own behalf. He acknowledged that on August 4, 2010 he pled guilty to Aggravated Assault and Possessing Instruments of a Crime. He indicated that he pled guilty because he did "not think" he "had a choice to go to trial." He testified that his attorney told him he had a "no win situation," that he should take the plea and that if he did not, he was facing a 15 or 20 year minimum to 40 year maximum. Contrary to what he testified to on August 4, 2010, he indicated that he did not stab the victim and did not possess a knife. He admitted that he lied to the Court on August 4, 2010 when he told the Court that he stabbed the victim and told the Court that he had a knife.

On cross-examination he testified that he did not want to take the plea deal, he was not happy with his attorney and that his attorney persuaded him to take it. He further testified that his attorney told him he did not have a chance to win and he was likely to be convicted. He further testified that he was advised by his attorney that if he wanted to plead pursuant to the plea agreement, he "has to admit" that he stabbed the victim. He was further

told that he had to say "yes to everything to take the deal." According to the Defendant, he had to "agree to everything" to get that deal.

Nicole Spring testified on behalf of the Commonwealth. She is presently employed as the First Assistant Public Defender and previously represented the Defendant through his guilty plea hearing on August 4, 2010. She testified that prior to the plea hearing, she discussed the plea offer with the Defendant and gave the Defendant her opinion that he should "take" the plea. She noted further that she told the Defendant that if the victim testified consistent with his testimony at the preliminary hearing, the Defendant likely would be convicted. She further testified that during the guilty plea hearing in August, she had a conference with the Defendant and specifically told him that he "wasn't pleading guilty if [he] did not admit [he] had a knife."

The parties stipulated that the Court could take judicial notice of the Defendant's written Guilty Plea Colloquy as well as the transcript of the August 4, 2010 guilty plea hearing. The parties also stipulated that August 4, 2010 was the date of Defendant's scheduled jury selection, that if Defendant did not plead guilty he would have been required to proceed to jury selection, that the Defendant knew that the Commonwealth had subpoenaed the victim who was obligated to appear and who expressed his willingness to appear, and finally that the Commonwealth "still knows" the location of the victim who remains willing to testify.

The Commonwealth argues that while the Defendant has arguably asserted a "fair and just reason" for the withdrawal of his plea, the Court is not required to accept his assertion. The Commonwealth further claims, in the alternative, that the Defendant admitted to being intoxicated and is not capable of recalling the events or that the Defendant's alleged

assertion is in reality a "hope that the victim will not appear." The Commonwealth also asserts that even if the Court accepts Defendant's assertions, the totality of circumstances demonstrates that the Commonwealth will be prejudiced if the withdrawal is allowed. The Commonwealth argues that it was required to go through substantial efforts to effectuate service of a subpoena on the victim, that the plea occurred on the date of jury selection, that many other witnesses were subpoenaed, and that those witnesses temporarily "put aside" their jobs and lives. The Commonwealth further noted that it will need to go through these procedures again with respect to another trial.

Defendant counters that he has set forth a fair and just reason to withdraw his plea, that his previous inconsistent statements do not preclude a withdrawal and that the Commonwealth being required to "merely do" what it would have had to do in preparation for trial, does not constitute prejudice.

Withdrawals of pleas of guilty are governed by Rule 591 of the Pennsylvania Rules of Criminal Procedure. At any time before the imposition of sentence, the Court may, in its discretion, permit upon motion of the Defendant the withdrawal of a plea of guilty. Pa. R.Cr. P. 591 (A).

Requests to withdraw guilty pleas prior to sentencing are to be liberally allowed for any fair and just reason unless the prosecution has suffered substantial prejudice. Commonwealth v. Dorian, 460 A.2d 1121 (Pa. Super. 1983); Commonwealth v. Kirsch, 930 A.2d 1282 (Pa. Super. 2007), appeal denied, 945 A.2d 168 (Pa. 2008).

An assertion of innocence constitutes a fair and just reason for withdrawal of a first guilty plea. Commonwealth v. Randolph, 553 Pa. 224, 718 A.2d 1242 (1998);

Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1972); Commonwealth v. Iseley, 419 Pa. Super. 364, 615 A.2d 408 (1992), appeal denied, 627 A.2d 730 (Pa. 1993).

