

11-0533

# Tenth Judicial Circuit

of

ROBERT A. BURNSIDE, JR.  
CIRCUIT JUDGE  
RALEIGH COUNTY COURTHOUSE



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## West Virginia

Raleigh County

### MEMORANDUM

**TO:** Charles B. Mullins, II, Esq.  
Thomas G. Truman, Esq.

**FROM:** Robert A. Burnside, Jr., Chief Judge

**DATE:** February 23, 2011

**RE:** *State v. David Griffey*  
*Case Nos: 08-F- 92-H and 08-F-370-H*

Defendant's motion for reconsideration of sentence pursuant to Rule 35 was argued on February 14, 2011. The argument made a number of references to the transcripts of the plea hearing of April 23, 2010, and the sentencing hearing of July 16, 2011. Although the relief requested in the written motion was the reconsideration of the sentence, the argument presented was that the sentence had violated a plea agreement governed by Rule 11(e)(1)(C), the remedy for which is the withdrawal of the plea.

At the close of the hearing, the court requested that counsel for defendant make specific reference to the portions of the transcripts that support the motion. The court received Mr. Mullins' letter of February 16, 2011. The court reviewed the transcripts of the sentencing hearing of April 23, 2010, and the sentencing hearing of July 16, 2010, with particular attention to the portions to which Mr. Mullins made reference in his letter of February 16, 2011.

Although it appears that counsel for defendant exhibited a degree of confusion as to the distinction between a Rule 11(3)(1)(B) plea and a Rule 11(3)(1)(C) plea (herein Rule B and Rule C for ease of reference), that confusion arose from a misunderstanding of those terms, and not from a misunderstanding of the substance of the hearings.

When Rule 11(e) is studied the elements necessary to a Rule C plea are clear. A Rule C plea embodies an *agreement* between the prosecuting attorney and the defendant (1) that a specific sentencing disposition is correct, *and* (2) that the defendant may withdraw his plea if that disposition is not accepted by the court. If the latter of those two elements is absent, it is not a Rule C plea. It might be a Rule B plea or it might be something else, but it is not a Rule C plea.

Such an agreement is either reached or it is not. If it is reached, it is a Rule C plea. If it is not, it is not. The court does not participate in the negotiations, and it is not a party to the agreement. The court is, rather, the means by which the agreement is accepted or rejected.

An examination of the transcript of the plea hearing and the sentencing hearing reveals there that the state and defendant had not reached an agreement to a Rule C plea. There was, however, evidence of confusion by counsel for defendant as to the necessary elements of a Rule C plea, indicated by the imprecise use of the terms that emerge from the Rule. That confusion, however, does not bring into existence that which does not exist – an agreement in which both the state and the defendant participated that supports a Rule C plea.

Counsel's confusion is demonstrated by the following statement at the plea hearing on April 23, 2010:

MR. MULLINS: Well, Your Honor, this is a sentence that was offered under 11(1)(B) and I'm familiar with cases where -- it's like a Rule 11 where you either have to accept it or reject it.

Although counsel referred to Rule B, he described an element peculiar to a Rule C plea. After counsel for defendant concluded his explanation of his understanding of the plea agreement, the assistant prosecuting attorney responded:

MR. TRUMAN: Well, that is not the State's understanding. The State's understanding is that the Defendant could argue for alternative sentencing but that he was entering his plea with the risk that the Court could impose one to ten concurrent, could impose one to ten consecutive, could impose one year on each concurrently, run all that concurrent to his current charges or consecutive to his current charges.

This response does not describe a Rule C plea. A Rule C plea does not entail the "risk" of an undesired sentencing disposition, and it does not contemplate an "argument" for a specific sentencing because it is grounded on an *agreement* that a certain sentence would either be accepted or rejected by the court.

The sentencing hearing was conducted on July 16, 2010. At the beginning of the sentencing hearing, the court commented that it thought the plea was a Rule C hearing. That belief may have arisen from the information on the cover sheet of the presentence report, which stated "This is a it was a Rule 11(e)(1)(c) plea." As the sentencing hearing proceeded, however, it was clear that the parties had not reached an agreement as to sentencing that qualified under Rule C, as indicated by the following exchange between the court and counsel for defendant:

THE COURT: I gather there was no agreement with -- no specific agreement as to a sentencing structure. Even though it's called a Rule (C), it doesn't quite fit a Rule (C). You had no agreement as to that?

MR. MULLINS: I would agree with that, yes.

The defendant stated his understanding of the agreement, but when asked twice to tell the court who told him that, he gave uninformative responses.

The court then asked the prosecuting attorney for a copy of the agreement, and the following exchange occurred:

Mr. Truman, do you have a copy of the agreement that I can look at? I didn't --

MR. TRUMAN: Yeah, and it doesn't say anything like this guy's saying. He even signed a piece of paper on his plea form that says it's an (e)(1)(B) plea, the order says it's an (e)(1)(B) plea. How could it be what he says --

THE COURT: It is a (B) plea? You have it as a (B) plea?

MR. TRUMAN: Yeah.

THE COURT: Okay. Not a (C) plea?

MR. TRUMAN: How could it be what he says if the State remains silent? That's impossible. We either agree to it or we don't.

THE COURT: Well, I was puzzled with that too. Everybody said it was a (C) plea but then you told me you didn't agree to a sentence, so I don't see a (C) plea in that.

