

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 1104015868
)	
OMAR L. BROWN,)	
)	
Defendant.)	
)	

Submitted: November 17, 2013

Decided: January 15, 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.**

Brenna A. Dolphin, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Brian J. Chapman, Esquire, 1232 N. King Street, Suite 300, Wilmington, Delaware,
19801, Attorney for Defendant Omar J. Brown.

PARKER, Commissioner

This 15th day of January, 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. On April 19, 2011, the Wilmington Police Department arrested Defendant Omar L. Brown. Defendant Brown was indicted on a number of charges including: Trafficking in Heroin between 10 and 50 grams, Trafficking in Cocaine greater than 100 grams, Possession with Intent to Deliver Cocaine, Possession with Intent to Deliver Heroin, Maintaining a Dwelling for Keeping Controlled Substances, Maintaining a Vehicle for Keeping Controlled Substances, Forgery Second Degree, Possession of Drug Paraphernalia and Conspiracy Second Degree, along with other misdemeanor charges and traffic violations.

2. On November 23, 2011, Defendant Brown pled guilty to Possession with Intent to Deliver Heroin, Possession with Intent to Deliver Cocaine, Conspiracy Second Degree, Possession of Drug Paraphernalia and Forgery Second Degree. In exchange for the guilty plea, the State dismissed the remaining charges including the trafficking in heroin and trafficking in cocaine charges.¹ The State agreed to recommend that Defendant be sentenced to a total non-suspended period of 8 years of Level V incarceration, which was the minimum mandatory term of incarceration, followed by eighteen months of Level III probation.²

¹ November 23, 2011 Plea Agreement.

² November 23, 2011 Plea Agreement.

3. On November 23, 2011, following the entry of Defendant Brown's guilty plea, Defendant was immediately sentenced to a total non-suspended period of 8 years of Level V incarceration, followed by eighteen months of Level III probation.

4. On June 3, 2011, Defendant Brown had been sentenced in a different case in which Defendant pled guilty to, *inter alia*, possession of cocaine with intent to deliver, stemming from Defendant's actions which occurred on or about September 16, 2010. In that case, given Defendant Brown's criminal record, Defendant was sentenced as a habitual offender to a total non-suspended period of three years at Level V.³

5. In the subject action, Defendant Brown did not disclose that he had previously been declared a habitual offender. In fact, on the Immediate Sentencing Form dated November 23, 2011, Defendant Brown appears to have misled the court by claiming that he had never previously been declared a habitual offender.⁴

6. In the subject action, Defendant did not file a direct appeal to the Delaware Supreme Court.

RULE 61 MOTION AND COUNSEL'S MOTION TO WITHDRAW

7. On November 16, 2012, Defendant filed a *pro se* motion for postconviction relief raising three ineffective assistance of counsel claims. 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. Thereafter, the State filed a response to the motion.⁵

³ See, *Brown v. State*, 2011 WL 5319900, at *1 (Del. 2011); *State v. Omar Brown*, Case No. 1009013840-Superior Court Docket No. 29.

⁴ See, Immediate Sentencing Form dated November 23, 2011- Q: Have you previously been declared a §4214 habitual offender? A: No.”

⁵ See, Super.Ct.Crim.R. 61(g)(1)and (2).

8. After the submissions had been received by Defendant's trial counsel and the State, Defendant filed a motion seeking the assistance of counsel on his Rule 61 motion. The court granted Defendant's motion for the appointment of counsel⁶ and on June 27, 2013, counsel was appointed to represent Defendant Brown on his Rule 61 motion.

9. On October 18, 2013, assigned counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e)(2).

10. 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.

11. 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.⁷ 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 Brown.⁸ 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.⁹

12. 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

⁶ See, Superior Court Docket No. 39.

⁷ See, Superior Court Docket No. 47- Defendant's Rule 61 counsel's Motion to Withdraw.

⁸ *Id.*

⁹ *Id.*

Defendant desired to do so.¹⁰ Defendant's response was due on or about November 19, 2013. Defendant did not file a response to counsel's motion to withdraw.

13. 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 so totally devoid of any, at least, arguable claims.¹¹

DEFENDANT'S RULE 61 MOTION IS WITHOUT MERIT

14. In his Rule 61 motion, Defendant claims that his counsel was ineffective: 1) for failing to provide effective assistance at Brown's plea phase; 2) for failing to investigate and obtain evidence to demonstrate Brown's innocence; and 3) for coercing Defendant into accepting the State's plea offer.

15. 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.¹² 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

¹⁰ See, Superior Court Docket No. 46- Defendant's Rule 61 counsel's letter dated October 17, 2013.

¹¹ 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.).

¹² *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

defense counsel's unprofessional errors, the outcome of the proceedings would have been different.¹³

16. 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."¹⁴

17. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹⁵ There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.¹⁶ Furthermore, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.¹⁷

18. The United States Supreme Court emphasized that a high bar must be surmounted to prevail on an ineffective assistance of counsel claim.¹⁸ The United States Supreme Court cautioned that in reviewing ineffective assistance of counsel claims in the context of a plea bargain, the court must be mindful of the fact that "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks."¹⁹

19. Turning to the subject action, Defendant first claims that his counsel was ineffective for failing to provide effective assistance at the plea phase. Defendant fails to

¹³ *Id.*

¹⁴ *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).

