IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	C.R. ID No. 0707012162 ALR
	)	
	)	
ROBERT ALLEY,	)	
Defendant.	)	

Submitted: November 13, 2013
Decided: February 14, 2014

Upon Defendant's Motion for Postconviction Relief
DENIED

On September 17, 2007, Robert Alley was indicted for Felony Resisting Arrest, Disregarding a Police Officer's Signal, and Criminal Impersonation. Assistant Public Defender Kathryn Van Amerongen represented Mr. Alley with respect to these charges. The State offered Alley a plea, which included a request for a pre-sentence investigation and notification that the State intended to seek habitual offender sentencing pursuant to 11 Del. C. § 4214(a). Alley rejected this plea offer. The State made a subsequent plea offer in which it would not seek habitual offender sentencing. After consulting with Ms. Van Amerongen, Alley accepted the plea and, on December 22, 2008, he pled guilty to Felony Resisting Arrest and Criminal Impersonation.

At the heart of this Motion for Postconviction Relief is Alley's most recent encounter with the criminal justice system. In March 2013, Alley was charged in a new criminal case in which the State contends that Alley committed two counts of First Degree Robbery, as well as Wearing a Disguise During the Commission of a Felony. These charges are unrelated to the charges to which Alley pled guilty in 2008. In preparation for his upcoming case, it was determined that Alley would not have been subject to habitual offender sentencing in 2008 because his criminal history involved multiple overlapping convictions. However, because he was convicted of a felony offense in 2008, Alley is now subject to habitual offender sentencing in his pending case.

On March 22, 2013, Alley filed a Motion for Postconviction Relief as a self-represented litigant, alleging that Ms. Van Amerongen, his trial counsel in 2008, provided ineffective service of counsel by mistakenly informing him that he would have been subject to habitual offender sentencing under 11 Del. C. § 4214(a) if convicted at trial. On May 6, 2013, an amendment to Rule 61(e)(1) of the Delaware Superior Court Rules of Criminal Procedure became effective; requiring the appointment of counsel for an indigent movant's first postconviction proceeding.

On May 16, 2013, John A. Barber, Esquire was appointed to represent Alley. On August 15, 2013, Ms. Van Amerongen submitted an affidavit denying Alley's

claims of ineffective assistance of counsel. On November 1, 2013, the State submitted its response to the pending motion. The State suggested that not only is Alley's motion procedurally barred, but it also fails on the merits and should be denied without further proceedings. On November 12, 2013, Alley filed a reply to the State's response.

Before considering the merits of a motion for postconviction relief, the Court must determine whether the motion overcomes the procedural bars of Rule 61(i).[1] Rule 61(i)(1) requires that a Motion for Postconviction Relief be filed within one year of the final judgment.[2] Alley entered his guilty plea on December 22, 2008 and did not file his motion until March 22, 2013, well beyond the one-year time limitation.

Nevertheless, the time limitations set forth in the Court's Rules may be overcome. For example, if the motion provides a colorable claim that there has been a "miscarriage of justice" as the result of a constitutional violation that undermined the fundamental fairness of the proceedings leading to the final judgment, then the time limitations do not act as a procedural bar.[3] Alley's motion is based on a claim of ineffective assistance of counsel, an alleged constitutional

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[1] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

[2] Other procedural bars require that the motion does not include any grounds for relief that were not previously asserted in a prior postconviction claim; asserted in prior proceedings leading to the judgment of conviction; or formerly adjudicated in any proceeding leading to the judgment of conviction. Super. Ct. Crim. R. 61(i)(2)-(4). *See also Younger v. State*, 580 A.2d 552, 555-56 (Del. 1990).

[3] Super. Ct. Crim. R. 61(i)(5); *Younger*, 580 A.2d at 555.

violation. Accordingly, Alley can overcome the procedural time bar of Rule 61 if his allegations of ineffective assistance of counsel meet the two-prong test established in *Strickland v. Washington*.[4]

To succeed on a claim of ineffective assistance of counsel the movant must show that (1) trial counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[5] The movant must overcome the strong presumption that counsel's conduct was professionally reasonable.[6] Failure to prove either prong renders the claim insufficient.[7] Moreover, to avoid summary dismissal, the movant must provide concrete allegations of prejudice, including specifying the nature of the prejudice and the adverse affects actually suffered.[8]

The grounds of Alley's ineffective counsel claim are (1) his trial counsel erroneously advised him that he was subject to habitual offender sentencing during the 2008 proceedings, when such habitual status was then inapplicable and (2) but for her advice, there is a reasonable probability he would have pled not guilty and instead would have insisted on a trial. Now, by virtue of his guilty plea in 2008, he is subject to habitual offender status in his pending case.

