

COMMONWEALTH OF PENNSYLVANIA vs. GREGORY WARD, Defendant, Franklin County Branch, Criminal Action - Nos. 530 of 1996 and 741 of 1996.

COMMONWEALTH V. GREGORY WARD.

Criminal action; *nolo contendere* plea to two counts of robbery; appeal from sentence; allegation of court error in not appointing new counsel after defendant assaulted his attorney during sentencing.

1. A defendant is entitled to legal representation during critical stages of the prosecution's proceedings, such as pleading and sentencing.
2. The court must advise a defendant of his right to representation in order to ensure that his waiver of that right is knowing and intelligent.
3. The defendant intelligently and understandingly waived his right to have new counsel appointed to represent him for the completion of the sentencing where he was represented by court-appointed counsel from the time he was charged through almost the entire sentencing and was therefore aware of his right to counsel, his attorney spoke on his behalf at the sentencing, the defendant assaulted his attorney and did not request new counsel after court reconvened.
4. Under Canon 3.C.(1) of the Code of Judicial Conduct, a judge should recuse himself from presiding over a proceeding in which his impartiality might reasonably be questioned, including a proceeding where he has a personal bias or prejudice concerning a party.
5. The court was not required to recuse itself from the remainder of the defendant's sentencing where the court specifically stated on the record that no additional terms would be added to the robbery sentence as a result of the court having witnessed the assault, and where the sentence as imposed was completely consistent with the plea agreement.
6. The defendant had the right to file post-trial motions within ten days of sentencing, including a motion challenging the entry of his *nolo contendere* plea for robbery and was so advised by the court at the conclusion of the sentencing.
7. The defendant's right to file a post-sentence motion to withdraw his plea was not compromised by the fact that the court did not appoint new counsel within ten days, where new counsel did not file a petition for leave to challenge the validity of the plea *nunc pro tunc* under 42 Pa.C.S.A. section 5505, which allows the court to correct any irregularities or illegalities in the plea for 30 days after sentencing.

John F. Nelson, Esquire Attorney for Plaintiffs
Michael J. Toms, Esquire Attorney for Defendant

ORDER OF COURT

Herman, J., July 28, 1997:

INTRODUCTION

The defendant was charged with two counts of robbery. The defendant used a loaded handgun to rob an employee and a customer of a state liquor store. He pled *nolo contendere* and the

Commonwealth agreed not to seek a sentence beyond the mandatory minimum of 60 months on each charge. During the sentencing on May 21, 1997 the defendant assaulted his attorney, Todd A. Dorsett, Esquire, by punching him in the mouth. The court recessed the proceeding and reconvened later that day. The court sentenced the defendant to 60 - 240 months on each robbery charge with sentences to run consecutively. New counsel, Michael J. Toms, Esquire was appointed to represent the defendant on June 10, 1997. The defendant filed a notice of appeal and we directed him to file a concise statement of matters complained of on appeal.

DISCUSSION

Issue I

Citing *Commonwealth ex rel. Mullins v. Maroney*, 428 Pa. 195, 236 A.2d 781 (1968), the defendant contends we erred in not providing him with new counsel to finish the sentencing hearing after he struck his attorney in the face. That case stands for the proposition that a defendant has a right to counsel at critical stages of the prosecution's proceedings such as pleading and sentencing. The court found that Mullins, who was indigent, did not intelligently and understandingly waive his right to counsel because the court did not advise him during the plea colloquy that he had a right to counsel free of charge.

The defendant in the case at bar was represented by court-appointed counsel from the time he was charged through almost the entire sentencing hearing during which his counsel spoke on his behalf. The defendant's counsel was finished with his presentation and the defendant was then given the opportunity to address the court. After briefly protesting the fairness of the sentencing proceeding, the defendant violently and without provocation assaulted his attorney who left the courtroom to tend his injury. Court was recessed and reconvened later that day. As we stated on the record upon reconvening, the attack occurred after Attorney Dorsett's efforts on the defendant's behalf were completed. The defendant was then given the opportunity to finish his statement to the court. (N.T. pp. 6-7). He offered an apology for his conduct and asked the court procedural questions about the upcoming assault charges. Having already been

represented by court-appointed counsel throughout the course of the prosecution's proceedings, it is beyond question he knew of his right to counsel but did not ask for new counsel for the remainder of the sentencing. He made no further comments about the sentence beyond asking about credit for time served. (N.T. pp. 9, 13). Under those circumstances, the fact that new counsel was not immediately appointed for the remainder of the sentencing did not in any way compromise the defendant's rights.

