## IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
Plaintiff,	) )	
v.	)	Cr. ID. No. 1107000268
LAMMOT SCRUGGS,	)	
Defendant.	) ) )	

Submitted: November 26, 2013 Decided: January 9, 2014

# COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED AND COUNSEL'S MOTION TO WITHDRAW SHOULD BE GRANTED.

Phyllis R. Scully, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

John A. Barber, Esquire, 1232 N. King Street, Suite 300, Wilmington, Delaware, 19801, Attorney for Defendant Lammot Scruggs.

PARKER, Commissioner

This 9<sup>th</sup> day of January, 2014, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

### BACKGROUND AND PROCEDURAL HISTORY

- Defendant Lammot Scruggs was found guilty by a Superior Court jury of 1 Terroristic Threatening and Contempt of a Protection From Abuse Order arising out of Defendant's actions that occurred on or about July 1, 2011. The jury was deadlocked on the additional charges of Burglary in the Second Degree, Offensive Touching and Endangering the Welfare of a Child.
- 2. Before a re-trial on those additional charges, on March 6, 2012, Defendant Scruggs pled guilty to Burglary in the Second Degree. In exchange for the guilty plea, the State dismissed the remaining charges and did not seek to have Defendant Scruggs sentenced as a habitual offender. 1
- 3. On March 30, 2012, Defendant Scruggs was sentenced to a total of 7 years of Level V incarceration, to be suspended after 4 years, for 6 months at Level III probation.
- 4. Defendant filed a direct appeal to the Delaware Supreme Court. On direct appeal, Defendant's counsel filed a brief and a motion to withdraw pursuant to Superior Court Criminal Rule 26(c). On October 15, 2012, the Delaware Supreme Court affirmed the judgment of the Superior Court.<sup>2</sup>

#### RULE 61 MOTION AND COUNSEL'S MOTION TO WITHDRAW

5. On April 2, 2013, Defendant filed a pro se motion for postconviction relief. In Defendant Scrugg's pro se motion, he raised three claims. He claimed: 1) that his counsel was ineffective for failing to investigate whether the petition for the Protection

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<sup>&</sup>lt;sup>1</sup> March 6, 2012 Plea Agreement; *Scruggs v. State*, 2012 WL 4897391, at \*1 (Del. 2012). <sup>2</sup> *Scruggs v. State*, 2012 WL 4897391 (Del. 2012).

from Abuse Order ("PFA") introduced at trial was filed correctly; 2) that the State's amendment of the indictment on the day of trial was in error as it did not give the defense adequate notice to prepare a defense; and 3) that the PFA was not filed correctly in that he did not have notice of the petition for the PFA and therefore did not have an opportunity to defend against it.

- 6. Defendant was thereafter assigned counsel. On October 1, 2013, assigned counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e)(2).
- 7. Superior Court Criminal Rule 61(e)(2) provides that:

If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

8. In the motion to withdraw, Defendant's Rule 61 counsel represented that, after undertaking a thorough analysis of the Defendant's claims, counsel has determined that the claims are so lacking in merit that counsel cannot ethically advocate any of them.<sup>3</sup> Counsel further represented that, following a thorough review of the record, counsel was not aware of any other substantial claim for relief available to Defendant Scruggs.<sup>4</sup> Defendant's Rule 61 counsel represented to the court that there are no potential meritorious grounds on which to base a Rule 61 motion and has therefore sought to withdraw as counsel.<sup>5</sup>

<sup>5</sup> *Id*.

<sup>&</sup>lt;sup>3</sup> See, Superior Court Docket No. 44- Defendant's Rule 61 counsel's Motion to Withdraw.

i Id.

- 9. Defendant's Rule 61 counsel advised Defendant of his motion to withdraw and advised Defendant that he had the right to file a response thereto within 30 days, if Defendant desired to do so.<sup>6</sup> Defendant's response was due on or before October 31, 2013. Defendant did not file a response to counsel's motion to withdraw.
- 10. In order to thoroughly evaluate Defendant's Rule 61 motion, and to determine whether Defendant's Rule 61 counsel's motion to withdraw should be granted, the court enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claim(s).
- 11. In deciding Defendant's Rule 61 motion and counsel's motion to withdraw, the court should be satisfied that Rule 61 counsel made a conscientious examination of the record and the law for claims that could arguably support Defendant's Rule 61 motion. In addition, the court should conduct its own review of the record in order to determine whether Defendant's Rule 61 motion is so totally devoid of any, at least, arguable claims.<sup>8</sup>

### **DEFENDANT'S RULE 61 MOTION IS WITHOUT MERIT**

12. In his Rule 61 motion, Defendant claims that his counsel was ineffective for failing to investigate whether the petition for the Protection from Abuse Order ("PFA") introduced at trial was filed correctly. Defendant also claims that the State's amendment of the indictment on the day of trial was in error as it did not give the defense adequate notice to prepare a defense, and that the PFA was not filed correctly in that he did not

<sup>&</sup>lt;sup>6</sup> See, Superior Court Docket No. 45- Defendant's Rule 61 counsel's letter dated September 30, 2013.

<sup>&</sup>lt;sup>7</sup> Super.Ct.Crim.R. 61(g)(1) and (2); Superior Court Docket No. 46.

<sup>&</sup>lt;sup>8</sup> See, for example, *Roth v. State of Delaware*, 2013 WL 5918509, at \*1 (Del. 2013)(discussing standard to be employed when deciding counsel's motion to withdraw on a defendant's direct appeal.).

have notice of the petition for the PFA and therefore did not have an opportunity to defend against it.

