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Commonwealth v. Carnell

COMMONWEALTH OF PENNSYLVANIA
v. WILLIAM CRAIG CARNELL, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action No. 65 of 2011

Appeal and Error in Criminal Cases

1. Direct appeal in a criminal matter lies from the judgment of sentence, not from the denial of post-sentence motions.

Plea of Guilty or Nolo Contendere: Effect of Plea

1. A plea of nolo contendere has the same effect on the case as a guilty plea.
2. A guilty plea is a confession with binding collateral consequences.
3. In deciding a motion to withdraw a plea, the court treats guilty pleas and nolo contendere pleas identically.

Plea of Guilty or Nolo Contendere: Presentence Withdrawal of Plea

1. The court has discretion to permit a defendant to withdraw his plea of guilty or nolo contendere at any time prior to imposition of sentence.
2. A defendant has no absolute right to withdraw a plea, but a request should be allowed if the defendant asserts a fair and just reason, and withdrawal of the plea would not prejudice the defendant.
3. A credible assertion of actual innocence is a fair and just reason that would permit withdrawal of a plea.
4. An insincere, conditional, or ambiguous assertion of innocence is not a fair and just reason that would permit withdrawal of a plea.

Guilty or Nolo Plea: Withdrawal and Prejudice to Commonwealth

1. In deciding a motion to withdraw a plea of guilty or nolo contendere, the court must consider whether the defendant has asserted a fair and just reason permitting withdrawal, and whether the Commonwealth would be prejudiced thereby.
2. If the defendant fails to assert a fair and just reason that would permit withdrawal of a plea of guilty or nolo contendere, the court need not consider prejudice to the Commonwealth.

Right to Counsel: Right to Self-Representation

1. The Sixth Amendment guarantees both defendants' right to counsel and their right to represent themselves.
2. A court may not consider a defendant's best interests in assessing whether he has validly waived the right to assistance of counsel.

Appearances:
Anthony W. Forray, Esq., *Senior Deputy Attorney General*
F. Dean Morgan, Esq., *Counsel for Defendant*
William Craig Carnell, *Defendant*

OPINION

Walsh, J., August 10, 2012

Appellant William Craig Carnell and his co-defendant wife, Melissa "Missi"[1] Ann Carnell, stole thousands of dollars from Appellant's elderly mother and disabled brother. Appellant pleaded nolo contendere to charges of theft and conspiracy, and now appeals his judgment of sentence.[2] He argues that this Court erred in refusing to allow him to withdraw his plea presentence. Because we correctly found that Appellant's assertion of innocence was not credible, the Superior Court should affirm.

Background

The Commonwealth, through the Office of Attorney General, accused Appellant and his wife of using their power of attorney over Appellant's mother, Margaret "Peggy" Carnell to take large sums of money from her. Missi used the Carnell's power of attorney to withdraw money from Peggy's bank accounts, to mortgage Peggy's property, and to open credit-card accounts in Peggy's name. Before Appellant and Missi managed Peggy's financial affairs,

1 Margaret Carnell's nominal diminution is alternatively spelled "Missy" and "Missi" in various court documents. Because this case involves family members with the same surname, we will refer to William Craig Carnell as "Appellant," and Missi Carnell as "Missi" or "wife."

2 Carnell's Notice of Appeal states that he appeals from the denial of the post-sentence motion. It should say that he appeals from the entry of judgment of sentence. See, e.g., Commonwealth v. W.H.M., Jr., 932 A.2d 155, 158 n.1 (Pa. Super. 2007)("An appeal from an order denying a post-trial motion is procedurally improper because a direct appeal in a criminal proceeding lies from the judgment of sentence.").

Peggy owned her home and the land it was on, and had approximately $70,000.00 in cash in her bank accounts. Instead of using their power of attorney to care for Peggy, Appellant and his wife used the money for personal matters. Appellant used the money to buy a backhoe, camper, boat, boat trailer, a trailer to haul the backhoe, and a used dump truck.

