

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

ERIC ORNER,
Defendant

:
: **No. CP-41-CR-0000404-2021**
:
: **Opinion and Order re Defendant's**
: **Motion to Withdraw Guilty Plea**
:

OPINION AND ORDER

On May 23, 2022, Eric Orner (Defendant) was scheduled to begin a jury trial but chose to plead guilty to the charges Statutory Sexual Assault¹, Involuntary Deviate Sexual Intercourse², Aggravated Indecent Assault³, Corruption of Minors⁴, and Photograph Film Depict on Computer Filming Sexual Acts.⁵ On September 19, 2022, several days before sentencing he filed a motion to withdraw his guilty plea. Hearing on the motion was held on October 11, 2022. For the reasons stated below the Defendant's motion will be denied.

Background

Defendant was arrested on March 6, 2021 by the Pennsylvania State Police (PSP) alleging that, between September 1, 2019 and January 1, 2021, Defendant would have engaged in sexual intercourse and deviant sexual intercourse with an individual under the age of 16 (AH). At that time the Defendant would have been 11 or more years older than AH. It was also alleged that, as a result of the acts between him and AH, he would have corrupted or tended to corrupt her morals along with the allegation that he would have knowingly photographed, videotaped or depicted on a computer or a film AH by either engaging in either a prohibited sexual act or a simulation of a prohibited sexual act. In anticipation of his jury trial, Commonwealth filed a

¹ 18 Pa C.S.A. § 3122.1(b).

² 18 Pa. C.S.A. § 3123(a)(7).

³ 18 Pa. C.S.A. § 3125(a)(8).

⁴ 18 Pa. C.S.A. § 6301(a)(1)(ii).

⁵ 18 Pa. C.S.A. § 6312(b)(2).

Motion in Limine at which time the parties entered into an agreement accepted by this Court. The agreement acknowledged that intoxication would not be an available defense to the Defendant at trial. Further, defense counsel agreed that it would be bound by the provisions of the Rape Shield Law.⁶ On May 23, 2022, just prior to the start of the two-day jury trial, the Defendant pled guilty before this Court. At the time of the guilty plea, the Defendant acknowledged he would have been 31 years old and that he had sexual relations with AH, who would have been 15 at the time (NT p7). The Defendant further acknowledged that he would have been advised that as a result of a conviction for the offense of involuntary deviant sexual intercourse he would be listed as a Tier III offender under SORNA⁷. Prior to sentencing the Defendant would also need to be evaluated by the SOAB⁸ to determine if he was a sexually violent predator. Defendant was scheduled for sentencing on September 22, 2022. However, on September 19, 2022, the Defendant filed a motion to withdraw his guilty plea and a hearing on that motion was scheduled for October 11, 2022.

At the hearing on the motion to withdraw the guilty plea, the defense presented no testimony or evidence. Defense counsel argued that the Defendant's fair and just reason for withdrawing his plea was that the Defendant believed that the victim did not wish to press charges or to testify. Defense Counsel argued that the victim attempted to reach out to the Defendant through Facebook and that any victim impact statement that was prepared for the District Attorney's office in anticipation of sentencing was filled out by AH's mother. Additionally, AH was made to press charges against the Defendant. Finally, defense counsel alleges that because the Defendant has not yet been sentenced he does not have to assert his innocence in order to have his request to withdraw his plea granted. The Commonwealth alleges

⁶ 18 Pa. C.S. §3104

⁷ Sexual Offender Registration and Notification Act, 42 Pa. C.S.A. § 9799.14(d)

⁸ Sexual Offender Assessment Board, 42 Pa. C.S.A. § 9799.24

that the information regarding the statements and position of the victim is not true. Counsel for the Commonwealth, who would have been prepared to try the case, offered to the Court that at all times the victim was prepared to proceed. In fact, the Commonwealth's attorney met with AH four to five times in anticipation of her testimony being needed during the trial. At the time of the hearing on the motion to withdraw, the Commonwealth stated that AH is more motivated and desiring of a trial now more than ever. Since the incident occurred, AH has "come a long way". The Commonwealth argues that the perception of the Defendant that AH does not want to proceed is not true but that it does not establish a fair and just reason other than to delay the disposition of the case.

In Pennsylvania, there is no absolute right to the withdrawal of a guilty plea *Commonwealth v Garcia*, 280 A3d 1019 (Pa.Super. 2022). A fair and just reason will support the request to withdraw a plea when the claim is at least "plausible." *Commonwealth v. Carrasquillo*, 115 A3d 1284, 1292 (Pa. 2015). The analysis for the Court is "whether the accused has made some colorable demonstration, under the circumstances, such that permitting withdrawal of the plea would promote fairness and justice." *Commonwealth v. Norton*, 201 A.3d 112, 120-121 (Pa. 2019). A bare assertion of innocence is not sufficient to grant the presentence withdrawal of a guilty plea. *Norton* at 122, citing *Commonwealth v. Hvizda*, 116 A.3d 1103 (Pa. 2015). In *Norton*, the Defendant entered a plea of no contest on the day of his jury selection. He filed his motion to withdraw his guilty plea four months later, claiming that "he could not live with himself" that he was innocent and that he wanted to "test the commonwealth's evidence." *Id.* at 115, 121. The Supreme Court found that a bare assertion of innocence "was not in and of itself a sufficient reason" to grant Norton's presentence motion to withdraw a *nolo contendere* plea entered on the eve of trial. *Id.* at 122.

Defendant pled guilty on the day of jury selection at which time the Commonwealth was prepared to proceed. Defendant filed his motion to withdraw guilty plea approximately four months after the entry of the plea. Although defense counsel claims Defendant believes that the victim is not willing to testify, the Court does not find this to be a “plausible assertion of innocence” or a “fair and just reason” to withdraw his plea. At no time did the Defendant assert even a colorable claim of innocence. Rather, defense counsel merely argued that Defendant believed that now the victim was unwilling to testify against Defendant or that her mother was “forcing her” to come forward. The arguments of counsel are not evidence. *Commonwealth v. Molina*, 104 A.3d 430, 463 (Pa. 2014); *Commonwealth v. Puksar*, 951 A.2d 267, 280 (Pa. 2008); *Commonwealth v. Moore*, 263 A.3d 1193, 1206 (Pa. Super. 2021). The Court finds that the Defendant has not met his burden of persuasion to justify the grant of a withdrawal of his guilty plea.

Even if Defendant had testified that he now believes the victim does not wish to testify against him, the Court would still find that such an assertion does not constitute a fair and just reason to withdraw his plea, particularly a plea that was entered as the jury was about to enter the courtroom to commence trial.

Conclusion

Defendant pled guilty on the day of jury selection and filed a request to withdraw that plea approximately four (4) months later. His reason for wishing to withdraw his guilty plea was not an assertion of innocence but a belief that the aggrieved party does not wish to testify against him. The Court finds that the Defendant has failed to present a fair and just reason to justify the grant of the withdrawal of his plea. Therefore, the motion to withdraw his plea shall be denied.

ORDER

AND NOW, this 6th day of December, 2022, the Defendant's Motion to Withdraw Guilty Plea is hereby DENIED. Sentencing is rescheduled for January 10, 2023 at 11:00 AM in Courtroom #1.

By the Court,

Nancy L. Butts, President Judge