

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 21, 2011

HAND DELIVERED IN THE COURTROOM

Timothy Spicer
Sussex Community Correction Center
Violation of Probation Unit
23207 Dupont Boulevard
Georgetown, DE 19947

RE: *State v. Spicer*
Defendant ID# 0904006958 (R-1)

Dear Mr. Spicer:

On December 16, 2010, you filed a Motion for Post Conviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61").

HISTORY

On October 6, 2009, you entered a guilty plea to a DUI Fourth Offense. The State and Defense requested immediate sentencing, with the recommendation that you be sentenced under the sentencing guidelines of a third offense pursuant to 21 *Del.C.* § 4177(d)(5). The Court accepted that recommendation, resulting in the mandatory term of incarceration being reduced to three months instead of six months.

Subsequently, you were arrested on an Administrative Warrant for a violation of probation (VOP), which was returned in this Court on August 24, 2010. You were held in default of \$9,000.00 cash bail. That same day a letter was mailed to you at Sussex Correctional Institution informing you that your VOP hearing was scheduled for September 9, 2010, and that if you did not hire your own attorney a Public Defender would represent you.

You were found in violation of probation on September 9, 2010. At that time, you were released on an unsecured bond and a TASC evaluation was ordered. As a condition of the unsecured bond, you were to have no alcohol in your house.

On October 5, 2010, you were sentenced to three months at supervision level 4 Violation of Probation Center, followed by supervision level 4 Crest residential substance abuse treatment program (RSATP), followed by supervision level 3 with Crest aftercare.

You filed a Motion for Modification of Sentence on November 5, 2010, which was denied on November 17, 2010. This was followed by the current Motion for Post Conviction Relief.

THE RULE 61

In your Post Conviction Motion you mix complaints about your original October 6, 2009, conviction together with the October 5, 2010, violation of probation sentence.

All complaints and grounds involving the original conviction are procedurally barred. Rule 61(i) required that your Post Conviction Motion be filed within one year of the original October 6, 2009, conviction. Therefore, your December 16, 2010, motion comes too late to attack the original conviction. Specifically, the complaints about an illegal search, confession, right to remain silent, denial of right to confront witness, and denial of right to testify, are procedurally barred.

The Court shall not consider the complaints as to your opinion that you have been sentenced too harshly on the VOP because (1) you had been doing well, (2) you had a hardship based on no one being available to care for your property and (3) you were not treated the same as other offenders. These complaints do not go to the violation of your probation but to the sentence imposed as a result of the violations.

That leaves your complaints as to the finding of violation of probation by the Court. You allege that your lawyer was ineffective for not challenging the severity of the sentence and you attack the effectiveness of the sentenced residential substance abuse treatment program (RSATP). Basically, you complain that your lawyer did not do enough to avoid the sentence. You complain you did not get to testify. You also complain about a mis-statement by the Court in its November 16, 2010, denial of your Motion for Modification of Sentence.

THE VOP

The VOP allegations included a dilute urine screen, being discharged from the DUI treatment program, admitting to drinking alcohol, and an August 23, 2010, violation for drinking alcohol that violated the special condition for "zero tolerance for alcohol". The PBT result was .04 BAC.

On September 9, 2010, with your attorney present, there was an admission of drinking and being discharged from the DUI Program. There was also an admission to drinking on August 23, 2010. There was a denial as to intentionally attempting to dilute your screens. The Violation of Probation Report sentencing recommendation was for the Crest residential substance abuse treatment program. Your attorney argued you had struggled and slipped but you were doing your best in counseling. He noted your financial hardship as well as the need to care for your animals and/or pets.

Specifically, I addressed the Court's concerns and asked you if you had anything to say. You apologized. You noted your concerns for your animals. You noted your progress. We had a

colloquy about your living arrangements, employment and other matters. Therefore, on September 9, 2010, I found you to be in violation of probation, released you on an unsecured bond, and ordered a TASC evaluation. I specifically told you that you were to have no alcohol in the house. You said you understood you would be in trouble if an empty (beer) can was found in your trash can.

At the October 5, 2010, sentencing your attorney reported there was no TASC report because of mix ups in schedules and your transportation problems. Another sentencing date was sought and you also addressed the Court. I agreed to move the sentencing out another two weeks to allow time for TASC to evaluate you, but I revoked bond in order to eliminate any further excuses as to why the TASC evaluation could not take place.

It was at this point during the hearing that your probation officer reported to the Court that you were seen driving a moped to a liquor store in Laurel, on October 4, 2010, which was one day before your scheduled sentencing in this Court. Your probation officer viewed surveillance film at the liquor store and confirmed that he observed you purchasing eighteen Budweiser bottles, walking out of the store, and driving away on a moped. You admitted that you did this. You said you bought the beer but did not drink it. The probation officer also reported that the liquor store clerk said you were a “regular”.

Based on this new information I decided to forego deferring sentencing for two weeks to obtain the TASC evaluation, and I proceeded with sentencing you that day. This sentence included three months at the Department of Correction Supervision Level 4 Violation of Probation Center, followed by 10 months at Supervision Level 4 Crest residential substance abuse treatment program, and upon completion of that program the balance would be suspended for supervision level 3 probation with Crest Aftercare.

DECISION

You were not denied the opportunity to address the Court at your violation of probation hearing on September 9, 2010, nor at the subsequent sentencing on October 5, 2010.

You knew you were not to have alcohol in the house. The Violation of Probation Center portion of the sentence was for punishment as to your conduct after you were warned by the Court.

The residential treatment program sentence was appropriate based upon your continued alcohol consumption. You were operating a motor vehicle and you purchased beer.

Your attorneys argued on your behalf, but there was little they could do after the moped/Budweiser report, which you acknowledged. Your unfortunate circumstances at home were known, but the Court found it necessary to punish you as well as to provide treatment. Your

attorneys did the best they could.¹ Their work on your behalf did not fall below an objective standard of reasonable representation. It was your conduct and apparent stupidity that warranted your sentence. Thus, you can establish no prejudice.

CONCLUSION

This ends the issue of your Post Conviction Motion and it is **DENIED**.

I do note that based upon another Motion for Modification of Sentence filed by you on December 21, 2010, I have re-ordered a TASC evaluation. A hearing is scheduled regarding this motion on **January 21, 2011, at 1:30 p.m.**, with the benefit of the TASC evaluation.

IT IS SO ORDERED.

Yours very truly,

T. Henley Graves

THG:pac

cc: Prothonotary
Department of Justice
Office of the Public Defender

¹*Strickland v. Washington*, 466 US 668 (1984) requires that for you to establish your attorney was ineffective you must prove they committed errors and/or omissions in their professional work and that those errors and/or omissions actually caused you prejudice.