IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	Case No. 1011002958
	)	
EDWARD DUCOIN	)	
	)	
Defendant.	)	

Submitted: July 5, 2013
Decided: October 10, 2013

Upon Consideration of Defendant's Motion to Withdraw Guilty Plea, **DENIED.**

OPINION

Victoria Watson Counihan, Esquire, Kevin Carroll, Esquire, and Gregory Strong, Esquire, Deputy Attorneys General, Delaware Department of Justice, Carvel State Office Building, 820 North French Street, 5th Floor, Wilmington, Delaware 19801, Attorneys for the State.

Joe Hurley, Esquire, 1215 King Street, Wilmington, Delaware 19801, Attorney for the Defendant.

RAPPOSELLI, J.

INTRODUCTION

Defendant Edward DuCoin ("Defendant") pled guilty to two counts of the Sale of Unregistered Securities on October 26, 2011 and subsequently filed a Motion to Withdraw Guilty Plea. An evidentiary hearing was held on the matter on May 29 and 30, 2013. After a full hearing and consideration of supplemental Memoranda of Law, for the reasons set forth below, the Motion is **DENIED**.

FACTUAL AND PROCEDURAL HISTORY

An Indictment was secured against Defendant in November 2010 for felony offenses to include Securities Fraud, Theft, and three (3) counts of the Sale of Unregistered Securities.[1] Following plea negotiations, Defendant agreed to plead guilty to two (2) counts of the Sale of Unregistered Securities. The State agreed to recommend the presumptive sentence of up to nine (9) months at Level II probation and to dismiss the remaining charges.

Pursuant to the agreement, Defendant entered his guilty plea to two felony counts on October 26, 2011 before J. Babiarz. A sentencing hearing was scheduled for January 13, 2012. On the same day, Joe Hurley, Esquire, filed Motions to Continue the Sentencing Hearing and for Substitution of Counsel, and

[1] The Grand Jury later added another count to the Indictment for Racketeering (a Class B felony).

the hearing was rescheduled for February 3, 2012. On February 2, 2012 Defendant filed this Motion to Withdraw Guilty Plea. After numerous attorney-client privilege discovery filings from both sides, the evidentiary hearing was held on May 29 and 30, 2013.

STANDARD OF REVIEW

Superior Court Criminal Rule 32(d) provides that "[i]f a motion for withdrawal of a plea of guilty or *nolo contedere* is made before imposition or suspension of sentence . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason."[2] The motion is to be addressed to the sound discretion of the trial court.[3] Defendant bears the burden to show a "fair and just reason" to permit the withdrawal.[4]

DISCUSSION

When considering a Motion to Withdraw Guilty Plea, this Court is guided by the five factors recognized in *State v. Friend* to determine if a "fair and just reason" exists (referred to by the parties here as *Cabrera* factors):

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[2] *See Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007) (citing *State v. Cabrera*, 891 A.2d 1066, 1069 (Del. Super. 2005)).
[3] *Id*.
[4] *Id.*

1) Was there a procedural defect in taking the plea;
2) Did Defendant knowingly and voluntarily consent to the plea agreement;
3) Does Defendant presently have a basis to assert legal innocence;
4) Did Defendant have adequate legal counsel throughout the proceedings; and
5) Does granting the Motion prejudice the State or unduly inconvenience the Court.[5]

This Court "will review each of these factors as it specifically relates to this case."[6] Significantly, however, the five-factor *Cabrera* analysis does not necessarily require balancing, but rather, "[c]ertain factors standing alone, will themselves justify relief."[7] While the decision to permit withdrawal under Rule 32(d) lies within the discretion of the Court, that discretion is governed by Superior Court Criminal Rule 11 which states, "[t]he Court . . . shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the . . . consequences of the plea."[8]

[5] *State v. Friend*, 1994 WL 234120 (Del. Super. May 12, 1994) *aff'd*, 683 A.2d 59 (Del. 1996); *Cabrera*, 891 A.2d at 1069.
[6] *Friend*, 1994 WL 234120.
[7] *Patterson v. State*, 684 A.2d 1234, 1239 (Del. 1996) (specifying circumstance when a single factor might suffice).
[8] *Scarborough*, 938 A.2d at 649-50 (citing Super. Ct. Crim. R. 11).

