

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JACK PARKER

Appellant

No. 1193 EDA 2013

Appeal from the Judgment of Sentence entered March 28, 2013  
In the Court of Common Pleas of Delaware County  
Criminal Division at No: CP-23-CR-0000040-2012

BEFORE: ALLEN, STABILE, and STRASSBURGER, \* JJ.

MEMORANDUM BY STABILE, J.:

**FILED APRIL 14, 2014**

Appellant, Jack Parker, appeals the judgment of sentence entered by the Delaware County Court of Common Pleas (trial court) on March 28, 2013. He challenges the trial court's refusal to grant his oral motion made at sentencing to withdraw his guilty plea. Because we find that the trial court misapplied the law, and therefore abused its discretion, we vacate the judgment of sentence and remand for further proceedings.

Late in the evening of November 14, 2011, police found Parker at his estranged wife's place of employment, the Delaware County 911 call center. Parker told police that he was trying to catch his wife cheating on him. He also said that he had placed a GPS tracking device on her car. Because

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\* Retired Senior Judge assigned to the Superior Court.

Parker had been ordered to stay away from his wife and off county property, police arrested and charged him with several crimes.

On November 13, 2012, the date set for trial, Parker pleaded guilty to stalking, defiant trespass, disorderly conduct, and interception of wire or oral communications.<sup>1</sup>

On March 28, 2013, Parker appeared for sentencing represented by new counsel.<sup>2</sup> At the beginning of the hearing, defense counsel on behalf of Parker and by way of oral motion, requested to withdraw Parker's guilty plea. N.T. Sentencing, 3/28/13, at 3-4. The Commonwealth asked the court to deny the request. It accused Parker of "playing games with the court" because sentencing had been continued two times and Parker waited until the last minute to ask to withdraw the plea. *Id.* at 4-6. The Commonwealth also argued that forcing the victim to appear again in court constituted prejudice and therefore sufficient grounds to deny the request.

*Id.* The following exchange occurred:

THE COURT: Why does [Parker] want to withdraw his guilty plea at this point? What's the reason?

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<sup>1</sup> 18 Pa.C.S. §§ 2709.1 (graded as a misdemeanor of the first degree); 3503(b) (graded as a misdemeanor of the third degree); 5503(a) (graded as a summary offense); and 5703, respectively.

<sup>2</sup> Parker retained three lawyers in succession. The first represented him from the preliminary hearing until his trial was scheduled. The second represented him at the guilty-plea hearing on November 13, 2012. Parker retained the third, who represents him now, prior to sentencing.

[DEFENSE COUNSEL SCOTT] KRAMER: He is asserting . . .

THE COURT: What's the basis on which I should do that for him, allow him to do that?

MR. KRAMER: He is asserting his innocence on some of the charges.

THE COURT: But he already admitted that he . . .

MR. KRAMER: With prior counsel he admitted that, and, Your Honor, I believe the case law is he has up until sentencing to withdraw his plea. It is rather unorthodox. Not too many clients do that, withdraw their plea after pleading guilty before sentencing but it has been done before. I have done it before. I personally think Mr. Parker should go forward with the plea . . .  
[.]

THE COURT: What was the date of his guilty plea? The Pre-Sentence Investigation was ordered . . .

[ASSISTANT DISTRICT ATTORNEY PEARL] KIM: Yes, Your Honor. November 13, 2012, and since then we have been listed back on 1/15/2013, 2/19/2013, and 3/25/2013, and not at any of those listings did [Parker] at that time try to make any sort of oral motion to withdraw the guilty plea.

MR. KRAMER: If I may explain, Your Honor.

THE COURT: Yes.

MR. KRAMER: There has been discussions [sic] back and forth. However, the prior continuances were for sentencing purposes to get a Pre-Sentence Investigation done as well as drug and alcohol evaluation. It wasn't a delaying tactic on my part. And after speaking with my client, reviewing the discovery and meeting with him numerous times he was on the fence back and forth but I didn't want to make any representation until Mr. Parker was very entrenched, I guess, in his position to make sure that he understood what was going on and what the ramifications may be.

THE COURT: All right.

MR. KRAMER: Personally, I think, Mr. Parker, I think you should go forward with the plea but as I indicated to you, it's your right

to withdraw your plea but there may or may not be ramifications.

THE COURT: All right. Well, it seems to me that this perhaps a unique case where he's been in jail since November of 2011, right?

MR. KRAMER: Yes.

THE COURT: And he finally—you've been listed for trial numerous times and I see that the plea negotiation—there was an offer made on May 21, 2012, which he did not avail himself of and it went on and on. Each time I think he was stating he wanted to go to trial. He would say he was going to consider a guilty plea. And I think that there's been—this is a pretty obvious case of him attempting to manipulate the system in such a way prolonging what would otherwise be a state sentence into a county sentence regardless of time. This is the case perhaps where it would be inappropriate for me to allow him to withdraw his plea at this late date. I'm not going to allow it to happen.