Issue II

The defendant next contends the court should have recused itself from the rest of the hearing after witnessing the assault and cites Canon 3.C.(1) of the Code of Judicial Conduct. That section addresses disqualification and provides:

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it..."

Once the hearing was reconvened but before we imposed sentence, we stated:

"I want to note for the record that we specifically are not going to consider your actions that appeared before the Court today in imposing sentence in this matter, and the sentence I'm about to announce was the sentence I had intended to impose depending on the information that I had heard in the sentencing proceeding that was in accordance with the recommendation of the Commonwealth prior to the disruption of the sentencing proceeding this morning. I'm not aggravating your sentence in any way based on what happened here today.

This is a sentence that I think it's fair under the circumstances based on what happened, particular the violent nature of the [robbery] offense."

(N.T. May 21, 1997, pp. 10-11). The sentence we imposed was completely consistent with the plea agreement. No additional terms were added to the sentence as a result of our having witnessed the assault. Our impartiality as to the appropriateness of the robbery sentences cannot reasonably be questioned in light of our above comments on the record.

Issue III

The defendant also argues we erred in not providing him with new counsel immediately after the sentencing so as to enable him to file a post-sentence motion challenging the entry of his nolo contendere plea within the ten day period set forth in Pa.R.Crim.P. 1410(A)(1).

The defendant was sentenced on May 21, 1997. The court advised him of his right to petition for withdrawal of his plea. (N.T. p.12). He remained in Franklin County Prison without representation until June 10, 1997 when Attorney Toms was appointed as counsel. Attorney Toms was appointed after the ten-day period had expired. However, he could have petitioned for leave to challenge the validity of the plea *nunc pro tunc*, as the court still had jurisdiction to act pursuant to 42 Pa.C.S.A. section 5505. The petition would have allowed the court to correct any irregularities or illegalities in the plea. *Commonwealth v. Laskaris*, 385 Pa. Super. 339, 561 A.2d 16 (1989).

Three of the defendant's grounds for appeal pertain to the alleged ineffectiveness of Attorney Dorsett. These are: (1) trial counsel was ineffective for refusing to subpoena the witnesses identified by Defendant as necessary for his defense; (2) trial counsel was ineffective because he failed to tell Defendant that the robbery and theft charges stemming from the same incident merged for sentencing, and (3) trial counsel was ineffective because he refused to file any pre-trial motions for Defendant. We cannot address issue number two because no record has been developed on the issue of Attorney Dorsett's ineffectiveness. That issue could have been addressed at an evidentiary hearing in conjunction with oral argument pursuant to a *nunc pro tunc* petition challenging the validity of the plea.

Issues one and three would not constitute grounds for ineffective assistance of counsel because the defendant waived his right to assert these claims by entering a no contest plea. The answers given by the defendant on the written plea colloquy indicate his understanding of this waiver. The defendant never indicated to the court at the time of the no contest plea that he was forced to enter the plea because his attorney did not subpoena witnesses or file pre-trial motions on his behalf.

We respectfully submit we committed no errors during any part of these proceedings.

ZEIGLER; GALEN MOWEN; MARSHA SNIDER; E. EVERETT MOWEN; SHELBY JEAN ZEIGLER; ELDON S. MOWEN; E. DWAIN MOWEN; SHAWN L. MOWEN; GERALD H.C. MOWEN; CONNIE KUNKLE; AUBREY MOWEN; OLEN MOWEN; BETTY BRECHBEIL; CLIFFORD E. MOWEN; ATTORNEY GENERAL OF PENNSYLVANIA, DEFENDANTS, Franklin County Branch, Orphan's Court Division - No. 22-1996)

In re Esther Kite v. Capitola Johnston, et al.

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