

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

January 27, 2014

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**Re: *State v. Deronte Purnell***  
**ID No: 1107017850**  
**Motion for Postconviction Relief (R1)**

Date Submitted: January 6, 2014

Dear Counsel:

On April 22, 2013, Deronte Purnell (“the Defendant”) filed his first Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). Mr. Gill was appointed to represent the Defendant. Scheduling orders were entered but had to be modified because of the work loads of the attorneys involved in this case. On January 6, 2014, Mr. Gill submitted the final filing.

**BACKGROUND**

On February 22, 2012, the Defendant entered a guilty plea to Robbery in the First Degree,

Possession of a Deadly Weapon During the Commission of a Felony and Possession of a Deadly Weapon by a Person Prohibited. Due to his criminal record, and the fact that this was his third Robbery conviction, he faced a minimum sentence of seven years and a maximum sentence of fifty-three years. A presentence investigation was conducted.

On April 27, 2013, the Defendant was sentenced to a total of twenty years at Level 5 (and completion of Key), followed by Level 4 (Crest), followed by Level 3 probation.

### **THE INITIAL RULE 61 MOTION**

\_\_\_\_\_ In the Defendant's initial *Pro Se* Rule 61 Motion, he alleged his attorney was ineffective.

The Defendant argued that according to the initial plea agreement form "the movant agreed to a 20 years sentence on the Possession of a Deadly Weapon During the Commission of a Felony and to 25 years on the Robbery, suspended after serving 5 years and completing Key." This proposed sentence to which the defendant alleges he agreed is five years longer than the sentence he received. This initial plea agreement did not include the charge of Possession of a Deadly Weapon by a Person Prohibited, which was later added.

In spite of agreeing to the above, the Defendant alleged that due to his attorney's communications with him, he expected a lower sentence based upon the Truth-In-Sentencing SENTAC guidelines.

The Defendant also alleged he agreed to immediate sentencing because he was an habitual offender and eligible under 11 *Del. C.* § 4214(b), which requires a non-discretionary life sentence. He also alleged he did not want a presentence investigation because the Court would have learned about his criminal record.

The Defendant alleges that the prosecutor crossed out the term "immediate sentencing" and noted that sentencing would occur after a presentence investigation. He alleges his attorney did not

inform him of the above. He further alleges had he known there was going to be a presentence investigation, he would not have plead guilty and would have gone to trial.

Finally, the Defendant alleges he did not really commit a robbery because the store clerk he robbed was a cooperating victim who conspired with him in order to pay off a drug debt. Therefore, he concluded he is only possibly guilty of misdemeanor theft.

### **THE AMENDED RULE 61 MOTION**

Following the appointment of counsel, the Defendant was given the opportunity to amend the initial postconviction motion.

In the Amended Motion, the Defendant alleges that his attorney did not adequately investigate his case and did not personally visit with him in prison.

The Amended Motion expands on the Defendant's theory that the Defendant was the drug supplier for the victim, and that witnesses and phone records would confirm they were seen together. Therefore, trial counsel is faulted for not making inquiry nor developing these exculpatory facts involving a staged robbery.

The Defendant alleges that because of trial counsel's failure to inquire into what actually occurred he was prejudiced by accepting an unfavorable plea agreement to crimes he did not commit. The Defendant also alleges the Public Defenders are so over-worked they are inefficient.