1. Was there a procedural defect in taking the plea?

Defendant does not contend that there was a procedural defect in taking the plea and, therefore, this factor is not at issue.

2. Did Defendant knowingly and voluntarily consent to the plea agreement?

Defendant acknowledges that he knowingly and voluntarily consented to the plea agreement.[9] It is clear from the record that on October 26, 2011, J. Babiarz engaged Defendant in a plea colloquy, discussed the Truth in Sentencing Guilty Plea Form, the nature of the charges, the rights he was waiving, that the plea was voluntary, that nothing was promised to Defendant in exchange for a guilty plea, and that Defendant understood the future consequences of having felony convictions on his record.[10]

Moreover, at the evidentiary hearing, Defendant testified about his impressive collection of educational credentials and business accomplishments. Defendant has an undergraduate degree from the University of Pennsylvania,

[9] Def.'s Motion to Withdraw Guilty Plea at 2, *State v. DuCoin*, Case No. 1011002958 (Del. Super. Feb. 3, 2012) [hereinafter Def.'s Motion to Withdraw Guilty Plea].

[10] Transcript of Guilty Plea at 6-9, *State v. DuCoin*, Case No. 1011002958 (Del. Super. Oct. 26, 2011) (TRANSCRIPT).

Wharton School of Business.[11] He has also been involved in the development of multiple business organizations.[12] This leaves this Court with the clear impression that he had the academic acumen to understand the nature of the offenses and the consequences of the plea.

Therefore, this Court finds that Defendant knowingly and voluntarily consented to the plea agreement.

3. Does Defendant presently have a basis to assert legal innocence?

Defendant's assertion of legal innocence is based on a mistake of law defense.[13] The defense of mistake of law is recognized in limited circumstances.[14] Specifically, a mistake of law defense may be asserted when a defendant: (1) erroneously concludes in good faith that his particular conduct is not subject to the operation of the criminal law; (2) makes a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded or under our legal system, to ascertain and abide by the law; (3) acts in good faith

[11] Transcript of May 29, 2013 Hearing at 49, *State v. DuCoin*, Case No. 1011002958 (Del. Super. May 29, 2013) (TRANSCRIPT) [hereinafter Transcript of May 29, 2013 Hearing].
[12] Transcript of May 29, 2013 Hearing, *supra* note 11, at 49.
[13] Defendant also claims legal innocence as to charges that were entered as *nolle prosequi* to which no plea was entered and which are thus not considered in this Motion.
[14] *Kipp v. State*, 704 A.2d 839 (Del. 1998).

reliance upon the results of such effort; and (4) the conduct constituting the offense is neither immoral nor anti-social.[15]

The mistake of law defense in this case is based on alleged legal advice that Defendant claims to have relied upon in the sale of securities to a Delaware resident/victim. At no time was Defendant represented by Delaware counsel. Defendant asserts that "[w]ith regard to the sale of securities, the defendant . . . was represented, at all pertinent times, by New Jersey counsel and followed the directions of New Jersey counsel," Robert Frawley, Esquire ("Frawley").[16] Subsequently, Defendant also alleged that he acted on the legal advice of a North Carolina attorney, Vaughn Ramsey, Esquire, ("Ramsey").[17] This Court heard testimony from both Frawley and Ramsey and considered their respective advice to Defendant.

Defendant alleges that he relied on legal advice from Frawley. This is wholly inconsistent with Frawley's testimony. Frawley testified that Defendant did not engage him for legal representation until June 2007. The offenses to which

[15] *Id.* at 842 (citing *Long v. State,* 65 A.2d 489, 497-98 (Del. 1949)).
[16] Def.'s Motion to Withdraw Guilty Plea, *supra* note 9, at 2.
[17] Def.'s Memorandum of Law at 2, *State v. DuCoin*, Case No. 1011002958 (Del. Super. May 28, 2013) [hereinafter Def.'s Memorandum of Law]; Def.'s Closing Response at 27-29, *State v. DuCoin*, Case No. 1011002958 (Del. Super. Jul. 5, 2013) [hereinafter Def.'s Closing Response].

