

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Division - Felony Branch

JUN 29 A 11 4

UNITED STATES OF AMERICA

Criminal No.: 2011 CF1 001426

v.

Judge: Wm. Jackson

BRIAN A GAITHER

Next Date: 01/31/13

DEFENDANT GAITHER'S MOTION TO WITHDRAW GUILTY PLEA

COMES NOW Brian A. Gaither, by and through undersigned counsel, and respectfully requests that this Honorable Court allow him to withdraw his guilty plea and allow him to proceed to trial. As grounds for such motion, the defendant states to the court as follows:

INTRODUCTION - RELEVANT BACKGROUND

This case is before the court upon an indictment of Mr. Gaither for an incident that allegedly occurred on or about August 2d, 2010. The incident is alleged to have occurred at an unspecified time at [REDACTED] Trenton Place, S.E., Washington, DC.

The alleged decedent, Latisha Monique Frazier, was reported missing to the Metropolitan Police Department by her mother on Wednesday, August 4th, 2010. The mother reported that Ms. Frazier had not returned home for two days and had never remained away from home without notice for that period of time.

Defendant Gaither was arrested on January 22d, 2011, at approximately 4:10 p.m. on a misdemeanor bench warrant unrelated to the instant case.

The body of Latisha Monique Frazier has never been found.

Although the case was reported on local television on August 4th 2010 and again on January 20th, 2011, no one came forward with any information concerning the disappearance of Latisha M. Frazier until on or after January 20th, 2011. This witness did not claim to be an eye witness, but reported that she had been told by defendant Jackson that he participated in the beating, restraint and death of Latisha M. Frazier.

Subsequent to the initial non-fact witness, two additional witness concerning the disappearance of Latisha M. Frazier came forward, indicated themselves, and additionally implicated defendant Gaither as a participant in an alleged physical assault.

Subsequent to his arrest on January 22d, 2011, it is alleged that defendant Gaither gave a voluntary state implicating himself in an assault on the Ms. Frazier.

Defendant Gaither here proffers to this Honorable Court that at no time did he indicate that he participated in the death of Ms. Frazier.

Defendant Gaither proffers to the court that he admitted participating in attempting to temporarily restrain Ms. Frazier, but stated with clarity that when he departed Ms. Frazier's presence she was alive and responsive, demonstrated by the fact that she was coughing and recuperating.

PROCEDURAL HISTORY

On January 24th, 2011, defendant Gaither was assigned counsel and presented before M. Judge Howze on one charge of second degree murder in violation of D.C. Code Section 2103(2001 ed.). Defendant was detained.

The case was assigned to Judge William Jackson and a preliminary hearing was scheduled for February 11th, 2011.

On January 3d, 2011 the scheduled February 11th, 2011 preliminary hearing was vacated, the initial complaint was withdrawn and a new complaint charging defendant Gaither with first degree murder was filed. The preliminary hearing was waived by defendant Gaither and a felony status conference with codefendants was scheduled for March 4th, 2011.

On February 15th, 2011, the status hearing scheduled for March 4th, 2011 was amended and changed to June 10th, 2011. However, the March 4th, 2011 felony status hearing was held, defendant Gaither's oral motions for release on bond and recovery of decedent's remains was denied.

On March 15th, 2011 a motion to compel recovery of decedent's body was filed on behalf of defendant Gaither. Government's opposition to defendant's motion to compel was filed on April 12th, 2011 and on April 20th, 2011 the court scheduled a status hearing for April 27th, 2011.

On April 27th, 2011 defendant's motion to compel recovery of the decedent's body was denied and the case was continued for a felony status conference on June 10th, 2011. Defendant's renewed motion for change of bond status was denied.

On June 10th, 2011 the case was continued until October 21st, 2011, because defense counsel was unavailable.

On October 13th, 2011 a consent motion to toll indictment clock and reschedule arraignment date was filed. On October 14th, 2011 the motion was granted by the court.

On November 1st, 2011 a seven count indictment was filed. And an arraignment date was scheduled and defendant was arraigned on November 3d, 2011.

On November 7th, 2011 a jury trial was scheduled for November 19th, 2012.

On November 15th, 2011 the court received correspondence pro se from the defendant.

On January 3d, 2012 the United States filed a motion requesting a handwriting exemplar. A status hearing was scheduled for January 20th, 2012.

On January 13th, 2012 a motions to suppress identification, statements and tangible evidence to sever defendants and to suppress identification memorandum of points and authorities in support thereof was filed on behalf of defendant. On March 1st, 2012 a motion's hearing was scheduled for May 11th, 2012.

On March 14th, 2012 the government's omnibus opposition to defendant Gaither's motion to suppress was filed.

On May 11th, 2012 the status hearing scheduled for May 11th, 2012 was vacated and changed to June 22d, 2012. On June 21st, 2012 continuance motions were filed and the motion's hearing were continued by the court until July 19th, 2012.

