

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT KINGSHILL

GOVERNMENT OF THE VIRGIN ISLANDS,)

Plaintiff,)

vs.)

WILLIAM EUGENE JOWERS,)

Defendant.)

CRIMINAL NO. 326/1994

CHARGES: ASSAULT I, ASSAULT
II, POSSESSION OF A FIREARM
DURING A CRIME OF VIOLENCE

NOT FOR PUBLICATION

JULIO A. BRADY, ESQ., ATTORNEY GENERAL
Joseph Ponteen, Esq., Asst. Attorney General
Department of Justice
6040 Castle Coakley
Christiansted, St. Croix, VI 00820
(Attorney For Plaintiff)

WARREN B. COLE, ESQ.
HUNTER, COLIANI, COLE & TURNER
1138 King Street, Suite 301
Christiansted, St. Croix, VI 00820
(Attorney for Defendant)

CABRET, J.

MEMORANDUM OPINION

(June 2, 1997)

THIS MATTER is before the Court on defendant's presentence motion to withdraw his guilty plea. The defendant in this case, William Eugene Jowers, was originally charged with Assault in the First Degree¹, Assault in the Third Degree², and Possession of a Firearm During a

¹ 14 V.I.C. §295(1).

² 14 V.I.C. §297(2).

Crime of Violence.³ On February 1, 1995, Jowers entered a plea of guilty to Assault in the Third Degree, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).⁴ On the eve of sentencing, defendant learned of exculpatory evidence which has allegedly been in the Government's possession for some time, and moves this Court to allow him to withdraw his plea of guilty. For the reasons which follow, the motion will be granted.

FACTS

William Jowers was arrested in the early morning hours of March 27, 1994. An unlicensed .380 caliber 9mm. Kurtz handgun was found approximately three feet away from him when he was arrested, along with a can of mace. The Government alleges that on March 27, Jowers used this gun to shoot a woman on the street. The victim originally identified Jowers. Jowers was also identified by three other witnesses who allegedly saw the shooting from various vantage points in town. Jowers has consistently insisted that he has little recollection of the events of the night in question as a result of being assaulted earlier in the evening. However, Jowers alleges that an unidentified man shot the woman while Jowers struggled with him in her presence.

Based upon his inability to totally recall what occurred on March 27, 1994, Jowers

³ 14 V.I.C. §2253(a).

⁴ The Supreme Court recognized in *North Carolina v. Alford*, that "... while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite for the imposition of criminal penalty. An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Alford*, 400 U.S. at 37 (emphasis added).

took an *Alford* plea to the charge of Assault in the Third Degree. In preparation for Jowers' sentencing, a pre-sentence report was prepared and in it, Probation Officer Norma Ascencio revealed that the alleged victim claims to have repeatedly told Government attorneys that the man who shot her was not William Jowers. It is this information which is the impetus for Jowers' motion to withdraw his guilty plea.

DISCUSSION

It is well established that "[a] defendant may plead guilty, not guilty or *nolo contendere* to any complaint or information," and it is equally well settled that a defendant "may be permitted to change a plea of guilty or *nolo contendere* to one of not guilty only by permission of the court." See Terr. Ct. R. 126. The defendant, however, does not have an absolute right to withdraw a guilty plea, and acceptance of the motion to withdraw a guilty plea is within the discretion of the court. *Government of the Virgin Islands v. Berry*, 631 F.2d 214, 219 (3d Cir. 1980) (citing *United States v. Vallejo*, 408 F.2d 667, 669 (3d Cir. 1973)). According to Rule 32(e) of the Federal Rules of Criminal Procedure, "[i]f a motion to withdraw a plea of guilty . . . is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." FED. R. CRIM. P. 32(e).⁵ "[M]otions to withdraw guilty pleas made before sentencing should be liberally construed in favor of the accused and should be granted freely." *Government of the Virgin Islands v. Knight*, 764 F. Supp. 1042, 1046 (D.V.I. 1991)(citing *Berry*,

⁵ In the absence of local laws to the contrary, practice and procedure in the courts of the Virgin Islands shall be governed by the Federal Rules of Criminal Procedure. Terr. Ct. R. 7.

631 F.2d at 219). Moreover, when a trial judge determines the interest of justice would not be served by a guilty plea, then the defendant should be permitted to withdraw his guilty plea. *See, U.S. Ex rel Culbreath v. Rundle*, 466 F.2d 730 (3d Cir. 1972); *United States v. Scarborough*, 527 F.Supp. 380 (W.D.Tex. 1981).

