

COMMONWEALTH	:	No. CR-413-2018
	:	
vs.	:	Opinion and Order re
	:	Defendant's Motion to
	:	Withdraw Guilty Plea
PAUL LOWMILLER,	:	
Defendant	:	

OPINION AND ORDER

Before the court is the Defendant's Motion to Withdraw Guilty Plea. By way of background, Defendant was charged with Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse (IDSI), Aggravated Indecent Assault, Corruption of Minors, and Indecent Assault.¹ The case was scheduled for a guilty plea hearing on April 30, 2018. During the hearing, Defendant made a statement that he did not know at the time of the incident that the complainant was 14 years old. A discussion then ensued regarding the possibility of a mistake of age defense. Defendant initially indicated that he wished to plead guilty despite the possibility of that defense, but later indicated he felt pressured. The court continued the matter until May 4, 2018 to give Defendant more time to decide whether he still wished to plead guilty or whether he wanted a trial.

On May 4, 2018, Defendant entered a guilty plea to Count 2, IDSI, a felony of the first degree, and sentencing was scheduled for late August 2018.² On May 30, 2018, however, defense counsel filed a motion to compel discovery because Defendant was seeking to withdraw his plea and needed the discovery to aid in his decision making. The court granted the discovery motion, as well as a subsequent motion to obtain access to Defendant's

¹ 18 Pa.C.S. §§3122.1(b), 3123(a)(7), 3125(a)(8), 6301(a)(1)(ii), and 3126(a)(8), respectively.

² Sentencing was originally scheduled for August 20, 2018 but due to the unavailability of the court it was re-

cell phone.

On August 22, 2018, Defendant formally filed his Motion to Withdraw Guilty Plea. He claimed he was not guilty of the crimes because he did not know the complainant was under the age of fourteen (14) when the alleged offenses occurred.

Hearings were held on October 10, 2018 and December 13, 2018.

At the October 10, 2018 hearing, Defendant testified that he instructed his attorney to file the Motion because the complainant told him “she was 17 turning 18 in like a week or something, or a month or something....” He indicated he pled guilty because he felt like he was being pressured. He told his attorney that he did not want to plead guilty but she told him he was looking at 125 to 150 years in jail, which made him feel nervous. He was advised of a 25-year mandatory minimum if he was convicted of these offenses.³ Defendant admitted that the complainant performed oral sex on him but he denied knowing that she was under 14 years of age. Defendant stated he didn’t want to do anything with her, she came over on her own, and she said she was 17 at the time. Defendant indicated that he didn’t receive his discovery until July and when he went through it he saw a statement made by the complainant that she wasn’t harmed or threatened in any way.⁴

On cross-examination, the prosecutor asked Defendant if he remembered giving a statement to the police that he knew the complainant’s age was 14, but Defendant

scheduled to August 29, 2018. See Order of July 11, 2018.

³ Pursuant to 42 Pa.C.S. §9718.2, there is a mandatory minimum of 25 years and a maximum of 50 years which the Commonwealth could seek on each offense in this case if Defendant is convicted. If that occurs, the court does not have any authority to impose a lesser sentence, regardless of who initiated the sexual contact, the lack of force or threat of force, or any other circumstance. This mandatory has withstood constitutional challenge. *Commonwealth v. Golson*, 189 A.3d 944, 999-1002 (Pa. Super. 2018).

⁴ The court notes that Defendant is not charged with any offenses requiring forcible compulsion or threat of forcible compulsion. The offenses he is charged with are based solely on the ages of the complainant and Defendant and the type of sexual conduct that occurred between them.

did not recall making such a statement or any statement that the complainant asked him to have sexual intercourse and to take her virginity but he knew it was wrong because of how young she was.⁵ Defendant also denied telling the police that he engaged in any other sexual contact or acts with the complainant or that there were any incidents other than the one involving her performing oral sex on him.

Defendant also testified that he thought he told his attorney “sometime toward the end of May” that he wanted to withdraw his plea. Defendant told his attorney that there was evidence on his cell phone that the complainant told him she was over the age of 14. Defendant admitted he was permitted to “go over his cell phone” with the state police. When that evidence did not appear on his cell phone, he claimed the only reason he gave the police was that “if [the complainant] deletes them [the messages], it deletes it off mine. I mean that’s just the way it is on messenger, if you delete them they—they delete automatically.” Defendant also claimed he couldn’t remember what name the messages were under at the time.

Defendant reiterated that he felt pressured into pleading guilty because his attorney at the time told him that the judge was wrong, mistake about the complainant’s age was not a defense, and he would be looking at 125 to 150 years.

Elizabeth Frankel, a paralegal in the Public Defender’s Office, testified that Defendant indicated there were text messages on his phone that the victim told him she was 17. Initially, they couldn’t get into the phone. The phone was taken to the prison so that Defendant could help guide them through getting into the phone and locating the messages.

⁵ The prosecutor did not confront Defendant with any such statement or introduce such a statement into evidence.

Defendant had told them that the messages weren't going to be under the complainant's name; there were going to be under a different name but Defendant could not remember the name. When they went through the phone, they couldn't find any conversations indicate the age of the complainant. Ms. Frankel also testified that Defendant always claimed his innocence, he thought the complainant was 17, and he never admitted that he knew she was under 17.