On May 14th, 2012, the government filed an opposition to defendant Gaither's motion to sever.

On July 9th, 2012 the government filed a motion to quash defendant's subpoenas duces techum, and on July 13th, 2012 the government withdrew its opposition to defendant's motion to sever and on July 19th, 2012, the court granted the severance motion, and a status hearing was scheduled for August 10th, 2012.

After motions filed on July 25th and 26th, 2012 on July 27th, 2012 the court signed a consent order authorizing independent DNA testing on July 27th, 2012.

At the August 10th, 2012 status hearing, a continued status hearing was set for September 10th, 2012.

On August 31st, 2012 the defense filed a motion for reconsideration of the court's decision on the order of trials and the government filed a response on September 13th, 2012.

On September 14th, 2012 a status hearing was scheduled for October 5th, 2012. On October 5th, the hearing was continued until October 19th, 2012. On October 17th, 2012 the government filed a motion in limine to exclude evidence that a third party committed the charge crimes and on October 19th, 2012, a continued status date of November 9th, 2012 was set.

On November 5th, 2012 the defense filed another motion to compel discovery and the government's opposition was filed on November 8th, 2012. On November 9th, 2012 jury instructions were discussed and the trial was set to continued on the acknowledged date.

On November 9th, 2012, the defense filed a motion to exclude evidence and unsealing of sealed witness list.

On November 15th, 2012 the defense filed a motion to continue, and the government filed a motion in liminae to admit jail calls. On November 16th, 2012 the motion to continue trial was denied, and the defense filed its motion to exclude jail calls.

On November 19th, 2012 the defense filed a motion for sanctions for Brady Violations and the defense motion to suppress statements was denied and the trial began. Defendant resolves the case by plea.

On January 9th, 2012 advisory counsel was appointed and on January 10th, 2012 a status date was set for January 31st, 2012 to provide advisory counsel an opportunity to meet with defendant, investigate the case and provide defendant with written advice on his options.

DEFENDANT GAITHER'S BASIS OF MOTION TO WITHDRAW PLEA

Defendant's proffers to the court that he is not guilty of all of the offenses charged and wishes to proceed to trial. In support of his declaration of innocence, defendant Gaither says to the court he had earlier in the proceedings notified his lawyers and the court of his state of confusion over the complexity of this case and his inability to fully comprehend and understand the legal concepts and court proceedings related to his Constitutional Rights to mount a defense and be represented by counsel that fully communicated with him concerning his options.

Defendant Gaither further proffers to the court that throughout the litigation of this case he was unable to communicate with his attorneys and that the complex nature of this multi-codefendant case caused defendant to be unaware of his options related to proceeding to trial.

Defendant Gaither proffers to the court, as is reflected in the procedural history of the instant case, that he entered a plea after the trial started with minimal time to consider the full gravity of entering a plea that carried significantly the same time as exercising his trial rights.

Defendant Gaither says to the court that he indicated to his attorneys in the cell block prior to entering the plea, that he was confused, needed more time to discuss and fully understand whether he should proceed to trial or enter a plea. Defendant Gaither further proffers to the court that his attorneys refused to indicate his concerns to the court and told

him that he had no option except to resolve the case by plea. Defendant submits that at the earliest possible time after entering the plea defendant informed his attorneys that he wanted to withdraw his plea and proceed to trial, not receiving cooperation to notify the court and filing a motion to withdraw his plea, defendant submits that he timely notified the court and requested new counsel.

THE LEGAL STANDARD FOR WITHDRAWAL OF A GUILTY PLEA

In the District of Columbia a defendant may successfully withdraw a guilty plea by establishing two independent grounds. The defendant may show that there was a fatal defect in the Rule 11 proceeding or that the circumstances of his individual case are such that justice demands that the plea be withdrawn. Spring v. United States, 614 A.2d 1 (D.C. App. 1992, citing Gooding v. United States, 529 A.2d at 306. But motions to withdraw a guilty plea made prior to sentencing are regarded more leniently and should be given favorable consideration, "... if for any reason the granting of the privilege seems fair and just." Id., at 306; Binion v. United States, 658 A.2d 187 (D.C. App. 1995).

The factors used under the "fair and just" standard are: a) Whether the defendant has asserted his legal innocence; b) the length of the delay between the entry of the guilty plea and the desire to withdraw it, and c) whether the accused has had the full benefit of competent counsel at all relevant times. Spring v. United States, 614 A.2d 1, 4 D.C. App. 1992), citing Gooding v. United States, 529 A.2d at 301, 306-307 (D.C. App. 1987); Binion v. United States, 658 A.2d 187, 191 (D.C. App. 1995). In addition, other circumstances of a particular case may show other factors which bear upon the application of the fair and just standard.

