FOR PUBLICATION

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IN THE SUPERIOR COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. JOHN F. FUREY, Defendant.	TRAFFIC CASE NO. 07-00348 ORDER DENYING STIPULATED MOTION TO SET ASIDE CONVICTION

This matter came before the Court on December 3, 2008, for a hearing on the Commonwealth of the Northern Mariana Island's (the "Government") and John F. Furey's ("Defendant") stipulated motion pursuant to Com.RCr.P. 32(d) to set aside the conviction entered against Defendant by this Court on August 22,2007. The parties were represented by counsel and the Defendant appeared. Having considered the arguments of counsel, the pleadings, materials on record, including the audio recording of the proceedings[1] in this matter, and the relevant rules and case law, the Court is prepared to rule.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 22, 2007, Defendant appeared with counsel and, pursuant to a negotiated plea agreement, plead guilty to driving under the influence of alcohol in violation of 9 CMC § 7105. Defendant's guilty plea was supported by the following facts: On January 20, 2007, at approximately

[1] A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of the plea. Com.R.Cr.P. 11(g).

11:48 p.rn. a police officer responded to an auto crash along Highway 16 in Dandan, Saipan. Upon arriving at the scene, the officer foundd that Defendant had been operating a vehicle that struck a second vehicle. When the officer encountered Defendant, he detected the odor of alcohol on Defendant's breath, observed that Defendant's eyes were bloodshot and noticed that Defendant's speech was slurred. Defendant subsequently submitted to a breathalyser test which yielded a Blood Alcohol Concentration ("BAC") of 0.207 percent. 2

Before accepting Defendant's plea, the judge addressed Defendant in open court and informed him of his rights when pleading guilty. *See* Corn.R.Cr.P. 11(c). Thereafter, the Court accepted Defendant's guilty plea and sentenced him to thirty days imprisonment, all ofwhich was suspended for one year except for the first three days. Defendant received eight hours of credit for time served. Additionally, Defendant was placed on probation for one year, fined six hundred dollars, charged a ninety dollar probation fee, charged a twenty-five dollar assessment fee, ordered to attend an alcohol information class, ordered not to possess or consume alcohol while on probation, and had his driver's license suspended for thirty days. Pursuant to the plea agreement, the remaining charges against Defendant were dropped

The record shows that the court adopted and pronounced Defendant's sentence pursuant to Corn.RCr.P. II(e)(I)(C). In other words, Defendant and the Government agreed and recommended to the court that the specific sentence given was the appropriate disposition ofthe case. Defendant has now successfully completed the tenns of his sentence and moves the Court to set aside his conviction and allow him to withdraw his guilty plea to prevent "manifest injustice." (Stipulated Mot. to Set Aside Conviction at 2.) The basis of Defendant's motion is that, prior to his conviction, he and opposing counsel discussed and agreed upon a disposition pursuant to 6 CMC § 4113, which would have allowed the Court to vacate Defendant's conviction after successful completion of probation. Nevertheless, Defendant asserts that the Court rejected any discussion of the parties' agreement.[3] *(Id* at 2.)

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2 In the Commonwealth, the BAC limit for persons over the age of twenty-one is less than 0.08 percent. 9 CMC § 7105(aXl).

3 There are conflicting representations on this point, however. Defendant also submitted a letter to the Court asserting that the prosecuting attomey never offered him a disposition pursuant to 6 CMC § 4113 because the attorney

Defendant argues that, because he was not offered a disposition pursuant to 6 CMC § 4113, which was the only "correct and just way to handle this matter," he had "no choice" but to accept a conviction that remains on his record *Id.* Defendant further argues that leaving the conviction on his record would be manifest injustice because of the nature of his violation and his cooperation with the terms of his probation. *Id.* Neither the Judgement and Commitment Order entered on August 22, 2007, nor the audio recording of the proceedings in this matter contain any mention, discussion, or rejection of a 6 CMC § 4113 disposition.

D. STANDARD

Under Com.R.Cr.P. 32(d), "[a] motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his/her plea." A criminal defendant has no absolute right to withdraw a guilty plea, however. *United States v. Rios,* 490 F. Supp. 215, 219 (E.D.N.Y. 1980), citing *United States ex rel. Scott v. Mancusi,* 429 F.2d 104, 109 (2d Cir. N.Y. 1970) (analyzing the former Federal Rule of Criminal Procedure 32(d) after which the Commonwealth Rule was modeled).[4] The defendant bears the burden of proving manifest injustice. *State v. Ross,* 916 P.2d 405, 408 (Wash. 1996). Whether a defendant will be permitted to withdraw a plea of guilty or nolo contendere after sentencing is a matter left to the sound discretion of the trial court. *United States v. Dumorne,* 392 F. Supp. 530,531 (D.P.R. 1975).

