

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

PAUL EUGENE GREEN

Appellant

No. 1449 MDA 2013

Appeal from the Judgment of Sentence July 10, 2013
In the Court of Common Pleas of Cumberland County
Criminal Division at No(s): CP-21-CR-0002093-2012,
CP-21-CR-0003154-2012

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY PANELLA, J.:

FILED APRIL 23, 2014

Appellant, Paul Eugene Green, appeals from the judgment of sentence entered on July 10, 2013. Green's counsel has filed a brief and a petition to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009), alleging that the appeal is wholly frivolous. We affirm Green's judgment of sentence and grant counsel's request to withdraw.

On July 10, 2013, Green entered a nolo contendere plea to driving under the influence, highest rate of alcohol, third or subsequent offense, graded as a misdemeanor of the first-degree.¹ On the same date, Green

¹ On April 1, 2012, Green was operating a motor vehicle on Interstate 81 in Cumberland County with a BAC of .164%.

entered a nolo contendere plea to “one consolidated count of unlawful possession with intent to [deliver] and delivery of a Schedule I controlled substance, heroin.”² N.T., Nolo Contendere Plea and Sentencing, 7/10/13, at 3. Green was subsequently sentenced to 1 to 5 years’ on the DUI conviction and, on the possession with intent to deliver and delivery convictions, Green was sentenced to a concurrent term of not less than 46 months nor more than 8 years’ imprisonment.

On July 18, 2013, Green filed a counseled post-sentence motion wherein he sought to withdraw his guilty plea asserting that he is “not guilty of the ... offenses.” Post-Sentence Motion, 7/18/13, at ¶ 2. The trial court denied Green’s motion on July 22, 2013, and this appeal followed.

Green raises the following question for our review:

- I. THE COURT ERRED IN DENYING DEFENDANT’S MOTION TO WITHDRAW THE NOLO CONTENDERE PLEA.

Anders Brief, at 17.

Here, Green’s court-appointed counsel has petitioned for permission to withdraw and has submitted an **Anders** brief. Court-appointed counsel who

² On both September 21, 2012, and September 28, 2012, Green sold an undercover operative 10 bags of heroin for \$200.00. **See** N.T. Nolo Contendere Plea and Sentencing, 7/10/13, at 3-4. Additionally, on October 23, 2012, a search warrant was served on Green’s vehicle and “in the vehicle was concealed 102 bags of heroin.” **Id.**, at 4.

seeks to withdraw from representing an appellant on direct appeal on the basis that the appeal is frivolous must:

- (1) provide a summary of the procedural history and facts, with citations to the record;
- (2) refer to anything in the record that counsel believes arguably supports the appeal;
- (3) set forth counsel's conclusion that the appeal is frivolous; and
- (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Santiago, 978 A.2d at 361. When we receive an **Anders** brief, our first task is to rule on the petition to withdraw and then review the merits of the underlying issues. **See Commonwealth v. Garang**, 9 A.3d 237, 240-241 (Pa. Super. 2010). In addition, "[p]art and parcel of **Anders** is our Court's duty to review the record to insure no issues of arguable merit have been missed or misstated." **Commonwealth v. Vilsaint**, 893 A.2d 753, 755 (Pa. Super. 2006).

In the instant matter, counsel has substantially complied with all of the requirements of **Anders** and **Santiago**. Specifically, he has petitioned this Court to withdraw because "counsel has determined that any appeal ... would be frivolous." Motion to Withdraw as Counsel, 1/13/14, at ¶ 2. In addition, after his review of the record, counsel filed an appellate brief with this Court that: (1) provides a summary of the procedural history and facts with citations to the record; (2) refers to any facts or legal theories that arguably support the appeal; and (3) explains why he believes the appeal is frivolous.

See Anders Brief, at 7-24. Lastly, counsel has attached, as an exhibit to the brief, a copy of the letter sent to Green giving him notice of his rights and including a copy of the **Anders** brief and the petition. **See Commonwealth v. Millisock**, 873 A.2d 748, 749 (Pa. Super. 2005). Green did not respond. Because counsel has substantially complied with the dictates of **Anders**, **Santiago**, and **Millisock**, we will examine the issue set forth in the **Anders** brief that counsel believes has arguable merit.

