NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
YUSEPH CROSS,	:	
	:	
Appellant	:	No. 2041 EDA 2013

Appeal from the Judgment of Sentence June 26, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0008969-2009

BEFORE: BOWES, WECHT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JULY 31, 2015**

This case returns to this panel after we remanded for Appellant's counsel, David W. Barrish, Esq. ("Counsel"), to file an amended ***Anders*** petition[1] and brief or an advocate's brief. Appellant, Yuseph Cross, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas following his negotiated guilty plea to indecent assault of a complainant less than thirteen years old and corruption of minors.[2] Counsel

* Former Justice specially assigned to the Superior Court.

[1] ***See Anders v. California***, 386 U.S. 738 (1967); ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981).

[2] 18 Pa.C.S. §§ 3126(a)(7), 6301(a)(1).

has filed an advocate's brief, raising one issue for our review: whether the trial court erred in denying Appellant's pre-sentence motion to withdraw his plea. Pursuant to the recent Pennsylvania Supreme Court decision in ***Commonwealth v. Carrasquillo***, 7 EAP 2014, 2015 WL 3684430 (Pa. Jun. 15, 2015),[3] we find no relief is due and affirm.

On March 22, 2012, Appellant appeared before the trial court to plead guilty to indecent assault of a complainant less than thirteen years old and corruption of minors. The victim in this matter is Appellant's cousin and was six or seven years old at the time of the incidents. The Commonwealth alleged that on two or three occasions in 2004, Appellant, who was then twenty or twenty-one years old, exposed his penis to the victim and made the victim touch his penis with her mouth.[4] N.T. Guilty Plea H'rg, 3/22/12, at 7-8.

The plea hearing commenced with the following exchange between the court and Appellant:

> THE COURT: In exchange for your guilty plea the Commonwealth and you have agreed to a recommended sentence of five years probation on each of those charges to run concurrent or at the same time. You are also to undergo a Megan's Law assessment. Do you understand

[3] We note ***Carrasquillo*** and its companion decision, ***Commonwealth v. Hzvida***, 6 MAP 2014, 2015 WL 3795936 (Pa. Jun. 15, 2015), were decided after the parties' latest appellate briefs were submitted.

[4] Although the incidents allegedly occurred in 2004, Appellant was not charged until 2009. ***See*** N.T. at 7-8.

that?

[Appellant:] Yes.

THE COURT: All other charges will be dismissed. Is that your understanding of the agreement?

[Appellant:] Yes.

Id. at 3. The Commonwealth further stated that under the parties' plea negotiations, it would "nolle pross[ ] the lead charge" of involuntary deviate sexual intercourse, which carried a five-year mandatory minimum sentence, and that Appellant would be supervised by the sex offender unit of the probation department. ***Id.*** at 9, 11. The court accepted Appellant's plea, but deferred sentencing for a presentence report and sexually violent predator assessment. ***Id.*** at 10

Prior to sentencing, possibly in October or early November 2012, Appellant filed a motion to withdraw his plea.[5] The sole argument was as follows:

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[5] At that time, Appellant was represented by prior counsel. The certified record transmitted on appeal did not include the motion to withdraw the plea, or any docket entry that one was filed. Upon informal inquiry by this Court, the Commonwealth provided a copy of the motion, which this Court made a supplemental record. The Commonwealth's copy did not bear a "filed" time stamp, but the signature line and verification are dated November 1, 2012. However, Appellant's brief states the motion was filed on October 15, 2012. Appellant's Brief at 3.

The trial docket does include a May 2, 2013 entry for the denial of Appellant's motion. The record, however, does not include a traditional order denying the motion. Instead, the trial court made and signed a copy of that docket entry.

> 3. On October 15, 2012, prior to a sentencing hearing commencing, [Appellant] indicated he desired to withdraw his guilty plea.
>
> 4. [Appellant] wishes to withdraw his guilty plea as he asserts his innocence to the charges.

Appellant's Mot. to Withdraw Guilty Plea, at 1.

