

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES NEWMAN,

Defendant.

OPINION AND ORDER

12-cr-105-wmc

A grand jury in this district returned an indictment against defendant James Newman and co-defendant James Misleveck, charging both with unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Those charges stemmed from Newman and Misleveck's escape from a state prison facility near Black River Falls, Wisconsin. During their flight, the defendants stole a 12-gauge shotgun along with a bag of ammunition from the back of a pickup truck, abducted a woman at gunpoint and forced her to drive to Sparta, Wisconsin, where they proceeded to steal another vehicle. The two were later arrested in Florida after having inflicted "great bodily harm" during the aggravated robbery of a 71-year-old convenience store clerk. On January 30, 2013, Misleveck pled guilty to the indictment. Newman did the same on June 26, 2013. After receiving the Presentence Investigation Report (dkt. #48), which includes a recommended guideline calculation of 168 to 210 months (well above the ten-year statutory maximum term for a violation of § 924(a)(2)), Newman's original counsel, Supervisory Associate Federal Defender Michael Lieberman, sought an extension of the deadline to file objections to the PSR so that Newman could move orally for appointment of new counsel.

That motion was subsequently granted and Newman's new counsel now moves to withdraw his guilty plea, arguing that the plea colloquy was insufficient to establish his guilt (dkt. #58). That motion will be denied for reasons set forth below.

OPINION

Rule 11(d)(1) of the Federal Rules of Criminal Procedure states that a defendant may withdraw his guilty plea "for any reason or no reason," provided that the request is made before the court accepts the plea. Once a guilty plea has been accepted, however, there is no automatic right to withdraw a guilty plea. *United States v. Redmond*, 667 F.3d 863, 870 (7th Cir. 2008) (citing *United States v. Chavers*, 515 F.3d 722, 724 (7th Cir. 2008)). Rather, a district court may allow the defendant to withdraw his guilty plea pursuant to Fed. R. Crim. P. 11(d)(2)(B) only if "the defendant can show a fair and just reason for requesting the withdrawal."

This remaining "escape hatch" under Rule 11(d)(2)(B) is "narrow." *United States v. Mays*, 593 F.3d 603, 607 (7th Cir. 2010). For example, relief is authorized where the defendant demonstrates that the plea was not "voluntarily and knowingly" made or where the defendant establishes his innocence as a matter of fact or law. *Id.* (citations omitted). Because the defendant's statements given under oath during the plea colloquy are presumed to be true, he bears a heavy burden of persuasion in showing that a "fair and just reason" for withdrawing the guilty plea exists. *Chavers*, 515 F.3d at 724.

Here, Newman seeks to withdraw his guilty plea on the grounds that the plea colloquy did not establish a sufficient “factual basis” for a finding of guilt. In particular, Newman maintains that his co-defendant (Misleveck) possessed the shotgun at all times and that Newman never touched it, which is consistent with Newman’s statement at his plea hearing that he was “guilty of constructive [possession].” (Tr. of Plea Hearing (dkt. #55) 14-15.) Newman argues that this constructive possession amounts to no more than “mere presence,” which is not sufficient for purposes of establishing guilt for the firearm violation outlined in 18 U.S.C. § 922(g)(1). Accordingly, Newman argues that he should be allowed to withdraw his guilty plea as one innocent as a matter of fact and law of actually possessing a firearm, an essential element of the crime charged.

For purposes of the firearms offense found in § 922(g)(1), the Seventh Circuit has already held that “possession can be actual or constructive.” *United States v. Bloch*, 718 F.3d 638, 642 (7th Cir. 2013) (citation omitted). “Actual possession occurs when the defendant has immediate physical possession or control of a firearm.” *Id.* (citing *United States v. Hampton*, 585 F.3d 1033, 1040 (7th Cir. 2009); *United States v. Baker*, 453 F.3d 419, 423 (7th Cir. 2006)). Constructive possession -- which has the same legal effect as actual possession -- “is a legal fiction whereby an individual is deemed to ‘possess’ contraband items even when he does not *actually* have immediate, physical control of the objects.” *United States v. Villasenor*, 664 F.3d 673, 681 (7th Cir. 2011) (quoting *United States v. Morris*, 576 F.3d 661, 666 (7th Cir. 2009) (emphasis in original)).

To distinguish a person having constructive possession of a weapon from “mere bystanders,’ who may have no connection to a gun but are merely in the same vicinity . . . the government must establish a nexus between the defendant and the gun.” *Bloch*, 718 F.3d at 642 (quoting *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012)). In other words, “the government must prove that the defendant ‘knowingly had both the power and the intention to exercise dominion and control over the object, either directly or through others.’” *Id.*

During the plea colloquy before this court, Newman’s counsel noted that there was no evidence of physical possession at the plea hearing. The court clarified, however, that Newman participated in both the theft of the shotgun and the subsequent abduction, in which Newman and Misleveck kidnapped a woman at gunpoint and took her car. (*See* Tr. of Plea Hearing (dkt. #55) 14-15.) Although Newman denied having control over the shotgun at any time, he acknowledged that he followed along during the kidnapping, furthering Misleveck’s and his escape from state prison and their flight to avoid re-capture. (*See id.* at 15.) Newman also conceded that the government would have proved with evidence at trial that: (1) he was with Misleveck when the firearm was stolen out of the truck; (2) he entered a car with Misleveck, the firearm and the female kidnapping victim; and (3) after releasing the victim, he still went along with Misleveck, stealing another truck and then abandoning the firearm in that truck. (*Id.*)

While Newman expressed confusion about the concept of constructive possession, Newman also confirmed that he knew Misleveck had taken the shotgun following their

escape from prison and used that firearm to force the victim into her vehicle. (*Id.* at 16-17.) Newman admitted further that he willfully and knowingly followed along with Misleveck as the pair used the stolen shotgun to procure transportation during their flight. (*Id.* at 17.) In sum, Newman agreed that the government could prove that he “went along every step of the way with the possession of the stolen shotgun.” (*Id.* at 15.)

Accepting Newman’s version of the offense is true, and that Misleveck was the only one who actually held the shotgun, Newman’s proximity to the weapon, coupled with his involvement in and benefit from the subsequent abduction at gun point and flight to avoid capture, are sufficient to distinguish him from a “mere bystander” and to impute constructive possession of the firearm. *See Griffin*, 684 F.3d at 696 (explaining that “proximity coupled with evidence of some other factor -- including connection with [an impermissible item], proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise is enough to sustain a guilty verdict” for purposes of 18 U.S.C. § 922(g)(1)). Under these circumstances, Newman does not establish that there was insufficient evidence to support his guilt, that he did not enter the plea knowingly and voluntarily, or that there is some other “fair and just reason” to permit him to withdraw his plea under Fed. R. Crim. P. 11(d)(2)(B).

ORDER

IT IS ORDERED that:

- 1) defendant James Newman's motion to withdraw his guilty plea (dkt. #58) is DENIED;
- 2) the parties may have ten additional days to file objections, if any, to the Presentence Report dated July 30, 2013; and
- 3) the clerk of court's office shall promptly consult with the parties and the probation office to find a new date and time to proceed with Newman's sentencing.

Entered this 2nd day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge