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United States District Court
for the Southern District of California

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. 15-CR-0174-W
)	
v.)	January 19, 2016
)	
MARCELLO DSAUN MCCAIN,)	San Diego, California
)	
Defendant.)	
)	

Transcript of Change of Plea Hearing
BEFORE THE HONORABLE THOMAS J. WHELAN
United States District Judge

APPEARANCES:

For the Plaintiff:	UNITED STATES ATTORNEY'S OFFICE SHANE P. HARRIGAN CAROLINE PINEDA HAN 880 Front Street, Room 6293 San Diego, CA 92101
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For the Defendant:	BURCHAM & ZUGMAN DAVID J. ZUGMAN 1010 Second Ave., Ste. 1800 San Diego, CA 92101
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Court Reporter:	Dana Peabody, RDR, CRR District Court Clerk's Office 333 West Broadway, Suite 420 San Diego, California, 92101 DanaPeabodyCSR@gmail.com
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1 San Diego, California, January 19, 2016

2 * * *

3 THE CLERK: Matter number 8 of the calendar,
4 15-CR-0174, United States of America versus Marchello Dsaun
09:35 5 McCain.

6 MR. ZUGMAN: Good morning, Your Honor. David Zugman
7 on behalf of Mr. McCain.

8 THE COURT: Good morning.

9 MR. HARRIGAN: Shane Harrigan and Caroline Han
09:35 10 appearing on behalf of the United States.

11 THE COURT: Good morning to both of you.

12 MS. HAN: Good morning, Your Honor.

13 MR. ZUGMAN: This is Mr. McCain. He is present in
14 custody.

09:37 15 THE COURT: The matter is on calendar for a status
16 hearing. I'm aware, Mr. Zugman, that you filed a motion, the
17 government has responded to the motion. What do we want to do?

18 MR. ZUGMAN: I spoke with the prosecution briefly
19 before the hearing. The intention would be that Mr. McCain
09:37 20 would enter his pleas to every count except for the 1001 count.
21 We would continue the motions to some date convenient, probably
22 two to three months out. The government recognizes that
23 there's more discovery that needs to be produced, and they
24 intend on producing that, so that would be our request of the
09:38 25 Court.

1 THE COURT: All right. Just I'll start with the
2 continuance of the motion hearing on Count 7. I assume that's
3 agreeable with the government?

4 MR. HARRIGAN: Yes, Your Honor.

09:38 5 THE COURT: And, Mr. McCain, is that going to be all
6 right with you, sir?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Do you want to go about three months,
9 Mr. Zugman?

09:38 10 MR. ZUGMAN: Yes, Your Honor.

11 THE COURT: That will put us into April. I can do
12 April 4th, April 18th.

13 MR. ZUGMAN: April 11th would be preferable for me.

14 THE COURT: The 11th at 9:00, and I'll just call it
09:38 15 for status. Is that agreeable with the government?

16 MR. HARRIGAN: Yes.

17 THE COURT: And, Mr. McCain, is that all right?

18 THE DEFENDANT: Yes.

19 THE COURT: That's as to Count 7.

09:38 20 Now, with regard to the other six counts, is there a
21 plea agreement?

22 MR. ZUGMAN: No, Your Honor. He's entering an open
23 plea to the other six counts.

24 THE COURT: All right. Mr. McCain, would you raise
09:38 25 your right hand to be sworn, sir.

1 (Oath administered.)

2 THE COURT: You can put your hand down, sir.

3 Have you taken any drugs or alcoholic beverages in the
4 last 24 hours?

09:39 5 THE WITNESS: No.

6 THE COURT: Your attorney just told me that you want
7 to plead guilty this morning to five counts to being a felon in
8 possession of a firearm and ammunition and that there was --
9 possession of that weapon violated interstate commerce. Is
09:39 10 that what you want to do, plead to those charges?

11 THE DEFENDANT: Yes.

12 THE COURT: He also told me you want to plead to one
13 count of felon in possession of body armor. Is that what you
14 want to do, plead to that charge also?

09:39 15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: In exchange for your guilty plea, as
17 you've just heard me be told by the parties, you don't have any
18 plea agreement. Is that right?

19 THE DEFENDANT: Yes, Your Honor.

09:39 20 THE COURT: Has anybody made any promises to you in
21 order to get you to change your plea this morning?

22 THE DEFENDANT: No, Your Honor.

23 THE COURT: Have you made any agreements, orally or
24 otherwise, with the government with regard to getting you to
09:39 25 plead this morning?

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: And have you had enough time to talk to
3 your attorney about entering the pleas this morning without a
4 plea agreement?

09:40 5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Have you had enough time to talk to him
7 about all the facts of your case?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Are you satisfied with his representation
09:40 10 of you?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: All right. If you plead guilty, do you
13 understand that you're going to be giving up your
14 constitutional rights?

09:40 15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Those rights include your right to trial
17 by jury, your right to confront and cross-examine the witnesses
18 against you, and your right against self-incrimination. Do you
19 understand your rights?

09:40 20 THE DEFENDANT: Yes.

21 THE COURT: Do you give them up?

22 THE DEFENDANT: Yes.

23 THE COURT: And, Mr. Zugman, do you join in the
24 waiver?

09:40 25 MR. ZUGMAN: I do.

1 THE COURT: Do you understand that the maximum penalty
2 for each of the five firearm counts is up to ten years in jail,
3 a fine of up to \$250,000, mandatory special assessment of \$100,
4 and following your release from custody, you'll be on
09:40 5 supervised release for up to three years?

6 with regard to the offense of felon in possession of
7 body armor, the maximum penalty for that offense is up to three
8 years in jail. There's a fine of up to \$250,000, a mandatory
9 special assessment of \$100, and you could be on supervised
09:40 10 release in that case for up to one year.

11 Are you aware of the maximum punishments that you'd be
12 facing?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Who wants to give me a factual basis for
09:41 15 the pleas?

16 MR. ZUGMAN: I can do it, Your Honor, if you prefer.

17 THE COURT: I don't know the facts. I can't do it.

18 MR. ZUGMAN: Fair enough.

19 With respect to Count 1, on February 13, Mr. McCain,
09:41 20 having previously been convicted in the district court for the
21 Central District in the State of Minnesota -- I hope I don't
22 have to repeat that for each one. It's true for each count.
23 He has a felony conviction. He did knowingly and unlawfully
24 possess firearms and ammunition which affected interstate
09:41 25 commerce, which included five rounds of winchester 12 gauge

1 ammunition, a Mossberg model 500 shotgun, an AR-15 style
2 semiautomatic.

3 On May 29th, still having that felony conviction, he
4 did possess a Glock 19 9 millimeter pistol, Mossberg model 500
09:41 5 shotgun.

6 On September 9th Mr. McCain, still having that
7 conviction, did possess a Glock pistol and the Mossberg
8 shotgun.

9 On January 23rd Mr. McCain, with that same conviction,
09:42 10 did possess a stolen Springfield Armory model 9 millimeter
11 pistol, nine rounds of ammunition, one round of Federal 9
12 millimeter ammunition, five rounds of Winchester 12 gauge
13 shotgun rounds, 15 rounds of Winchester PDX1 Defender .38
14 special hollow point ammunition, and 35 rounds of Century Arms
09:42 15 7.62 millimeter HotShot ammunition.

16 With respect to Count 5, on January 23rd, Mr. McCain,
17 still having that conviction, did possess body armor, serial
18 number 125375, that had been shipped and transported in
19 interstate and foreign commerce.

09:42 20 I should mention all the weapons that we've
21 described -- that I've described -- have traveled and are
22 related to interstate and foreign commerce.

23 On January 26th, 2015, Mr. McCain did possess a Glock
24 9 millimeter pistol, a Harrington Richardson 1871 Pardner Pump
09:43 25 12 gauge shotgun, and an M1 carbine, all in violation of

1 section 922.

2 THE COURT: All right. With regard to his prior
3 conviction, is it also part of the factual basis that the
4 punishment for that conviction exceeded one year?

09:43 5 MR. ZUGMAN: Yes, Your Honor.

6 THE COURT: Is the government satisfied with the
7 factual basis?

8 MR. HARRIGAN: I am as to Counts 1 through 4 and 6.

9 As to the body armor, just because the elements are a
09:43 10 little different, Your Honor, maybe the government could state
11 those. We have to show that the defendant's convicted of a
12 crime of violence as defined under Title 18 U.S. Section 16;
13 that he owned, purchased, or possessed the body armor; that the
14 body armor had traveled interstate commerce at some point
09:44 15 during its existence; and that the defendant possessed it
16 knowingly; that is, he has to know that what he possessed was
17 body armor; and that the possession was voluntary and
18 intentional.

19 In this case the government proffered that on January
09:44 20 23rd at an attached garage in his apartment building, he
21 possessed body armor -- knowingly possessed body armor as
22 detailed in Count 5 of the indictment.

23 And as to the interstate commerce nexus, that that
24 body armor in or about 2011 was manufactured in Brooklyn,
09:44 25 New York, and at some point traveled from Brooklyn, New York,

1 to Camp Pendleton, California, and ultimately ended up in the
2 possession of the defendant.