Although Rule 32(e) does not articulate any standard to be applied regarding the withdrawal of a guilty plea, the Third Circuit has set forth three relevant factors as a guide for the analysis of a motion to withdraw a plea of guilty. According to the Third Circuit, a court should consider 1) whether the defendant asserts his innocence; 2) the strength of the defendant's reasons for moving to withdraw; and 3) whether the government would be prejudiced by withdrawal. *United States v. Martinez*, 785 F.2d 111, 114 (3d Cir. 1986); *Berry*, 631 F.2d 214 (3d Cir. 1980). It is the burden of the defendant to establish a fair and just reason for withdrawing his plea. If the defendant sets forth a fair and just reason for withdrawing the plea, the burden shifts to the government to establish that it would be prejudiced by granting leave to withdraw. 3 Wright, *Federal Practice & Procedure: Criminal* 2d, §538 (1982). *See also United States v. Desmarais*, 967 F.2d 17, 19 (1st Cir. 1992). Utilizing these guidelines, the Court now considers whether defendant's arguments, construed liberally in his favor, present a "fair and just reason" to permit him to withdraw his guilty plea.

A. Assertion of Innocence by the Defendant

It is of considerable significance that the defendant credibly asserts that he is in fact innocent of the charges against him in moving to withdraw a guilty plea. *United States v. Roberts*,

570 F.2d 999, 1009 (D.C. Cir. 1977). From the outset, Mr. Jowers insisted that he never shot anyone on the night in question. In fact, he claims that he was the victim of a crime that night. Mr. Jowers' first assertion of his innocence was made on March 27, 1994, in a statement to the police. During that interview, Jowers made it clear that he had been attacked, that he was hit from behind, and that a gun was fired by some other person. On June 3, 1994, the defendant was arraigned and plead not guilty. Finally, at the time his negotiated plea of guilty was entered, Mr. Jowers again explained to the Court that he did not really think he had committed the crimes in question but since he had no real recollection he would agree to the Government's factual basis pursuant to *North Carolina v. Alford*.

The Government argues that the recantations by the victim are not credible, in light of her history of drug and alcohol abuse. The Government further contends that the defendant should not be able to bootstrap his claim of innocence on the clouded recollections of this victim. However, this is not a case where the defendant uses the victim's recantation to present a *post hoc* attempt to justify his motion. The defendant has consistently maintained his innocence from the time he was arrested until the time this motion was filed. Additionally, the Court cannot disregard the significance of the *Alford* plea that Jowers entered, which does not concede any wrongdoing on his part.⁶ In this case, the defendant has continually and credibly asserted his innocence, and that is sufficient to satisfy the first prong of the *Martinez* test.

B. Defendant's Reasons for Moving to Withdraw Plea

⁶ See *Infra* note 4.

In order for this Court to determine whether a "fair and just reason" exists to warrant the withdrawal of a guilty plea, the reasons stated for defendant's motion must also be evaluated. Most compelling here is the fact that the complaining witness has firmly recanted the prior identification of her assailant. She has identified another male as the actual perpetrator. Based upon the victim's recantation, defendant, who had previously been faced with no supporting witnesses and what appeared to be a small chance of acquittal, now wishes to assert his constitutional right to a trial by jury.

Moreover, "the liberal rule for withdrawal of a guilty plea before sentence is consistent with the efficient administration of criminal justice. . . . It ensures that a defendant is not denied a right to trial by jury unless he clearly waives it." *United States v. Young*, 424 F.2d 1276, 1279 (3d Cir. 1970). Under the circumstances of this case, where the victim has exonerated the defendant by identifying another as the perpetrator, which directly supports the defendant's unflinching claims of innocence, the Sixth Amendment right of the defendant to a trial by jury should be preserved. The Court is compelled to conclude that Jowers has sufficiently established a "fair and just reason" to allow him to withdraw his guilty plea.

C. Prejudice to the Government

Finally, the Court must consider any prejudice which the Government may be subjected to if the plea is withdrawn. In this case, the Government's claim of prejudice rests primarily on the loss of what it terms essential witnesses, as it alleges that two of its three eye witnesses are now unavailable. Charles Goodwin, a corrections officer who witnessed the shooting,

GOVERNMENT v. JOWERS
CRIMINAL NO. 326/1994
MEMORANDUM OPINION
PAGE 7

died on December 5, 1994, after the arrest of Jowers but before the entry of his plea. Another witness, Elroy Williams, Jr., is no longer in the Virgin Islands. Jowers believes and claims that Mr. Williams fled the jurisdiction prior to the entry of his plea.

The Government states that it does not directly rely upon Goodwin's death, having occurred prior to the entry of Jowers' plea, to show prejudice.⁷ However, the Government claims that it is prejudiced by the unavailability of Elroy Williams, Jr., as he is no longer in the Territory. The Government argues that in light of Officer Goodwin's death, Mr. Williams must be classified as an essential government witness. In support of the proposition that the disappearance of an essential witness is fatal to a motion to withdraw a guilty plea, the Government relies on *Knight*.⁸ However, the portion of *Knight* cited by the Government is dicta, and therefore, not controlling here. In fact, the reference to the "essential witness" was only utilized by the *Knight* court as an example of what would constitute specific prejudice to the government, warranting the denial of a motion to withdraw a guilty plea.⁹ In granting the defendant's motion to withdraw his guilty plea, the *Knight*

⁷ *Government's Response to Defendant's Motion for Leave to Withdraw Guilty Plea* at 10.

