IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	Case No. 1007024347
	)	
DANIEL FITHIAN,	)	
	)	
Defendant.	)	

ORDER

This 25th day of May, 2016, having considered Defendant's *pro se* Motion for Postconviction Relief, the Affidavit of Trial Counsel, Rule 61 Counsel's Non-Merit Brief and Motion to Withdraw as Counsel, the State's Response, and a full, thorough, and *de novo* review of the record of this case, Defendant's Motion for Postconviction Relief is **DENIED**. The Motion to Withdraw as Counsel is **GRANTED**.

It appears that:

1. On September 27, 2010, Defendant and his wife (Carla Fithian) were indicted in a 46-count indictment for the charges of Conspiracy Second Degree, multiple counts of Felony Theft, and Carla Fithian was charged with multiple counts of Forgery Second Degree.

2. The facts of the case are that the Defendant unlawfully used his mother-in-law's credit card (and Carla wrote checks to Defendant from her

mother's checking account) without permission between 2009 and 2010. It was alleged that approximately $18,000.00 was misappropriated. Defendant was arrested on July 28, 2010.

3. On January 10, 2011, Defendant entered a guilty plea to Theft of a Senior and Conspiracy Second Degree.

4. On May 13, 2011, the Court sentenced Defendant, effective March 18, 2011, to 3 years at Level V, no probation to follow (Theft) and 2 years at Level V suspended after 1 year for 1 year at Level IV (Halfway House).

5. On June 2, 2014, Defendant filed this Motion for Postconviction Relief,[1] alleging ineffective assistance of counsel[2], double jeopardy, judicial bias by the sentencing judge, and mistakes in the sentencing order.[3] This is Defendant's first Rule 61 Motion.[4]

6. Specifically, Defendant contends that "In light of [my defense attorney's] recent death I have determined that [his] poor health effected the

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[1] Although the docket sheet entry reflects that this Motion was filed on June 21, 2014, the actual Motion is date stamped by the Prothonotary's Office as June 2, 2014.

[2] Defendant's Pre-Plea and Sentencing Attorney was Edmund H. Hillis, Esquire, who has subsequently passed away. Plea Counsel was Dean Del Collo, Esquire.

[3] This motion was not assigned to a specific judge until January 26, 2015.

[4] Defendant previously filed Motions for Reduction/Modification of Sentence on August 4, 2011; October 21, 2011; November 27, 2012; June 7, 2013; and October 29, 2013. The Court denied all of these motions.

outcome of my case."[5] Defendant next asserts double jeopardy, in ground two, because his original sentencing order incorrectly entered restitution for each charge.[6]

7. Defendant also claims that the sentencing court was biased because "During sentencing Judge Toliver stated and compared me to a child molester"[7] and also because his wife received a sentence of probation when she entered a plea (Forgery, Theft and Conspiracy) several months before Defendant entered a plea. Lastly, Defendant contends, in ground four, that there are mistakes in his sentencing order involving probation.

8. Ground two of Defendant's motion (double jeopardy) is moot because the restitution problem has been corrected.

9. Ground four, involving Defendant's sentencing order, is governed by Superior Court Criminal Rule 35 and is not governed by Superior Court Criminal Rule 61 which concerns collateral attacks on convictions. Hence, this Court will address grounds one and three.

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[5] Defendant's Motion at p. 3.

[6] The sentencing court imposed $18,175.00 restitution, jointly and severally. A clerical error incorrectly reflected $18,175.00 restitution for each charge. On June 21, 2013, the Court wrote to Defendant informing him that the error was corrected. In view of the fact that the docket does not reflect a formal correction, this Court issued a revised order on May 24, 2016 to reflect that a civil judgment will be entered in the total amount of $18,175.00.

[7] Defendant's Motion at p. 3.

10. Plea Counsel filed an affidavit on November 12, 2015. Plea Counsel wrote that Mr. Hillis went over the plea paperwork with Defendant and the documents that Defendant signed on the day of the plea but was unavailable to be with Defendant during the plea. Defendant consented to Plea Counsel representing him at his plea and also that Plea Counsel "thoroughly went through the Plea Colloquy, to ensure that the Defendant was entering a plea, knowingly, intelligently and voluntarily".[8]

11. The Court appointed Rule 61 Counsel. On February 24, 2016, Rule 61 Counsel filed a non-merit brief and a Motion to Withdraw as Counsel.