The Commonwealth asserts that the Court does not have to accept Defendant's assertion of innocence if the Court does not believe it is credible. The Commonwealth contends the "real" reason why Defendant wants to withdraw his plea is not because he is innocent but simply because he is hoping the victim won't appear for trial.

Although there is at least one case where the Superior Court has upheld the denial of a motion to withdraw a guilty plea and commented that the assertion was not credible, see Commonwealth v. Tennison, 969 A.2d 572 (Pa. Super. 2009), the Court finds that case is distinguishable. In Tennison, it was clear from statements the appellant and his counsel made on the record that the appellant only wanted to withdraw his guilty plea if he was going to be sentenced prior to his plea and sentencing on federal charges. 969 A.2d at 574-575. The Superior Court noted that the alleged assertion of innocence was not clear and unequivocal, but conditional on the timing of the proceedings in his federal case. Id. at 577. In affirming the trial court's denial of the Appellant's motion to withdraw, the Superior Court stated: "Under the specific facts of this case, therefore, we cannot hold the court erred as a matter of law when it determined the assertion was simply pretextual, and thus failed to provide a fair and just reason to set aside Appellant's guilty plea." Id.

In the case at bar, although Defendant may be hoping that the witness will fail to appear and that may be factoring into his decision to withdraw his plea, Defendant has made a clear and unequivocal assertion of his innocence. Despite being aware that the witness was still available and willing to testify, as well as the fact that he could be subjecting himself to

perjury charges, Defendant testified that he did not stab the victim and he did not posses a knife on the date in question.

The Court also notes that at the guilty plea hearing Defendant initially denied having a knife. N.T., August 4, 2010, at p. 17. Defendant and his counsel then conferred off the record. At the hearing to withdraw his plea, plea counsel testified that during this discussion she explained to Defendant that he wasn't pleading guilty if he did not admit he had a knife.[1] The Court also notes that while Defendant did not plead guilty until immediately prior to jury selection on August 4, his trial was not scheduled to begin until September 30 and he did not wait to see if the victim actually appeared for trial. Given these facts and circumstances, the Court is constrained to find that Defendant's assertion of innocence is a fair and just reason and not merely a machination in hopes that the victim will not appear for trial.

The Commonwealth next asserts that Defendant's motion must be denied because it will be prejudiced if he is permitted to withdraw his plea. The Commonwealth noted that the victim in this case is residing in Kentucky. Although the victim was willing to testify in this case, the Commonwealth went through the procedures to have this out-of-state witness subpoenaed to ensure the victim's presence at the trial scheduled to commence on September 30. The Commonwealth also noted that it had subpoenaed all the other witnesses and efforts were made to schedule a definite trial date, which took "significant efforts." The Commonwealth contends having to re-do all these efforts constitutes substantial prejudice such that Defendant's motion must be denied.

[1] The Commonwealth called plea counsel as a witness in this case because Defendant claimed his plea was not knowing, intelligent and voluntary and he testified that he did not think he had a choice to go to trial because his attorney told him he had no chance of winning.

The Commonwealth cites two cases in support of its position: Commonwealth v. Ross, 498 Pa. 512, 447 A.2d 943 (1982) and Commonwealth v. Dicken, 895 A.2d 50 (Pa. Super. 2006). The Court finds the cases cited by the Commonwealth are distinguishable from the case at bar.

In Ross, the Pennsylvania Supreme Court issued a short per curiam opinion, where the Court stated, in relevant part:

> Appellant's claim of involuntariness is refuted by the record. The request to withdraw the plea, which had been made after the dismissal of numerous key Commonwealth witnesses in reliance on the plea, was properly denied pursuant to Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973).

Ross, supra.

This Court finds the Ross case distinguishable for several reasons.

First, Ross did not involve an assertion of innocence.