To be fair to Appellant, his wife was clearly the driving force behind the financial crimes. The Commonwealth conceded as much at sentencing. N.T., 2/7/12 (Tr. of Proceedings of Mot. to Withdraw Guilty [sic] Plea & Sentencing), at 15-16. Nevertheless, at the time of the crimes, Appellant earned a maximum of $40,000.00 per year as a construction worker while he and his wife spent almost three times that amount in purchases such as the boat, backhoe, and dump truck. Appellant also took at least one week-long vacation with his wife, leaving Peggy and John in a house-trailer that lacked power. Furthermore, in 2008, Appellant refused to allow access to Peggy, and denied that she needed medical care. In fact, Peggy had suffered a stroke. Other family members sought medical care for her, and she was hospitalized for a week.

By the time that the Carnells' management of Peggy's finances was stopped, her bank accounts were nearly depleted, she had a $120,000.00 mortgage on a home that she no longer occupied, and she had over $43,000.00 in credit-card debt. In all, the Commonwealth contends that Appellant and his wife took $228,000.00 from John and Peggy, which includes mortgage proceeds, Social Security disability checks owed to John, and money withdrawn from Peggy's bank accounts.

The Commonwealth charged Appellant on March 28, 2011. Represented by former counsel, Appellant waived mandatory arraignment on May 10, 2011. Former counsel's involvement in the case then ceased. On July 12, 2011 Appellant and Missi appeared and orally requested a continuance. The Honorable Carol L. Van Horn reluctantly granted their request. In her order, which she dictated in appellant's and Missi's presence, Judge Van Horn stated, "[t]he Defendant is advised that he shall forthwith contact counsel if he desires to obtain counsel to represent him in this matter and that such counsel shall be advised there shall be no further continuances of this matter absent exigent circumstances." Judge Van Horn's order also directed the Carnells to next appear on October 11, 2011 for call of the criminal list. That they failed to do, and the Court issued a bench warrant. Apparently, the Carnells crossed their dates. N.T., 10/18/11 (Tr. of Proceedings of Guilty [sic] Plea), at 2-3. The Court nevertheless refused to vacate the bench warrants pending their next court date, October 18, 2011. Id.

On that date, Appellant appeared before this Judge, and entered a plea of nolo contendere, pro se, to two counts of theft by unlawful taking and one count conspiracy. Appellant's wife also entered a nolo plea. The Court accepted Appellant's plea after he signed a written colloquy and after he was questioned on the record. N.T., 10/18/11 at 15-25.

Appellant appeared for sentencing on November 29, 2011, and requested counsel, so the Court continued sentencing and appointed counsel. On December 22, 2011, we continued sentencing again, to allow Appellant to move to withdraw his plea. We denied the motion to withdraw on February 7, 2012, and sentenced Appellant thereafter. Defendant filed a post-sentence motion on February 16, which we denied on May 24.[3] This appeal followed on July 3, 2012.[4]

Discussion

On appeal, Appellant raises three claims of error, but the claims really challenge one issue: whether the Court erred in refusing to allow Appellant to withdraw his plea. Here are the claims (restated for ease of reading):

1. This Court erred denying his presentence motion to withdraw his nolo contendere plea because Carnell asserted his actual innocence and the Commonwealth failed to show substantial prejudice;

2. This Court erred in denying the post-sentence motion when Carnell demonstrated that the Commonwealth's evidence was substantially flawed, and actually supported Carnell's claim of innocence; and

3. The Court denied Carnell's right to effective assistance of counsel.

The Court will address the first and second claims together, because the post-sentence motion was effectively a motion to reconsider our denial of the presentence motion to withdraw plea.

I. This Court Properly Denied Appellant's Motion to Withdraw his Nolo Plea

3 The May 24 order was not docketed until June 5, 2012. In the normal course of business, orders are hand-delivered from the Court's chambers in Chambersburg to the Clerk of Courts for Fulton County in McConnellsburg.

4 The undersigned was never served with the Notice of Appeal. Cf. Pa. R.A.P. 906(a)(2). We received notice only after the Clerk forwarded the record copy to chambers.