12. On April 23, 2016, the State filed its response to the Motion for Postconviction Relief. The State asserted that Defendant's Motion was time-barred because his conviction became final on June 13, 2011 and this Motion was filed more than one year after that date.[9]

13. Before considering the merits of ground one (ineffective assistance of counsel) or ground three (sentencing bias) alleged in Defendant's motion for postconviction relief,[10] the Court must first determine if the motion is procedurally barred under Superior Court Criminal Rule 61.[11]

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[8] Aff. Of Dean Del Collo, Esquire, Nov. 12, 2015.

[9] Defendant did not file a direct appeal within thirty (30) days after his sentence was imposed on May 13, 2011. State's Response, April 23, 2016.

[10] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

14. In the instant case, Defendant's motion was filed approximately three years after his conviction became final. Defendant's motion is barred unless, pursuant to Rule 61(i)(5), Defendant asserts lack of jurisdiction or states a colorable claim that there was a "miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceeding leading to the judgment of conviction."[12]

15. Here, the Court does not find that the work of his Pre-plea/Sentencing Attorney or his Plea Counsel was substandard and does not find that Defendant

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[11] Superior Court Criminal Rule 61(i) provides, in pertinent part:

(i) Bars to Relief.

(1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceedings, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default; and

(B) Prejudice from violation of the movant's rights.

(4) Former Adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal *habeas corpus* proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

[12] Sup. Ct. Crim. R. 61(i)(5).

was prejudiced or prevented from having a fair trial or that the performance of either counsel weakened Defendant's appeal. An analysis of the law concerning attorney performance leads to the conclusion that Defendant's plea was knowing, voluntary, and intelligent and that counsel did not fall below normal standards at sentencing.

16. In order for Defendant to establish ineffective assistance of counsel, Defendant must show that counsel's alleged errors "were so grievous that his performance fell below an objective standard of reasonableness ... [and] there is a reasonable degree of probability that but for counsel's unprofessional errors the outcome of the proceedings would have been different . . . ."[13]

17. The law is clear that there is a strong presumption that counsel's representation is competent and falls within the "wide range" of reasonable professional assistance.[14] Moreover, deference must be given to counsel's judgment in order to promote stability in the process.[15]

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[13] *Id.* At *4. *See also Strickland v. Washington*, 466 U.S. 668 (1984); *Harrington v. Richter*, 131 S. Ct. 770, 778 (2011); *Premo v. Moore*, 131 S. Ct. 733, 736 (2011); *Scott v. State*, 7 A.3d 471, 475-76 (Del. 2010); *Duross v. State*, 494 A.2d 1265 (Del. 1985); *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003), impliedly overruled on other grounds as recognized in *Steckel v. State*, 882 A.2d 168, 171 (Del. 2005).

[14] *Premo v. Moore*, 131 S. Ct. at 739.

[15] *Id.* at 736.

18. Furthermore, to overcome the strong presumption that counsel has acted competently, the defendant must demonstrate that "counsel failed to act reasonabl[y] considering all the circumstances"[16] and that the allegedly unreasonable performance prejudiced the defense. The question in this case is not whether counsel deviated from the best or most common practice but whether counsel's representation was inadequate under the prevailing professional norms.[17] Thus, the essential question is whether counsel made mistakes so crucial that counsel was not functioning at the level guaranteed by the Sixth Amendment[18] and deprived Defendant of a fair trial.

19. In order to show prejudice, the defendant must prove that, but for counsel's errors, the result would have been different.[19] The Court does not need to be certain that counsel's performance had no effect on the outcome.[20] However, there must be a substantial probability that there would have been a different

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[16] *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (internal quotation marks omitted) (quoting *Strickland v. Washington* at 688).

[17] *Harrington*, 131 S. Ct. at 778.

[18] *Ibid.*

[19] *Cullen*, 131 S. Ct. at 1403.