Second, it is unclear when the plea in Ross occurred. Cases have held that the Commonwealth suffers substantial prejudice where a plea is entered after a jury has been selected or trial has commenced, because the defendant may be trying to obtain a new jury without grounds for a mistrial, the defendant has obtained a preview of the Commonwealth's case, or due to the expense or difficulties that arise when witnesses previously appeared for trial. Commonwealth v. Whelan, 481 Pa. 418, 392 A.2d 1362 (1978)(when a defendant pleads guilty after the Commonwealth has commenced its case, the Commonwealth will be substantially prejudiced); Commonwealth v. Morales, 452 Pa. 53, 305 A.2d 11 (1973)(appellant would obtain an unfair advantage by obtaining a preview of the Commonwealth's evidence and might be a means of obtaining a new jury without grounds for

a mistrial); Commonwealth v. Carelli, 308 Pa. Super. 522, 454 A.2d 1020, 1026 (1982)(Commonwealth witnesses had traveled great distances or took leave from employment to attend the first day of trial). The Court has not found any case where the Appellate Courts have found substantial prejudice where the plea was entered prior to jury selection and the out-of-state witness was still available and had not previously appeared for trial.

Third, and perhaps most importantly, case law clearly sets forth a two-step process for the Court to utilize when determining whether to allow a defendant to withdraw a guilty plea prior to sentencing. A defendant must show a "fair and just reason" for wanting to withdraw his plea. If defendant offers a fair and just reason, withdrawal should be liberally allowed unless the prosecution has suffered substantial prejudice. If a defendant fails to offer a fair and just reason, the Court can deny the petition on that basis alone. Commonwealth v. Michael, 562 Pa. 356, 755 A.2d 1274, 1277 (2000)(there must first be a fair and just reason for the withdrawal of the guilty plea before the question of prejudice arises). In Ross, the appellant did not establish that he had a fair and just reason to withdraw his plea. Although the appellant claimed his plea was involuntary, the Court found that claim was refuted by the record. Since the appellant did not establish a fair and just reason, the Commonwealth did not have to suffer any prejudice, let alone "substantial prejudice."

The Court also finds the Dicken case distinguishable. In Dicken, the defendant entered her plea after the jury was selected and sworn but before any testimony had been taken. The Commonwealth had several witnesses on standby from Arizona, Ohio, and New York. The defendant obtained a preview of the Commonwealth's case when she was informed prior to the entry of her plea that the Commonwealth had secured a witness from Arizona who

would negate her defense of her lack of involvement in and knowledge of how to set up a meth lab by testifying that the two of them had run a meth lab in Arizona. The Superior Court found substantial prejudice based on the combination of the fact that the defendant had obtained a preview of the Commonwealth's case and the number of out-of-state witnesses who previously were ready to appear and testify against the defendant. Here, there is only one out-of-state witness and Defendant did not obtain a preview of the Commonwealth's case. Defendant also pled guilty prior to jury selection; thus, there is no argument in this case that Defendant is attempting to obtain a more favorable jury when no grounds exist for a mistrial.[2]

The Court acknowledges and is sympathetic to the fact that it may be inconvenient for the Commonwealth to again issue subpoenas for the witnesses in this case, especially the out-of-state witness. This, however, is not an unheard of occurrence. Whenever a case gets continued at or after the pre-trial conference, whether it is for the unavailability of a witness due to illness or emergency, a late discovery of evidence, or the withdrawal of a guilty plea, the Commonwealth has to again subpoena its witnesses for another trial term. The Court does not believe this inconvenience rises to the level of substantial prejudice to defeat a fair and just reason for withdrawal of a plea, especially when that reason is an assertion of innocence.

Accordingly, the following Order is entered:

[2] This possibility was another reason the trial court found substantial prejudice in Dicken.

ORDER

AND NOW, this ____ day of February 2011, following a hearing and argument, the Court GRANTS the Defendant's motion to withdraw his guilty plea. This case is placed back on the trial list and is scheduled for a pre-trial conference on May 13, 2011 at 9:00 a.m. in Courtroom #1.

BY THE COURT,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Don Martino, Esquire
Eileen Dgien
Gary Weber, Esquire (Lycoming Reporter)
Work File