

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

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID. No. 1104015690
	)	
DAVID L. MATTHEWS,	)	
	)	
Defendant.	)	
	)	

Submitted: May 17, 2014

Decided: May 29, 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.**

Kate S. Keller, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Dennis Bruce Phifer, Esquire, 121 Mute Swan Place, Newark, Delaware 19711, Attorney for Defendant David L. Matthews.

PARKER, Commissioner

This 29<sup>th</sup> day of May, 2014, upon consideration of Defendant's Motion for Postconviction Relief and Defendant's Rule 61 Counsel's Motion to Withdraw, it appears to the Court that:

**BACKGROUND AND PROCEDURAL HISTORY**

1. Following a two day trial, on November 2, 2011, Defendant David L. Matthews was found guilty by a Superior Court jury of Robbery in the First Degree.

2. Prior to sentencing, the State filed a motion to declare Defendant a habitual offender pursuant to 11 *Del. C.* § 4214(b).<sup>1</sup> If granted, sentencing under §4214(b) would have resulted in a sentence of life in prison.

3. Sentencing was scheduled to take place on March 30, 2012. On that date, the State requested a continuance to refile its habitual offender petition to seek sentencing under 11 *Del. C.* §4214(a), in recognition that there were insufficient predicate crimes to qualify for sentencing under §4214(b).<sup>2</sup> If sentenced under §4214(a), Defendant would have been facing a minimum mandatory sentence of 25 years at Level V, without the opportunity for any of the 25 year minimum mandatory sentence to be suspended and without the opportunity to earn "good time" credits.<sup>3</sup>

4. Defendant's trial counsel opposed the State's continuance request and the court denied the State's request for a continuance.<sup>4</sup>

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<sup>1</sup> See, Superior Court Docket No. 21.

<sup>2</sup> March 30, 2012 Sentencing Transcript, at pgs. 2-5.

<sup>3</sup> See, 11 *Del. C.* § 4214(a) ("any person sentenced pursuant to this subsection shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this title for the 4<sup>th</sup> or subsequent felony which forms the basis of the State's petition to have the person declared to be a habitual criminal. . ."). Thus, Defendant would have been sentenced to at least 25 years minimum mandatory at Level V and would have been ineligible for good time credits.

<sup>4</sup> March 30, 2012 Sentencing Transcript, at pgs. 3-5.

5. Defendant was thereafter sentenced as a non-habitual criminal to a total of 25 years of Level V incarceration, to be suspended after 14 years, for 2 years at Level III probation.

6. Defendant filed a direct appeal to the Delaware Supreme Court. On October 15, 2012, the Delaware Supreme Court found Defendant's appeal to be without merit and affirmed the conviction and sentence of the Superior Court.<sup>5</sup>

### **FACTS**

7. The charge at issue stems from the following facts. These facts as set forth herein were derived principally from the recitation of facts contained in the Delaware Supreme Court's opinion on direct appeal and from the trial testimony of the bank teller, Ms. KerryAnn Sterling.<sup>6</sup>

8. On April 19, 2011, Kerryann Sterling was engaged in her duties as a teller at the Wells Fargo Bank in Meadowwood when a man wearing a black jacket with distinctive green and yellow markings approached her station. The man threw two handwritten notes onto Sterling's station which demanded that she give him all of the cash in her drawer.<sup>7</sup>

9. The man induced the teller to read the notes by gesturing with his head- nodding in their direction. His right hand remained concealed at all times. At no time did he appear to communicate audibly, nor did he remove his hoodie.<sup>8</sup> The unusual behavior of the man alarmed the teller. She quickly scanned one of the notes, the shorter note of the two, and "realized that it said something about cash or I'll blow your f'ing head off."

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<sup>5</sup> *Matthews v. State*, 2012 WL 4879465 (Del.).

<sup>6</sup> *Matthews v. State*, 2012 WL 4879465 (Del.); November 1, 2011 Trial Transcript, at pgs. 18-42.

<sup>7</sup> *Matthews v. State*, 2012 WL 4879465, at \* 1 (Del.).

<sup>8</sup> November 1, 2011 Trial Transcript, at pgs. 21-35.