The trial court held a brief hearing on May 2, 2013.[6] The Commonwealth stated it had asked the victim's mother whether the victim and her family wished to "proceed[,] based on everything that has happened with the negotiated guilty plea and now the request for the withdrawal." N.T., 5/2/13, Mot. to Withdraw Plea H'rg, at 3-4. The Commonwealth averred, "They've been very reluctant to have to go through this process again. Their understanding was that . . . they had prepared to go to trial. The case worked out. They started to be in a position to start counseling, trying to move on from it." ***Id.*** at 4. Upon questioning by the court, the Commonwealth confirmed the victim was six years old at the time of the incidents and, at the time of that hearing, was a pre-teen. ***Id.***

The court then immediately ruled,

> I'm ready to make my decision. I've reviewed the notes of testimony. There was a thorough colloquy in this matter. Given the representations of the Commonwealth in time in terms of where the complainant is in this process in her recovery and also the history here, because the plea was

[6] The transcript of the hearing—excluding the cover page and court reporter's certificate—span five and a half pages. This transcript was not initially included in the certified record, but was provided by the trial court upon informal inquiry by this Court.

> taken in March of 2012. There were a number of listings. I believe there were some family issues with counsel. But it was not a motion to withdraw until, basically, October of 2012.
>
> So in the totality of the circumstances, I've heard the arguments, I've reviewed everything, I'm going to deny the motion.

Id. at 4-5. Finally, the Commonwealth stated the sexual offender assessment report recommended Appellant was not a sexually violent predator. ***Id.*** at 5.

The case proceeded to sentencing on June 26, 2013. Both parties requested the trial court to accept the negotiated sentence of two terms of five years' probation, to run concurrently.[7] The court imposed the requested sentence.

Appellant did not file a post-sentence motion, but took this timely appeal. Initially, Counsel filed a brief stating that after making a conscientious examination of the record, he determined the appeal would be wholly frivolous. On November 21, 2014, this panel issued a memorandum, remanding for Counsel to address, either in an advocate's brief or an amended ***Anders*** brief, the trial court's denial of Appellant's pre-sentence motion to withdraw plea. Counsel has filed an advocate's brief, raising a sole issue: whether the trial court erred in denying Appellant's pre-sentence motion. The Commonwealth has filed a supplemental brief.

[7] Appellant's counsel stated the recommended sentence was a guideline sentence. N.T. Sentencing, 6/26/13, at 5.

Appellant avers the trial court erred in denying his pre-sentence motion to withdraw his plea. He contends (1) he asserted his innocence to the charges in his motion to withdraw plea; and (2) at the hearing on the motion, the trial court failed to conduct, pursuant to the comment to Pennsylvania Rule of Criminal Procedure 591, an on-the-record colloquy to determine whether there was a fair and just reason to permit withdrawal. Appellant requests a new hearing to determine whether there was a fair and just reason to permit withdrawal. We find no relief is due.

"A trial court's decision regarding whether to permit a guilty plea to be withdrawn should not be upset absent an abuse of discretion." ***Commonwealth v. Pardo***, 35 A.3d 1222, 1227 (Pa. Super. 2011).

> Our Supreme Court has established significantly different standards of proof for defendants who move to withdraw a guilty plea before sentencing and for those who move to withdraw a plea after sentencing.

Id. at 1226 (citations omitted).

In the recent decision of ***Carrasquillo***, our Supreme Court considered "whether the common pleas courts must accept a bare assertion of innocence as a fair and just reason for withdrawal." ***Carrasquillo***, 2015 WL 3684430 at *4. The Court summarized that the decision in ***Commonwealth v. Forbes***, 299 A.2d 268 (Pa. 1973),

> reflects that: there is no absolute right to withdraw a guilty plea;[ ] trial courts have discretion in determining whether a withdrawal request will be granted; such discretion is to be administered liberally in favor of the accused; and any demonstration by a defendant of a fair-and-just reason will

> suffice to support a grant, unless withdrawal would work substantial prejudice to the Commonwealth.

