

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ZAKUON A. BINAIRD, )  
 )  
 Defendant. )

Cr. ID. No. 1410000295

Date submitted: April 22, 2016

Date decided: July 24, 2017

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

John S. Taylor, Esquire, Deputy Attorney General, Delaware Department of Justice, 820 N. French St. 7<sup>th</sup> Floor, Wilmington, DE, 19801. Attorney for the State.

Natalie S. Woloshin, Esquire, 3200 Concord Pike, PO Box 7329, Wilmington, DE 19803. Attorney for Defendant.

Zakuon A. Binard, *pro se*.

**MANNING**, Commissioner:

This 24<sup>th</sup> day of July, 2017, upon consideration of defendant Zakuon A. Binaird's motion for postconviction relief ("Motion"), I find and recommend the following:

**Procedural History**

Mr. Binaird pled guilty on April 16, 2015, to one count of Drug Dealing Heroin, a Class C felony. Mr. Binaird was sentenced to ten years at Level V, suspended after one year, for 18 months at Level III probation, with credit for 197 days previously served.<sup>1</sup> Mr. Binaird, with the assistance of counsel, then filed a motion to withdraw his guilty plea on June 4, 2015. After briefing and argument, The Honorable Vivian L. Medinilla issued her decision denying Mr. Binaird's motion to withdraw his guilty plea.<sup>2</sup> Mr. Binaird's counsel then filed a motion for Reargument on January 29, 2016. While that motion was pending, on April 13, 2016, Mr. Binaird, acting *pro se*, filed the instant motion for postconviction relief against his then counsel, Ms. Woloshin. That motion was referred to the undersigned Commissioner on April 22, 2016. On April 26, 2016, Judge Medinilla denied Mr. Binaird's Motion for Reargument.<sup>3</sup> A scheduling order as to Mr. Binaird's motion

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<sup>1</sup> Mr. Binaird is currently serving a VOP sentence and has not begun the probationary portion of this sentence as of the date of this report.

<sup>2</sup> *State v. Binaird*, 2016 WL 358990 (Del. Super. Jan. 22, 2016).

<sup>3</sup> *State v. Binaird*, 2016 WL 1735504 (Del. Super. Apr. 26, 2016).

for postconviction relief was issue on April 28, 2016. However, at the request of Mr. Binaird, the pending motion for postconviction relief was stayed on May 11, 2016, so he could pursue an appeal to the Delaware Supreme Court with the assistance of Ms. Woloshin. On January 18, 2017, the Delaware Supreme Court denied the appeal and affirmed the judgment against Mr. Binaird on the basis of and for the reasons stated in Judge Medinilla’s decisions.<sup>4</sup>

The facts surrounding Mr. Binaird’s crimes are not relevant to deciding his claims and need not be recited here. Based upon my review of Mr. Binaird’s Motion I do not see the need for an evidentiary hearing, nor for additional briefing. The arguments made by Mr. Binaird 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.

Mr. Binaird’s claims for postconviction relief, quoted verbatim, are as follows:

- Ground One: Ineffective [Assistance of] Counsel; failing to investing chemist Phillips.
- Ground Two: Ineffective [Assistance of] Counsel; coerced to take guilty plea.
- Ground Three: Withdraw guilty plea; State withheld evidence and deliberately lied.

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<sup>4</sup> *Zakuon A. Binaird v. State of Delaware*, No. 270, 216 (Del. Jan. 18, 2017).

## 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.<sup>5</sup> The first prong requires the defendant to 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.<sup>6</sup>

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.<sup>7</sup> Most germane to this case, mere allegations of ineffectiveness will not suffice—a defendant must make and substantiate concrete allegations of actual prejudice.<sup>8</sup> An error by defense counsel, even if professionally

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<sup>5</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 697.

<sup>8</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.<sup>9</sup>

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.<sup>10</sup> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided.<sup>11</sup>

### Analysis

The procedural requirements of Superior Court Criminal Rule 61 must be addressed before considering the merits of any argument.<sup>12</sup> Mr. Binaird's Motion was timely filed and is not repetitive, thus satisfying the requirements of Rule 61 (i)(1) and (2).<sup>13</sup>

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<sup>9</sup> *Strickland*, 466 U.S.at 691.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See Younger*, 580 A.2d at 554.

<sup>13</sup> Rule 61(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 [].

(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.

However, Grounds One and Three are both procedurally barred as formerly adjudicated under Rule 61(i)(4). The substance of both of these arguments is nearly identical to what was raised, and quite vigorously pursued I might add, by Ms. Woloshin as part of Mr. Binarid's Motion to Withdraw his Guilty Plea, Motion for Rearmament and appeal to the Delaware Supreme Court. Specifically, Ms. Woloshin moved to allow Mr. Binaird to withdraw his guilty plea on the grounds that the State had intentionally failed to disclose exculpatory and impeachment evidence regarding the chemist who tested the drugs associated with Mr. Binaird's case. After extensive briefing and argument, Judge Medinillia denied Mr. Binaird's request in a written decision. Because the substance of these claims was raised below and previously ruled upon, Mr. Binaird cannot raise them again in this context.

As to Ground Two, "[i]n 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."<sup>14</sup>

Mr. Binaird alleges that he was "coerced" into accepting a guilty plea. However, he has proffered no specific facts or examples to explain how he was coerced by counsel. Outside of Mr. Binaird's conclusory allegations, there is nothing

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<sup>14</sup> *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2004) (Citing *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)).

in the record to indicate that he was not properly represented or advised by his lawyer before he entered his guilty pleas. In fact, all of the guilty plea paperwork indicates that Mr. Binaird was aware of exactly what he faced when he accepted the guilty plea offered by the State. More probable is that Mr. Binaird felt pressured to accept the guilty plea because had he gone to trial and been convicted, the State could have petitioned to have him sentenced as a Habitual Offender under 11 *Del. C.* § 4214(b)—whereupon he faced a mandatory life sentence.

**Conclusion**

For the foregoing reasons, Mr. Binaird's Motion should be **Denied**.

**IT IS SO RECOMMENDED.**

  
Bradley V. Manning,  
Commissioner

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