***Id.*** at 6-9.

The trial court immediately sentenced Parker to an aggregate of two and a half to five years in prison. Parker filed a written motion to reconsider the sentence, which the trial court denied. This appeal followed.

Parker presents only one issue for appellate review:

Did the Court of Common Pleas error [sic] by refusing to grant Appellant's pre-sentence motion to withdraw his guilty plea?

Appellant's Brief at 2.

We review a trial court's refusal to allow withdrawal of a guilty plea for an abuse of discretion. ***Commonwealth v. Gordy***, 73 A.3d 620, 624 (Pa. Super. 2013), *appeal denied*, No. 797 MAL 2013, \_\_\_ A.3d \_\_\_ (Pa. Mar. 4, 2014). "An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, and/or

misapplication of law. By contrast, a proper exercise of discretion conforms to the law and is based on the facts of record.” **Id.** (internal citation omitted).

A trial court should grant a pre-sentence request to withdraw a plea of guilty or *nolo contendere* for any “fair and just reason,” unless granting the motion would substantially prejudice the Commonwealth. **Commonwealth v. Forbes**, 299 A.2d 268, 271 (Pa. 1973); **Gordy**, 73 A.3d at 623-24; **Commonwealth v. Katonka**, 33 A.3d 44, 46-47 (Pa. Super. 2011) (*en banc*). The “mere assertion of innocence” is a fair and just reason to allow withdrawal of a guilty plea. **Katonka**, 33 A.3d at 46. “Although it is apparently an extremely unpopular rule with prosecutors and trial courts, since **Forbes**, caselaw has continuously upheld an assertion of innocence as a fair and just reason for seeking the withdrawal of a guilty plea.” **Commonwealth v. Carrasquillo**, 78 A.3d 1120, 1125 (Pa. Super. 2013) (*en banc*) (internal quotation omitted);<sup>3</sup> **see also Commonwealth v. Randolph**, 718 A.2d 1242, 1244-45 (Pa. 1998) (reminding this Court not to ignore the standard set forth in **Forbes**). Pre-sentence requests to withdraw guilty pleas are liberally granted, because “courts should show solicitude for a defendant who wishes to undo a waiver of all constitutional rights that

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<sup>3</sup> Our Supreme Court has granted allowance of appeal in **Carrasquillo**. The case is docketed at No. 7 EAP 2014. **See Carrasquillo**, \_\_\_ A.3d \_\_\_, 2014 WL 642944 (Pa. Feb. 14, 2014).

surround the right to trial—perhaps the most devastating waiver possible under our Constitution.” **Carrasquillo**, 78 A.3d at 1125 (internal quotation omitted).

“Substantial prejudice” means “due to events occurring *after the entry of the plea*, the Commonwealth’s prosecution of its case is in a worse position than it would have been had the trial taken place as originally scheduled.” **Gordy**, 73 A.3d at 624 (emphasis added). Personal inconvenience to complainants is not prejudice, unless that inconvenience affects the Commonwealth’s ability to try the case. **Id.**

In this case, the trial court erred in not accepting Parker’s assertion of innocence as a fair and just reason to allow withdrawal of his guilty plea. The trial court believed it could deny the request based on defense counsel’s “feeble assertion of innocence to **some** of the charges,” Trial Court Opinion, 7/8/13, at 5 (emphasis in original). The law, however, does not require a “bold assertion of innocence.” **Commonwealth v. Kirsch**, 930 A.2d 1282, 1285 (Pa. Super. 2007). And even if it did, the trial court never gave Parker a chance to elaborate on defense counsel’s statement because it did not colloquy Parker. **Cf.** Pa.R.Crim.P. 591 *Comment* (“When the defendant orally moves to withdraw a plea of guilty or *nolo contendere* at the sentencing hearing, the court should conduct an on-the-record colloquy to determine whether a fair and just reason to permit the withdrawal of the plea exists.”). The trial court asked Parker no questions. In fact, he spoke

only twice during the entire hearing—after he was sentenced—to acknowledge his post-sentence rights and to thank the court.

Nonetheless, defense counsel's assertion of innocence on Parker's behalf, though partial, was unconditional. Defense counsel said that his client was innocent of "some" of the charges. A protestation of partial innocence is a fair and just reason to permit withdrawal of a guilty plea. In ***Commonwealth v. Unangst***, 71 A.3d 1017, 1021 (Pa. Super. 2013), for example, we held that the trial court should have allowed the defendant to withdraw guilty pleas where he admitted to trespassing on the victim's property, but unequivocally denied committing burglary, theft, or reckless endangerment.

