



Kevin P. Dooley
County Court Judge

BROOME COUNTY COURT

County Court Chambers
P.O. Box 1766
Binghamton, New York 13902

Phone: (607) 240-5801
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November 14, 2018

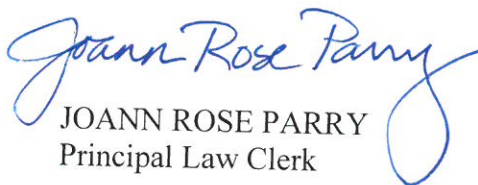
Ms. Judith Osburn
Broome County Court Clerk's Office
Broome County Courthouse
Binghamton, New York 13901

Re: **People v. Michael M. Roque**
Indictment No. 18-223

Dear Ms. Osburn:

Enclosed please find for filing a Decision and Order issued in connection with the above-captioned matter, which is being electronically transmitted to the Court Clerk's Office and the attorneys for the parties. Hard copies to your office, the attorneys and the defendant will follow by regular mail.

Sincerely,


JOANN ROSE PARRY
Principal Law Clerk

cc: Torrance L. Schmitz, Esq.
Broome County District Attorney's Office

David E. Butler, Esq.
Butler & Butler

Michael M. Roque, Inmate
Broome County Jail

STATE OF NEW YORK
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

MICHAEL M. ROQUE,
Defendant.

KEVIN P. DOOLEY, J.

DECISION & ORDER
Indictment No. 18-223

On May 14, 2018, a Broome County Grand Jury handed up Indictment No. 18-223, charging the above-named defendant with Murder in the Second Degree, a class A-I felony. The one-count indictment alleges that on April 15, 2018, in the Town of Vestal, the defendant intentionally caused the death of Joao Souza.

The defendant was arraigned in Broome County Court on May 17, 2018. On September 4, 2018, a conference was conducted between the Court and counsel. At the conference, it was agreed that if the defendant entered a plea of guilty to the indictment, the sentence to be imposed would be “capped” at twenty years to life.¹

On September 6, 2018, the defendant appeared in Court in connection with the plea offer that was being extended to him. After defense counsel placed the terms of the plea offer on the record, the Court asked the defendant how he wanted to proceed. The defendant told the Court that there were “a few concerns” about his attorney he wanted to address before continuing further. The defendant complained that he has made certain demands and requests that his attorney had not fulfilled, including a request to be provided with a copy of his “discovery file.” The Court noted that the defendant had sent a letter to the Court expressing his concerns, which was forwarded to defense counsel, and gave the defendant an opportunity to speak privately with defense counsel about those concerns. When the case was again called, the defendant advised the Court that he would not accept the plea offer that had been extended by the prosecution because he knew he was innocent. For that reason, the Court directed defense counsel to file the Omnibus Motion he had prepared, advised the parties that any pre-trial hearings would be held

¹ Pursuant to Penal Law §70.00, the range of sentencing for a person convicted of an A-I felony is between 15 years to life and 25 years to life.

on September 20, 2018, and stated that the trial would proceed as scheduled on September 24, 2018.

The following day, September 7, 2018, the defendant returned to court at defense counsel's request. Defense counsel advised the Court that the defendant now wished to accept the plea offer but wanted to address the Court first. The defendant then apologized to the Court for his actions in court on September 6, 2018, explaining that he had panicked because the pressure he felt at the proceeding, including the presence of the media, was "too overwhelming."

Before continuing further, the Court discussed with the defendant the letter, dated August 14, 2018, the defendant had sent to the Court expressing his concerns about his case. In the letter, the defendant complained that his attorney had failed to "complete numerous things" the defendant had requested be done or to visit him at the jail on "multiple" occasions.² The Court explained to the defendant that "...you know, the lawyer has a certain job to do in representing you and sometimes people are charged with crimes, they want the lawyer to do certain things and demand that they do certain things and that may not necessarily be in their best judgment what has to be done. So that's usually up to the lawyer whether that should be done or not."

The Court then placed the terms of the plea offer on the record and engaged in a lengthy discussion of the conditions of the plea. The defendant stated that he understood the terms of the plea offer and told the Court he wanted to plead guilty. The defendant acknowledged that he had been given enough time to discuss the case with his attorney, including the evidence the prosecution had gathered, the possible defenses that could be raised at trial, his chances of any success at trial, and the consequences if he was convicted after trial. The defendant was told that it was ultimately his decision whether to plead guilty after receiving and considering the advice of his attorney. The defendant stated that he understood and stated "I believe this is the best choice to consider. I'll be accepting the plea." When asked by the Court, the defendant confirmed that no one had forced, threatened or coerced him into making his decision, that he was entering his plea freely and voluntarily, and "out of my own free will" after considering all the "pros and cons" of his case.

The Court advised the defendant of the rights he would be waiving by entering a plea of guilty, including the right to remain silent, the right to a trial by jury, the right to cross-examine witnesses and call his own witnesses, the right to testify at trial if he chose to do so, and the right

² This was the same letter referenced by the Court at the September 6, 2018, appearance.

to raise any legal or factual defenses to the charge. The defendant stated he understood the rights he was waiving.