APPLICATION OF THE LEGAL STANDARD TO THE FACTS OF DEFENDANT'S GATHIER'S CASE

In accessing a claim of innocence the courts have held that it is not enough for the defendant to say that he did not do it. The defendant's assertion in Spring offers an example. There the defendant entered his guilty plea on March 21st. In a hand written pro-se pleading dated April 4th and filed with the Court April 12th, the defendant sought to withdraw his guilty plea. His sole reason in the motion was that he was not in the "right frame of mind" due to medication he was taking. Spring v. United States, 614 A.2d at 3.

At a hearing on the motion the defendant said that he had a good defense to the charge, but when pressed as to what it was, he could only say that he was not picked from the line-up and that he "was in the wrong place at the wrong time". Id., at 5. The court noted that his motion did not claim non-culpability. Id., at 5.

Mr. Gaither asserted his innocence very early in this case. His immediate notification to counsel and to the court before sentencing that he had entered a plea while not in full and total control on his mental faculties and while under a great deal of pressure because of the denial of his continuance motion and the start of the trial fulfills the requirements for the court to grant defendant's motion to withdraw his plea.

Defendant had appeared the day before entering a plea and had indicated to the court that he was ready for trial and had announced ready for trial on prior occasions including a scheduled trial date where his attorney requested a continuance.

Defendant Gaither here proffers to the court that the combination of repeated status hearings in which he indicated he was not guilty of the charges and wanted to proceed to trial,

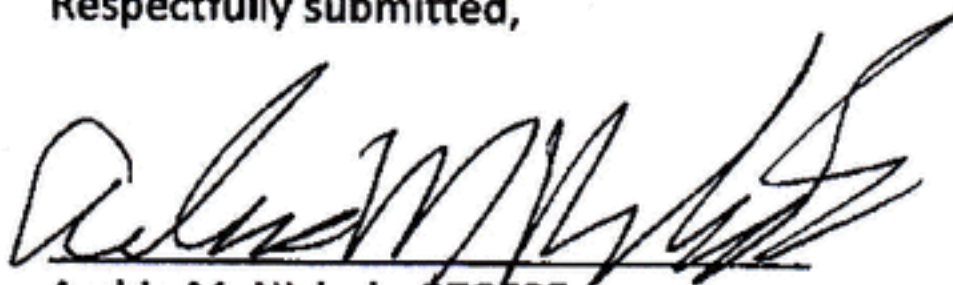
combined with his detention since the inception of this case contributed to the unintended entry of this plea of guilty.

CONCLUSION

Defendant Gaither has asserted his innocence in this case at an early period after the entry of his unintended plea. His notification to counsel and the court was only by ability to notify counsel and court from the restrictive detention at D.C. Jail.

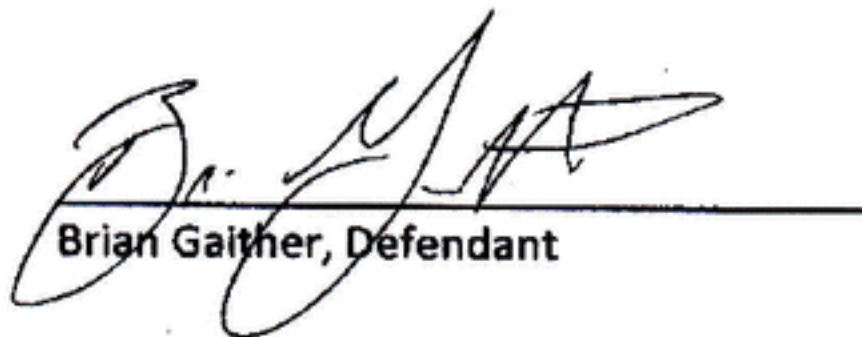
The notification of his desire to withdraw his plea was made not after the entry sentence or consultation with new counsel. It is therefore, respectfully requested that the defendant's motion to withdraw his plea be granted and a trial date set.

Respectfully submitted,



Archie M. Nichols 370635
Attorney for Defendant Gaither
14421 Morton Hall Road
Silver Spring, MD 20906

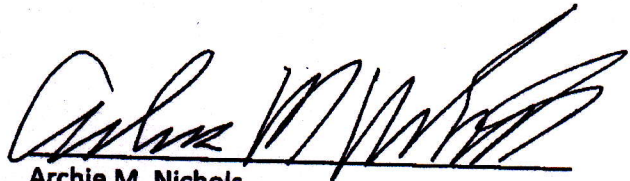
By affixing my signature below
I certify that I have read the above
Motion and certify its accuracy
As to issues of fact.



Brian Gaither, Defendant

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of this motion has been served upon the Office of the U.S. Attorney at the requested email address and a hard copy through intercourt mail on this _____ day of January 2013.



Archie M. Nichols