3 AS to -- because this is a little bit different
4 definition, in terms of the violent felony, defendant, I
09:45 5 believe, would stipulate that his conviction for assault in the
6 second degree in violation of Minnesota Statute 609.222, the
7 two counts, which are punishable by a term of imprisonment of
8 more than one year, qualified as crimes of violence under 8 USC
9 Section 16(a).

09:45 10 MR. ZUGMAN: Stipulated, Your Honor.

11 THE COURT: Do you agree with that also, Mr. McCain?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: All right. In this matter the Court finds
14 you're in full possession of your faculties, you do understand
09:45 15 the nature of these proceedings and the consequences of your
16 plea. I find that you understand your constitutional rights,
17 that you made a knowing, intelligent, voluntary waiver of your
18 rights.

19 Permission to withdraw your not guilty pleas to Counts
09:45 20 1 through 6 of the superseding -- second superseding indictment
21 is granted.

22 How do you plead to the charge in Count 1 that on or
23 about February 13, 2014, within the Southern District of
24 California, the defendant, Marchello Dsaun McCain, being a
09:46 25 person who had previously been convicted in a court,

1 specifically on or about May 31, 2005, in the district court or
2 the Fourth Judicial District of the State of Minnesota, County
3 of Hennepin, of two counts of assault in the second degree in
4 violation of Minnesota Statute Section 609.222, a crime
09:46 5 punishable by imprisonment for a term exceeding one year, did
6 knowingly, unlawfully possess firearms and ammunition
7 affecting -- in and affecting commerce, specifically five
8 rounds of Winchester 12 gauge 2.75 inch 7.5 shot shotgun
9 ammunition, a Mossberg model 500 12 gauge pump action shotgun,
09:46 10 serial number U645986, and an AR-15 style automatic
11 semiautomatic rifle, all in violation of Title 18 United States
12 Code Section 922(g)(1); guilty or not guilty, sir?

13 THE DEFENDANT: Guilty.

14 THE COURT: How do you plead to the charge in Count 2
09:47 15 that on or about May 29, 2014, within the Southern District of
16 California, the defendant, Marchello Dsaun McCain, being a
17 person who had previously been convicted in a court,
18 specifically on or about May 31, 2005, in the district court
19 for the Fourth Judicial District for the State of Minnesota,
09:47 20 County of Hennepin, of two counts of assault in the second
21 degree in violation of Minnesota Statute Section 609.222, the
22 crime punishable by imprisonment for a term exceeding one year,
23 did knowingly and unlawfully possess firearms in and affecting
24 commerce, specifically a Glock model 19 9 millimeter caliber
09:47 25 pistol, serial number RXU609, and a Mossberg model 500 12 gauge

1 pump action shotgun, serial number T893954, all in violation of
2 Title 18 United States Code Section 922(g)(1); guilty or not
3 guilty, sir?

4 THE DEFENDANT: Guilty, Your Honor.

09:48

5 THE COURT: And how do you plead to the charge in
6 Count 3 that on or about September 9, 2014, within the Southern
7 District of California, the defendant, Marchello Dsaun McCain,
8 being a person who had previously been convicted in a court,
9 specifically on or about May 31, 2005, in the district court

09:48

10 for the Fourth Judicial District for the State of Minnesota,
11 County of Hennepin, of two counts of assault in the second
12 degree in violation of Minnesota Statute Section 609.222, a
13 crime punishable by imprisonment for a term exceeding one year,
14 did knowingly and unlawfully possess firearms in and affecting
15 commerce, specifically a Glock model 17 9 millimeter caliber
16 pistol and a Mossberg model 500 12 gauge pump action shotgun,
17 serial number T893954, all in violation of Title 18 United
18 States Code Section 922(g)(1); guilty or not guilty, sir?

09:48

19 THE DEFENDANT: Guilty, Your Honor.

09:49

20 THE COURT: And how do you plead to the charge in
21 Count 4 that on or about January 23, 2015, within the Southern
22 District of California, the defendant, Marchello Dsaun McCain,
23 being a person who had previously been convicted in a court,
24 specifically on or about May 31, 2005, in the district court
25 for the Fourth Judicial District of the State of Minnesota,

09:49

1 County of Hennepin, of two counts of assault in the second
2 degree in violation of Minnesota Statute Section 609.222, a
3 crime punishable by imprisonment for a term exceeding one year,
4 did knowingly and unlawfully possess firearms and ammunition in
09:49 5 and affecting commerce, specifically a stolen Springfield
6 Armory model XD 9 millimeter pistol, serial number US96206,
7 nine rounds of Winchester 9 millimeter ammunition, one round of
8 Federal 9 millimeter ammunition, five rounds of Winchester PDX1
9 Defender 12 gauge shotgun rounds, 15 rounds of Winchester PDX1
09:50 10 Defender .38 special hollow point ammunition, and 35 rounds of
11 Century Arms 7.62 by 35 millimeter HotShot ammunition, all in
12 violation of Title 18 United States Code Section 922(g)(1);
13 guilty or not guilty, sir?