We further agree with Parker that the trial court could not deny the motion to withdraw his guilty plea based on Parker's alleged manipulation of the system and dilatoriness. We rejected such a rationale in ***Unangst***. "Indeed, any time a defendant moves to withdraw a guilty plea prior to sentencing, he could be accused of engaging in a dilatory tactic to avoid sentencing." ***Id.*** at 1022; ***see also Commonwealth v. Pardo***, 35 A.3d 1222, 1228-29 (Pa. Super. 2011) (discounting the Commonwealth's argument in the trial court that the motion to withdraw the plea should be denied because the defendant was playing games with the system).

Similarly, the trial court could not rely on defense counsel's advice to his client. Parker's best choice may have been not to withdraw the guilty plea. Defense counsel had a duty to advise Parker on the best course of

action. The wisdom or imprudence of withdrawing a guilty plea, however, is irrelevant to the trial court's focus: whether the defendant asserts a fair and just reason sufficient to permit withdrawal. **See Unangst**, 71 A.3d at 1021.

Finally, the trial court could not rely on statements in the pre-sentence investigation report to find Parker's assertion of innocence not credible. In its opinion, the trial court found that Parker did not truly assert his innocence based on statements he made to the pre-sentence investigator that he was upset because he was charged with felonies. **See** Trial Court Opinion, 7/8/13, at 1-2, 5 (quoting Parker's psychological evaluation). "[W]e note that the statements to the pre-sentence investigator should not have been considered because the matter never should have proceeded to sentencing in the first instance." **Unangst**, 71 A.3d at 1021-22.

In sum, "the trial court undertook the same type of analysis condemned by the Supreme Court in **Randolph**, *i.e.*, rendering a credibility determination as to [Parker's] actual innocence." **Katonka**, 33 A.3d at 49 (citing **Randolph**, 718 A.2d at 1244). When a defendant orally moves at sentencing to withdraw a plea of guilty, the preferred practice is to either colloquy the defendant, or allow the defendant to file a written motion. **See Gordy**, 73 A.3d at 623 (defendant filed written motion and court held hearing); **Carrasquillo**, 78 A.3d at 1123 (trial court engaged in colloquy with defendant); **Katonka**, 33 A.3d at 48 (trial court held two hearings on motion to withdraw). However, there was nothing improper about Parker's oral assertion of innocence made for the first time at sentencing. **Katonka**,



33 A.3d at 49. Though the trial court could have either questioned Parker or allowed the filing of a written motion, the record supports the existence of a fair and just reason to permit withdrawal: Parker's unconditional assertion of innocence made through counsel.

Because we have determined that Parker proffered a fair and just reason for withdrawal, we must determine whether the Commonwealth would be prejudiced by withdrawal of the plea. Pa.R.Crim.P. 591(B). When a defendant moves to withdraw his plea at sentencing, the trial court must give the Commonwealth ten days to respond to the motion. Pa.R.Crim.P. 591 *Comment*; **Katonka**, 33 A.3d at 48. The trial court did not afford the Commonwealth this time in which to respond or the opportunity to present evidence of prejudice. Accordingly, the record is incomplete, and pursuant to **Katonka**, we must remand this case to the trial court with instructions to hold an evidentiary hearing to make a determination as to whether the Commonwealth would be prejudiced by Parker's withdrawal of his guilty plea. **Id.**<sup>4</sup>

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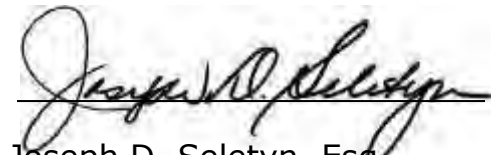
<sup>4</sup> In its written opinion, the court concluded that the Commonwealth would be prejudiced because the victim would have to appear for another court hearing. Trial Court Opinion, 7/8/13, at 5. To show prejudice on remand, the Commonwealth must present more than witness inconvenience. While we sympathize with the victim, making her appear to testify and forcing the Commonwealth to prove its case do not constitute prejudice. **Gordy**, 73 A.3d at 624; **see also Carrasquillo**, 78 A.3d at 1129 ("[P]rejudice cannot be equated with the Commonwealth being made to do something it was already obligated to do prior to the entry of the plea.").

For the foregoing reasons, we hold that the trial court erred as a matter of law and therefore abused its discretion by not accepting Parker's withdrawal of his guilty plea, and by not providing the Commonwealth its right to respond to Parker's oral motion and to present evidence on the issue of prejudice.<sup>5</sup> Accordingly, Parker's judgment of sentence must be vacated and this matter remanded for an evidentiary hearing on whether the Commonwealth will suffer prejudice if Parker's motion to withdraw his guilty plea is granted.

Judgment of sentence vacated. Case remanded for evidentiary hearing and proceedings consistent with this memorandum. Jurisdiction relinquished.

Allen, J., Concurs in the Result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/14/2014

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<sup>5</sup> If the trial court determines that the Commonwealth will be prejudiced, it should deny the motion to withdraw the guilty plea. If the court finds no prejudice, it should grant the motion. **See *Katonka***, 33 A.3d at 48 n.3.