The robber made gestures with his hand like he was going to take something out of his pocket and shoot her.<sup>9</sup> She interpreted the phrase “blow your f’ing head off” to mean “Use a gun to shoot me.”<sup>10</sup>

10. Sterling gave the man the money in the drawer, totaling \$1,077, and the robber exited the bank.<sup>11</sup> She gave the man the money because she thought he was going to shoot her if she did not comply.<sup>12</sup>

11. Within minutes, Corporal John Jefferson of the Delaware State Police responded to a radio dispatch for the bank robbery, and observed Defendant Matthews walking along the road less than a mile from the bank. As Corporal Jefferson began to question Matthews, Matthews walked over to Corporal Jefferson’s vehicle and placed his hands on the Officer’s car. Corporal Jefferson handcuffed Matthews and placed Matthews in his vehicle to transport Matthews to the bank for identification. Corporal Jefferson observed that Matthews was carrying a coat which matched the description of the robber’s clothing. While being transported, Matthews stated: “I can’t even rob a bank.”<sup>13</sup>

12. At the bank, Officers searched Matthews and discovered \$1,077 in cash concealed in his sock. Officers also discovered the two demand notes the robber had given Sterling. The Officers conducted a “show up” identification, in which Sterling identified Matthews as the man who robbed her.<sup>14</sup>

13. The Delaware Supreme Court observed that the evidence against Defendant was overwhelming. The evidence included: Matthews’ presence less than a mile from the

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<sup>9</sup> November 1, 2011 Trial Transcript, at pg. 41-42.

<sup>10</sup> November 1, 2011 Trial Transcript, at pg. 30.

<sup>11</sup> *Matthews v. State*, 2012 WL 4879465, at \* 1 (Del.).

<sup>12</sup> November 1, 2011 Trial Transcript, at pg. 41.

<sup>13</sup> *Matthews v. State*, 2012 WL 4879465, at \* 1 (Del.).

<sup>14</sup> *Matthews v. State*, 2012 WL 4879465, at \* 1 (Del.).

bank within minutes after the robbery carrying a coat which matched the description of what the robber was wearing; Matthews' admission to the police officer that transported him to the identification that he "can't even rob a bank"; Matthews' possession of the exact amount of money stolen from the bank; and the two handwritten notes discovered on Matthews which matched the demand notes used in the robbery.<sup>15</sup>

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

14. On December 27, 2012, Defendant filed a *pro se* motion for postconviction relief. Before making a recommendation, the record was enlarged and Defendant's trial counsel was directed to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. In turn, the State was also directed to, and did, file a response to the motion.<sup>16</sup>

15. After the submissions had been received by Defendant's trial counsel and the State, the court appointed counsel to assist Defendant on his Rule 61 motion. On or about August 23, 2013, counsel was appointed.

16. On April 17, 2014, assigned counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e)(2).

17. 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.

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<sup>15</sup> *Matthews v. State*, 2012 WL 4879465, at \* 1-2 (Del.).

<sup>16</sup> See, Super.Ct.Crim.R. 61(g)(1)and (2).

18. 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>17</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 Matthews.<sup>18</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>19</sup>

19. 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>20</sup> Defendant's response was due on or about May 16, 2014. Defendant has not filed a response to counsel's motion to withdraw.

20. In order to evaluate Defendant's Rule 61 motion, and to determine whether Defendant's Rule 61 counsel's motion to withdraw should be granted, 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 devoid of any, at least, arguable postconviction claims.<sup>21</sup>

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<sup>17</sup> See, Superior Court Docket No. 49- Defendant's Rule 61 counsel's Motion to Withdraw.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See, Superior Court Docket No. 49- Defendant's Rule 61 counsel's letter dated April 16, 2014, accompanying his Motion to Withdraw.

<sup>21</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).

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

21. In his Rule 61 motion, Defendant raises several ineffective assistance of counsel claims. Defendant contends that his trial counsel was ineffective for: 1) failing to argue for the lesser-included offense of Robbery Second Degree at trial; and 2) failing to investigate and read the police report(s). Defendant further claims that his trial counsel was ineffective for failing to convince the State to offer a plea to Robbery in the Second Degree and that both his trial counsel and appellate counsel were ineffective for failing to communicate. All of Defendant's claims are without merit. Each claim will be addressed below.