In his **Anders** brief, Green argues that the trial court erred in denying his post-sentence motion to withdraw his nolo contendere plea. This issue lacks arguable merit.

There remains no absolute right to withdraw a guilty plea once sentence has been imposed. The decision to allow a defendant to withdraw their plea post-sentence is a matter that rests within the sound discretion of the trial court. **See Commonwealth v. Muhammad**, 794 A.2d 378, 382 (Pa. Super. 2002). Furthermore, a request to withdraw a guilty plea made after sentencing is subject to a higher scrutiny "since courts strive to discourage [the] entry of guilty pleas as sentence-testing devices." **Commonwealth v. Flick**, 802 A.2d 620, 623 (Pa. Super. 2002). Therefore, in order to withdraw a guilty plea after the imposition of sentence, a defendant must make a showing of prejudice which resulted in a "manifest injustice." **Id.**, at 623. A defendant meets this burden only if he can demonstrate that his guilty plea was entered involuntarily, unknowingly, or unintelligently. **See Commonwealth v. Stork**, 737 A.2d 789, 790 (Pa.

Super. 1999). Whether a defendant entered into the plea knowingly, voluntarily, and intelligently requires a totality of the circumstances analysis, but, at a minimum, the court must make the following inquiries:

- (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
- (2) Is there a factual basis for the pleas?
- (3) Does the defendant understand that he has the right to trial by jury?
- (4) Does the defendant understand that he is presumed innocent until he is found guilty?
- (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged? [and,]
- (6) Is the defendant aware that the sentencing judge is not bound by the terms of any plea agreement tendered, unless he accepts the agreement?

Commonwealth v. Moser, 921 A.2d 526, 529 (Pa. Super. 2007).

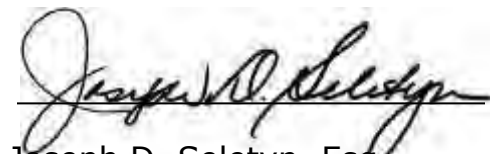
Moreover, once a defendant enters a guilty plea, it is presumed that he was aware of what he was doing. ***See Stork, supra***, 737 A.2d at 790. Consequently, defendants are bound by statements they make at their guilty plea colloquy and may not successfully assert any claims that contradict those statements. ***See Muhammad***, 794 A.2d at 384. As such, when the record establishes a guilty plea colloquy was conducted during which the defendant states he understands the nature of the charges against him, the voluntariness of the plea is established and the burden of proving involuntariness rests upon the defendant. ***See Stork***, 737 A.2d at 790. Additionally, since the law does not require that a defendant be pleased with

the outcome of his guilty plea, the defendant's mere disappointment in the sentence actually imposed does not represent a manifest injustice. **See Commonwealth v. Byrne**, 833 A.2d 729, 737 (Pa. Super. 2003).

After an exhaustive review of the record in this case, it is evident that based upon the totality of the circumstances, Green knowingly, intelligently and voluntarily entered his nolo contendere plea. Moreover, Green's plea did not result in a manifest injustice. As such, we can find no abuse of discretion in the trial court's denial of Green's post-sentence motion. In its well-written opinion, the trial court ably and methodically reviewed the validity of Green's guilty plea and specifically examined each of the inquiries enunciated in **Moser**. Accordingly, we are in agreement with both the trial court and, Green's counsel that Green's issues lack arguable merit. Therefore, we grant counsel's petition to withdraw and affirm on the basis of the trial court's opinion. **See** Trial Court Opinion. 11/25/13, at 1-5.

Petition to withdraw granted. Judgment of sentence affirmed.
Jurisdiction relinquished.