Carrasquillo, 2015 WL 3684430 at *7 (citing ***Forbes***, 299 A.2d at 271). The Court then held a defendant's assertion of innocence "must be at least plausible to demonstrate, in and of itself, a fair and just reason for presentence withdrawal of a plea." ***Id.*** at *8. ***See also Hvizda***, 2015 WL 3795936 at *3 ("In the companion case of ***Carrasquillo*** . . . we have determined that a bare assertion of innocence . . . is not, in and of itself a sufficient reason to require a court to grant [a request to withdraw a plea]."). The Court stated:

> [T]he proper inquiry on consideration of such a withdrawal motion is whether the accused has made some colorable demonstration, under the circumstances, such that permitting withdrawal of the plea would promote fairness and justice. The policy of liberality remains extant but has its limits, consistent with the affordance of a degree of discretion to the common pleas courts.

Carrasquillo, 2015 WL 3684430 at *8.

In the instant appeal, the Commonwealth argues that because Appellant entered a negotiated plea, the higher, post-sentence standard of "manifest injustice"[8] applies pursuant to ***Commonwealth v. Prendes***, 97

[8] "[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. Lincoln***, 72 A.3d 606, 610 (Pa. Super. 2013) (citation omitted) (emphasis added), *appeal denied*, 87 A.3d 319 (Pa. 2014).

A.3d 337 (Pa. Super. 2014). We first note that in ***Commonwealth v. Lesko***, 467 A.2d 307 (Pa. 1983) the defendant pleaded guilty to murder in the second degree and subsequently filed a **pre-sentence** motion to withdraw the plea. ***Id.*** at 308. The Supreme Court held that "[b]ecause the [defendant] was well aware of the only sentence imposable for the crime to which he pled guilty," the "petition was akin to a post-sentencing petition," and thus the trial court properly applied the **post-sentence** "manifest injustice" standard." ***Id.*** at 310. In ***Prendes***, this Court applied ***Lesko*** and held that because the defendant's "plea agreement included a negotiated sentence[, t]he trial court accepted the guilty plea with the negotiated sentence[, and thus the defendant] was fully aware of the sentence he would receive, the 'manifest injustice' standard applied." ***Prendes***, 97 A.3d at 354.

In ***Hvizda***, however, our Supreme Court disapproved of ***Lesko***'s "idiosyncratic approach to presentence withdrawal." ***Hvizda***, 2015 WL 3795936 at *3. Accordingly, we find ***Prendes***'s application of ***Lesko*** is no longer binding authority. We thus disagree with the Commonwealth's contention that the manifest justice standard applies merely because Appellant entered a negotiated plea.[9]

[9] The ***Hvizda*** Court noted, however, the continued validity of dual standards for reviewing pre- and post-sentence motions to withdraw guilty pleas:

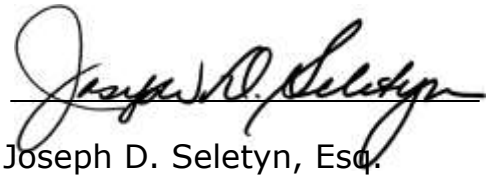
Applying the standard announced in ***Carrasquillo***, we conclude Appellant is not entitled to relief. In his motion to withdraw the plea and at the hearing thereon, Appellant presented no explanation beyond a mere assertion of innocence. On appeal, his brief likewise simply argues the trial court failed to determine whether he had a "fair and just" reason to withdraw his plea; he advances no further discussion or support for his claim of innocence. We thus hold the trial court had discretion to find Appellant failed to make a "colorable demonstration, under the circumstances, such that permitting withdrawal of the plea would promote fairness and justice." ***See Carrasquillo***, 2015 WL 3684430 at *8. Finding no basis for relief, we do not disturb the trial court's denial of his motion to withdraw guilty plea.

Judgment of sentence affirmed.

> Of course, there are other justifications for the elevated standard governing post-sentence withdrawal motions, also not recognized in ***Lesko***. ***See***, ***e.g.***, ***Commonwealth v. Gunter***, . . . 771 A.2d 767, 771 ([Pa.] 2001) ("The different treatment of pre-and postsentence motions reflects the tension in our jurisprudence between the individual's fundamental right to a trial and the need for finality in the proceedings.").

Hvizda, 2015 WL 3795936 at *3 n.2.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015