- 13. In order to prevail on an ineffective assistance of counsel claim, 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. 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 him 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 10
- 14. In the context of a plea challenge, the Defendant must establish that his counsel's conduct was deficient and that his counsel's deficient actions were so prejudicial that there was a reasonable probability that, but for counsel's deficiencies, the defendant would not have taken a plea but would have insisted on going to trial."11
- 15. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice. 12
- In this case, Defendant first claims that his counsel was ineffective for failing to 16. investigate whether the PFA was valid. However, the trial transcript establishes that a certified copy of a valid PFA was admitted into evidence at trial. 13 Defendant's

<sup>&</sup>lt;sup>9</sup> Strickland v. Washington. 466 U.S. 668, 687-88, 694 (1984).

<sup>&</sup>lt;sup>11</sup> Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Somerville v. State, 703 A.2d 629, 631 (Del. 1997); Premo v. Moore, 131 S.Ct. 733, 739-744 (2011).

<sup>&</sup>lt;sup>12</sup> Younger v. State, 580 A.2d 552, 556 (Del. 1990).

<sup>&</sup>lt;sup>13</sup> January 18, 2012 Trial Transcript, at pg. 31.

contention that his counsel was somehow ineffective for failing to investigate whether the PFA was valid is without merit.

- 17. In that same vein, Defendant's third claim is that because the PFA was not filed correctly he did not receive notice of the petition for the PFA and did not have an opportunity to defend against it. This argument is basically a recouching of Defendant's first claim. Again, a certified copy of a valid PFA was admitted into evidence at trial. 14
- 18. Moreover, Defendant admitted at trial that he was aware that there was a PFA in effect. 15 In addition, the victim testified at trial that, on the night at issue, Defendant had the PFA papers in his hand. 16 The victim testified that, on the night at issue, Defendant pushed out her window air-conditioning unit and put the PFA papers through the window. 17 Consequently, the trial record establishes that Defendant was aware of, and in possession of, the PFA documents on the night at issue. This claim, like the first claim, is without merit.
- 19. Defendant's final claim is that the State's amendment of the indictment on the day of trial was in error as it did not give the defense adequate notice to prepare a defense. At trial, the court granted the State's motion to amend the indictment on the Burglary Second Degree charge, over defense counsel's objection. 18 The amendment added the violation of the PFA as a predicate offense for the Burglary Second Degree in the alternative to the already existing predicate Offensive Touching charge. 19

 <sup>&</sup>lt;sup>15</sup> January 18, 2012 Trial Transcript, at pg. 57.
 <sup>16</sup> January 18, 2012 Trial Transcript, at pgs. 19, 27-28.

<sup>&</sup>lt;sup>18</sup> January 18, 2012 Trial Transcript, at pgs. 3-4.

- 20. First, as a general matter, Superior Court Criminal Rule 7(e) allows the State to amend the indictment prior to verdict "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The court held that under the circumstances of this case, the defendant had adequate notice of the underlying facts and the charge, and that therefore the State would be permitted to amend the indictment.<sup>20</sup>
- 21. Second, this claim is now moot. At the first trial, the jury was deadlocked on the Burglary charge. Defendant pled guilty prior to the second trial. Hence, Defendant's argument is moot at this juncture. The defense was on sufficient notice of the amendment for the second trial and had sufficient time to prepare.
- 22. Third, since Defendant's plea was entered into voluntarily, intelligently and knowingly, Defendant waived his right to challenge any alleged errors or defects occurring prior to the entry of his plea, even those of constitutional proportions.<sup>21</sup> Defendant's claim that the indictment should not have been amended was waived when Defendant voluntarily entered his plea. Indeed, Defendant represented to the court at the time he entered his guilty plea to the Burglary Second Degree charge that he understood he was giving up his right to a trial on this charge.<sup>22</sup> Defendant represented to the court that he understood he was giving up his right to take an appeal and his right to challenge anything concerning his guilty plea to the Burglary Second Degree charge.<sup>23</sup>
- 23. Defendant's ineffective assistance claim(s) is undermined by the record and fails to satisfy Strickland. Defendant fails to state a legitimate ground for relief against his

See, January 18, 2012 Trial Transcript, at pgs. 3-4.
 Somerville v. State, 703 A.2d 629, 632 (Del. 1997); Modjica v. State, 2009 WL 2426675 (Del. 2009); Miller v. State, 840 A.2d 1229, 1232 (Del. 2004).

<sup>&</sup>lt;sup>22</sup> March 6, 2012 Plea Colloquy, at pgs. 6-8.

<sup>&</sup>lt;sup>23</sup>March 6, 2012 Plea Colloguy, at pgs. 6-9.

counsel. The conduct of defense counsel does not appear to be deficient in any regard

nor has Defendant shown any actual prejudice allegedly as a result thereof.

24. The court has reviewed the record carefully and has concluded that Defendant's

Rule 61 motion is without merit and devoid of any other substantial claims for relief.

The court is also satisfied that Defendant's Rule 61 counsel made a conscientious effort

to examine the record and the law and has properly determined that Defendant does not

have a meritorious claim to be raised in his Rule 61 motion.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief

should be denied and Defendant's counsel's motion to withdraw should be granted.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary

cc: Timothy J. Weiler, Esquire

cc: Mr. Lammot Scruggs

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