⁸ "Prejudice to the government must be more specific, such as a witness essential to the government's case disappearing..." *Knight*, 764 F. Supp. at 1050 (citing *Berry*, 631 F.2d at 221-22). See also *United States v. Nahodil*, 776 F. Supp. 991 (M.D. Pa. 1991)(citing *United States v. Vasquez-Velsco*, 471 F.2d 294 (9th Cir. 1973) (government prejudiced by the death of its chief witness)).

⁹ The Government's reliance on this dicta in *Knight* is further misplaced, inasmuch as *Knight* cites *Berry*, 631 F.2d at 221-22, to support its "essential witness" theory. The Court in *Berry* found that the Government would be prejudiced by allowing the withdrawal because it was unlikely to be able to proceed against the defendant in the same manner it could have at the time it was prepared to try the defendant jointly with the other co-conspirators, since the cooperation of the co-conspirators as witnesses in a future trial against the defendant was uncertain, as one had already been sentenced and the other was acquitted and could not be located. *Berry* is clearly distinguishable from the case at bar because the prejudice in *Berry* arose from the government

GOVERNMENT v. JOWERS
CRIMINAL NO. 326/1994
MEMORANDUM OPINION
PAGE 8

court stated that the assertions made by the government, namely, that its "witnesses may have scattered and memories dimmed" were vague and did not constitute specific prejudice. *Id.* at 1050. In the case *sub judice*, the sole claim of prejudice proffered by the Government is the absence of Mr. Williams. The Government, however, has not produced any evidence in support of its allegations of prejudice regarding the unavailability of Elroy Williams. For example, there is no indication in the record that the Government in any way sought, but was unable, to locate Mr. Williams.

Assuming *arguendo*, that Mr. Williams is absent from the Territory, the Government has not submitted any evidence to refute the defendant's allegation that Mr. Williams left the Territory prior to the entry of his plea. Thus, inasmuch as Mr. Williams, just like Officer Goodwin, would not have been available to testify when this matter was scheduled for trial, the Government should not be permitted to rely directly upon the absence Mr. Williams to show prejudice. In other words, both Mr. Williams and Officer Goodwin would have been unavailable had this matter proceeded to trial,¹⁰ and therefore, the Government should not be allowed to claim prejudice for any witness that was not available before Jowers' plea.

Furthermore, this is not a case where the prosecution cannot proceed to trial because of the unavailability of its principal witness. For example, in *United States v. Nahodil*, 776 F.Supp. 991 (M.D.Pa. 1991) and *United States v. Vasquez-Velsco*, 471 F.2d 294 (9th Cir. 1973), the courts found that the government would be substantially prejudiced if the defendants were permitted to

having to reassemble witnesses after the acquittal of a codefendant when a joint trial was possible. In the instant matter, there are no codefendants involved, and the Government is not faced with having to reassemble witnesses that have already testified.

¹⁰ Jower's pled guilty five days before his trial was to begin.

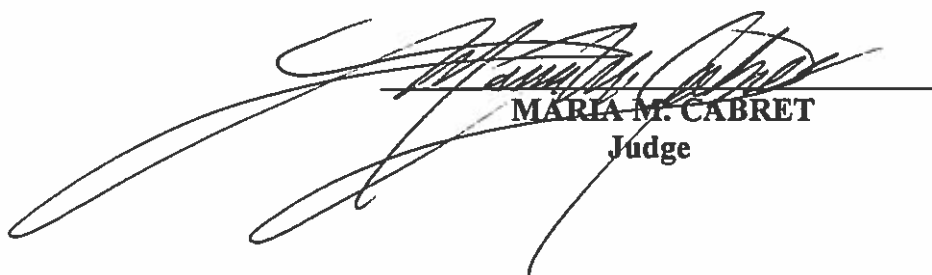
withdraw their guilty pleas because the defendants were charged with drug-trafficking offenses and the chief government witnesses, the confidential informants, died. The *Vasquez-Velsco* and *Nahodil* courts found that the government simply could not prosecute its respective case without the confidential informants. Quite conversely, in the case *sub judice*, the Government's chief witness, the victim, is still available to testify. Although the victim has recanted her identification of the perpetrator of the crime, this fact alone, does not make her an unavailable witness. Thus, notwithstanding her recanted testimony, she remains available to the Government, and clearly, the victim is *the most* essential witness in this case.

Finally, any prejudice that may inure upon the Government by the unavailability of two eye witnesses is significantly minimized by the fact that in addition to the victim, Mr. Luis Felix, the third eye witness to this incident remains available to the Government. Thus, inasmuch as the Government retains two key witnesses, this Court cannot accept the Government's claim that it would be substantially prejudiced if the defendant were allowed to withdraw his guilty plea.

CONCLUSION

For the reasons stated, this Court concludes that Jowers has demonstrated a fair and just reason why he should be relieved of his plea of guilty. Additionally, the government did not present an adequate showing of prejudice, and given the circumstances of this case, justice demands that the defendant's motion be granted. Accordingly, defendant is permitted to withdraw his guilty plea.

GOVERNMENT v. JOWERS
CRIMINAL NO. 326/1994
MEMORANDUM OPINION
PAGE 10



MARIA M. CABRET
Judge