[20] *Harrington*, 131 S. Ct. at 779.

result.[21] The test calls for the defendant to "make specific and concrete allegations of actual prejudice and substantiate them."[22]

20. In the instant case, the attorney who represented Defendant during his guilty plea is alive. Plea Counsel wrote, unequivocally, that he and Pre-plea/Sentencing Counsel each discussed the plea offer with Defendant.

21. Nevertheless, Defendant surmises, without a basis, that his Pre-plea/Sentencing Attorney, who is now deceased, was ineffective. Defendant also suggests that Plea Counsel continued the alleged ineffectiveness. Defendant does not state any reasons for this attack on his deceased attorney. Nor does he explain how the attorney who actually represented him during his plea was ineffective.

22. Furthermore, Defendant did not indicate any dissatisfaction with either of his attorneys when given the opportunity at his plea and sentencing to express any concerns. At the plea colloquy, Defendant told the Court that he was over 21 years old, wanted to plead guilty, no one had threatened or forced him to plead guilty and he understood his rights. He also said that he was sober, understood his rights in the Truth-in-Sentencing Guilty Plea Form wherein he indicated that he read the form, was sane and sober, satisfied with his attorneys, and was freely and voluntarily pleading guilty.

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[21] *Id.*

[22] *Scott v. State*, 7 A.3d 471, 476 (Del. 2010).

23. The Plea Transcript reflects that he was satisfied with *both* attorneys:

> MR. DEL COLLO: Your Honor, this is Daniel Fithian. He's here to plead guilty to two charges, one count of Theft Felony, that's theft of over $1,500 of someone over 62 years old; and the Conspiracy Second charge.
>
> Earlier today, Mr. Hillis went over the Truth-in-Sentencing guilty-plea form with this defendant and explained to him the rights he has when he comes to Court and the rights he waives by entering into this plea agreement. It was explained to this defendant that both of these charges are felonies, the theft charge has a penalty range of up to three years in jail and the Conspiracy Second up to two years, so he understand he's facing up to five years in prison as a result of this plea.
>
> Your Honor, it's also noted that apparently, he has one or two prior felonies so he's already lost the certain civil rights that are listed on the Truth-in-Sentencing guilty-plea form.
>
> It is also noted on the form that he had been a patient in a mental hospital as recently as 2009; however, he appears not to be taking any medication and there are no notations anywhere that Mr. Hillis is concerned about his mental state. Therefore, I believe that this plea is being entered before you knowingly, intelligently, and voluntarily.
>
> . . .
>
> COURT: Are you satisfied with your lawyer's representation of you?
>
> DEFENDANT: Yes.
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> COURT: Are you satisfied that Mr. Del Collo has fully advised you of your rights?
>
> DEFENDANT: Yes.
>
> COURT: Okay, and Mr. Hillis was representing you before?
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> DEFENDANT: Yes.
>
> COURT: Did you have time to talk to him about his case?
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> DEFENDANT: Yes, I did.
>
> COURT: Do you feel that between Mr. Hillis and Mr. Del Collo you were represented to the best of their ability?
>
> DEFENDANT: Mm-hmm. Yes.
>
> COURT: Do you have any questions right now for Mr. Del Collo or for the Court?
>
> DEFENDANT: Yes. Am I being sentenced today?
>
> COURT: No. You are not being sentenced today. Your sentence date will be March 18th.
>
> DEFENDANT: Okay.
>
> COURT: All right. Based on your answers and the plea papers, I will accept your plea today. And I am satisfied that your plea is knowing, voluntary, and intelligent, and I find you guilty of Theft Felony and Conspiracy Second Degree. Okay? So, you will have a presentence

> investigation done on you and you will come back, probably before me, on March 18th for sentencing. Okay?[23]

24. The law is clear that statements made at a plea colloquy are "presumptively truthful."[24] Hence, Defendant is "bound by [his] answers on the Truth-in-Sentencing Guilty Plea Form" and by his words during the plea colloquy[25] unless he presents credible evidence that his plea was unknowing or involuntary. Defendant's accusations have not met that burden and Defendant's criticisms are refuted by his own words and actions.[26]

25. Additionally, Defendant cannot assert innocence. The record reflects that Defendant told the Court that he has stolen from his mother-in-law.

