

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-0001200-2018
vs. : CRIMINAL DIVISION
JAMES DANIEL CHOICE, :
Appellant : 1925(a) Opinion

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

This Opinion is written in support of the judgment of sentence dated October 15, 2021 and docketed October 26, 2021.

By way of background, the Williamsport police filed a criminal complaint on July 18, 2018, charging James Daniel Choice (“Appellant”) with one count of persons not to possess firearms, one count of delivery of a controlled substance, four counts of possession with intent to deliver a controlled substance (PWID), three counts of possession of a controlled substance, one count of possession of a small amount of marijuana, and one count of possession of drug paraphernalia.¹

Defendant filed an omnibus pretrial motion on September 26, 2018 in which he sought suppression of the evidence seized during a search of his residence, severance of the firearm charge, and disclosure of *Brady/Giglio* information, as well any prior wrongs, bad acts evidence that the Commonwealth intended to introduce pursuant to Pa. R. Evid. 404(b).² In a decision dated December 19, 2018, the court denied suppression and granted severance.

¹ 18 Pa. C.S.A. §6105; 35 P.S. §780-113(a)(30), (16), (31), and (32).

The court deferred ruling on the discovery issues pending further discussions between the parties.

Over the next several months, despite being represented by counsel, Appellant attempted to file several pro se motions for ineffective assistance of counsel, a writ of habeas corpus, and reconsideration of the suppression. These motions were forwarded to counsel in accordance with Rule 576 of the Pennsylvania Rules of Criminal Procedure.

On March 20, 2019, defense counsel filed a motion to withdraw, which the court granted on April 8, 2019. On April 16, 2019, the court appointed conflict counsel, Jeffrey Yates, to represent Appellant.

On July 15, 2019, Appellant filed a motion to dismiss pursuant to Rule 600, which the court summarily denied as the criminal complaint was filed on July 18, 2018, and more than 365 days had not elapsed from the filing of the complaint when the motion to dismiss was filed.

On July 19, 2019, Appellant filed a motion for nominal bail pursuant to Rule 600, which the court denied in an Opinion and Order entered on or about August 8, 2019.

Following a second nominal bail motion which was filed on September 27, 2019 and heard on October 16, 2019, Appellant's bail was reduced but his release was conditioned upon his placement on and his compliance with the Intensive Supervised Bail Program.

On November 1, 2019, the court permitted Appellant's counsel to file another motion to suppress. The second motion was based on the veracity of the statements made in the search warrant. Shortly thereafter, Appellant waived his right to counsel and elected to

² At this time, Appellant was represented by Edward J. Rymysza, Esquire.

proceed pro se. On November 19, 2019, the court denied Appellant's second suppression motion. Appellant submitted a letter to the court, which it treated as a pro se motion to compel discovery. On November 21, 2019, Appellant filed a motion for reconsideration, allegedly based upon newly discovered evidence. Both motions were scheduled to be heard on December 11, 2019.

On November 27, 2019, Andrea Pulizzi entered her appearance as counsel for Appellant. She requested, and the court granted, a continuance of the hearing on December 11, 2019, which was rescheduled to January 31, 2020. Then she filed an amended motion to compel discovery and an amended motion for reconsideration.

On January 31, 2020, the court issued a decision on the motion to compel discovery.

On February 24, 2020, Appellant filed another omnibus pretrial motion, which included a motion to suppress and a petition for writ of habeas corpus. A hearing was originally scheduled for March 19, 2020, but was continued due to the COVID-19 pandemic. Moreover, as it appeared to raise the same or similar issues as previous motions, the court ordered a transcript of the prior hearing. After reviewing the transcript, the Commonwealth filed a motion to dismiss Appellant's omnibus pretrial motion filed on February 24, 2020. The court granted the Commonwealth's motion to dismiss in an opinion and order dated October 2, 2020 and docketed on October 5, 2020. The case was continued from the next trial term based on a defense request.

The case remained on the trial list until May, 2021. On May 14, 2021, the Commonwealth moved to amend the Information to add Count 12, possession with intent to deliver (marijuana). Appellant entered a guilty plea to Count 12 in exchange for a negotiated

sentence. Appellant’s sentencing hearing was continued twice – once due to the unavailability of the court and once at the request of the defense.

On October 15, 2021, at the time set for sentencing, Appellant changed his plea to an Alford plea. The court imposed the negotiated sentence of 200 to 493 days’ time served following by 3 years of probation consecutive to the state sentence that Appellant was serving.