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did not think the cowt would permit it due to Defendant's high blood-alcobollevel (Letter from Furey dated 10/5/07 at 2.)

[4] Where CNMI case law has not addressed an issue of law, the Court applies "the rules of common law, as expressed in the restatements of law ... [and] as generally understood and applied in the United States ...." 7 CMC § 3401; *Ito v. Macro Energy, Inc.,* 4 N.M.I. 46,55(1993). As there is a lack of case law in the Commonwealth regarding Com.R.Cr.P. 32(d), most of the cases cited in this Order analyze the former Federal Rule of Criminal Procedure 32(d) after which the Commonwealth rule was modeled. In 2002, however, the portion of the federal rule addressing the ability of a defendant to wihtdraw a guilty plea was moved tousess Fed Rules Crim Proc R Il(e). *See* USCS Fed Rules Crim Proc R 32, Notes of Advisory Committee on 2002 Amendments. Furthermore, under current USCS Fed Rules Crim Proc R 1l(e), "[a]fterthe court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack."

1 HI. DISCUSSION

2 Defendant argues that his lack of an opportunity to exptmge his record pursuant to 6 CMC § 3 4113 amounts to manifest injustice because "a 6 CMC [§] 4113 disposition was the only correct and 4 just way to handle this matter." (Stipulated Mot. to Set Aside Conviction at 2.) He further claims that, 5 without the opportunity to expunge his record pursuant to 6 CMC § 4113, he had "no choice but to 6 accept a conviction which remains on his record." *(Id)* Lastly, he argues that "[t]he nature of the 7 violation and [his] cooperation with all probationary requirements, fees and correctional measures 8 clearly indicates that the permanence of such a conviction record would perpetuate a manifest injustice 9 within the CNMI Judicial System and upon [him]" (*Id*) The Court disagrees.

10 The high "manifest injustice" standard of Rule 32(d) is designed to deter defendants from 11 pleading guilty simply to test the weight of their potential punishment and then withdraw their plea if 12 the punishment is unexpectedly severe. *See Kadwell v. United States,* 315 F.2d 667,670 (9th Cit. New. 13 1963). Thus, "a plea of guilty is, and should be, considered by itself as a conviction of the highest 14 order, constituting an admission and confession of guilt as conclusive as the verdict of a jury." 9 15 A.L.R. Fed. 309, 2a. Many courts have held that to withdraw a guilty plea after sentencing, a defendant 16 must "allege and establish some reason that amounts to fraud, an imposition on him, or a 17 misapprehension of his legal rights, and/or that he is not guilty of the charge to which he pleaded." 18 *United States v. Dumorne,* 392 F. Supp. 530,531 (D.P.R 1975); *Stidham v. United States,* 170 F.2d 19 294, 298 (8th Cir. Mo. 1948). Nevertheless, courts have found that the manifest injustice standard is 20 met when a guilty plea was entered under the following circumstances: (1) involuntarily, (2) without 21 effective assistance of counsel, (3) without an understanding of the nature of the charges, (4) after a 22 court's failure to establish a sufficient factual basis for the plea, (5) pursuant to a plea agreement that 23 was not kept by the prosecution, and (6) as a result of procedural errors by the court. 21 Am Jur 2d 24 Criminal Law § 702. We find that none of these circumstances exist here, and are unpersuaded by 25 Defendant's other miscellaneous argmnents attempting to prove manifest injustice.

26 Defendant argues that his guilty plea was not entered voluntarily. Under Com.R.Cr.P. 11(d),

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the court may not accept a guilty plea that is not made voluntarily.[5] Because Defendant was not offered a disposition pursuant to 6 CMC § 4113, he asserts that he had "no choice" but to plead guilty and accept a conviction that would remain on his record. (Stipulated Mot. to Set Aside Conviction at 2.) This is simply not true. Defendant always had the choice to plead not guilty and contest the charges against him at trial. Indeed, he plead not guilty at arraignment. The fact that a defendant is not optimistic about his chances at trial, does not like the potential punishment he faces, and/or does not like the plea agreement offered to him does not mean he has no choice but to plead guilty and accept an unfavorable plea agreement. Furthennore, while a defendant may negotiate a plea agreement, he has no right to dictate the terms of the agreement to the Government or to the Court. Even when the parties agree that a specific sentence is the appropriate disposition of the case, the court may still reject the agreement pursuant to Com.R.Cr.P. II(e)(2).