14 THE DEFENDANT: Guilty.

09:50 15 THE COURT: And how do you plead to Count 5, that on
16 or about January 23 of 2015, within the Southern District of
17 California, the defendant, Marchello Dsaun McCain, being a
18 person who had previously been convicted of a crime of violence
19 and an offense under state law that would constitute a crime of
09:50 20 violence if occurred within the special maritime and
21 territorial jurisdiction of the United States, specifically on
22 or about May 31, 2005, in the district court for the Fourth
23 Judicial District of the State of Minnesota, County of
24 Hennepin, two counts of assault in the second degree in
09:51 25 violation of Minnesota Statute Section 609.222, a crime

1 punishable by imprisonment for a term exceeding one year, did
2 knowingly possess in and affecting commerce body armor, serial
3 number 125375, that had been shipped and transported in
4 interstate and foreign commerce in violation of Title 18 United
09:51 5 States Code Section 931; guilty or not guilty?

6 THE DEFENDANT: Guilty, Your Honor.

7 THE COURT: And how do you plead to the charge in
8 Count 6 that on or about January 26, 2015, within the Southern
9 District of California, the defendant, Marchello Dsaun McCain,
09:51 10 being a person who had previously been convicted in a court,
11 specifically on or about May 31, 2005, in the district court
12 for the Fourth Judicial District for the State of Minnesota,
13 County of Hennepin, of two counts of assault in the second
14 degree, in violation of Minnesota Statute Section 609.222, a
09:51 15 crime punishable by imprisonment for a term exceeding one year,
16 did knowingly and unlawfully possess firearms in and affecting
17 commerce, specifically a Glock model 17 gen 4 9 millimeter
18 pistol, serial number VEM605, a Harrington and Richardson 1871
19 Pardner Pump 12 gauge shotgun, serial number NZ541169, and an
09:52 20 M1 carbine 30 caliber semiautomatic rifle, serial number
21 3469868, all in violation of Title 18, United States Code
22 Section 922(g)(1); guilty or not guilty, sir?

23 THE DEFENDANT: Guilty.

24 THE COURT: I accept your guilty plea to the first six
09:52 25 counts.

1 Do you want me to set a sentencing hearing, or do you
2 just want status at the time?

3 MR. ZUGMAN: I think we should figure out what we're
4 going to do with the other count before we set sentencing
09:52 5 because we don't want the probation office -- to inconvenience
6 them, so I think we should put it off until April.

7 THE COURT: Status on April 11 at 9:00. Does that
8 sound all right?

9 MR. HARRIGAN: Yes, Your Honor.

09:52 10 And for the record, time is excludable as to Count 7.

11 THE COURT: The motion is pending, so time is
12 excludable, but with regard to the sentence, Mr. McCain, you've
13 got a right to be sentenced on this and obviously much shorter
14 period than what they're asking for. Is that going to be all
09:53 15 right with you if I put off ordering the presentence report
16 until at least April 11th at 9:00?

17 THE DEFENDANT: Yes.

18 THE COURT: And that's --

19 MR. HARRIGAN: Yes, Your Honor.

09:53 20 THE COURT: We'll set it for status regarding the PSR
21 on the 11th at 9:00.

22 MR. ZUGMAN: One housekeeping matter. In early
23 January, I filed a motion for payment in excess of the
24 statutory maximum given the complexity and length --

09:53 25 THE COURT: I thought I signed that.

1 MR. ZUGMAN: It did not appear on the docket. So I
2 knew it wasn't really an issue. I just wanted to --

3 THE COURT: If it's not on the docket, resubmit it.

4 MR. ZUGMAN: I'll resubmit it.

09:53

5 THE COURT: I'm 99 percent sure I signed it.

6 MR. ZUGMAN: Thank you.

7 THE COURT: If I haven't, I will sign it.

8 MR. ZUGMAN: Thank you, Your Honor.

9 THE COURT: All right.

10 ---000---

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12 C-E-R-T-I-F-I-C-A-T-I-O-N

13

14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled matter.

16

17 Dated March 16, 2016, at San Diego, California.

18

19

/s/ Dana Peabody

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Dana Peabody,
Registered Diplomate Reporter
Certified Realtime Reporter

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