

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : NO. 083 CR 07
 :
 EDWIN DAVID KISTLER, :
 Defendant :

 James M. Lavelle, Esquire Counsel for Commonwealth
 Assistant District Attorney

 Michael P. Gough, Esquire Counsel for Defendant

 Nanovic, P.J. - December 27, 2011

MEMORANDUM OPINION

Defendant, Edwin David Kistler, has appealed from our order dated November 10, 2011, denying his Post-Sentence Motion. In response to our Pa.R.A.P. 1925(b) order directing Defendant to file a Concise Statement of Matters Complained of on Appeal, Defendant has done so. In this statement, Defendant raises one issue: whether the Court abused its discretion in denying his pre-sentence petition to withdraw his guilty plea. This Opinion is filed in accordance with Pa.R.A.P. 1925(a).

On October 20, 2006, Defendant was charged with two counts of theft by deception under Section 3922 of the Crimes Code, 18 Pa.C.S.A. §3922(a)(1), (3). In essence, Defendant was charged with obtaining \$122,465.00 from George Abrachinsky under the false pretense that this money would be invested on Mr.

Abrachinsky's behalf to acquire a valuable annuity. Following the transfer of these monies by Mr. Abrachinsky to Defendant the annuities were never purchased and Mr. Abrachinsky's monies were never returned to him.

On April 14, 2008, Defendant entered a plea to Count 1 of the information, theft by deception (18 Pa.C.S.A. §3922(a)(1)), graded as a felony of the third degree. A presentence investigation was court ordered and sentencing was scheduled for June 3, 2008. At Defendant's request, this sentencing date was continued to July 14, 2008.

At the time of sentencing, Defendant failed to appear. No reason was given. A bench warrant was issued to have Defendant located and brought before the Court. On October 28, 2008, Defendant's counsel at the time, Michael Brunnabend, Esquire, filed a Motion to Withdraw as Counsel averring, *inter alia*, that Defendant's whereabouts were unknown, Defendant had failed to maintain contact with him, and that Defendant had failed to pay monies due and owing counsel. This motion was granted by order dated December 11, 2008.

On or about September 20, 2010, more than two years after Defendant had failed to appear for sentencing, Defendant was located and brought before the Court. (N.T. 11/29/10, pp.17-18). Defendant acknowledged his failure to appear at the July 14, 2008 sentencing, and claimed that he had fled because

he believed Mr. Abrachinsky's daughter and grandson were in danger from Mr. Abrachinsky and he wanted to protect them. (N.T. 11/29/10, p.9; N.T. 7/18/11, pp.21-22). At this time, bail was modified from \$50,000.00, 10 percent, to \$75,000.00 straight bail. Sentencing was again scheduled, this time for October 18, 2010 and continued, at Defendant's request, until November 1, 2010.

On October 29, 2010, Defendant filed a continuance request advising the Court that he intended to withdraw his plea. A petition to this effect was filed on November 2, 2010. Thereafter, hearings on Defendant's petition to withdraw his plea were held on November 29, 2010 and July 18, 2011. By order dated July 20, 2011, we denied the petition.

Sentencing was again scheduled for August 15, 2011. At this time, Defendant once again failed to appear, and a bench warrant was issued. Defendant was located and brought before the Court. This time Defendant claimed he had failed to appear due to health issues of both his brother, who had recently died, and himself. Defendant was sentenced on September 30, 2011, to eighteen months to thirty-six months' imprisonment in a state correctional facility.

On October 5, 2011, Defendant filed a Post-Sentence Motion asking to be allowed to withdraw his guilty plea, claiming that his earlier plea was not knowingly, voluntarily

and intelligently made. This request was denied in our order of November 10, 2011, the order identified in Defendant's Notice of Appeal as the order being appealed from.

Under Commonwealth v. Forbes, a pre-sentence motion for withdrawal of a guilty plea should be granted if the court finds "any fair and just reasons" for the withdrawal, unless the Commonwealth was "substantially prejudiced." 299 A.2d 268, 271 (Pa. 1973). Under Commonwealth v. Kirsch, the Commonwealth is prejudiced where it is proven that "due to events occurring after the plea was entered, the Commonwealth is placed in a worse position than it would have been had trial taken place as scheduled." 930 A.2d 1282, 1286 (Pa.Super. 2007) *appeal denied*, 945 A.2d 168 (Pa. 2008). See also Commonwealth v. Walker, 26 A.3d 525, 529 (Pa.Super. 2011) (discussing the standard for allowing withdrawal of a guilty plea prior to sentence). Here, Defendant was scheduled for jury selection the day of his plea.

At the time of the hearings held on November 29, 2010 and July 18, 2011 the evidence established that the victim of Defendant's crime, George Abrachinsky, had died on July 17, 2010. (N.T. 11/29/10, pp.30-31). This was after Defendant had failed to appear for sentencing on July 14, 2008 and before September 20, 2010, when Defendant was first located and brought before the Court on the bench warrant. Defendant admitted that he took no steps to withdraw his plea until after learning of

Mr. Abrachinsky's death (N.T. 11/29/10, pp.23-24), and also, that he did not voluntarily turn himself in after learning of Mr. Abrachinsky's death. (N.T. 7/18/11, p.28).

Mr. Abrachinsky was the principal and critical witness to the Commonwealth's case. (N.T. 11/29/10, pp.31-34). Prior to his death, Mr. Abrachinsky's testimony was not preserved, either at the time of the preliminary hearing or otherwise. (N.T. 7/18/11, p.5). Without Mr. Abrachinsky's testimony, the Commonwealth effectively argued that it would be unable to prove its case against the Defendant. (N.T. 11/29/10, pp.26-27; N.T. 7/18/11, pp.68-69). To argue that the Commonwealth was not substantially prejudiced by this turn of events, the entire delay being attributable to Defendant's unlawful flight is to deny the obvious. Commonwealth v. Dickter, 465 A.2d 1, 2-3 (Pa.Super. 1982) (holding that the Court "cannot permit [the defendant] to prejudice the Commonwealth's position by his own illegal conduct.").

Before pleading guilty on April 14, 2008, the Defendant completed both a written and oral guilty plea colloquy. In these colloquies, Defendant was advised of his right to proceed to trial and the consequences of pleading guilty. In the oral colloquy, Defendant was specifically informed of the elements of the crime of theft by deception to which he was pleading guilty and agreed to the Commonwealth's

version of the evidence upon which it relied to establish Defendant's guilt. Defendant unequivocally pled guilty to the offense for which he was sentenced, and the Court found on the record that Defendant's plea was knowingly, voluntarily and intelligently made.

Under the circumstances, our decision to deny Defendant's petitions to withdraw his plea, both prior and subsequent to sentencing, is not only the correct one, but the only one evoking justice. We find Defendant's reasons for seeking to withdraw his plea after twice failing to appear for sentencing, and only after learning of Mr. Abrachinsky's death, to be "little other than a self-serving attempt to improperly manipulate the system," which we will not countenance. Walker, 26 A.23 at 530 (quoting Commonwealth v. Iseley, 615 A.2d 408, 414 (Pa.Super. 1992)). Accordingly, we respectfully request that Defendant's appeal be denied and that our decision denying Defendant's post-sentence motion be affirmed.

BY THE COURT:

P.J.