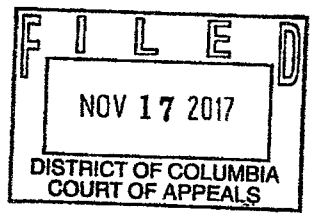
District of Columbia
Court of Appeals



No. 16-CO-241

MILTON NELSON WARD,
Appellant,

v. **CF2-5519-11**

UNITED STATES,
Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson, Beckwith, and Easterly, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing *en banc*; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED that appellant's petition for rehearing *en banc* is denied.

PER CURIAM

Associate Judge McLeese did not participate in this case.

Copies to:

Honorable Robert E. Morin

Director, Criminal Division

Copies e-served to:

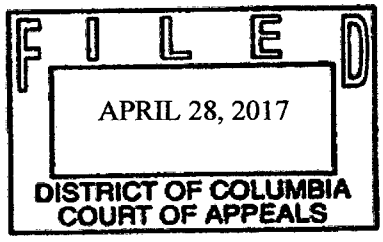
Milton Nelson Ward
1450 3rd Street, SW
Hickory, NC 28601

Elizabeth Trosman, Esquire
Assistant United States Attorney

pii

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CO-241



MILTON NELSON WARD, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CF2-5519-11)

(Hon. Robert E. Morin, Trial Judge)

(Submitted April 25, 2017 Decided April 28, 2017)

Before GLICKMAN, FISHER, and THOMPSON, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: The trial court denied appellant Milton Nelson Ward's request to withdraw his guilty plea. On appeal, he argues that the trial court applied an incorrect legal standard, that his Second Amendment and Fourth Amendment rights have been violated, and that he was denied the effective assistance of counsel. We affirm.

I. Background

On June 24, 2011, appellant pled guilty to possession of an unregistered firearm ("UF").[1] As part of a plea agreement, the government dismissed its charges of felony carrying a pistol without a license ("CPWL") and unlawful possession of ammunition, and it agreed not to oppose a sentence of probation. During the Rule 11 colloquy, appellant informed the court that he was satisfied with his lawyer.

---

[1] D.C. Code § 7-2502.01 (2012 Repl.).

The government proffered that police officers had responded to a traffic accident when one of them, while standing near the passenger door of appellant's vehicle, observed a handgun inside appellant's open glove box. Appellant had not registered that firearm in the District of Columbia. When the court asked, "Is that what happened . . . ?," appellant answered, "Yes." On that same day, the court sentenced appellant to thirty days' incarceration, with execution of the sentence suspended in favor of nine months' unsupervised probation.

Nearly four years later, appellant filed a *pro se* motion to withdraw his guilty plea and/or vacate his sentence, citing D.C. Code § 23-110 (2012 Repl.) and former Super. Ct. Crim. R. 32 (e), which now is Super. Ct. Crim. R. 11 (d) (withdrawal of guilty pleas). Appellant made various claims, including a Fourth Amendment argument based on an alternative account of the facts which led to the officer's discovery of the firearm and ammunition. He alleged that the officer "became impatient" when appellant could not locate his insurance information fast enough, opened the passenger door, and began searching appellant's vehicle. The officer then allegedly opened the glove compartment, where he found the gun.

Appellant also tied these assertions to a claim of ineffective assistance of counsel, arguing that his counsel failed to investigate this account and advised him not to mention it when pleading guilty. In a sworn affidavit, appellant's counsel stated that he had "never advised a client in a criminal case that he/she could not object to or raise any concerns concerning a factual proffer made during the course of a plea and I did not make an exception of my policy for Mr. Ward." The affidavit also stated that "Mr. Ward had to choose between accepting the government's offer to plea to a misdemeanor, unregistered firearm, or going to trial on the felony CPWL charge." Indeed, the government had emailed appellant's counsel warning that if appellant did not take the offer to plead guilty to the misdemeanor UF offense at the next status hearing, "the deal is off and the next plea offer will be to CPWL." Appellant's counsel averred that "[t]his information was shared with Mr. Ward before he entered his plea."

