IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: **No. 99-10,741**
	:
vs.	: **CRIMINAL DIVISION**
	:
CLYDE McALLISTER,	:
Defendant	: **1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This Opinion is written in reference to the Court's Judgment of Sentence dated April 4, 2000 and docketed April 7, 2000. The relevant facts are as follows: The Defendant, Clyde McAllister, pled guilty before this Court on February 1, 2000, to the following drug related counts of the Information:

Count 3 - corrupt organizations
Count 5 - conspiracy to deliver controlled substances
Counts 34-54 delivery of cocaine
Counts 136-233 criminal use of a communication facility

The Pennsylvania Sentencing Guidelines for the corrupt organization count were 9-16 months in the standard range, plus nine months and minus nine months in the aggravated and mitigated range, respectively. For the deliveries of cocaine and the conspiracy counts, the guidelines were 3-12 months in the standard range, plus six months and minus six months for the aggravated and mitigated ranges, respectively. For criminal use of communications facility, the guideline range was RS-9 in the standard range, plus three and minus three months for the aggravated and mitigated range, respectively. Pursuant to the plea agreement, all remaining counts of the Information would be dismissed. The information contained 233 counts in all.

Further, the plea agreement contemplated that the aggregate minimum sentence imposed on all counts would be no less than 5 years and no more than 8 years, with the Court exercising its discretion as to the appropriate aggregate minimum sentence. It also was agreed at the guilty plea proceeding on February 1, 2000 that the Court would utilize the offense gravity score of six (6) for the delivery counts, based on the amount of cocaine being under 2.5 grams.[1]

The Court ordered the preparation of a pre-sentence investigation and scheduled sentencing for April 4, 2000.

Factually, the case was complex. The charges revolved around a conspiracy to deliver cocaine for which the Defendant was the local hub from September 1998 thru May 1999. In its investigation, the Commonwealth utilized a non-consensual phone tap of the Defendant's phone approved by a Judge of the Pennsylvania Superior Court pursuant to 18 Pa.C.S.A. §5708. The Commonwealth also utilized a pen register on the Defendant's phone pursuant to 18 Pa C.S.A. Section 5704(5) before the non-consensual wire tap.

The Defendant worked with certain dealers of cocaine, who would contact him by pager and telephone, to order quantities of cocaine. The Defendant then would procure the cocaine from his supplier. These dealers would typically meet the Defendant at his home to pick up the cocaine and the dealers would then sell the cocaine on the streets of Lycoming County. The

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[1]The Commonwealth Attorney at the guilty plea hearing did not have a file on this case and he had little knowledge about the case. Although we don't see reference to this in the guilty plea transcript, we believe at sidebar that the Assistant District Attorney agreed to apply the offense gravity score for each cocaine delivery to be the score consistent with cocaine less than 2.5 grams. We believe he agreed to this because the Defendant was pleading guilty to 20 separate deliveries and there was a plea agreement for the aggregate minimum sentence for all Counts to be between five and eight years. The Court reported this agreement by mentioning it in the Order accepting the guilty plea on February 1, 1000. See also the transcript of the sentencing hearing of April 8, 2000, at p 35, where the Court discussed this.

Pennsylvania Attorney General’s Region IV Strike Force monitored the phone conversations and conducted surveillance of the Defendant's movements after the phone calls. Some of the drug dealers involved in the conspiracy were confronted by the police at various times. These individuals provided information which eventually focused law enforcement officials on the activities of the Defendant. This, in turn, led to the surveillance, pen register and ultimately non-consensual wire tap of the Defendant's telephone.

Ultimately, the investigation led to the arrest of the Defendant on or about May 21, 1999. Eventually, the Defendant fully cooperated with law enforcement officials as to his activities and his cooperation was the reason the Commonwealth entered into the plea agreement that the Defendant's minimum sentence be in the range of 5-8 years.

The Court sentenced the Defendant on April 4, 2000 and fully complied with the plea agreement. The Defendant was sentenced to an aggregate sentence of 6 ½ to 13 years imprisonment in a State Correctional Institution. In its sentencing Order, the Court also indicated it would not be opposed to the use of community corrections during the sentence, which means the Court suggested that the State Correctional Institution, at sometime during the sentence, could return the Defendant to the Lycoming County prison system. See Sentencing Order of April 4, 2000; N.T., April 4, 2000, at p.45.