22. 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.<sup>22</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 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.<sup>23</sup>

23. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>24</sup> There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.<sup>25</sup> Furthermore, an error by counsel, even if professionally unreasonable, does

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<sup>22</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>23</sup> *Id.*

<sup>24</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>25</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

not warrant setting aside the judgment of conviction if the error had no effect on the judgment.<sup>26</sup>

24. Turning to the subject action, Defendant first claims that his trial counsel failed to make an argument at trial for the lesser included offense of Robbery in the Second Degree. Defendant is incorrect in this regard. Defendant's trial counsel did argue for the lesser included offense of Robbery in the Second Degree.<sup>27</sup> Indeed, Defendant's trial counsel's closing statement was predominately dedicated to arguing that Defendant should be found guilty of Robbery in the Second Degree rather than Robbery in the First degree because evidence of the presence and/or threat of a gun was lacking.<sup>28</sup> Furthermore, the jury was instructed on the lesser included charge of Robbery Second Degree.<sup>29</sup> Defendant's Rule 61 counsel agreed that upon his review of the record it was clear that Defendant's trial counsel "vigorously advocated" for the lesser included charge of Robbery in the Second Degree.<sup>30</sup> This claim lacks a factual foundation and is without merit.

25. Defendant next claims that his trial counsel was ineffective because counsel failed to investigate and read the police report(s) which would have indicated that Defendant did not have a gun when he robbed the bank. Specifically, Defendant contends that the CAD (Computer Assisted Dispatch) report should have been introduced at trial to establish that he did not have a gun when he robbed the bank.

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<sup>26</sup> *Strickland*, 466 U.S. at 687-88, 694.

<sup>27</sup> November 2, 2011 Trial Transcript, at pgs. 102-104 ("Every time everyone took the stand, they said no gun, no gun. . . This is a robbery in the second degree. . . And I can't beat this dead horse for another minute: It is what it is. He robbed Wells Fargo without a gun.")

<sup>28</sup> *Id.*

<sup>29</sup> November 2, 2011 Trial Transcript, at pgs. 114-115.

<sup>30</sup> Superior Court Docket No. 49- Defendant's Rule 61 counsel's motion to withdraw, at pg. 9.

26. First, Defendant's trial counsel denies that he was ineffective in any respect or that he did not diligently represent Defendant at trial. Second, Defendant could never establish that any prejudice resulted from Defendant's trial counsel not taking any additional steps (to the extent there was any additional step that had not been taken) to establish that Defendant did not have a gun when he robbed the bank because that issue was undisputed at trial and emphasized by Defendant's trial counsel at every opportunity. The record undisputedly revealed that no witness saw a gun and that no gun was recovered.

27. There can be no question that Defendant's trial counsel was well aware that Defendant did not have a gun when he robbed the bank because counsel vigorously argued this point at closing.<sup>31</sup> Defendant's trial counsel argued to the jury that "[e]very time everyone took the stand, they said no gun, no gun."<sup>32</sup>

28. The issue in this case was not whether Defendant actually had a gun, but whether through his words or conduct he implied that he had a gun. In order to be convicted of Robbery in the First Degree, it is not required that the defendant actually have or brandish a weapon. It is sufficient to establish the elements of Robbery in the First Degree if it is established that by words or conduct the defendant represented that he was in possession of a deadly weapon.<sup>33</sup>

29. In this case, the record revealed that at least one of the notes produced by Defendant to the teller contained the threat that Defendant would "blow her f'ing head off" if she did not give the money to him. She understood that to mean that Defendant would use a gun to shoot her if she did not give money to him. The teller was also

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<sup>31</sup> November 2, 2011 Trial Transcript, at pgs. 102-104.

<sup>32</sup> November 2, 2011 Trial Transcript, at pg. 102.

<sup>33</sup> See, 11 *Del. C.* § 832.

alerted to the fact that Defendant kept his right hand in his coat pocket throughout the robbery and made gestures with that hand consistent with the idea that he had a gun. The teller testified that she understood that Defendant would shoot her if she did not comply with his demand for money.

30. Defendant's Rule 61 counsel concluded that even if the CAD (Computer Assisted Dispatch) report had been introduced at trial, it is unlikely it would have created any reasonable doubt in the minds of the jury. The CAD report was silent on the issue of the presence of weapon, and it purports to have been filed by someone other than the complaining witness. It did not plainly controvert the testimony of the primary percipient witness.<sup>34</sup>

31. 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.

