IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-893-2012**
	:	
vs.	:	
	:	
DARRAL DICKERSON,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the court on January 7, 2013 for a hearing and argument on Defendant's motion to withdraw his guilty plea. The relevant facts follow.

On May 13, 2012, Defendant arrived at the Williamsport Hospital with a gunshot wound to the inside of his right foot. Initially, Defendant told the police he was shot by an unknown person when he was stopped along Route 15 near the scenic overlook. Defendant's statements regarding how the shooting occurred, however, were not consistent with the trajectory of the bullet as evidenced by the entrance and exit wounds. Defendant eventually admitted to the police that he accidentally shot himself in the foot with a rifle. The police believed Defendant had convictions in New York for felony delivery of a controlled substance and felony possession with intent to deliver a controlled substance. Therefore, the police charged Defendant with one count of persons not to possess a firearm, in violation of 18 Pa.C.S. §6105.

On September 17, 2012, Defendant entered an open plea to the charge. The guilty plea order specifically noted that, with a prior record score of four (4) and an offense gravity score of nine (9) the standard sentencing guideline range for Defendant's minimum sentence was thirty-six (36) to forty-eight (48) months, but Defendant anticipated arguing for

a mitigated range sentence. Within days, however, Defendant wrote to the Court wanting to withdraw his guilty plea, claiming he did not understand he was pleading open, but rather thought he had a plea agreement for a sentence of 3 ½ to 7 years. The Court forwarded Defendant's letter to the Lycoming County Prothonotary for filing and sent copies to defense counsel and the Commonwealth.

On November 14, 2012, defense counsel filed a motion to withdraw Defendant's guilty plea, which the Court summarily denied because it did not set forth any reasons for the requested withdrawal. On December 5, 2012, defense counsel filed a second motion to withdraw guilty plea, in which counsel averred that Defendant was not guilty of the charge.

A hearing and argument was held on the motion to withdraw on January 7, 2013. At the hearing Defendant testified that he did not understand what an open plea was when he entered his guilty plea and he thought he was pleading guilty for a 3 ½ to 7 year sentence. He also indicated that at this time he did not even want that sentence because he did not believe his "point score" was correct. Defendant also did not believe he did anything wrong on the night in question; it was simply an accident. Finally, Defendant testified that he did not understand the nature of the charge when he entered his plea. He testified he is not a violent person, and he does not believe that he has a felony conviction that would render him a person not to possess a firearm under Pennsylvania law.

During Defendant's testimony, he was questioned about his prior conviction history. Defendant admitted that he has a prior conviction for an attempt to sell a controlled

substance, three convictions for possession of a controlled substance, a conviction for possessing marijuana in a public place and two "violations" for trespass. Defendant testified that although he was arrested for entering a dwelling without permission, he did not plead guilty to that offense. Instead, he entered a guilty plea to a "violation" for being in the lobby of an apartment building in New York without identification. He explained that he was arrested, spent a night in jail, and entered a plea for a "violation, and not a crime," for time served and community service. When he failed to perform community service, he received a 60 day sentence.

The Commonwealth conceded that the attempt to sell a controlled substance conviction was not the equivalent of Pennsylvania's possession with intent to deliver a controlled substance. The Commonwealth asserted, however, that at least one of Defendant's convictions for criminal trespass was the equivalent of criminal trespass graded as a felony of the second degree in Pennsylvania and his prior record score was actually a five. The Commonwealth asked the Court to keep the record open for a transcript of the guilty plea colloquy and possibly testimony from Ms. Gardner.

Defense counsel claimed all of Defendant's prior convictions should be considered misdemeanors. Therefore, Defendant would not have a disqualifying conviction under section 6105 of the Crimes Code, 18 Pa.C.S. §6105, and his prior record score would only be a three. Defense counsel argued Defendant should be permitted to withdraw his plea on the basis that Defendant asserted his innocence or that Defendant did not enter a knowing, intelligent, and voluntary plea because he did not understand the nature of the charges

against him, the possible range of sentences due to disputes regarding his prior record score, or what an open plea was.

DISCUSSION

Rule 591(A) of the Pennsylvania Rules of Criminal Procedure states:

> 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 or nolo contendere and the substitution of a plea of not guilty.

Pa.R.Cr.P. 591(A). Although there is no absolute right to withdraw a guilty plea, a request made prior to sentencing should be liberally allowed. Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268, 271 (1972); see also Commonwealth v. Pardo, 35 A.3d 1222, 1226-1227 (Pa. Super. 2011); Commonwealth v. Katonka, 33 A.3d 44, 46 (Pa. Super. 2011). In determining whether to grant a pre-sentence motion to withdraw a guilty plea, the standard is fairness and justice. Commonwealth v. Randolph, 553 Pa. 224, 718 A.2d 1242, 1244 (1998), citing Forbes, supra. If the court finds any fair and just reason, withdrawal should be freely permitted unless the prosecution has been substantially prejudiced. Id. An assertion of innocence constitutes a fair and just reason. Randolph, supra; Forbes, supra; Pardo, supra; Katonka, supra.