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: 4/23/2014

COMMONWEALTH : IN THE COURT OF COMMON PLEAS OF
 : CUMBERLAND COUNTY, PENNSYLVANIA
 V. :
 :
 PAUL GREEN : CP-21-CRIMINAL 2093 – 2012
 :
 : CP-21-CRIMINAL 3154 – 2012
 :
 :

IN RE: OPINION PURSUANT TO Pa. R.A.P. 1925

Guido, J. November 25, 2013

On July 10, 2013 the defendant and Commonwealth reached a plea agreement to resolve all of the charges at 2093 Criminal 2012 (hereinafter "drunk driving ") and 3154 Criminal 2012 (hereinafter "drug delivery"). The agreement called for the defendant to plead nolo contendere to one consolidated count of possession with intent to deliver and delivery of heroin at 3154 Criminal 2012 in return for an agreed upon sentence of 46 months to 8 years. It was also agreed that the defendant would enter a nolo contendere plea to a third or subsequent offense of driving under the influence of alcohol, highest rate, at 2093 Criminal 2012 with the understanding that any sentence would run concurrent with the sentence imposed on the drug delivery charge. The agreement also called for the defendant to be sentenced immediately.

We accepted the defendant's nolo contendere plea subject to the terms of the agreement. He was sentenced immediately in accordance with those terms. On July 18, 2013 he filed a motion to withdraw his plea. The only reason given for his request was that "he is not guilty" of the charges.¹ On July 22, 2013 we denied the motion without a hearing. The defendant filed the instant appeal in which he contends that we erred in denying the motion.

¹ Motion to Withdraw Nolo Contendere Plea, paragraph 2.

DISCUSSION

We denied the defendant's motion for two reasons. In the first instance, we were satisfied that his stated reason was not sufficient to justify granting the motion. In the second instance, we were convinced the motion was simply another attempt by the defendant to delay his eventual incarceration. We will discuss each of those reasons below.

No Valid Reason

"[A] Defendant who attempts to withdraw a guilty plea after sentencing must demonstrate prejudice on the order of manifest injustice before withdrawal is justified. 'A plea rises to the level of manifest injustice when it was entered into involuntarily, unknowingly, or unintelligently.' "

Commonwealth v. Garcia, 5 A. 3rd 397, 403 (Pa. Super 2010) quoting *Commonwealth v. Pantalion*, 957 A. 2nd 1267, 1271-72 (Pa. Super 2008). No allegations of "manifest injustice" were made in the instant case.

The defendant's assertion that he is not guilty of these offenses could not be construed as an allegation that his plea was entered "involuntarily, unknowingly, or unintelligently." *Id.* The factual basis for each plea was set forth in the guilty plea colloquy as follows:

MR. DAILEY: The First docket is 2093 of 2012. It's Count 2, DUI. The facts that support the case: On April 1st, 2012, the Defendant was driving on Interstate 81 in Cumberland County. His BAC within two hours of driving on that interstate was .164 percent.

THE COURT: Mr. Green, are you prepared to concede that the Commonwealth could prove those facts beyond a reasonable doubt if we went to trial?

MR. GREEN: Yeah.

MR. DAILEY: At docket 3154 of 2012, the Defendant will be pleading no contest to one consolidated count of unlawful possession with intent to delivery and delivery of a Schedule I controlled substance . . .

The events occurred in September of 2012 on three days. September 21st, 2012, in Cumberland County at 3115 Ritner Highway in Newville, the Defendant sold a controlled substance, heroin, Schedule I, 10 bags for \$200.00 to an undercover operative who was working for the Cumberland County Drug Task Force.

September 28th of 2012, at approximately 2:00 in the afternoon, Mr. Green again at 3299 Ritner Highway, sold to an undercover operative 10 bags of heroin for \$200.00.

October 23rd, 2012, at 1:30, again in Cumberland County, a search warrant was served on the Defendant's vehicle, and in the vehicle was concealed 102 bags of heroin, all are Schedule I controlled substances.

THE COURT: Sir, are you prepared to concede that if you went to trial on those charges that the Commonwealth could prove those facts beyond a reasonable doubt?

DEFENDANT: Yes.²

Defendant clearly understood that he was conceding that the Commonwealth could prove the articulated facts beyond a reasonable doubt at trial.