¹⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁶ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

¹⁷ *Strickland*, 466 U.S. at 687-88, 694.

¹⁸ *Premo v Moore*, 131 S.Ct. 733, 739-744 (2011).

¹⁹ *Id.*, at pg. 741.

explain how his counsel's representation was deficient and then to thereafter explain how, in the absence of his counsel's errors, Defendant would have rejected the plea offer and would have exercised the right to a trial. Conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel.²⁰

20. A review of the record including the indictment, plea agreement, the plea colloquy, the Truth-in-Sentencing Guilty Plea Form, and the Immediate Sentencing Form reveal that the charges in the indictment carried a significant amount of Level V incarceration. As a result of the plea, the State dismissed a number of charges including the felony charges of trafficking in heroin and trafficking in cocaine. These charges carried a significant amount of minimum mandatory incarceration well beyond the ultimate sentence in this case. In addition, given Defendant's previous criminal history, if convicted at trial, Defendant could have been sentenced as a habitual offender and facing up to life in prison.

21. The plea agreement, plea colloquy and the Truth-in-Sentencing Guilty Plea Form reflect that Defendant entered into his plea freely, voluntarily and intelligently with knowledge of the charges he faced, the consequences of entering into the plea agreement, and his voluntary relinquishment of his constitutional right to a trial.

22. A defendant is bound by his answers on the plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.²¹ In this case, the Truth-in-Sentencing Form and plea colloquy reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the charges for which he was sentenced.

²⁰ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

²¹ *State v. Harden*, 1998 WL 735879, *5 (Del. Super.); *State v. Stuart*, 2008 WL 4868658, *3 (Del. Super. 2008).

23. Defendant's counsel represented to the court during the plea colloquy that Defendant understood the rights he was giving up and the penalties he was exposed to and that his decision to accept the State's plea was knowing, intelligent and voluntary.²²

24. Defendant, personally, represented to the court that he had read and understood all the information in the Truth-In-Sentencing Guilty Plea Form.²³ Defendant represented that nobody was forcing him to enter into his plea.²⁴ Defendant represented that he was freely and voluntarily pleading guilty to the charges listed in the plea agreement. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.²⁵

25. Defendant also acknowledged his guilt and acknowledged that he was voluntarily pleading guilty to the charges.²⁶

26. Based on Defendant's representations during the plea colloquy, the court found that Defendant's plea was knowingly, intelligently and voluntarily given, and the court accepted the plea.²⁷

27. 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.²⁸ Defendant's present contention that his counsel was ineffective before or during the "plea phase" was waived when Defendant voluntarily entered his plea. Indeed, any contention that counsel was inattentive before or during the plea, that counsel failed to adequately investigate the facts

²² Guilty Plea Transcript of November 23, 2011, at pg. 4.

²³ Guilty Plea Transcript of November 23, 2011, at pgs. 5-6.

²⁴ Guilty Plea Transcript of November 23, 2011, at pgs. 5-6.

²⁵ Guilty Plea Transcript of November 23, 2011, at pgs. 5-6.

²⁶ Guilty Plea Transcript of November 23, 2011, at pgs. 6-9.

²⁷ Guilty Plea Transcript of November 23, 2011, at pg. 9.

²⁸ *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).

and/or defenses, that counsel failed to provide Defendant with discovery, that counsel failed to discuss strategies, that counsel failed to interview witnesses, or that counsel otherwise failed to properly prepare for trial, was waived when Defendant voluntarily entered his plea. These contentions all stem from allegations of defects, errors, misconduct and deficiencies which allegedly occurred prior the entry of the plea and which were waived when Defendant knowingly, freely and intelligently entered his plea.

28. In addition to being waived, Defendant's claim that he was not satisfied with his counsel's representation during the plea phase is also without merit. This present claim is directly contrary to Defendant's representation at the time he entered the plea that he was satisfied with his counsel's representation of him and that his counsel had fully advised him of his rights.²⁹

29. Defendant has not presented any clear, contrary evidence to call into question his prior testimony. Defendant is bound by these representations.

30. Defendant's Rule 61 counsel advised that after completing a comprehensive review of the guilty plea paperwork, the plea colloquy as well as trial counsel's file, Defendant's Rule 61 counsel concluded that Defendant's claim that his trial counsel was ineffective during the "plea phase" was without merit.³⁰

31. Defendant's claim that his counsel provided ineffective assistance at the plea phase is undermined by the record and fails 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.

²⁹ See, Truth-in-Sentencing Guilty Plea Form dated November 23, 2011.

³⁰ Superior Court Docket No. 47- Defendant's Rule 61 counsel's motion to withdraw, at pg. 2-3.