32. Defendant's final claim is that his trial counsel was ineffective for failing to convince the State to offer a plea to Robbery in the Second Degree and for failing to communicate with Defendant on trial strategy. Defendant also claims that his appellate counsel was ineffective for failing to consult with him on the direct appeal.

33. As to Defendant's claim that his trial counsel was ineffective for failing to convince the State to offer a plea to Robbery in the Second Degree, Defendant's trial counsel advises that the State refused to offer Defendant a plea to Robbery in the Second Trial. The State agrees that it never offered Defendant a plea to Robbery in the Second Degree because it did not believe he was entitled to such a plea offer.<sup>35</sup>

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<sup>34</sup> Motion to Withdraw as Counsel, at pg. 10.

<sup>35</sup> State's Response to Defendant's Motion for Postconviction Relief, at pgs. 4-5.

34. A defendant has no constitutional right or other legal entitlement to a plea offer.<sup>36</sup> Since the State does not have a duty to extend any plea offer to a defendant, this Defendant cannot complain that his counsel was ineffective because counsel could not convince the State to offer the plea deal Defendant wanted to accept. This claim is without merit.

35. As to Defendant's claim that his trial counsel was ineffective for failing to communicate regarding trial strategy and that his appellate counsel was ineffective for failing to communicate regarding appellate issues, these allegations are conclusory and lacking in any specifics. Mere allegations of ineffectiveness will not suffice. The defendant must make and substantiate concrete allegations of actual prejudice. Defendant fails to explain what his counsel failed to communicate and thereafter to explain how he suffered actual prejudice as a result thereof. Defendant has not met the *Strickland* standard of demonstrating that, but for, the supposed ineffective assistance of counsel, the result of the proceeding would have been different. Conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>37</sup>

36. Defendant's Rule 61 counsel concluded that his review of the record does not support the claim that trial counsel was unprepared for trial and that given the large quantum of evidence establishing guilt, it is unlikely that closer communication and collaboration would have produced a different result.<sup>38</sup> Similarly, appellate counsel has a paramount duty to fashion appeals that are grounded in existing law or in the interest of justice to fashion an argument for a good faith extension or revision of existing law. In the absence of a *per se* rule, the alleged failure of appellate counsel to collaborate with

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<sup>36</sup> *Washington v. State*, 844 A.2d 293, 296 (Del. 2004).

<sup>37</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>38</sup> Motion to Withdraw as Counsel, at pg. 10.

Defendant in the preparation of his appeal, under the facts of this case, does not appear to be of constitutional consequence.<sup>39</sup> Moreover, Defendant has failed to allege what meritorious appealable issues existed that should have been raised, but was not raised, on direct appeal.

37. Defendant's Rule 61 counsel noted that perhaps the greatest service that Defendant's trial counsel provided was during the sentencing phase by opposing the State's continuance request to modify its habitual status petition from disposition under §4212(b), to disposition under §4214(a). Apparently, one of the charges alleged as a predicate offense did not qualify as a §4214(b) crime. Defendant was eligible to be sentenced under §4214(a), but another felony conviction would have to be alleged in the petition.<sup>40</sup> The court denied the State's continuance request and did not sentence Defendant as a habitual offender.

38. As a result, rather than being sentenced to 25 years minimum mandatory at Level V, Defendant was sentenced to 25 years at Level V, suspended after 14 years for 2 years at Level III. The required minimum mandatory time under this sentencing regimen was not only materially shorter but it also allowed other collateral benefits, such as the ability to earn good time credits.

39. Defendant's claims that his counsel provided ineffective assistance are undermined by the record and fail to satisfy *Strickland*. The conduct of defense counsel does not appear to be deficient nor has Defendant shown any actual prejudice allegedly as a result thereof.

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<sup>39</sup> Motion to Withdraw as Counsel, at pg. 10.

<sup>40</sup> March 30, 2012 Sentencing Transcript, at pgs. 2-3.

40. 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.**

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Commissioner Lynne M. Parker

oc: Prothonotary  
cc: Raymond D. Armstrong, Esquire  
cc: Mr. David L. Matthews