At any time before the imposition of sentence, a court may, in its discretion, permit a defendant to withdraw his plea of guilty or nolo contendere. Pa. R. Crim. P. 591(A). A defendant has no absolute right to withdraw a guilty or nolo contendere plea, but such a request should be liberally allowed. Id. Comment. The request should be granted if the defendant asserts a "fair and just reason" that would permit withdrawal and the Commonwealth would not be substantially prejudiced thereby. Id. Assertion of actual innocence is a "fair and just reason." Commonwealth v. Miller, 748 A.2d 733, 735-36 (Pa. Super. 2000). The Superior Court reviews a trial court's denial of a motion to withdraw a nolo contendere plea for abuse of discretion. Pa. R. Crim. P. 591(A); cf. Commonwealth v. Pardo, 35 A.3d 1222, 1227 (Pa. Super. 2011) ("A trial court's decision regarding whether to permit a guilty plea to be withdrawn should not be upset absent an abuse of discretion.").

Mere assertion of innocence, however, is not always a "fair and just reason." Rather, the plea judge retains discretion to weigh the sincerity of the assertion of innocence, based on the totality of circumstances. Commonwealth v. Tennison, 969 A.2d 572, 573 (Pa. Super. 2009). The judge may deny the motion to withdraw where the assertion of innocence is insincere. Id. In Tennison, the defendant attempted to game the system, by conditionally asserting his innocence in an attempt to delay and receive a better sentence in his related federal case. Id. at 574-75. The Superior Court affirmed the trial judge's refusal to grant the motion to withdraw. The court noted that the defendant made a conditional, ambiguous assertion of innocence, and that the defendant's equivocations appeared to be an attempt to favorably influence the outcome of his cases. Id. at 577-78.

In determining the credibility of a defendant's assertion of innocence, the plea judge cannot look solely to the incongruity between his plea colloquy and his later, presentence assertion of innocence. Commonwealth v. Katonka, 33 A.3d 44, 49-50 (Pa. Super. 2011) (en banc). Thus, an admission of guilt at a guilty plea colloquy (or standing mute during a nolo plea colloquy) does not bar a later, presentence assertion of actual innocence. Id.

Appellant advances several arguments in Parts 1 and 2 of his Concise Statement. First, he attempts to distinguish Tennison by arguing that, because he pleaded no contest, he never admitted guilt. Next, he argues that his mere assertion of innocence in open court should have been sufficient to permit withdrawal of his plea. Appellant argues that it was improper for the Court to conclude that his attempt to withdraw his plea was because of the Probation Department's recommended prison sentence-length. Third, Appellant contends that the Court erred in failing to identify whether the Commonwealth would be substantially prejudiced by withdrawal of the plea. Part 2 of the Concise Statement attacks the facts underlying Appellant's conviction, claiming that the Affidavit of Probable Cause is "substantially flawed" and supports Appellant's assertion of innocence.

The first argument is without merit. Appellant has pointed to no cases holding that a court must treat a motion to withdraw a nolo contendere plea different than a motion to withdraw a guilty plea. Rather, it has long been the law that a nolo plea is the same as a guilty plea in its effect upon the case, the only difference being that a guilty plea is a binding confession with collateral consequences. See, e.g., Commonwealth v. Hayes, 369 A.2d 750, 751 (Pa. Super. 1976) (en banc); Commonwealth ex rel. Monaghan v. Burke, 74 A.2d 802, 804 (Pa. Super. 1950). Nothing in Pennsylvania Rule of Criminal Procedure 591, its Comment, or the case law distinguishes nolo pleas from guilty pleas. We also see no reason to distinguish them.

As to the second argument, we did not rely on the incongruities between Appellant's acceding to the sufficiency of the Commonwealth's evidence with his later assertion of innocence. That would have contradicted Katonka's holding. Rather, we believed, based on the totality of the circumstances, that Appellant's "attempt to withdraw his plea appears to be one final step to game the system and delay conclusion of this matter." May 24, 2012 Order ¶ 11. First, at the hearing on the motion to withdraw, Appellant admitted on the record that the Probation Department's sentence recommendation influenced his decision to withdraw his plea. N.T., 2/7/12, at 10-11. Second, the history of the case is one of delay and obfuscation. Id. at 3-5. Third, the record belies Appellant's claims that he knew more about the case *after* he pleaded nolo contendere. As the Attorney for the Commonwealth stated on the record, Appellant and his co-defendant had no hesitation pleading no contest at the time they entered the pleas. Id. at 6. Rather, it was only after he saw the sentencing recommendations that Appellant wavered. Id. We similarly found Appellant's claims that he was a mere country rube - and did not understand the charges against him - unavailing. See ¶ 12 of our May 24 order for the reasons. Under the totality of the circumstances, the Court determined that Appellant's assertion of innocence was not credible.