32. Turning to Defendant's second claim, Defendant contends that his trial counsel was ineffective for failing to investigate and obtain evidence to demonstrate his innocence.

33. This claim, like Defendant's first claim, was waived when Defendant entered into his guilty plea. This claim relates to conduct which occurred prior to the entry of the plea and was waived when Defendant voluntarily entered into his guilty plea.

34. In addition to having waived this claim, it is also without merit. Defendant's trial counsel, in his Affidavit, advised that he reviewed all the police reports, reviewed the surveillance tapes and the tapes of the co-defendant's statements and conducted an interview of Donald Bratcher, Mr. Brown's co-defendant, who already had pled guilty and agreed to testify against Defendant Brown at trial.³¹

35. Defendant's trial counsel also reviewed the text messages seized from Defendant's phone as well as the recordings of the telephone conversations that Defendant was a party to while incarcerated at the Howard R. Young Correctional Institution.³² Defendant's trial counsel advised that while he was prepared to defend Defendant at trial and to argue that the State's evidence did not meet the reasonable doubt standard, counsel was not aware of any evidence establishing Defendant's innocence, other than Defendant's own statements to that effect.³³ Defendant's trial counsel advised that he did interview Defendant on multiple occasions concerning the charges brought by the State in this case.³⁴

³¹ Superior Court Docket No. 26- Affidavit of Trial Counsel in response to Defendant's Rule 61 Motion.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

36. Defendant's Rule 61 counsel advised that after completing a comprehensive review of the guilty plea paperwork, the plea colloquy, as well as trial counsel's file and trial counsel's Affidavit in response to Defendant's Rule 61 motion, Defendant's Rule 61 counsel concluded that Defendant's claim that his trial counsel was ineffective was without merit.³⁵

37. Defendant's ineffective assistance claim is undermined by the record and fails 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.

38. Defendant's final claim is that his counsel coerced him into accepting the State's plea offer. Defendant's present contention is belied by Defendant's representation during the plea colloquy and in his plea paperwork that nobody was forcing him to enter into his plea.³⁶ Defendant represented that he was freely and voluntarily pleading guilty to the charges listed in the plea agreement. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.³⁷

39. Defendant is bound by these representations. Defendant has not presented any clear, contrary evidence to call into question his prior testimony at the plea colloquy or answers on the Truth-in-Sentencing Guilty Plea Form.

40. Defendant's trial counsel, in his Affidavit, advised that he did not coerce Defendant into accepting the plea. However, the evidence against Defendant was substantial in this case and given the sentencing implications of Defendant's "rather substantial prior record" in which he had already been declared a habitual offender,

³⁵ Superior Court Docket No. 47- Defendant's Rule 61 counsel's motion to withdraw, at pg. 3.

³⁶ Guilty Plea Transcript of November 23, 2011, at pgs. 5-6.

³⁷ Guilty Plea Transcript of November 23, 2011, at pgs. 5-6; Truth-in Sentencing Guilty Plea Form dated November 23, 2011.

Defendant's trial counsel told Defendant it was in his best interests to accept the plea in which the State would be recommending jail time of the minimum mandatory term of 8 years.³⁸

41. Defendant's Rule 61 counsel concluded that Defendant's claim was without merit.³⁹ Defendant's Rule 61 counsel stated that following a thorough review of the plea agreement, the plea colloquy, the Truth-in-Sentencing Guilty Plea Form, and trial counsel's file, there was no merit to Defendant's claim that he was coerced into accepting the plea. Defendant's Rule 61 counsel recognized that the charges included in the indictment carried a significant amount of Level V incarceration. In addition, due to the Defendant's previous criminal history several of the charges carried a great deal of minimum mandatory incarceration well beyond the ultimate resolution which occurred in this case.⁴⁰

42. Defendant received a significant benefit by pleading guilty. He was sentenced to the minimum mandatory period of incarceration of 8 years for the charges listed in the plea agreement, rather than face the potential of significantly more prison time, up to a life sentence, if convicted at trial and sentenced as a habitual offender. Defendant's guilty plea represented a rational choice given the pending charges, the State's evidence, and the potential sentence he was facing.

43. The decision to accept the plea and not go to trial does not appear to be deficient in any regard. Defendant received a significant benefit by accepting the plea. Defendant cannot establish that his counsel's conduct was deficient, and that thereafter, if he had not

³⁸ Superior Court Docket No. 26- Affidavit of Trial Counsel in response to Defendant's Rule 61 Motion.

³⁹ Superior Court Docket No. 47- Defendant's Rule 61 counsel's motion to withdraw, at pg. 4.

⁴⁰ Superior Court Docket No. 47- Defendant's Rule 61 counsel's motion to withdraw, at pg. 4.

accepted the plea but had proceeded to trial, he would have likely received a better result than that achieved by the plea agreement. Defendant has failed to satisfy either prong of the *Strickland* test and, therefore, his claims of ineffective assistance of counsel fail.

44. 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: Kevin O'Connell, Esquire
cc: Mr. Omar L. Brown