Judge Robert Morin denied appellant's motion. First, Judge Morin found no defect in the Rule 11 colloquy. He then found that appellant had made no viable claim of innocence, that he had waited nearly four years to attempt to withdraw the plea, and that he had not shown ineffective assistance of counsel. Judge Morin further concluded that there was no "substance" to appellant's Fourth Amendment argument other than "speculation that witnesses might have corroborated his version of the events."

Regarding the ineffective assistance of counsel argument, Judge Morin noted that appellant had been fully informed by his counsel as to the terms of the plea offer and was so eager to accept it that he had emailed the prosecutor—without his counsel's knowledge—asking to "accept the misdemeanor plea as soon as possible." Judge Morin also recognized that if appellant had rejected the misdemeanor plea, "the next plea offer would [have] be[en] to felony CPWL." Given these circumstances, there was no "reasonable probability" that appellant "would have rejected the plea and proceeded to trial had counsel filed a suppression motion."

II. Analysis

A motion to vacate sentence under D.C. Code § 23-110 that is filed after a guilty plea and sentencing is treated as a motion to withdraw the plea. *Bradley v. United States*, 881 A.2d 640, 646 (D.C. 2005). Our review is for abuse of discretion. *Johnson v. United States*, 812 A.2d 234, 240 (D.C. 2002).

A. The Trial Court's Application of the "Manifest Injustice" Standard

We apply two sets of standards when considering motions to withdraw guilty pleas. When a defendant tries to withdraw the plea before sentencing, we examine whether allowing him to do so would be "fair and just." *See, e.g.*, *Gooding v. United States*, 529 A.2d 301, 306 (D.C. 1987). However, a post-sentence motion such as the one at issue here is evaluated for whether its denial would result in "manifest injustice." *See, e.g.*, *Johnson*, 812 A.2d at 240. This standard is stricter than the "fair and just" standard. *See Springs v. United States*, 614 A.2d 1, 4 (D.C. 1992). "Manifest injustice can take several forms." *Johnson*, 812 A.2d at 240. It may result, for example, from "a fatal defect in the Rule 11 proceedings,"[2] when "the government fail[s] to comply with the terms of a plea

---

[2] Appellant briefly suggests that there was a defect in the Rule 11 proceedings. He asserts that Judge Morin stated that appellant's conviction could be expunged after two years. As the trial judge noted and appellant concedes, this alleged statement appears nowhere in the record. The trial judge did state on the same day as the Rule 11 proceedings, during sentencing, that appellant had to "remain registered with the Gun Offender Registry for up to two years after the expiration of [appellant's] probation[.]" Thus, to the extent that appellant is (continued...)

agreement," or "if justice demands withdrawal in the circumstances of the individual case." *Id.* (internal quotation marks omitted).

When analyzing whether "justice demands withdrawal" in this case, Judge Morin considered factors that appellant complains he should not have—any claim of innocence, the delay in filing the motion, and counsel's competence. Appellant argues that these factors only apply to presentence motions to withdraw guilty pleas.[3]

However, *Johnson*—a case in which the defendant attempted to withdraw his plea *after* sentencing—made clear that a showing of manifest injustice is possible if "justice demands withdrawal in the circumstances of the individual case." *Id.* Appellant concedes this point. *Johnson* then cited *Maske v. United States*, 785 A.2d 687, 694 (D.C. 2001), which stated that three factors to consider when deciding whether "justice demands withdrawal" are "(1) whether the defendant has asserted his legal innocence, (2) the length of delay between entry of the guilty plea and the expression of the desire to withdraw it, and (3) whether the defendant has had the full benefit of competent counsel at all relevant times." We have stressed that an assertion of innocence is a "compelling consideration" even in the post-sentencing context.[4] *Bettis v. United States*, 325 A.2d 190, 195 (D.C. 1974).

(...continued)
making an argument based on an alleged statement about expungement, it has no factual foundation.

[3] It is unclear why appellant challenges the third factor since he himself is arguing that his counsel was ineffective. In his reply brief, appellant seems to drop his opposition to Judge Morin's consideration of that factor.