Cases in which defendants argue that their guilty pleas were made invohmtarily are always fact specific, and such arguments often do not succeed. For example, in *United States* v. *Hoskins,* 910 F.2d 309 (5th Cir. Tex. 1990), the defendant argued that her guilty plea was involuntary because her attorney scared her into pleading guilty by telling her she would likely go to prison if she went to trial. *Id* at 311. The Court denied her motion to withdraw her plea because it found no ineffective assistance of counsel and that the defendant merely regretted pleading guilty. *Id.* In *United States v. Gulley,* 60 Fed. Appx. 538 (6th Cir. Mich. 2003), the defendant argued his guilty plea was involuntary because his attorney had promised him a lesser sentence and because his request for new counsel or time to prepare to represent himself was denied *Id* at 544. The court found that the attorney's promise of a lesser sentence was superseded by discussions that took place before the defendant's plea was entered and that his plea was therefore entered knowingly and intelligently under the circumstances. *Id.* In *United States* v. *Quinones,* 906 F.2d 924 (2d Cir. N.Y. 1990), the court found that the defendant entered his guilty plea voluntarily because it did not find his testimony concerning threats and coercion by his co-

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[5] The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his/her attorney. Com.R.Cr.P. II(d).

defendants was credible. *Id* at 929.

While there are cases in which courts have found that guilty pleas were entered involuntarily, they are distinguishable from this case. For example, in *Ross,* the court found that the defendant had not entered an intelligent and voluntary guilty plea when the state failed to inform him that his sentence would include an immediate and mandatory twelve-month community placement following his prison term as a direct consequence of his guilty plea. *Ross,* 129 P.2d at 407. In *Gannon v. United States, 208* F.2d 772 (6th Cir. Ohio 1953), the court allowed the defendant to withdraw his guilty plea because he had not been represented by counsel and was unaware of the existence of the Boggs Act, which provided for mandatory minimum sentences and fines. *Id* at 774. In this case, Defendant was made aware of the potential consequences he faced if he entered a guilty plea; he simply desired different consequences. In fact, the record reflects that the court addressed Defendant in open court and informed him of his rights when pleading guilty before accepting his plea, as required by Com.R.Cr.P. 11(c). Furthermore, Defendant does not allege that he faced any threats or coercion if he did not plead guilty, or that he did not have the effective assistance of counsel.

Although he plead guilty to a violation of 9 CMC § 7105, Defendant asserts it would result in manifest injustice if his conviction is not vacated because a disposition pursuant to 6 CMC § 4113 was "the only correct and just way to handle this matter." (Stipulated Mot. to Set Aside Conviction at 2.) Sentencing under 6 CMC § 4113, however, is not the standard disposition for a violation of 9 CMC § 7105 and the court was not obligated to offer Defendant such preferential treatment. A disposition pursuant to 6 CMC § 4113 is an extraordinary sentencing provision intended to give extra leniency to a defendant after the judge considers mitigating circumstances and determines that it would be in the best interests of justice, the public and the defendant to provide the defendant with an opportunity to avoid having a criminal record.[6] In this case, the Court notes that the sentence squarely falls within 9 CMC § 7109, the penalty provision for driving under the influence of alcohol. The court further notes that Defendant received the mandatory minimum in almost all aspects of his sentence.

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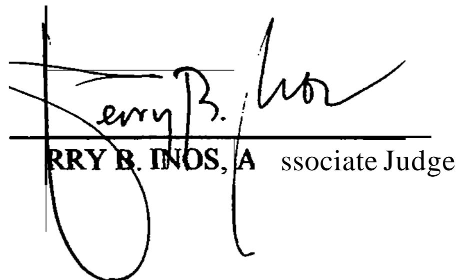
6 In such a case, the defendant is placed on probation for a certain period of time and subject to certain conditions. If the defendant successfully complies with the conditions of his probation, the conviction is expunged.

Finally, the fact that Defendant completed all the terms of his sentence does not entitle him to vacate his conviction when his sentence was not imposed pursuant to 6 CMC § 4113. If that was the case, then any defendant convicted of any offense could have his conviction set aside by complying with the terms ofhis sentence. Such an outcome would not serve the ends of justice or the best interest of the public, which override any perceived benefit to Defendant in this case.

IV. CONCLUSION

For the fore going reasons, the Court finds no manifest injustice to correct and hereby DENIES Defendant's motion to set aside his conviction.

SO ORDERED this 2nd day ofJuly, 2009.



RRY B. INOS, Associate Judge