Not every criminal conviction disqualifies a person from possessing or using a firearm under section 6105; rather, the disqualifying offenses are only those listed in subsection (b) of the statute. While numerous offenses are listed, it appears that the only offense at issue in this case is criminal trespass. Criminal trespass, in violation of section 3503 of the Crimes Code, is a disqualifying offense, but only "if the offense is graded a

felony of the second degree or higher." 18 Pa.C.S. §6105(b).

Criminal trespass is graded as a felony of the second degree if a person, knowing that he is not licensed or privileged to do so, breaks into any building or occupied structure or separately secured or occupied portion thereof. 18 Pa.C.S. §3503(a)(1)(ii). The term "breaks into" means to "gain entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access." 18 Pa.C.S. §3503(a)(3). The Court notes that a person who, knowing he is not licensed or privileged to do so, enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof is also guilty criminal trespass, but that offense is graded as a felony of the third degree and is not a disqualifying offense under section 6105(b).

The Court finds that Defendant has asserted his innocence in this case. Although Defendant admitted that he had been arrested and charged with unlawfully entering a dwelling in New York, he testified that was not the charge to which he entered a guilty plea. Instead, Defendant claimed he entered a plea to "violations," not crimes, and that these "violations" merely involved entering the lobby of his apartment building without identification and entering an apartment or "project" building in which he was not a tenant. While Defendant's insistence that he only pled guilty to trespass "violations," and not "crimes," may seem like a distinction without a difference to an individual in Pennsylvania, there does appear to be a distinction under New York law. See N.Y. Penal Law §§10.00 (relating to definitions), and 55.10 (relating to designation of offenses).

There are various trespass and criminal trespass offenses under New York law. Based on Defendant's testimony, it appears that the relevant portions of New York Penal Law are as follows:

"Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

… 3. 'Violation' means an offense, other than a 'traffic infraction,' for which a sentence of imprisonment is excess of fifteen days cannot be imposed.

… 6. 'Crime' means a misdemeanor or a felony…." N.Y. Penal Law §10.00.

"A person is guilty of criminal trespass in the second degree when: 1. he or she knowingly enters or remains unlawfully in a dwelling…. Criminal trespass in the second degree is a class A misdemeanor." N.Y. Penal Law §140.15.

"A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property … (e) where the building is used as a public housing project in violation of conspicuously posted rules or regulations governing entry and use thereof; or (f) where the building is used as a public housing project in violation of a personally communicated request to leave the premises from a housing police officer or other person in charge thereof…. Criminal trespass in the third degree is a class B misdemeanor." N.Y. Penal Law §140.10.

"A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises. Trespass is a violation." N.Y. Penal Law, §140.05. [1]

[1] The provisions of New York Penal Law quoted above are the current versions of those statutes. The Court is unsure whether those provisions have been amended since 2002 when Defendant was arrested for his trespass

Based on a review of Defendant's testimony and these provisions of New York penal law, it is clear to the Court that Defendant is asserting that he is not guilty in this case because although he may have been charged with other criminal trespass offenses, the offense to which he pled guilty was trespass which would not be a disqualifying offense under section 6105 of Pennsylvania's Crimes Code.

In this decision, the Court is not actually determining whether any of Defendant's prior convictions constitute a disqualifying offense. It is only indicating that it is satisfied that Defendant's testimony constitutes an assertion of innocence, which constitutes a fair and just reason to withdraw his guilty plea. The Commonwealth still believes Defendant has convictions for the crimes of criminal trespass in the second degree and criminal trespass in the third degree under New York law and that the facts of at least one of those convictions would render it the equivalent of criminal trespass graded as a felony of the second degree in Pennsylvania. That is an issue for another proceeding at which both parties are free to present any relevant documents or testimony. [2]

The Commonwealth has neither alleged nor established that it would suffer substantial prejudice if Defendant is permitted to withdraw his guilty plea.

Since Defendant has asserted his innocence and the Commonwealth has not shown that it would be prejudiced by the withdrawal of the guilty plea, the Court must grant Defendant's motion.

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charges in New York.

[2] The Commonwealth indicated that it reserved the right to call witnesses at trial to establish that Defendant has a conviction that would constitute a disqualifying offense. Absent a stipulation, the Commonwealth must present Defendant's relevant convictions at trial. However, the Court believes the issue of whether a certain

In light of this ruling, any issues regarding whether Defendant's guilty plea was knowing, voluntary and intelligent, as well as the Commonwealth's request to hold the record open for the transcript of the guilty plea hearing and testimony from Ms. Gardner on those issues, is moot.

ORDER

AND NOW, this ___ day of January 2013, the Court GRANTS Defendant's motion to withdraw his guilty plea. This matter is set for a status conference on February 8, 2013 at 1:30 p.m. in Courtroom #4 of the Lycoming County Courthouse.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Robert Cronin/Kristen Gardner, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Eileen Dgien, Deputy Court Administrator
Work file

New York conviction constitutes an equivalent offense to a disqualifying Pennsylvania offense may be purely a legal issue for the Court to decide.