[4] In his reply brief, appellant compares the rule establishing the "manifest injustice" standard, Super. Ct. Crim. R. 11 (d)(3), to its federal counterpart, which no longer contains that language, but recognizes that a plea of guilty may be set aside on "collateral attack." Fed. R. Crim. P. 11 (e). Appellant then seems to argue that his claim is more akin to a habeas corpus petition and that we should therefore focus on his constitutional arguments rather than whether he has established manifest injustice. But even the federal rule does not provide much aid to appellant. It states, for instance, that "the defendant may not withdraw a plea of guilty" after sentence has been imposed. *Id.* Further, when the provisions of former Super. Ct. Crim. R. 32 (e) were moved to Super. Ct. Crim. R. 11 (d)(3), the
(continued...)

We thus see no inconsistency between Judge Morin's analysis and our case law. Furthermore, we fail to see how the consideration of factors often used under a more lenient standard would prejudice appellant, who concedes that he is subject to the stricter "manifest injustice" standard. Accordingly, appellant's argument on this point fails.

B. Appellant's Constitutional Claims

In addition to arguing that his counsel was ineffective for failing to advance his constitutional arguments, an issue discussed below, appellant seems to make stand-alone arguments that his Second Amendment and Fourth Amendment rights have been violated. He bases his Fourth Amendment argument on his alternative version of the facts surrounding the discovery of the loaded handgun and his Second Amendment argument on a claim that the UF statute is unconstitutional. Appellant states that the government could not "constitutionally prosecute" him, seemingly arguing that his conviction is invalid.

However, appellant's guilty plea forecloses the specific arguments that he makes here. Appellant fails to acknowledge the importance of his guilty plea, which he cannot take back lightly. *See, e.g.*, *United States v. Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence."). Indeed, "as a practical matter virtually every possible avenue of appeal is waived by a guilty plea[.]" *Wallace v. United States*, 936 A.2d 757, 761 (D.C. 2007) (quoting *Bettis*, 325 A.2d at 194).

(...continued)
comments to the rule explicitly noted that the rule was "retain[ing] the difference between the federal and Superior Court provisions: post-sentence plea withdrawal is not permitted by the federal rule, but is permitted by this rule to correct manifest injustice." Super. Ct. Crim. R. 11 cmt. to 2016 amendments. Finally, the Supreme Court has held—in a case involving a habeas corpus petition—that the test for deciding whether appellant has been prejudiced in a case such as this, where he is challenging counsel's competence, is whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Thus, no matter how appellant casts his claim, he cannot evade the impact of his decision to plead guilty.

The interest in finality that accompanies a guilty plea is so strong that "[a] criminal defendant who enters a guilty plea gives up several constitutional rights[.]" *Hopkins v. United States*, 84 A.3d 62, 66 (D.C. 2014). Thus, "when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged Fourth Amendment violation because the conviction does not rest in any way on evidence that may have been improperly seized." *Haring v. Prosise*, 462 U.S. 306, 321 (1983); *see also Collins v. United States*, 664 A.2d 1241, 1242-43 (D.C. 1995) (holding that a defendant could not appeal the pretrial denial of his motion to suppress because he had subsequently "entered an unconditional plea of guilty" and had thus "waived all pre-judgment issues on appeal"). Further, "appellant has waived his current . . . Second Amendment claims because he knowingly entered an unconditional guilty plea, thus, he waived his right to appeal his conviction[]." *Smith v. United States*, 20 A.3d 759, 762 (D.C. 2011).[5]

Finally, appellant knew, or should have known, that his guilty plea would have these important consequences. During the Rule 11 colloquy, appellant said he understood that by pleading guilty he would give up many rights, including the opportunity to have his lawyer "make motions, make objections, and make arguments on [his] behalf." *See, e.g., Gregg v. United States*, 395 A.2d 36, 40 (D.C. 1978) (holding that a defendant could not overcome "the presumptive validity of [his guilty] plea" through "conclusory" arguments and "unsupported" allegations where "the trial judge ha[d] done everything possible to make clear the rights, implications, and voluntary nature of appellant's plea"). Appellant also signed a written plea agreement and waiver in which he acknowledged that he was giving up the right to "file motions to suppress evidence and statements[.]" Indeed, the government had previously specified, in a letter transmitting the first plea offer, that it would expire "on the date of the first scheduled status hearing in

