

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

February 3, 2014

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RE: *State vs. Jerry Henry*
ID #s 1201002933 & 1204003166
Motion for Postconviction Relief (R1)

Date Submitted: December 16, 2013

Dear Mr. Henry and Counsel:

On June 20, 2013, Mr. Henry filed a timely postconviction motion pursuant to Superior Court Criminal Rule 61 ("Rule 61").

Alexander Funk, Esquire was appointed to represent Mr. Henry ("Defendant"). Mr. Funk requested additional time to review, investigate, and amend the motion. This extension was granted. Subsequently on November 14,

2013, Mr. Funk filed a motion to withdraw pursuant to Rule 61 (e)(2). The Defendant was sent a copy of this Motion. By correspondence to Defendant on November 22, 2013, he was advised by the Court that his appointed attorney found no merit in his Rule 61 allegations and if he chose to file a response, it was to be received by the Court on or before December 16, 2013. Nothing has been received and therefore the matter is ripe for a decision.

BACKGROUND

On September 18, 2012, Defendant pled guilty to Drug Dealing; Aggravated Possession (Tier 5); Attempted Robbery in the First Degree; Possession of a Firearm during the Commission of a Felony; and Conspiracy. The Defendant acknowledged he was an habitual offender pursuant to 11 *Del. C.* § 4214(a). Defendant also acknowledged he was in violation of probation for Trafficking in Cocaine, Racketeering as well as lesser violations.

The negotiated sentence was found to be reasonable and appropriate and it was imposed. On the Drug Dealing charge, the sentence was fifteen (15) years Level 5 pursuant to 11 *Del. C.* § 4214(a); on the Firearm charge the sentence was five (5) years Level 5; and on the Attempted Robbery charge, the sentence was twenty-five (25) years Level 5, suspended after five (5) years for probation. On the remaining charges and the violations of probation, the Defendant received either a suspended sentence or the Violation of Probation was discharged.

DEFENDANT'S RULE 61 ALLEGATIONS

The Defendant complains that his attorney was ineffective. He complains his attorney (i) consorted with the Prosecutor in threatening that he faced a potential life sentence if convicted at trial, (ii) did not conduct an adequate investigation, and (iii) generally scared him into pleading guilty because of the downside potential of going to trial.

The Defendant complains that the prosecutor threatened him with the potential downside consequence of going to trial because of the potential habitual offender status. If convicted at trial, and the habitual offender status was applied to the violent felonies, the Defendant faced a *de facto* life sentence.

The Defendant alleges a violation of this Fifth Amendment Rights in that he alleges his confession was not really an honest confession and he confessed to help others (i.e. he alleges he just told the detective what the detective wanted to hear).

The Defendant believes a notarized affidavit from a witness would have subjected the State's case to adversarial testing at trial.

Finally, Defendant alleges the search warrant was unconstitutional because the probable cause was based on drug deals for which he never was charged.

APPOINTED COUNSEL'S NOVEMBER 14, 2013 SUBMISSION

Mr. Funk reported to the Court that he should be permitted to withdraw as

counsel because after (i) meeting with the Defendant; (ii) reviewing prior counsel's file including all discovery, police reports, DVDs and interviews; (iii) reviewing the transcripts; and (iv) reviewing the relevant case law, he could not professionally advocate the Defendant's position. The Defendant chose not to respond.

DECISION

Presently the Court has before it a set of allegations by the Defendant that everyone has done him wrong. The Defendant complains that the drug buys used for probable cause for the search warrant should not be considered for probable cause because he was not arrested for them. He is wrong as the purpose of the drug buys were to establish probable cause and no arrest was required. He complains his confession was made to help others. He complains that his lawyer did not conduct an adequate investigation, but does not reveal what an adequate investigation would have discovered. He also complains his lawyer and the prosecutor leaned on him to plead guilty, instead of going to trial, by warnings of a possible life sentence.

The bottom line is that Defendant's appointed attorney conducted a review of these claims, including interviewing the Defendant. Appointed counsel found no basis to advocate the Defendant's position in light of appointed counsel's findings and conclusions.

Simply put, appointed counsel found nothing to allow the Defendant to withdraw his guilty plea based on the colloquy and statements he made at the time he entered his guilty plea.

After informing the Court he was going to be truthful, the Defendant acknowledged he was waiving his trial and appellate rights, that he was satisfied with his attorney, that neither his attorney or “anyone on Earth” was forcing him to plead guilty, and that he was in fact guilty of the crimes.

Additionally, the following conversation took place with the Defendant:

THE COURT: Mr. Henry, you find yourself at the end of a very unfortunate street; a very unfortunate place. You’re looking at a lot of time. But what you’re telling me today—and correct me if I’m wrong—is that you admit you committed these awful offenses; you know you’ve got to go to jail for a long time; you know that by doing this, you’ll be giving up your trial and appeal rights; and you’ll be laying everything in the lap of the judge that makes the final decision; is that correct?

THE DEFENDANT: Yes.

THE COURT: If you have any problems; complaints; headaches, with anyone at all that gets in the way of you entering this plea knowingly, voluntarily and intelligently, as the pastor says at church weddings, speak now or forever hold your peace. Don’t be writing me or another judge saying, I want to take it all back because my lawyer didn’t do me right. He didn’t do what I asked him; or, he left things undone; or, he did things the wrong way and the prosecutor did things trickily and the

police entrapped me and probation was lousy and, Your Honor, you were blind and you didn't know what was going on and my family pressured me into doing this.

So if you've got any issue; you've got any problems; you've got any headaches with anyone—anyone on Earth—that gets in the way of this plea, we speak now or, as the pastor says, we forever hold our peace.

Do you have any issues, problems or headaches?

THE DEFENDANT: No.

THE COURT: You're asking me to accept the guilty pleas to these charges?

THE DEFENDANT: Yes.

THE COURT: —understanding full well the consequences?

THE DEFENDANT: Yes.

THE COURT: Understanding that you've got to go to jail for a long time?

THE DEFENDANT: Yes.

CONCLUSION

Based upon the aforementioned, the Court is satisfied that the Defendant has not sustained his burden of proof to establish any of the allegations in the Rule 61 Motion. The Defendant's statements at the time the plea was entered belie his subsequent claims. He admitted he was guilty which was the same thing he

confessed to.¹ He shall not get another bite out of the apple.

Mr. Funk's Motion to Withdraw is granted. The Postconviction Motion is hereby denied.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

THG/ymp

pc: Prothonotary

¹*Savage v. State*, 2003 WL 214963, at *2 (Del. Jan. 31, 2003) (*citing Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)). (Absent clear and convincing evidence to the contrary, the Defendant is bound by his representations to the Court, especially when he reported he would be truthful).