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[4] *Strickland v. Washington*, 466 U.S. 668 (1984).
[5] *Id.* at 688-89.
[6] *Id.* at 688.
[7] *Id.*
[8] *Younger*, 580 A.2d at 556.

Alley first asserts that Ms. Van Amerongen's representation fell below an objective standard of reasonableness because she incorrectly advised Alley that he was eligible for sentencing as a habitual offender in 2008. According to Alley, Ms. Van Amerongen advised him that if he did not accept the plea offer, the State would seek habitual offender sentencing which would subject him to a sentence of life imprisonment, if convicted. In support for this contention, Alley relies on the following exchange during his plea colloquy and sentencing:

> THE COURT: The court finds the guilty pleas are knowingly, intelligently, and voluntarily offered and they will be accepted. We will proceed to immediate sentencing.
> MS. VAN AMERONGEN: Thank you, Your Honor. If I may, the original plea agreement had been to a PSI. And the reason for that is, as Your Honor can probably see from his [the defendant's] criminal history, is that he would have qualified as a habitual offender.

Alley argues that Ms. Van Amerongen's statements to the Court are evidence of her legal conclusion that Alley was eligible for habitual offender status in 2008.

Alley also relies on Ms. Van Amerongen's affidavit, in which Ms. Amerongen states:

> I did not advise Mr. Alley . . . that he would face a mandatory life sentence for any charges listed in his indictment and there is no mention of habitual offender

> status on any of the plea forms or anywhere else in our office file.

Alley argues that Ms. Van Amerongen's affidavit only denies advising Alley that he faced a "*mandatory* life sentence" if convicted of "any charges listed in the indictment" and fails to deny advising him that he was *eligible* to be sentenced as a habitual offender, if convicted at trial.

Alley contends that Ms. Van Amerongen's statements during his plea colloquy and sentencing, in addition to her affidavit, are evidence that she incorrectly advised him that he was eligible for habitual offender status in 2008 and that such erroneous advice was outside the range of competence required of counsel. With regard to plea negotiations, criminal defendants often consult with defense counsel on how to proceed once a plea offer has been extended by the State.[9] In this context, counsel's role is to aid the client only after completing an appropriate investigation of the case.[10] While the decision to plead guilty is personal to the client, the decision must be an informed one and the advice of counsel is vital to the decision-making process.[11]

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[9] *MacDonald v. State*, 778 A.2d 1064, 1071 (Del. 2001); Del. Law. R. Prof. Cond. 1.2(a).
[10] *MacDonald*, 778 A.2d at 1071-72. *See* ABA Criminal Justice Standard 14-3.2(b); *Michael v. State*, 529 A.2d 752, 763 (Del. 1987) (applying the ABA Criminal Justice Standards equally to Delaware Prosecutors and Defense Counsel).
[11] *MacDonald*, 778 A.2d at 1071-72.

Ms. Van Amerongen explained to the Court during the plea colloquy that the State was previously considering seeking habitual offender status for Mr. Alley and she confirmed her understanding that Alley would be eligible to be sentenced as an habitual offender. For the purposes of this discussion, the Court will assume Ms. Van Amerongen mistakenly advised Alley that he would be subject to sentencing as an habitual offender if convicted at trial. Nevertheless, even assuming that the evidence supports Alley's contention that he can meet the first prong of the *Strickland* test, he cannot satisfy the second prong because he did not suffer actual prejudice.