Defendant pled guilty occurred on December 1, 2005, and March 24, 2006.[18] Defendant admits that Frawley did not advise him regarding the sale of stocks outside of New Jersey, [19] but argues that he "relied upon the absence of any conversation or dialogue . . . as indication there was no obligation."[20] Frawley, however, testified that his limited responsibilities did not include the transactions at issue.[21]

Defendant subsequently asserted at the hearing, as a basis for a mistake of law defense, that he relied on legal advice from Ramsey.[22] Again, the testimony from Ramsey contradicted that of Defendant. Ramsey testified that he advised Defendant to be aware of State Blue Sky Laws (a common name for the relevant reporting requirements),[23] did not advise Defendant on the sale of securities in Delaware in any way, and made clear to Defendant that each state has a unique set of applicable laws.[24] Defendant argues that Ramsey's "advice" advanced a

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[18] Transcript of May 29, 2013 Hearing, *supra* note 11, at 158-159.
[19] Def.'s Memorandum of Law, *supra* note 19, at 2.
[20] Def.'s Memorandum of Law, *supra* note 19, at 3.
[21] Transcript of May 29, 2013 Hearing, *supra* note 11, at 158-159.
[22] Def.'s Closing Response, *supra* note 19, at 2.
[23] Transcript of May 29, 2013 Hearing, *supra* note 11, at 140-154; State's Response to Motion to Withdraw Guilty Plea, "Exhibit N," 7-11, 21-23, and 26-27, *State v. DuCoin*, Case No. 1011002958 (Del. Super. Apr. 22, 2013) [hereinafter State's Response].
[24] Transcript of May 29, 2013 Hearing, *supra* note 11, at 143-48. In his October 31, 2005 Letter to Defendant, Ramsey emphasized "I am not licensed to practice in Delaware . . . [and in order to establish whether an exemption applied, they would] need to also look at the Blue Sky Rules for Delaware." State's Response, *supra* note 25, at "Exhibit N."

mistaken belief that there was "a distinction between 'shares of the corporation' and convertible notes."[25] Defendant's alleged confusion is unjustified given Ramsey's testimony that his advice applied to convertible debt and not just to equity.[26] Ramsey's advice was at best ambiguous, and is thus, without further evidence, inconsistent with an assertion that Defendant made a "bona fide, diligent effort," or acted in "good faith reliance."

Based on the detrimental testimony of both Frawley and Ramsey, coupled with the lack of support in evidence other than Defendant's contradictory testimony, this Court finds that Defendant does not presently have a basis to assert legal innocence.

4. Did Defendant have adequate legal counsel throughout the proceedings?

In *Strickland v. Washington,* the United States Supreme Court established a two-prong test for determining the adequacy of a defendant's legal representation during the criminal process.[27] "In the context of a guilty plea challenge, *Strickland* requires a defendant to show that: (1) counsel's representation fell below an

[25] Def.'s Closing Response, *supra* note 19, at 27.

[26] Transcript of May 29, 2013 Hearing, *supra* note 11, at 153:

> State: So, you informed Mr. DuCoin that the blue sky state laws applied to the convertible debt, not just to equity; correct?
>
> Mr. Ramsey: Yes.

