

MEMORANDUM OF LAW

TO: The Honorable Thomas A. Rymer
FROM: Larry D. Lamson, Esquire
DATE: February 20, 1992
SUBJECT: Anthony Gray
Case No: C-91-409

On or about October 7, 1991, Anthony Gray appeared before this Honorable Court with Maria Cristina Gutierrez, his attorney of record, and entered a plea of guilty to First Degree Murder and First Degree Rape.

On December 20, 1991, Mr. Gray filed a hand-written request to withdraw his prior plea of guilty. Mr. Gray then dismissed Attorney Gutierrez, and subsequent counsel filed a formal motion to withdraw the guilty plea. As reason for the withdrawal of the plea, Mr. Gray indicates that the plea was not voluntarily entered, nor did he understand the consequences of the guilty plea. that he was not informed of the consequences of the plea, and further, that Attorney Gutierrez rendered ineffective assistance in handling his case.

Under Md. Rules Code Ann., Rule 4-242(c), the Court may accept a plea of guilty to a charge only after it determines, upon an examination of the defendant on the record in open court, that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) that

there is a factual basis for the plea.

At any time before sentencing, the Court may permit the Defendant to withdraw a plea of guilty when the withdrawal serves the interest of justice, Md. Rules Code Ann., Rule 4-242(f). The defendant's right to withdraw a guilty plea prior to sentencing is a discretionary matter for the trial Court and will not be overturned unless abused. Fontana v. State, 399 A.2d 950, 42 Md. App. 203 (1979). In the instant case, Mr. Gray's plea of guilty was not entered voluntarily. He did not understand the nature of the charges against him, nor did he understand the consequences of the guilty plea.

Certain criteria must be present on the record before a guilty plea is considered voluntary, and having been made with intelligent understanding of the nature of the offense to which the plea was entered. Holloway v. State, 261 A.2d 811, 8 Md. App. 618 (1970). It is no longer permissible for the Court to accept a plea merely because the defendant is represented by counsel and capable of participating in his own defense. James v. State, 242 Md. 424, 428. Rather, the defendant must have an intelligent understanding of both the nature of the offense and the possible consequences of such a plea.

The Court of Special Appeals stated, in Bryant v. State, 424 A.2d 1115, 47 Md. App. 627 (1981), that "... an accused must be informed of the maximum sentence that the trial Court can impose

for the offense before the Court can accept a guilty plea." A judge who is considering acceptance of a guilty plea must first satisfy himself that the defendant is aware of the consequences of the plea. Durkin v. State, 468 A.2d 145, 56 Md. App. 442 (1983).

In Matthews v. State, 15 Md. App. 686, 292 A.2d 131 (1972), a new trial was ordered when the record did not affirmatively demonstrate that the defendant had been apprised of the maximum sentence to which he subjected himself by his guilty plea. The purpose of informing the accused of the maximum sentence is to ensure that the defendant understands the sentence which he could receive with respect to the charges pending before the Court. This information is particularly pertinent when either a plea is not founded upon a representation that a specific lesser sentence will be imposed or the bargained for sentence is at or near the maximum permitted by the State. State v. King, 524 A.2d 807, 71 Md. App. 229 (1987).

In the instant case, the Court discussed with Mr. Gray the sentence which the Court would impose under the terms of the plea agreement. The record, however, is void of any mention of the statutory maximum penalty which Mr. Gray could have received if found guilty after a trial. Without such information, an accused is unable to assess whether or not there is any logical ground for him to enter a plea of guilty, as opposed to proceeding with trial.

Here, Mr. Gray entered a plea of guilty to the two most serious crimes charged, and bound himself to the maximum penalty which he could receive under Maryland law. It is this very scenario which the Court of Appeal anticipated in rendering its decision in King, id.

Unless the Court informs the defendant of the possible maximum penalty for the pending charges, the plea is not entered with an understanding of the possible consequences and cannot, therefore, be considered voluntary. In the absence of a voluntary plea, the law requires that the interest of justice be served by allowing the defendant to withdraw his plea.

As further reason for allowing Mr. Gray to withdraw his plea of guilty, he indicates that the advice of his attorney, Maria Cristina Gutierrez, was ineffective, and that he was not competently represented prior to or at the time of entering his plea of guilty. The Court correctly characterized the status of the plea when the Court indicated, during the proceeding, that the plea was an agreement between Mr. Gray's attorney and the State, rather than an agreement between Mr. Gray and the State.