The Public Defender filed a Notice of Appeal on Defendant’s behalf on May 2, 2000. Up to this point, Defendant had been represented by private counsel, Marc Lovecchio, Esquire. On May 4, 2000, the Court ordered defense counsel to file a concise statement of matters complained of on appeal in accordance with Rule 1925(b) of the Pennsylvania Rules of Appellant Procedure. On May 16, 2000, the Public Defender filed a Motion for Extension of Time within which to file such a statement. In an Order dated May 18, 2000, the Court granted

the Defendant an extension to June 16, 2000. On November 14, 2000, the Defendant filed his concise statement of matters complained of on appeal. This Opinion speaks to the issues raised by the Defendant in his matters complained of on appeal.

The Defendant appears to raise two basic issues in his appeal. He attacks the guilty plea colloquy of February 1, 2000, on the basis that the Court failed to advise him on the record of the elements of the offenses for which he plead guilty to. Similarly, he challenges the guilty plea colloquy on the basis that the Court failed to advise him on the record of the minimum and maximum sentences that he faced on the charges to which he plead guilty. The second issue raised by the Defendant is that the trial Court abused its discretion when imposing a sentence of 6 ½ to 13 years incarceration. The Court will address these issues seriatim.

In order to be valid, a guilty plea must be entered in a knowing, intelligent and voluntary manner. See Commonwealth v. Shekerko, 432 Pa.Super. 610, 639 A.2d 810 (1994), appeal denied, 539 Pa. 677, 652 A.2d 1322; Pa.R.Cr.P. 319. To date, the Defendant has not filed a Motion to withdraw his guilty plea. However, a Defendant may attack a guilty plea, after sentencing on three grounds: (1) legality of the sentence; (2) jurisdiction of the Court; and (3) the voluntary, knowing and intelligent nature of the guilty plea itself. See, Commonwealth v. Alston, 387 Pa.Super. 393, 564 A.2d 235, 237 (1989)(citations omitted).

The Court presumes the Defendant is now attacking the guilty plea colloquy by asserting that he did not enter his guilty plea in a voluntary, knowing and intelligent manner.

The comment to Rule 319 of the Rules of Criminal Procedure requires that, at a minimum, a Judge should inquire into the following six areas before accepting a plea:

> (1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or nolo contendere?
> (2) Is there a factual basis for the plea?

> (3) Does the defendant understand that he or she has the right to trial by jury?
> (4) Does the defendant understand that he or she is presumed innocent until found guilty?
> (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
> (6) Is the defendant aware that the Judge is not bound by the terms of any plea agreement tendered unless the Judge accepts such agreement?

The comment goes on to state:

> Inquiry into the above six areas is mandatory during a guilty plea colloquy under Commonwealth v. Willis, 369 A.2d 1189 (Pa. 1977) and Commonwealth v. Dilbeck, 353 A.2d 824 (Pa. 1976).

A determination of whether a guilty plea can withstand a voluntariness challenge must be based on the totality of circumstance surrounding the guilty plea. See Commonwealth v. Iseley, 419 Pa Super 364, 615 A.2d 408, 415 (1992), appeal denied, 534 Pa 653, 627 A.2d 730 (1993). Case law also requires that the guilty plea colloquy include a demonstration that the Defendant understands the nature of the charges. Comm v Campbell, 451 Pa. 465, 304 A.2d 121 (1973). In the case of Comm v Belleman, 446 A.2d 304 (Pa. Super. 1982), the Court stated:

> . . . for an examination to demonstrate a Defendant's understanding of the charge the record must disclose that the elements of the crimes and crimes charged were outlined in understandable terms.

446 A.2d at 306, citing Commonwealth v. Ingram, 455 Pa. 198, 203-204, 316 A.2d 77, 80 (1974). Likewise, it is clear that the Defendant must be informed of the maximum punishment that might be imposed for his conduct. Commonwealth v. Persinger, 615 A.2d 1305, 1308 (Pa. 1992).

This Court has reviewed the transcript of the guilty plea colloquy of February 1, 2000. While the Defendant acknowledged to the Court that he understood the maximum sentence for

each count to which he was pleading guilty, the Court did not then personally state the maximum to the Defendant. See Guilty Plea pp 3-5. The cover sheet to the written guilty plea colloquy forms which the Defendant initialed, however, does set forth the maximum sentence for each charge to which the Defendant was pleading guilty. Likewise, the Defendant acknowledged to the Court he understood the meaning and elements of each of the counts to which he was pleading guilty as his attorney, Marc Lovecchio, Esquire, reviewed them with him. Attorney Lovecchio also filed a written certification, which is attached to the written guilty plea colloquy, that he thoroughly explained to the Defendant each and every element of each crime to which the Defendant expressed a desire to plead guilty. Attorney Certification, para. 4; see also the written guilty plea colloquy at p.2 (Defendant answers yes to the question, "Has your attorney explained to you all of the elements of the crime or crimes to which you intend to plead guilty?")