> THE COURT: What did you do in relation to Rosanna Jones and her bank account?
> THE DEFENDANT: My wife had brought some checks to me and I cashed the money – cashed the checks, and I gave the money back to her and we spent it on household items. We spent some of it on Rosanna Jones, we spent some of it on bills, but it wasn't with Rosanna's permission. Carla and I had decided we were going to pay the money back but, you know, we got arrested prior to that happening.
> THE COURT: Did you know Rosanna Jones?
> THE DEFENDANT: Yes, she's my mother-in-law.
> THE COURT: And you knew that you were not entitled to just clean out her bank account; right? Is that right?
> THE DEFENDANT: Yes.

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[23] Plea transcript, Jan. 10, 2011, pp 3–4, 13–14.

[24] *Maddox v. State*, 2012 WL 385600, *1 (Del. Feb. 6, 2012).

[25] *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997) (holding that statements of a defendant during the plea colloquy are presumptively truthful and pose a formidable barrier in any subsequent collateral proceeding) (internal quotation marks omitted).

[26] *Wynn v. State*, 2012 WL 2368610, *2 (Del. May 28, 2013).

THE COURT: But you did it anyway?
THE DEFENDANT: Yes, ma'am.[27]

26. Moreover, Defendant received the benefit of the bargain.[28] Defendant, who was found in possession of his mother-in-law's stolen credit card and admitted to the police that he had cashed the checks (and Carla admitted to the police that she wrote the check to Defendant because he had a crack cocaine problem), was able to avoid a trial on six theft charges. Defendant's guilty plea "constitutes a waiver of any claim of error or defect [alleged to have occurred] prior to the entry of the plea."[29]

27. Lastly, Defendant's allegation of bias at sentencing is also unsupported. Defendant has an extensive criminal history which includes arrests in Florida and Wyoming. He was convicted of possession of cocaine in Florida in 2002 and eight counts of Burglary in Wyoming in 1992. He also had a Delaware arrest on June 29, 2010 for Theft (M) and Criminal Trespass (ID No. 1006018823) which resulted in a conviction in the Court of Common Pleas. Additionally, he has a capias history and was returned to court twice, August 6, 2010 and January 11,

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[27] Plea transcript, p. 10.

[28] *Samans v. State,* 2012 WL 1970109, *1 (Del. June 1, 2012).

[29] *Id.* (citing *Downer v. State*, 53 A.2d 309, 312-13 (Del. 1988)). *See also Mahan v. State*, 2012 WL 4762027 (Del. Oct. 5, 2012).

2011, for violations of probation which seemed to involve Defendant's failure to report to the Salvation Army Rehabilitation Center.

28. Moreover, Defendant was not sentenced arbitrarily or with a closed mind.[30] The record reflects that Pre-plea/Sentencing Counsel and Defendant both had an opportunity to address the Court. Indeed, Pre-plea/Sentencing Counsel characterized the co-defendant (Defendant's wife) as the "mastermind" of the scheme to violate the elderly woman's trust.[31]

29. Additionally, Defendant spoke and attempted to convince the Court that he was a help to the victim. Defendant blamed his drinking problem as the cause for misappropriating the victim's money:

> DEFENDANT: Yes, sir. I just wanted to say that I'm sorry for what I've done. I was drinking heavily at the time that I had done that. It was about a year ago.
>
> At the time I was at Miss Rosanna Jones's residence, I was trying to help her and take care of her. I cooked for her; I cleaned for her. I actually helped her pay her bills while I was there. And she was highly upset with me because I couldn't find a job. She's even told me that I was a bum several times. Her daughter, my wife and I were staying there. We were taking care of her and we were really trying to do our best to do good with her.
>
> And that's all I have to say. I'm just very, very sorry.[32]
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> * * * * *

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[30] *Dickerson v. State*, 2013 WL 1559650, *2 (Del. 2013). ("There is no evidence that the judge sentenced with a preconceived bias or without taking [Defendant's] past history into consideration").