---

[5] Regarding appellant's argument that the government could not "constitutionally prosecute" him, we have noted that "[e]ntry of a valid guilty plea . . . does not foreclose *jurisdictional* attacks which assert that the state could not constitutionally prosecute." *Gooding*, 529 A.2d at 304 n.4 (emphasis added). However, we have rejected the argument that a Second Amendment challenge is the type of "jurisdictional infirmity" that cannot be waived by a guilty plea. *See Sims v. United States*, 963 A.2d 147, 149 (D.C. 2008); *see also Smith*, 20 A.3d at 762 n.5 (Second Amendment challenge did not fit within exception for claims that the government could not "constitutionally prosecute" the defendant).

this matter or seven (7) days after [appellant] files any motions that will require a response by the government in this case, including, but not limited to, motions to suppress," reflecting that the government entered into the plea deal in part so that it would not have to expend resources responding to any motions.

Thus, to the extent that appellant is making stand-alone Second Amendment and Fourth Amendment arguments, those claims have been foreclosed by appellant's guilty plea and we may not consider them so long as the guilty plea stands. We therefore turn to appellant's claim that his plea must be set aside because his counsel was ineffective.

C. Ineffective Assistance of Counsel

When a defendant attempts to set aside his guilty plea by asserting that his counsel was ineffective, we analyze the claim under the framework established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Johnson*, 812 A.2d at 240 n.8. Appellant must show both that counsel was deficient, and that the deficient performance "prejudiced the defense." 466 U.S. at 687. In this context, the *Strickland* prejudice standard requires appellant to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Upshur v. United States*, 742 A.2d 887, 895 (D.C. 1999).

Appellant's arguments fail, first of all, because he does not show that counsel was deficient. He argues that his counsel should have investigated his Fourth Amendment claims, but appellant directly contacted the prosecutor to express his interest in accepting the plea mere hours after his new counsel was appointed. He also assured the prosecutor that he had told his counsel that he wanted to accept the offer. Afterwards, during his Rule 11 colloquy, appellant affirmed that he was satisfied with his counsel. Appellant has claimed, in an affidavit filed with his motion to withdraw his plea, that counsel discouraged him from questioning the government's version of the facts. However, appellant's counsel has signed a sworn affidavit stating otherwise, and, as already noted, there is plenty of evidence that appellant was eager to accept the plea and thus to stipulate to the government's version of the facts. Under these circumstances, we cannot say that appellant's counsel was deficient.

We reach the same conclusion regarding appellant's Second Amendment argument. Appellant primarily relies upon *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

Heller held that the Second Amendment does not permit "the absolute prohibition of handguns held and used for self-defense *in the home*." 554 U.S. at 636 (emphasis added); *see also Gilliam v. United States*, 80 A.3d 192, 207 (D.C. 2013) ("The Supreme Court has not declared that the Second Amendment guarantees a right to carry a handgun openly outside the home."). Appellant's conduct did not occur in his home.[6]

Palmer is not binding on this court. More importantly, it was decided in 2014, three years after appellant's guilty plea. Clearly, appellant's counsel could not have used a decision that did not yet exist to aid appellant. *See, e.g.*, *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").[7]

Indeed, we have consistently upheld the District's UF statute. *See, e.g.*, *Jackson v. United States*, 76 A.3d 920, 945 (D.C. 2013) (noting that "we have repeatedly held that the CPWL and UF statutes remain[] facially valid after *Heller*"); *Plummer v. United States*, 983 A.2d 323, 338-39 (D.C. 2009) (recognizing that "the District's statutes requiring licensing and registration of pistols or handguns have a legitimate and significant penal purpose" and "are not facially invalid").