### **DEFENSE COUNSEL'S RULE 61(G) AFFIDAVIT**

\_\_\_\_\_ In the Rule 61(g) Affidavit, defense counsel states the following:

a) The State's initial plea offer was for 25 years Level 5 with Key, followed by Level 4 (Crest), followed by probation. Defense counsel reports the Defendant rejected this plea offer.

b) At the Defendant's final case review, negotiations resulted in the added charge of Possession of a Deadly Weapon by a Person Prohibited and striking the immediate sentence

recommendation of 25 years. At this point, a presentence investigation was requested. The guilty plea, with the presentence recommendation, is what was discussed with the Defendant and ultimately what the Defendant accepted.

c) In the Defendant's post-*Miranda* confession to the police as well as in all of his communications with the representative of the Public Defender's Office, he never raised the present claim that the robbery was staged.

d) In the Defendant's communications with the Public Defender's Office, he acknowledged being intoxicated and committing the robbery, but denied using a knife. He reported he wanted his case resolved as soon as possible and that he needed a drug treatment program. His potential status of being an habitual offender also was discussed.

e) The Public Defender's Office assigned a psycho-forensic evaluator to investigate the Defendant's background and make treatment recommendations that were offered at sentencing.

f) Defense counsel communicated with the Defendant at prison by way of video conferencing. He met with the Defendant in the courthouse and discussed the Defendant's case and plea negotiations at case review on December 5, 2011 and January 3, 2012. At the final case review on February 22, 2012, further discussions and negotiations took place resulting in the plea being entered that day.

### **STATE'S RESPONSE**

The State's response is that there was no alteration of the plea agreement after the Defendant signed it. The "crossing out" was done as a part of the negotiations at the final case review, and the Defendant thereafter signed the plea agreement.

The State included in its response a copy of a letter that the Defendant sent to the assigned prosecutor which he also copied to his defense counsel. In said letter, the Defendant

accepted responsibility and acknowledged he should be held accountable for his actions. He sought a 5 years Level 5 sentence and drug treatment. He makes no mention of a staged robbery nor does he mention he is only guilty of theft.

### **THE LAST WORD**

The Defendant was given the opportunity to respond to the aforementioned filings by his defense counsel (Rule 61(g)) and by the prosecutor. He could file “a reply and/or a Rule 61(g) affidavit.” He chose to file a reply. No Rule 61(g) affidavit was filed. The Defendant did not dispute his attorney’s representations, including that the Defendant never mentioned a sham or fake robbery.

In the Defendant’s reply, defense counsel is faulted for not personally visiting Mr. Purnell in prison and not conducting a more thorough investigation. The Defendant seeks an evidentiary hearing to establish his relationship with the store clerk victim, and to establish that the Public Defender’s Office lacks adequate staff and resources to adequately provide indigent defense services.

### **INEFFECTIVE ASSISTANCE OF COUNSEL**

Since the Defendant’s claims allege ineffective assistance of counsel, it is appropriate to set forth the applicable law our Supreme Court recently reviewed when it applied the *Strickland*<sup>1</sup> standard in *Swan v. State*:

*Strickland* requires Swan [the defendant] to make two showings. First, Swan [the defendant] must show that defense counsel’s performance was deficient. (“This requires showing

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 688 (1984) (hereinafter “*Strickland*”).

that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed to . . . [the defendant] by the Sixth Amendment.”). Second, *Swan* must show that his counsel’s deficient performance prejudiced the defense. (“This requires showing that counsel’s errors were so serious as to deprive . . . [the defendant] of a fair trial, a trial whose result is reliable.”). In *Strickland*, the United States Supreme Court explained that “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (“The object of an ineffectiveness claim is not to grade counsel’s performance.”).

Under *Strickland*’s first prong, judicial scrutiny is “highly deferential.” (“[T]he defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Accordingly, there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance . . . .” The *Strickland* court explained that “a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” A movant “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.”

Under *Strickland*’s second prong, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” In other words, “not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” “Some errors will have had a pervasive effect..., and some will have had an isolated, trivial effect.” Accordingly, “[t]he [movant] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” “Reasonable probability” for this purpose means “a probability sufficient to undermine confidence in the outcome.” In making this determination, the *Strickland* court explained that a court must consider the “totality of the evidence,” and “must ask if the [movant] has met the burden of showing that the

decision reached would reasonably likely have been different absent the errors.” “[T]he *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.”<sup>2</sup>

## DISCUSSION

An evidentiary hearing is not necessary because this is not the forum to discuss the Public Defender’s Office’s budget and resources.