The court then asked counsel for defendant whether he makes "the representation that you have a (C) plea with a commitment of two one-year sentences or is it, in fact, a (B) plea?" to which counsel gave the following response:

MR. MULLINS: Well, to make it more complicated, Your Honor, I actually -- when John [assistant prosecuting attorney John Gallaher] and I were doing this, I actually thought there was a provision later on in the rule that allowed -- John and I specifically talked about it, that allowed the Defendant to -- and I think it was Subsection (B), I could be incorrect. I thought there was a provision that allowed the Defendant to ask the Court for disposition and the State did not have to take a position and, if the

Court was willing -- or not willing, excuse me, to accept the Defendant's offer, that the Defendant could withdraw and go back to the place where he was, and, in fairness to the Defendant, Your Honor, I've never shirked away from my responsibility, that's what I told him. I told him that my understanding was is that the State is not going to speak against you, the State is not going to help you either, but the State is going to allow us to ask the Judge to give you two one-year flat sentences and, if those are not accepted, then you are reverted back and you could go have your trial, which I think you're crazy to do but you have that right, and I thought that was later on under Rule 11.

A careful, repeated reading of this response does not reveal an answer to the question posed by the court. Counsel did not claim in his "response" that he believed they had agreed to a Rule C plea or to the elements necessary to it.

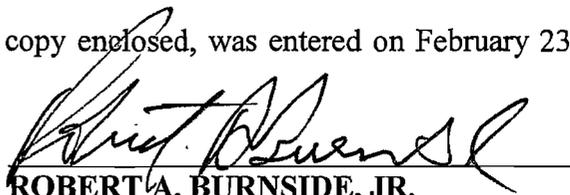
The court closed that part of the hearing with the explanation that the defendant could move to withdraw the plea if he believed a plea agreement had been violated, but that it was not a Rule C plea. The court then proceeded to sentence the defendant, with an explanation for the choice of the sentence as announced.

Upon these considerations, and viewing the motion as a motion to amend the sentence under Rule 35, the motion is rejected for the reasons stated at the sentencing hearing in support of the sentence as announced at that time.

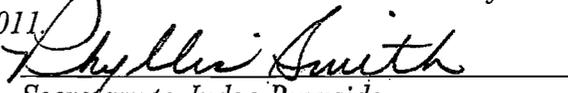
In the first alternative, if the motion is intended as a motion to withdraw the plea on the grounds that the court rejected a plea agreement governed by Rule 11(e)(1)(C), the court finds that the parties did not reach a plea agreement governed by that Rule and that the defendant may not withdraw his plea on a claim that a sentencing agreement was rejected by the court.

In the second alternative, if the motion is viewed as a motion to withdraw the plea on the grounds that the state violated a plea agreement, the court finds that there is nothing the record of the plea hearing or sentencing hearing that supports that conclusion.

An order to this effect, information copy enclosed, was entered on February 23, 2011.

  
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**ROBERT A. BURNSIDE, JR.**  
**CHIEF JUDGE**

*I hereby certify that the foregoing Memorandum was mailed to counsel of record listed above on the 23<sup>rd</sup> day of February, 2011.*

  
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*Secretary to Judge Burnside*

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

Vs.

Civil Action No: 09-F-92-B

DAVID D. GRIFFY, SR.,

Defendant.

**ORDER**

**Refusing motion for reconsideration of sentence;  
Refusing motion to withdraw plea**

In accordance with the court's memorandum of February 23, 2011, incorporated herein by reference, and for the reasons stated therein, it is

**ORDERED** that the defendant's motion to reconsider the sentence pursuant to Rule 35 should be and it is hereby refused, or, in the alternative, it is

**ORDERED** that if the motion is intended as a motion to withdraw the plea on the grounds that the court rejected a plea agreement governed by Rule 11(e)(1)(C), the motion as thereby framed should be and it is hereby refused, or, in the second alternative, it is

**ORDERED** that if the if the motion is intended as a motion to withdraw the plea on the grounds that the state violated a plea agreement, the motion as thereby framed should be and it is hereby refused.

The circuit clerk is directed to mail a copy of this order to counsel of record.

ENTER: February 23, 2011

  
ROBERT A. BURNSIDE, JR.  
CHIEF JUDGE

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

CASE NO. 08-F-92-B/08-F-370-B

DAVID GRIFFY,

Defendant.

**ORDER APPOINTING COUNSEL  
FOLLOWING ELIGIBILITY DETERMINATION BY PUBLIC DEFENDER**

An affidavit has been filed with this Court reciting that David Griffy is unable to employ counsel for representation in certain proceedings before this Court. After reviewing the eligibility determination made by the Public Defender pursuant to W. Va. Code 29-21-1, et seq., the Court is of the opinion the eligibility requirements of W. Va. Code 29-21-1, et seq., are satisfied. Accordingly, the Court ORDERS:

That Charles Mullins, a licensed Attorney at Law practicing before the Bar of this Court, is appointed to represent David Griffy in the following described proceedings before this Court:

**BREAKING AND ENTERING, TRESPASSING, GRAND LARCENY,  
DESTRUCTION OF PROPERTY, TRANSFERRING STOLEN PROPERTY,  
CONSPIRACY**

The Circuit Clerk is directed to forward **BY MAIL** all documents pertaining to this matter to the attorney appointed by this Court.

ENTER this 4<sup>th</sup> day of JUNE, 2009.

  
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JUDGE

**IMPORTANT NOTE:**

All required Orders of Court must be certified and must bear the Circuit Clerk's seal.