---

[6] By contrast, we have required a hearing when a defendant pled guilty to violating various firearms statutes based on evidence found *in his home* and subsequently attempted to withdraw his pleas after *Heller* had been decided. *Magnus v. United States*, 11 A.3d 237, 240 (D.C. 2011).

[7] Further, *Palmer* relied heavily on *Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), which the Ninth Circuit has since overturned. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc). The Ninth Circuit has also made clear that the panel opinion in *Peruta* may no longer be cited as precedent, *Peruta v. Cty. of San Diego*, 781 F.3d 1106, 1107 (9th Cir. 2015), further undermining the persuasive authority of *Palmer*. *See In re T.M.*, 155 A.3d 400, 407 (D.C. 2017) (stating that "any weight that this court would have given to the district court's interpretation of *Heller* in *Palmer* is now significantly less persuasive" due to the Ninth Circuit's decision to overturn the panel opinion in *Peruta*).

At the very least, the issue was sufficiently unclear at the time that appellant pled guilty that counsel was not required to file a motion to dismiss on Second Amendment grounds, thereby foregoing the opportunity to accept the misdemeanor plea offer, in order to be considered reasonably competent. *See, e.g.*, *In re T.M.*, 155 A.3d at 406-07 ("Given the state of this court's case law on the [Second Amendment] issue, what is clear to us is that at the time of trial [in 2013], had the trial court surveyed the state of the pertinent case law, it would not have found a clear and definitive answer to the question of *Heller*'s reach."); *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008) ("Important questions about the reach of *Heller* remain to be answered, but what assuredly is not 'clear' and 'obvious' . . . is that it dictates an understanding of the Second Amendment which would compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined.").

Finally, even if counsel had been deficient, there was no "reasonable probability" that appellant would have rejected the plea offer and gone to trial. *See Hill*, 474 U.S. at 59. As already noted, appellant proactively contacted the government in order to express his interest in accepting a plea hours after his counsel was appointed and without counsel's knowledge.

The plea was very advantageous to appellant, who was charged with a felony and two misdemeanors. The government's initial offer was for appellant to plead guilty to the felony offense of CPWL, which carries a penalty of up to five years in prison. *See* D.C. Code § 22-4504 (a)(1) (2012 Repl.). Nevertheless, appellant was permitted to plead guilty to a misdemeanor, and the government promised that it would not oppose a sentence of probation. Given this very favorable offer and appellant's demonstrated eagerness to accept it, we cannot say that Judge Morin abused his discretion by concluding that there was no reasonable probability that appellant would have elected to go to trial and to risk the possibility of more severe punishment if convicted.[8]

---

[8] Appellant also complains that the trial court issued its order without a hearing, which he believes is required (absent certain exceptions) because he filed a motion under D.C. Code § 23-110. As an initial matter, it is unlikely that appellant's motion would be properly considered to be a § 23-110 motion because he was no longer in custody at the time he filed his motion. *See id.* (permitting a "prisoner in custody" to attack his sentence); *see also Magnus*, 11 A.3d at 245 ("The trial court correctly ruled that [the appellant] could not proceed under D.C. Code § 23-110 because he was no longer in custody under sentence of the Superior

(continued...)

III. Conclusion

For the foregoing reasons, the judgment of the Superior Court is hereby

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Robert E. Morin

Director, Criminal Division

Copies e-served:

Milton Nelson Ward

Elizabeth Trosman, Esquire
Assistant United States Attorney

(...continued)
Court when he filed his petition." (internal quotation marks omitted)). However, even assuming that appellant's motion is governed by the provisions of § 23-110, no hearing is required if "the motion, files, or other accompanying data conclusively show that [appellant] is not entitled to relief." *Goodall v. United States*, 584 A.2d 560, 562 (D.C. 1990); *see also* D.C. Code § 23-110 (c) (2012 Repl.). Here, the determinative question was whether appellant had demonstrated "manifest injustice," entitling him to withdraw his guilty plea. The court did not need an evidentiary hearing to resolve that question.