

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

TERRELL L. DAVIS,

Defendant.

Cr. ID. No. 1406015337

Date submitted: August 15, 2016

Date decided: November 7, 2016

**COMMISSIONER'S REPORT AND RECOMMENDATION ON
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF AND
MOTION FOR APPOINTMENT OF COUNSEL**

Barzilai K. Axelrod, Esquire, Deputy Attorney General, Delaware Department of Justice, 820 N. French St. 7th Floor, Wilmington, DE, 19801. Attorney for the State.

Kevin J. O'Connell, Esquire, Office of Defense Services, 820 N. French St. 3rd Floor, Wilmington, DE, 19801. Attorney for the Defendant.

Terrell L. Davis, *pro se*.

MANNING, Commissioner:

This 7th day of November, 2016, upon consideration of defendant Terrell L. Davis' motion for postconviction relief ("Motion"), I find and recommend the following:

Procedural History

Davis pled guilty on December 4, 2014, to one count of Drug Dealing Tier 4 and one count of Aggravated Possession of Heroin, Tier 5. On March 13, 2015, Davis was sentenced as a Habitual Offender under 11 *Del. C.* § 4214(a) to a total of ten years at Level V, suspended after seven years, for one year at Level III probation. Davis did not appeal his conviction to the Delaware Supreme Court. Davis' sentence became final on April 16, 2015. Davis filed a *pro se* motion for appointment of counsel and postconviction relief on April 11, 2016. Davis' Motion was assigned to the undersigned commissioner on May 18, 2016. A briefing schedule was issued on May 26, 2016. The State and Trial Counsel both filed responsive pleadings thereafter.

The facts surrounding Davis' crimes are not relevant to deciding his claims and need not be recited here. Based upon my review of Davis' Motion I do not see the need for an evidentiary hearing. The arguments made by Davis in his Motion can be fully addressed with the factual record created by the pleadings and other information currently available in the Court's file. Davis' claims for postconviction relief, quoted verbatim, are as follows:

Ground One: Ineffective Assistance of Counsel. Counsel never discussed the case with defendant. Counsel never came to see or made a video conference to see defendant. Defendant wrote counsel about a meeting and counsel wrote back and said he would schedule a video. Counsel failed to do so.

Ground Two: Ineffective Assistance of Counsel. Counsel failed to investigate the case. Counsel never obtain the toxicology report to see if the alleged drugs were weighed and authenticated.

Ground Three: Ineffective Assistance of Counsel. Counsel failed to investigate the defendants case. Counsel failed to investigate the warrant that was obtained to search the defendant's home or if there was probable cause to get the warrant.

Ground Four: Ineffective Assistance of Counsel. Counsel failed to file [a] motion to dismiss. Counsel notified defendant that he had filed [a] motion on defendants behalf in the court. Counsel never did.

Davis also argues that none his claims were raised previously because he "took a plea." Davis notes that he "is not versed in the law" and didn't know to raise these grounds previously.

Legal Standard

To prevail on an ineffective assistance of counsel claim, a defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.¹ The first prong requires the defendant to

¹ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires the defendant to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.²

When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.³ Most germane to this case, mere allegations of ineffectiveness will not suffice—a defendant must make and substantiate concrete allegations of actual prejudice.⁴ An error by defense counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.⁵

In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be viewed from his or her perspective at the time decisions were being made.⁶ A fair assessment of attorney performance requires

² *Id.*

³ *Id.* at 697.

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁵ *Strickland*, 466 U.S. at 691.

⁶ *Id.*

that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or “Monday morning quarterbacking” should be avoided.⁷

The procedural requirements of Superior Court Criminal Rule 61 must be addressed before considering the merits of any argument.⁸ Davis’ Motion was timely filed, is not repetitive, and none of the claims he raised were previously adjudicated in any forum. Therefore, Davis’ Motion is not procedurally barred under Rule 61(i)(1) - (4).

Analysis

“In order to prevail on a claim of ineffective assistance of counsel in connection with a guilty plea, a defendant must show that, but for his counsel's unprofessional errors, he would not have pleaded guilty but would have insisted on proceeding to trial.”⁹

Trial Counsel filed an affidavit responding to Davis’ allegations. In the affidavit, Trial Counsel notes that he was involved in a capital murder trial at the time of Davis’ case and that most, if not all of, Davis’ court appearances were handled by Todd Conner, Esq. another lawyer with the Office of Defense Services. Trial Counsel notes that Mr. Conner, who appears for all intents and purposes to

⁷ *Id.*

⁸ *See Younger*, 580 A.2d at 554.

⁹ *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2004) (Citing *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)).

have been Davis' *de facto* lawyer for this case, met with Davis on numerous occasion both in person and by videophone to discuss the case with him and his family. Trial Counsel also notes that Mr. Conner had a Psycho-Forensic Evaluation report prepared for mitigation purposes. Further complicating the situation was the fact that Davis was eligible for sentencing as a Habitual Offender under 11 *Del. C.* §§ 4214 (a) *and* (b). Trial Counsel admits that he was not able to personally meeting with Davis until March 13, 2015, just prior to sentencing. However, at sentencing, Davis was sentenced to three years less than the 10 years of Level V the State was requesting.

In his affidavit, Trial counsel averred that he reviewed the police reports as well as the search warrant obtained by the police and determined that it was supported by sufficient probable cause. Finally, Trial Counsel notes that Davis accepted the State's plea offer prior to the date on which the State was required to provide the Toxicology Report per the Court's standard scheduling order. The fact that Davis *elected* to accept the State's plea offer without knowing the exact weight or composition of the drugs in question does not invalidate his guilty plea.¹⁰

Given the unambiguous information contained in the guilty plea paperwork, I have no doubt that Davis' plea was knowingly, intelligently and voluntarily entered and that he knew the correct penalty range he faced at the time he entered

¹⁰ See Generally *Brown v. State*, 108 A.3d 1201, 1202 (Del. 2015).

his guilty plea. In the absence of clear and convincing evidence to the contrary, Davis is bound by his representations to the Court.¹¹ Outside of Davis' conclusory allegations, there is nothing in the record to indicate that he was not properly represented or advised by his lawyer (i.e. Mr. Conner) before he entered his guilty pleas. I take judicial notice of the fact that both Trial Counsel and Mr. Conner are veteran defense attorneys with many decades of experience.

Davis' Motion is devoid of any concrete examples of how his attorneys' representation of him was deficient, or how that deficient representation prejudiced him. Davis has failed to show that he otherwise would not have pleaded guilty.

Davis' claims are conclusory accusations unsupported by the record and all fail to meet the standard for relief under *Strickland*, its progeny, and Rule 61.

Appointment of Counsel

Davis was not convicted following a trial and did not appeal his conviction to the Delaware Supreme Court. Therefore, Davis has failed to meet the requirements of Rule 61(e)(2)(i) for the appointment of counsel and his Motion in this respect should also be Denied.

¹¹ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

Conclusion

For the foregoing reasons, Davis' Motion is so lacking in merit that it should be Denied and Summarily Dismissed pursuant to Super Ct. Crim. Rule 61(d)(5).

IT IS SO RECOMMENDED.


BRADLEY V. MANNING,
Commissioner

oc: Prothonotary
cc: Defendant via first class mail, all counsel via e-mail