Ms. Gutierrez met with Mr. Gray for one, ten-minute session in the Calvert County Sheriff's Department lock-up prior to his Bond Review Hearing, and only once again for one, forty-five-minute session prior to the plea proceeding. Further, Ms. Gutierrez represented that a private investigator would be employed to assist

in Mr. Gray's case; however, this was not accomplished.

A review of Mr. Gray's school records indicates that he is of below average intelligence and is functionally illiterate. While Mr. Gray was in the ninth grade, he failed the Maryland Functional Reading examination receiving a total score of only 326. Even though Mr. Gray was placed in Special Program classes throughout his formal education, he continued to receive failing grades. When Mr. Gray reached the twelfth grade, he officially terminated his education program and, in fact, never graduated from high school.

In Boykin v. Alabama, 295 U.S. 238, 23 L.Ed. 274, 89 S.Ct. 1709 (1969), the United States Supreme Court stated,

"What is at stake for an accused facing death or life imprisonment demands the utmost solicitude of which courts are capable, in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought."

A close examination of the record reveals that Mr. Gray did not comprehend the nature and gravity of the situation in which he was involved. At several points, Mr. Gray answered negatively to

questions posed by the Court, only to answer them positively once the same questions were rephrased. Had counsel adequately explained the proceeding to Mr. Gray, he would have been able to communicate accurate responses to the questions posed by the Court.

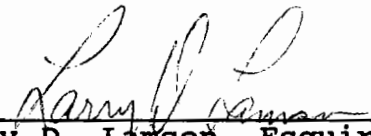
Although the Court of Special Appeals has held that brief visits between attorney and client, standing alone, do not constitute incompetent representation, such brief consultations are a factor to be considered in assessing whether or not a defendant has received effective assistance of counsel. Hamm v. Warden, 209 A.2d 785, 238, Md. 633.

In Davis v. State, 391 A.2d 872, 40 Md. App. 467 (1978), the Court of Special Appeals defined the test for determining competency of counsel in a post-conviction proceeding, and stated that the Courts must determine whether under all circumstances of a particular case counsel was so incompetent that the accused was not afforded genuine and effective legal representation. The Maryland Courts recognize that a defendant's right to withdraw his guilty plea prior to sentencing is more broad than in a post-conviction proceeding.

On October 7, 1991, Mr. Gray appeared before the Court as a person considerably below average in intelligence, represented by an attorney who spent less than one hour counselling him. Ms. Gutierrez advised Mr. Gray to plead guilty, even though no physical evidence exists to incriminate him, while he faced the most serious

charges defined by law. The representation rendered by Ms. Gutierrez was so deficient as to go to the very fairness of the proceeding. The combination of the above-stated factors, taken as a whole, establish that Mr. Gray was not afforded genuine and effective legal representation. The interest of justice demands that the proper relief be granted to a defendant in this situation. The only remedy which exists here is to allow the withdrawal of the previously entered plea and to permit Mr. Gray to proceed with trial.

Respectfully submitted,



Larry D. Lamson, Esquire
120 Hospital Drive, Suite A
Prince Frederick, MD 20678
(410) 535-1900
Attorney for the Defendant

IN THE CIRCUIT COURT FOR CALVERT COUNTY, MARYLAND

STATE OF MARYLAND.

:

-vs-

: Criminal C-91-409

ANTHONY GRAY

ANSWER TO AMENDED REQUEST TO
WITHDRAW GUILTY PLEA

TO THE HONORABLE, THE JUDGES OF SAID COURT;

Comes now the State of Maryland, by and through Warren F. Sengstack, State's Attorney for Calvert County, Maryland, and in answer to the Amended REquest to Withdraw Guilty Plea filed in the above captioned case states as follows:

1. The State denies each and every allegation made by the Defendant in said Motion.
2. The State opposes each and every request made by the defendant in said Motion.
3. And for such other and further reasons as may be set forth at a hearing on said Motion.

WHEREFORE, the State respectfully requests that this Honorable Court deny the said Request To Withdraw Guilty Plea.


Warren F. Sengstack
State's Attorney

I HEREBY CERTIFY, that a copy of the foregoing answer was mailed, postage prepaid, to Larry D. Lamson, Esquire, 120 Hospital Road, Prince Frederick, Maryland 20678, this 20th day of Feb., 1992.


Warren F. Sengstack

Filed: Feb. 20 , 1992

FEB 20 1992

CIRCUIT COURT
FOR CALVERT COUNTY, MD

44