The Court specifically advised the defendant that he would be waiving his right to remain silent because the Court would be asking him questions about what had happened and the defendant would have to answer those questions because the Court had to be satisfied that the defendant was actually guilty of the crime to which he was pleading. The defendant then admitted that he had intentionally caused the death of Joao Souza by stabbing him with a knife and pleaded guilty to the indictment. The Court found that the defendant's plea was knowingly, intelligently and voluntarily made, and accepted the defendant's plea of guilty. Sentencing was scheduled for November 16, 2018, at 9:00 a.m., and the defendant was remanded to the Broome County Jail.

By letter dated October 22, 2018, the defendant wrote to the Court, requesting permission to file a *pro se* motion which his attorney had failed to submit on his behalf. A court appearance to address the defendant's letter was held on November 2, 2018. The defendant advised the Court at that time that he had sent the Court a *pro se* motion, pursuant to CPL 220.60, for an Order permitting him to withdraw his guilty plea, on the ground he had been denied the effective assistance of counsel. The defendant claimed that he was innocent and only pleaded guilty because he felt "backed into a corner" because his attorney had done nothing on his behalf. He said there were at least twelve, and as many as eighty-three witnesses he had wanted his attorney to interview and evaluate. The Court adjourned the proceedings until the defendant's motion was received and reviewed.

The defendant's *pro se* motion, dated October 29, 2018, was received in chambers on November 5, 2018. In the motion, the defendant claims that he had been denied the effective assistance of counsel, because his attorney had failed to investigate or discover potentially exculpatory evidence, file an Omnibus Motion, provide him with the "discovery file" or serve an alibi notice on the prosecution. The defendant also alleges that his attorney coerced him to plead guilty, and that he is innocent of the charge.

On November 12, 2018, the prosecutor filed his response to the defendant's *pro se* motion, arguing that the defendant has failed to raise any ground that would require the Court to conduct a hearing or grant the defendant's motion.

The decision whether to permit a defendant to withdraw a previously entered plea rests in the sound discretion of the Court and should not be granted when the plea minutes are unequivocal and refute the defendant's stated reasons for the motion. *People v. Ramos*, 63 NY2d 640 (1985); *People v. Frederick*, 45 NY2d 520, 526 (1978).

A hearing on a defendant's motion to withdraw his plea, based on a claim of ineffective assistance of counsel, is not required as long as the defendant has been given "a reasonable opportunity to present his contentions" (internal quotations omitted) *People v. Wrest*, 159 AD3d 1274 (3d Dept., 2008); *People v. Hayes*, 71 AD3d 1187 (3d Dept., 2010). A hearing is also not required when the record presents no genuine question of fact as to the voluntariness of the plea. *People v. Shurock*, 83 AD3d 1242 (3d Dept., 2011). A claim of actual innocence, made after a plea of guilty, warrants a hearing only if there is a sufficient showing of possible merit to require a fuller exploration of the facts. *People v. Caccavale*, 152 AD3d 537 (2d Dept., 2017); *People v. Anderson*, 270 AD2d 509 (3d Dept., 2000). If nothing the defendant says or fails to say during the plea allocution negates any element of the offense or otherwise calls into question the defendant's admitted guilt or voluntariness of the plea, there is no basis for granting the defendant's motion to withdraw the plea. *People v. Seeber*, 4 NY3d 780 (2005); *People v. Demontigny*, 60 AD3d 1152 (3d Dept., 2009); *People v. Burdo*, 1 AD3d 793 (3d Dept., 2003).

A review of the plea minutes demonstrates that the defendant's plea of guilty was knowingly and voluntarily made, and there was a sufficient factual basis for the Court to accept the defendant's plea. During the plea colloquy on September 7, 2018, the defendant specifically acknowledged that he understood the plea offer, had consulted with counsel prior to accepting the plea, was not coerced into pleading guilty, was doing so "out of (his) own free will" and was guilty of the crime to which he plead. Other than the self-serving allegations contained in the defendant's *pro se* motion, there is no basis for the Court to conclude that his retained defense counsel or anyone else coerced the defendant into pleading guilty. During the plea colloquy, the defendant acknowledged that the decision to plead guilty was his alone to make, and that he believed pleading guilty was "the best choice" to make.

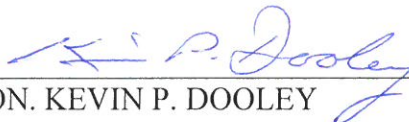
The defendant also understood that by pleading guilty, he was waiving his right to raise any legal or factual defense to the indictment, which includes his purported alibi defense. During the September 7, 2018, plea proceedings, the defendant never protested his innocence or made any statements suggesting that he had a viable defense to the charge contained in the

indictment. The defendant's belated, post-plea claim of innocence based on a possible alibi defense does not vitiate his knowing and voluntary guilty plea. *People v. Jackson*, 34 AD3d 1304 (4th Dept., 2006); *People v. Mann*, 228 AD2d 986 (3d Dept., 1996).

There is nothing in the record to support the defendant's claims of ineffective assistance of counsel, or of actual innocence. Therefore, the defendant's motion for an Order permitting him to withdraw his guilty plea is denied without a hearing. *People v. Wrest, supra*; *People v. Pittman*, 104 AD3d 1027 (3d Dept., 2013).

It is so Ordered.

Dated: Binghamton, New York
November 14, 2018



HON. KEVIN P. DOOLEY
Broome County Court Judge