Delay

In order to understand why we concluded that the defendant's motion was his latest attempt to delay his eventual incarceration, it necessary to understand the procedural history. On April 1, 2012 the defendant was arrested on the drunk driving charge. It was charged as a third offense at the highest rate. On January 16, 2013, pursuant to a plea agreement he pled guilty to driving under the influence, high rate of alcohol. He was directed to appear for sentence on March 12, 2013, almost a full year after his arrest.

On February 7, 2013 the defendant filed a motion to continue his sentence for 60 days in order to resolve the drug delivery charge. We denied the motion. He appeared for sentence and made an

² Transcript of Proceedings, July 10, 2013, pp. 2, 4.

oral motion to withdraw his guilty plea. Since he did not give an adequate reason, we denied his request.³ We sentenced him to a period of incarceration in a state correctional institution for 1-5 years.⁴

The defendant subsequently filed a written motion to withdraw his guilty plea. In that motion he alleged that he was not guilty of the offense. Since the Commonwealth did not oppose the motion, we granted it on June 4, 2013. Trial was set for the next term of court which was scheduled to begin on July 8, 2013. He was released on bail pending trial.

The defendant's case was called for trial on July 10, 2013. As the jury was being assembled the parties agreed to resolve both charges pursuant to the agreement outlined above. While the jury waited we conducted the plea colloquy with the defendant. The defendant raised concerns about the provision of the agreement which called for immediate sentencing. Those concerns led to the following exchange:

THE COURT: But my question was whether or not he wants to enter these pleas knowing the rights that he has. If he wants to enter the pleas, fine. If he doesn't, we've got a jury waiting downstairs to be picked on the driving under the influence charge. It's time to go. Do you want to enter these pleas, Mr. Green?

DEFENDANT: I do, but -- Your Honor, what I'm asking is I've got a four-year-old daughter. I've only seen her twice in the last month that I've been out. I'm looking at --

THE COURT: Mr. Green, any plea you want to make for me not to sentence you today -- the Commonwealth's position is you're to be sentenced today.

DEFENDANT: Okay, I can be sentenced today, but I'm asking to start serving my time in a week or so. I just want to spend my last weekend with my four-year-old daughter. That's all I want to do.

THE COURT: Mr. Green, that's not going to happen, sir. You either enter the pleas or we go to trial.

DEFENDANT: I guess I'll enter the plea.

³ The reason given by the defendant was that he was not happy with the sentencing guidelines.

⁴ We note that we imposed a sentence in the mitigated range of the sentencing guidelines.

THE COURT: All right. We will accept the plea of nolo contendere to Count 2 at 2093 Criminal 2012 and to one consolidated Count at 3154 Criminal 2012, in full satisfaction of all charges at both terms and numbers. I'm prepared to move forward with sentencing now, and I'll go along with the plea agreement.

...

THE COURT: Mr. Green, anything you want to say, sir?

DEFENDANT: Just, Your Honor, that I wish I could begin serving my sentence next week. I just want to see my daughter this weekend.

THE COURT: Mr. Green, I understand that. Mr. Green, I sympathize with that. On the other hand, you have a history of changing your mind. We have the jury downstairs ready to go. There's no way I'm going to sentence you to 46 months to 8 years in a state correctional institution and have you report next week. That's just not going to be done. In light of your history of withdrawing your guilty pleas, the sentence is going to have to be today. I appreciate that, but - -

DEFENDANT: Well, before when I put in a guilty plea I didn't get sentence on that same day. I got sentenced later.

THE COURT: Right and you came back and wanted to withdraw your guilty plea. I wouldn't let you do that because you didn't give me any good reasons. Then after some thought, you came up with good reasons, and I let you withdraw the guilty plea. We're here today, and the jury is downstairs ready to go. That's why today is the day. I'm not going to have you come back and withdraw this guilty plea next week when I sentence you and not have a jury come back for another three months or two months, whatever it is.

DEFENDANT: I'm not going to do that.

THE COURT: Well, I don't believe you. That's why I'm going to sentence you today.⁵

Within a week he filed a motion to withdraw his no contest plea. We denied it without a hearing.

11/25/13

DATE



Edward E. Guido, J.

District Attorney

Timothy L. Clawges, Esquire

⁵ Transcript of Proceedings, July 10, 2013, pp. 5 - 8.