However, despite the above, this Court believes after reviewing the transcript of the February 1, 2000 oral guilty plea colloquy, that the colloquy does not fully comport with the strict mandates of Pennsylvania Rules of Criminal Procedure 319.[2] Therefore, the Court has no objection if the Superior Court remands the matter back to this Court to hold a hearing as to whether the Defendant wants to

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[2]It is very rare that this Court would not orally cover the maximum sentence and elements for the crimes to which a Defendant would be pleading guilty. What happened the morning of February 1, 2000 is that the Court become overwhelmed with the number of cases pleading guilty that morning. Our system had just developed a criminal monitoring day concept where all attorneys, Commonwealth and defense, are required to meet and review every case on the upcoming trial list. This monitoring event was held on January 24, 2000. The event succeeded beyond our expectations in producing guilty pleas and on the morning of February 1, 2000, all cases not going to trial came in to plead guilty. The Court then was confronted with a significant number of guilty pleas on the morning of February 1, 2000. The Court was scheduled to hold pre-trial conferences in the afternoon of February 1, 2000 on the cases going to trial. In this predicament we relied, more than ever before, on the written guilty plea colloquy form. See guilty plea transcript p.2. This information is not offered as an excuse, but as an explanation as to the situation on February 1, 2000.

withdraw his plea of guilty or if the Superior Court decides to enter an Order allowing withdrawal of the guilty plea.

The second issue in the Defendant's Matters Complained of on Appeal alleges the trial court abused its discretion in imposing the aggregate sentence of 6 ½ to 13 years. The Court cannot agree. First, the sentence imposed was well within the contemplation of the plea agreement and, in fact, was in the middle of the agreed upon range of the minimum sentence. Therefore, it is difficult to comprehend how a sentence which complied with the terms of the plea agreement was in any way an abuse of discretion.

Furthermore, the sentencing transcript of April 4, 2000 sets forth the competing factors and arguments made by the Commonwealth and the defense. The defense was seeking to convince the Court to impose a sentence at the bottom of the agreed upon range by imposing a 5 year aggregate minimum. The Commonwealth attorney, while acknowledging the Defendant's cooperation with law enforcement officials, vigorously argued for the high end of the range citing the extreme facts of the case such as the Defendant's high level role in this almost year long conspiracy to deliver cocaine. N.T., April 4, 2000, at pp. 25-33. The Court then considered all facets of this case. The Court considered the fact that the Defendant seemed to be a man who is well anchored and caring to his family. N.T., April 4, 2000, at p.42. It noted the Defendant was an individual who probably could be rehabilitated. N.T., April 4, 2000, at p.43. The Court carefully considered the cooperation of Defendant with the Commonwealth. N.T., April 4, 2000, at p.43. However, the Court also realistically looked at the seriousness of the offenses, the criminal conduct of Defendant, and its significant impact on the Lycoming County Community. Defendant was involved in a lengthy cocaine distribution scheme. Defendant was basically a hub in this conspiracy. Significant quantities of cocaine and money flowed from this conspiracy. Defendant was careful in protecting his role in this

conspiracy. The Assistant District Attorney in her argument noted that Defendant would take evasive measures when he drove his vehicle so law enforcement officers could not surveil him. N.T., April 4, 2000, at p.29. The breadth and scope of the Defendant's operation required costly, sophisticated and time consuming law enforcement efforts such as use of a non-consensual wire tap and police surveillance for a significant period of time. The Court believes it reasonably balanced the unique factors that applied to this individual Defendant and the crimes in which he engaged. See, N.T., April 4, 2000, at pp. 42-45 (where the Court explained the basis for the sentence). In light of these factors the Court does not believe it abused its discretion in fashioning the sentence it did.

Date _______________ By the Court,

Kenneth D. Brown, Judge

cc: Superior Court(original & 1)
William J. Miele, Esq.
Diane Turner, Esquire (ADA)
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Gary Weber, Esquire (Lycoming Reporter)