On November 17, 2021, Appellant filed a pro se notice of appeal from the Order entered October 15, 2021 “denying discharge enforcing to accept an unfavorable plea in violation of constitutional rights 6th amendment.”

By order entered on December 7, 2021, Appellant was directed to file a concise statement of matters complained of on appeal. To date, neither Appellant nor his former counsel filed such a statement.

On February 7, 2022, the court held a *Grazier*³ hearing. At that hearing, the court permitted Appellant’s counsel to withdraw because Appellant had not retained or paid her to represent him on appeal. Appellant indicated that he would represent himself at least until he was released from prison at which point he would explore hiring new private counsel. The court also sent Appellant an application to apply for a public defender in the event Appellant changed his mind or was unable to secure new private counsel.

The court apologizes for the lack of focus of its statement of facts, but the court does not know what issues Appellant wishes to assert on appeal. Appellant’s statement in his notice of appeal led the court to believe that he was challenging his plea and sentence. However, the only transcripts requested by Appellant were of the hearing held on October

³ *Commonwealth v. Grazier*, 552 Pa. 9, 713 A.2d 81 (1998).

16, 2019 on his motion to dismiss and the hearing held on January 31, 2020 on his motion to compel.

The court finds that Appellant has failed to preserve properly his issues for appeal. “Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.” Pa. R.A.P. 302(a).

Similarly, issues not asserted in a concise statement of matters complained of on appeal also are waived. Pa. R.A.P. 1925(b)(4)(vii).

Issues asserted in pro se motions, documents and filings when an individual is represented by counsel are legal nullities. As the Pennsylvania Superior Court noted in *Commonwealth v. Williams*,

In this Commonwealth, hybrid representation is not permitted. *See Commonwealth v. Jette*, 611 Pa. 166, 23 A.3d 1032, 1036 (2011)(concluding that a petitioner’s pro se motion when petitioner is represented by counsel is impermissible as hybrid representation; accordingly, the pro se motions have no legal effect and, therefore, are legal nullities.)”

151 A.3d 621, 623 (Pa. Super. 2016).

Furthermore, Appellant waived his right to challenge rulings on his discovery and Rule 600 motions when he entered his plea. A plea of guilty constitutes a waiver of all nonjurisdictional defects and defenses. When a defendant pleads guilty, he waives the right to challenge anything but the legality of his sentence and the validity of his plea.

Commonwealth v. Jones, 593 Pa. 295, 308, 929 A.2d 205, 212 (2007). In terms of its effect in a criminal case, a plea of *nolo contendere* is treated the same as a plea of guilty.

Commonwealth v. Norton, 650 Pa. 569, 574 n.1, 201 A.3d 112, 114 n.1 (2009);

Commonwealth v. Prieto, 206 A.3d 529, 533 (Pa. Super. 2019). Therefore, a defendant who

pleads *nolo contendere* also waives all claims and defenses other than those sounding in the jurisdiction of the court, the validity of the plea, and what has been termed the legality of the sentence imposed. *Prieto, id.*

An *Alford*⁴ plea is a *nolo contendere* plea in which the defendant does not admit guilty but waives trial and voluntarily, knowingly and understandingly consents to the imposition of punishment by the trial court. Provided the record reflects a factual basis for guilt, the trial court may accept the plea notwithstanding the defendant's protestation of innocence. Typically as in the present case, a defendant is exchanging his plea for a reduced sentence or reduced charges.

Commonwealth v. Snavelly, 982 A.2d 1244, 1244 n.1 (Pa. Super. 2007)(citations omitted).

Accordingly, by entering his plea, Appellant waived all claims of error related to the court's ruling on his discovery and Rule 600 motions.

If Appellant is attempting to challenge his guilty plea or sentence, he has failed to ensure a complete record for appeal. Appellant has the obligation to make sure that the record forwarded to the appellate court contains the transcripts and documents necessary to allow a complete assessment of the issues raised on appeal. *Commonwealth v. Lesko*, 609 Pa. 128, 237, 15 A.3d 345, 410 (2011). "For purposes of appellate review, what is not of record does not exist." *Hrinkevich v. Hrinkevich*, 676 A.2d 237, 240 (Pa. Super. 1996).

DATE: _____

By The Court,

Kenneth D. Brown, Senior Judge

cc: District Attorney
James Choice
Station House Shelter

⁴*North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

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