At the December 13, 2018 hearing, the Chief Public Defender, William Miele, testified that initially Susan Roinick, a new attorney was assigned to represent Defendant. Mr. Miele and Ms. Roinick were discussing the case and Mr. Miele brought up the "defense of age" statute. Ms. Roinick was not aware of that statute. On May 1, 2018, she wrote a letter to Defendant explaining the defense to him. Prior to May 4, 2018, Defendant would have been made aware that mistake of age was a defense to the charges.

Ms. Roinick testified that she worked in the Public Defender's Office from February 12, 2018 to June 23, 2018. Defendant was one of her first clients. She did not appear in court with him on April 30, 2018. She or a paralegal would have gone to the prison to fill out the plea colloquy with Defendant. She did not discuss a mistake of age defense with Defendant before April 30, 2018. When Defendant came in to plead, the judge advised that mistake of age may or may not be a defense. After the judge advised Defendant of the possibility of a mistake of age defense, the judge gave Defendant about a week to decide. Ms. Roinick did not believe a week was enough time to determine if the contents of Defendant's phone would support a mistake of age defense. If Defendant was convicted of these offenses, he was facing a 25-year mandatory minimum. The assistant district attorney

assigned to the case at that time was willing to waive the mandatory if the complainant did not have to testify. Ms. Roinick also testified that she wrote a letter to Defendant about the mistake of age defense and she talked to him a couple of times. The best evidence of the contacts with the client would be the notes on the left side of his file. Ms. Roinick could not remember if Defendant was “still waffling” on May 4, but she thought he was having trouble making decisions.

A recess was taken to check the records and notations in Defendant’s file. Following the recess, the Commonwealth admitted three exhibits. Commonwealth Exhibit 1 was a letter dated April 30, 2018 from Ms. Roinick to Defendant in which Ms. Roinick advised Defendant regarding the mistake of age defense, the 25-year mandatory minimum and the sentencing guideline ranges for his charges. Commonwealth Exhibit 2 was a copy of the activity sheets documenting the contacts with Defendant, including a notation on May 1, 2018 that Ms. Roinick gave Defendant the April 30, 2018 letter plus the statutory sections he was charged with, as well as the mistake of age statute. Commonwealth Exhibit 3 was a letter dated May 1, 2018 from Ms. Roinick to Defendant further explaining the plea offer and the 25-year mandatory minimum for each offense if Defendant went to trial and lost (which held the possibility of a sentence of 125 to 250 years if the judge ordered each sentence to be served consecutively).

The parties also reached a stipulation that Defendant would testify he requested discovery from the date of the letter but did not receive it until the end of July. The parties agreed that no exculpatory evidence was found on Defendant’s phone. The Commonwealth also asked the court to take judicial notice of the April 30, 2018 and May 4,

2018 transcripts.

Rule 591(A) of the Pennsylvania Rules of Criminal Procedure governs the withdrawal of a guilty plea and 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. Crim. P. 591(A). While there is no absolute right to withdraw a guilty plea, trial courts have discretion in determining whether a withdrawal request will be granted. When the withdrawal request is made prior to sentencing, such discretion is to be administered liberally in favor of the accused, and any demonstration by a defendant of a fair-and-just reason will suffice to support a grant, unless withdrawal would work substantial prejudice to the Commonwealth. *Commonwealth v. Carrasquillo*, 115 A.3d 1284, 1291-1292 (Pa. 2015).

Despite the fact that no exculpatory evidence was found on Defendant’s phone, the court finds that Defendant has stated a fair and just reason to withdraw his guilty plea. The court notes that at the time Defendant entered his plea he did not have any discovery in his case or access to his phone. More importantly, at least since April 30, 2018, Defendant has repeatedly stated that the complainant told him she was 17 years old at the time of the incident. Mistake of age is a defense to the charge to which Defendant pled guilty. The jury is free to believe or to disbelieve Defendant’s anticipated trial testimony. If the jury would believe Defendant, he would not be guilty of IDSI.⁶ Furthermore, Defendant asked his counsel to file a motion to withdraw his plea well before the motion was filed. In

⁶ While mistake of age can be a defense to the corruption of minors charge as the operative age in the statute is 18, Defendant’s anticipated testimony would not be a defense because he did not reasonably believe the complainant was 18 years of age or older. Instead, he has repeatedly indicated that the complainant told him she

fact, Ms. Roinick alleged in paragraph 14 of the motion to compel discovery that “Defendant seeks to withdraw his guilty plea.” The motion to compel was filed on May 30, 2018. Therefore, at least by May 30, 2018, Defendant informed his counsel that he wished to withdraw his plea.

Finally, the Commonwealth presented neither evidence nor argument that it would suffer substantial prejudice if Defendant were permitted to withdraw his guilty plea.

ORDER

AND NOW, this ___ day of March 2019, the court GRANTS Defendant’s Motion to Withdraw Guilty Plea. This case shall be placed on the April 2, 2019 pretrial list, the April 29, 2019 call of the list and the trial term which runs from May 14-June 14, 2019.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
William Miele, Esquire/Nicole Spring (PD)
Gary Weber, Esquire (Lycoming Reporter)
Work file

was 17 years old and about to turn 18 in the near future.