The third argument is also without merit. Because the Court found no fair and just reason to permit Appellant to withdraw his plea, we did not need to address whether the Commonwealth would have suffered prejudice. The Rule 591 analysis is a two-step, and a court must address prejudice only if a fair and just reason exists. In Tennison, for example, the court never discussed prejudice to the Commonwealth because it found that no fair and just reason

existed. 969 A.2d at 578; see also Katonka, 33 A.3d at 50 ("Because we have determined Katonka raised a "fair and just" reason for withdrawal, *we must next* determine whether the Commonwealth would be prejudiced by withdrawal of the plea.") (emphasis added).

We think that it is improper to address the arguments raise din Part 2 of Appellant's Concise Statement. Appellant attempts to dispute the evidence against him with other evidence that is not properly before the Court. It is not proper for us to weigh evidence of guilt or innocence in determining a motion to withdraw a plea. Rather, we believe that we were restricted to the evidence regarding the validity of the plea itself - not the whole case. We similarly will not address Appellant's alleged illiteracy - a claim that overstates the record.[5]

II. This Court did not Deny Appellant the Right to Effective Assistance of Counsel

The Sixth Amendment[6] guarantees a defendant's right to have "the Assistance of Counsel for his defence." A defendant also has a constitutional right to represent himself. Faretta v. California, 422 U.S. 806 (1975).

In his third assignment of error, Appellant argues that the Court denied him the right to effective assistance of counsel by denying his motion to withdraw his plea. Crucially, Appellant does not claim that he involuntarily waived the right to assistance of counsel. Rather, Appellant appears to argue that the Sixth Amendment required the Court to allow him to withdraw his nolo plea because, in refusing him to do so, we interfered with counsel's ability to effectively represent his client.

This argument is without merit, as we found in our May 24 Order. We are aware of no authority that *requires* a court to allow a counseled defendant to withdraw a guilty or nolo plea made while he was pro se. The Court is aware that a lawyer may have been able to more properly assist Appellant in deciding whether to contest the Commonwealth's charges. But that was not the Court's decision to make; it was Appellant's. More importantly, it was his constitutional right. And this Court may not interfere with a defendant's decision to waive counsel, no matter how pigheaded or foolish:

> [A] consideration of the defendant's best interests (i.e., that the defendant would be subject to less risk of conviction and/or consequently more severe punishment if represented by competent counsel) is wholly irrelevant to an assessment of whether a criminal defendant has rendered a knowing and intelligent waiver or his right to the assistance of counsel or not.

Commonwealth v. Starr, 664 A.2d 1326, 1336 (Pa. 1995) (vacating a murder conviction where a trial judge denied defendant his right to represent himself).

We granted Appellant two continuances post-plea: first to allow appointed counsel to familiarize himself with the case, and second, to allow counsel to file a written motion to withdraw Appellant's plea. Appellant does not dispute the validity of his waiver of the right to counsel for plea purposes. Therefore, there are no grounds to find that this Court denied him the right to counsel by denying his motion to withdraw his plea. Rather, the propriety of our decision must be addressed under Rule 591 and supporting case law, as discussed above in Part 1.

Conclusion

This Court properly refused to allow Appellant to withdraw his nolo contendere plea. We determined that Appellant did not credibly assert his innocence thus did not state a fair and just reason permitting withdrawal of the plea. For that reason, we respectfully suggest that the Superior Court affirm Appellant's judgment of sentence.

ORDER OF COURT

August 10, 2012, the Clerk of Courts is directed to transmit this Opinion and Order and the record of these proceedings to the Superior Court.

5 During the nolo plea colloquy. Appellant responded to a question from the Court, admitting that he had "some difficulty" reading English. N.T., 10/18/11, at 17-18. Curiously, Appellant does not allege that the nolo plea is defective solely for that reason.

6 Although Appellant claims that the Court denied his right to counsel "as [guaranteed by the Constitutions of the United States and Pennsylvania," he did not advance arguments related to whether the right to counsel is broader under the State Constitution.