[31] *Bryan v. State*, 2006 WL 1640177, *1 (Del. June 12, 2006). *See also, Weston v. State*, 832 A.2d 742, 746 (Del. 2003) (noting that the trial court sentenced the defendant with an open mind after listening to defendant's excuses for violating probation.

[32] Sentencing transcript, May 13, 2011, p 6.

DEFENDANT: I don't feel that I should have to pay back the money that was - - I mean, I didn't steal that money. That money wasn't stolen.

COURT: I'm sorry? You didn't do what?

DEFENDANT: She wrote the checks to me for the - - some checks that she wrote to me were actually written by her and I cashed them for her and gave her the money, because I always went to the grocery store for her, and, you know, to wherever she wanted me to go, and I bought her whatever she needed.

So what I'm saying is, I'm not saying that none of that money is owed. I'm just saying that a lot of that money was actually her money that had actually spent and she had actually wrote check to me; I cashed them; but I gave her the money back. And she would hold onto the money and then when she needed something from the store, she would give me the money to go and get it, you know, such as groceries, food, wine whatever she needed.

COURT: Wine?

DEFENDANT: Yes. She drinks a lot of wine and she smokes a lot of cigarettes, sir. She smokes, like, two packs a day, and she drinks about one big bottle of wine by herself in a day, sometimes even one-and-a-half.

COURT: So, she's a drunk, as well as being mentally infirm?

DEFENDANT: Yeah. She probably wouldn't be as mentally infirm if she wasn't drinking so much.

One of the times that - - one of the things me and my - - I know it's bad, it looks really bad that me and my wife were there, even though we weren't supposed to be there, but our intention was to take care of her and watch out for her because she has had grand mal seizures, or alcoholic seizures. She goes out walking around by herself in the middle of the night. She's been found laying out in the parking lot, again, and we've had to call an ambulance for her. It's just, you know, her daughter is very concerned about her, and that was one of the reasons why we stayed there, was to watch out for her.[33]

30. The Court considered the totality of the circumstances and, while the Defendant resents the Court's analogy, Defendant's sentence was within the statutory range:

[33] Sentencing transcript, May 13, 2011, pp. 9 – 10.

> COURT: And let me tell you something: Next to child molestation, abusing an elderly person, an elderly infirm person, ranks up there with me.[34]
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> * * * * *
>
> COURT: To the extent this exceeds and needs an explanation, although I do not know why, repetitive criminal conduct, need for correctional treatment - -
>
> These are aggravating factors.
>
> Clearly, undue depreciation of the offense, a major economic offense, at least to the victim, continuous abuse of the victim, lack of remorse, supervision to monitor restitution, lack of amenability to lesser sanctions, vulnerability of the victim. And just because you deserve it.[35]

31. Defendant has not shown that either Plea Counsel or Pre-plea/Sentencing Counsel did not act "reasonabl[y] considering all the circumstances"[36] and that the allegedly unreasonable performance prejudiced the defense. Defendant has not shown that he was deprived of a fair [proceeding] and that, but for counsel's alleged errors, the results would have been different.[37] Moreover, Defendant has not shown bias in sentencing when he received a sentence different from his wife.

32. Hence, Defendant's claims are without merit and his Motion is procedurally barred.

33. Lastly, the Court is satisfied that Rule 61 Counsel made a conscientious examination of the record and the law for claims that could arguably

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[34] Sentencing transcript, p. 11.

[35] Sentencing transcript, May 13, 2011, pp. 14 - 15.

[36] *Cullen*, 131 S. Ct. at 1392.

[37] *Id.* At 1403.

support Defendant's Rule 61 motion. Rule 61 Counsel's Motion to Withdraw as Counsel is **GRANTED**.

ACCORDINGLY, after a careful, thorough and *de novo* review of the record, Defendant's Motion for Postconviction Relief is **DENIED**. Rule 61 Counsel's Motion to Withdraw is **GRANTED**.

IT IS SO ORDERED.

Honorable Diane Clarke Streett

Original to Prothonotary

cc: Joseph S. Grubb, Esquire, DAG
Dean Del Callo, Esquire
Kevin Tray, Esquire
Daniel Fithian, Defendant
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