An evidentiary hearing is not necessary as to the defendant’s claim this was a sham robbery. The matter before the Court is an allegation that defense counsel was ineffective. Defendant does not offer any evidence that defense counsel ever was told about allegations the clerk was in on the robbery. Defense counsel, in his Rule 61(g) Affidavit, reports the Defendant never told him of this present claim. Therefore, defense counsel cannot be ineffective for failing to develop this unique defense. The present allegation is more in the vein of newly discovered evidence, which is not newly discovered if the Defendant knew this all along.

After considering the aforementioned submissions as well as the transcripts and plea documents, the Court is satisfied the Defendant’s Postconviction Motion must be denied.

At the entry of the guilty pleas, a comprehensive colloquy took place between Judge Richard F. Stokes and the Defendant. The Defendant was under oath at the time his guilty plea was considered by the Court.

The Defendant acknowledged having reviewed the charges, the evidence and the penalties, including the enhanced penalties because of his prior convictions. The Defendant knew he faced a sentence that had to start at seven years and went up to fifty-three years. He knew the final

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<sup>2</sup> *Swan v. State*, 28 A.3d 362 (Del. 2011) (all footnotes and citations omitted).

sentencing decision was up to the sentencing Judge. He also was aware he was waiving his trial and appellate rights.

Defense counsel reported to the Court that there was a request for a presentence investigation prior to sentencing. The Defendant was told he would come back later in April when the presentence report would be available for review. Being aware of this, when the Defendant was asked if he had any questions, he stated he did not. The Defendant reported he had plenty of time to go over his case with his attorney. The Defendant is mistaken in his belief that had there been an immediate sentencing, then the sentencing judge would not have known of his criminal record. The Defendant's criminal record is provided to the Court at all immediate sentencings for obvious reasons.

On April 27, 2012, the Defendant was sentenced. He made no mention about any of the complaints contained in his Postconviction Motion, even though these complaints were known to him at that time. He acknowledged he was accountable for his conduct.

The Court is satisfied that the Defendant received effective representation by his defense attorney and the Public Defender's Office. The fact that, while at the prison, communications with the Defendant were conducted only through correspondence and video conference is not evidence of ineffectiveness of counsel, especially in light of the multiple meetings the Defendant had with defense counsel in the courthouse.

The Court also is satisfied that there was no alteration of the plea agreement after the Defendant signed it. In making this allegation the Defendant puts his credibility in question because the alleged alteration by way of "cross outs" also included the third charge of Possession of a Deadly Weapon by a Person Prohibited being penned in. The Defendant pled guilty to this charge and does not allege it came after he signed the plea agreement. His statements under oath at the time he

entered the guilty plea also belie his present claims.

Defense counsel reports he never was told anything about anyone else being involved in any sham robbery. The Defendant did not dispute this. Therefore, I find that defense counsel was not ineffective for failing to pursue this unique potential defense or investigating same. As noted above, coming up with a new and undisclosed potential defense in a postconviction motion must fail unless it was a defense of which defense counsel should have been put on notice. There is no evidence of this. The withdrawal of the guilty plea, based on ineffective counsel allegations that the Defendant had a defense, which the Defendant knew of, but told no one, must be denied.

Finally, there is no basis to allow the Defendant to withdraw his guilty plea because his defense attorney is overworked. There is no evidence that defense counsel's workload caused him to be ineffective.

Based on the Defendant's admissions to this attorney, his letter to the prosecutor and his under oath admissions to the Court at his plea and his sentencing, there is no miscarriage of justice.

Defendant's Motion for Postconviction Relief is hereby denied.

IT IS SO ORDERED.

Very truly yours,

*/s/ T. Henley Graves*

T. Henley Graves

THG/ymp  
pc: Prothonotary  
John Daniello, Esquire