[27] *Strickland v. Washington,* 466 U.S. 668 (1984).

objective standard of reasonableness; and (2) counsel's actions were so prejudicial that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial."[28]

When evaluating the efficacy of counsel's representation, "the United States Supreme Court has cautioned us to eliminate the 'distorting effects of hindsight' and 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'"[29] "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[30]

Originally, Defendant was represented by private counsel but for purposes of this factor, the issues raised stem from the representation provided by Raymond Armstrong, Esquire, of the Office of the Public Defender ("Armstrong").[31] Defendant alleges that Armstrong's representation was not objectively reasonable

[28] *Somerville v. State*, 703 A.2d 629 (Del. 1997) (internal citations and punctuation omitted); *see Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).
[29] *Ploof v. State*, 2013 WL 2422870 (Del. June 4, 2013) (quoting *Strickland*, 466 U.S. at 689).
[30] *Strickland*, 466 U.S. at 690-91.
[31] A determination was made by another trial judge that Defendant qualified for legal services from the Office of the Public Defender.

and picks a few areas in which he disagrees with Armstrong's approach and focus in an attempt to paint them as colossal failures. Among other things, Defendant contends that Armstrong failed to review materials, interview witnesses and as a result, he failed to pursue a mistake of law defense. This Court disagrees.

This Court heard testimony from Defendant regarding allegations specific to Armstrong's failure to follow up on witness interviews and respond to Defendant's emails. While the emails may support the proposition that Armstrong could have been more communicative, Armstrong testified that he did, in fact, consider the value of the potential witnesses identified by Defendant. Armstrong testified that he spoke directly with Frawley and determined that his testimony would be detrimental to the case.[32] Armstrong's decision is consistent with Frawley's testimony which clearly established that the testimony would have been harmful to the defense.

Armstrong also testified that in addition to conducting legal research, he spoke with other attorneys in his office regarding the complexities of this case. Specifically, he conferred and sought advice from the Chief Deputy as well as the

[32] Transcript of May 30, 2013 Hearing at 57-58, *State v. DuCoin*, Case No. 1011002958 (De. Super. May 30, 2013) (TRANSCRIPT) [hereinafter Transcript of May 30, 2013 Hearing].

Public Defender.[33] Most significantly, Defendant failed to produce the necessary payroll evidence requested by Armstrong that would have helped with his defense. As such, this Court finds Armstrong's testimony reliable. He made a strategic decision to not pursue a mistake of law defense based on his professional opinion that the defense would not succeed.[34]

Given the reasonableness of Armstrong's strategy decisions, and Defendant's failure to provide sufficient evidence regarding the alleged lack of time and effort put into investigating the case, this Court will not employ a hindsight analysis to question the quality of Armstrong's representation. Defendant asks this Court to engage in exactly the kind of second-guessing that both the Delaware and United States Supreme Courts have repeatedly cautioned against.

Therefore, this Court finds that the representation provided by Armstrong was objectively reasonable and that Defendant had adequate legal counsel throughout the proceedings.[35]

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[33] Transcript of May 30, 2013 Hearing, *supra* note 34, at 60.
[34] Transcript of May 30, 2013 Hearing, *supra* note 34, at 37.
[35] Since this Court finds Defendant had objectively reasonable legal counsel, this Court does not address the prejudice prong of the *Strickland* test.

5. Does granting the Motion prejudice the State or unduly inconvenience the Court?

The State claims that it would be prejudiced by the granting of Defendant's Motion to Withdraw Guilty Plea because the passage of time will compromise witnesses' availability and the State's case.[36] The matter stems from conduct that occurred in 2005 and 2006. The passage of time may affect the State's case. However, because this Court finds that Defendant has not met the before-mentioned bases for withdrawing the plea, this Court does not address this factor.

CONCLUSION

This Court finds that Defendant has failed to meet his burden in establishing a "fair and just reason" to permit the withdrawal of his guilty plea. This Court is not persuaded by the credibility of Defendant's testimony at the evidentiary hearing and finds that Defendant's plea was made knowingly, voluntarily, and with an understanding of the consequences of the plea. Defendant does not presently have a basis to assert legal innocence and had adequate legal counsel throughout the proceedings. Therefore, Defendant's Motion is **DENIED**.

[36] State's Memorandum of Law in Further Response to Motion to Withdraw Guilty Plea at 11, *State v. DuCoin*, Case No. 1011002958 (Del. Super. June 6, 2013).

IT IS SO ORDERED.

/s/Vivian L. Rapposelli
Judge Vivian L. Rapposelli

cc: Prothonotary