A showing of prejudice is required because, "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."[12] The purpose of guaranteeing effective assistance of counsel is to ensure that criminal defendants receive fair proceedings with reliable outcomes.[13] Before accepting a defendant's guilty plea, the Court is required to personally address the defendant and determine that the State's plea offer has been accepted with an understanding of the consequences of the plea to the defendant.[14] The court must ensure the plea is voluntary and not the result of any threats, promises apart from a plea agreement, or discussions with counsel that are not

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[12] *Strickland*, 466 U.S. at 693.
[13] *Id.* at 689.
[14] Super. Ct. R. Crim. 11(c)(1).

reflected in the submission to the Court.[15] A knowing and intelligent plea requires the Court to spell out the "maximum possible sentence provided by law for conviction of the offense" because it is the most important consequence of entering a guilty plea.[16]

Alley entered a knowing, intelligent, and voluntary plea and the proceedings were entirely fair. Despite his contentions to the contrary, Alley's concern with his 2008 guilty plea is related to the role the resulting felony conviction is playing in his pending 2013 case and is not related to the decision he made in 2008. During the plea colloquy, Alley expressly acknowledged his future eligibility for habitual offender status if he had subsequent convictions. Alley completed the Truth-in-Sentencing Form, in which he acknowledged that the total maximum consecutive penalty he could receive, for the charges against him in 2008, was three (3) years incarceration and a penalty of up to $2,300. During the detailed plea colloquy, the Court again informed Alley of the maximum possible sentence he could face for the charges against him:

> THE COURT: You realize the maximum sentence you could receive for these two charges is three years in jail?
> THE DEFENDANT: Yes, sir.
> THE COURT: Has anybody promised you or guaranteed you what the sentence of this Court will be?
> THE DEFENDANT: No, they haven't, sir.

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[15] Super. Ct. R. Crim. 11(d).
[16] *Wells v. State*, 396 A.2d 161, 162-63 (Del. 1978).

Before accepting his plea, the Court asked Alley if he understood the charges to which he was pleading guilty to, which Alley responded, "I do, Your Honor." When asked if the plea was his choice, Alley stated "Yes, Sir." Alley confirmed having enough time to discuss the charges with his counsel and his decision to plead guilty. When asked if he was satisfied with his counsel's advice, Alley responded, "I am."

The Court then asked if Alley had any outstanding questions regarding his plea:

> THE COURT: Do you have any questions about the guilty pleas which you are entering or the trial and appeal rights which you are giving up?
> THE DEFENDANT: No, sir, Your Honor.
> THE COURT: The court finds the guilt pleas are knowingly, intelligently, and voluntarily offered and they will be accepted.

If Alley had doubts about entering a plea, or the possibility of being sentenced as a habitual offender in 2008 if he went to trial and was found guilty, he should have addressed those questions with Ms. Van Amerogen while completing his Truth-in-Sentencing Form or during his plea colloquy with the Court. After accepting his guilty plea, Alley was <u>not</u> sentenced as an habitual offender. Alley's sentence was well within the statutory maximum. Alley was sentenced to two (2) years at Level 5 with credit for twelve (12) days served, suspended after three (3)

months for one (1) year at Level 3 probation for Resisting Arrest and a concurrent sentence of one (1) year at Level 5 suspended for one (1) year supervision at Level 3 probation for Criminal Impersonation. The sentence imposed by the Court was longer than what the State had recommended but less than the maximum penalty allowed by law.

During sentencing, the Court explained:

> THE COURT: The aggravating factor here for the time will be repetitive criminal conduct. So that's why it's above the guidelines. And I'm going to put in the sentence order that you are eligible to be treated as a habitual offender. If there's a new felony conviction after today, you could face up to life imprisonment. Okay?
> THE DEFENDANT: Uh-huh.

Alley <u>expressly</u> acknowledged the Courts' warning that if he were to commit another felony, then he would be subject to sentencing as a habitual offender. He was on notice for exactly the circumstance in which he now finds himself.

Moreover, Alley had already indicated, both in writing and verbally, that he understood the penalty range for the crimes of Felony Resisting Arrest and Criminal Impersonation at the time he entered his plea. He indicated that his plea was neither forced, or the result of any promises. There is nothing in the record that supports Alley's contention that his decision to avoid trial and to plead guilty

was induced by Ms. Van Amerongen's advice that he would face either mandatory or discretionary habitual offender sentencing if convicted at trial. Another serious charge was dismissed entirely because Alley pled guilty to one felony and one misdemeanor. In the absence of clear and convincing evidence to the contrary, Mr. Alley is bound by his answers on the Truth-in-Sentencing Guilty Plea Form and by his sworn testimony prior to the Court's acceptance of his guilty plea.[17]

Alley's guilty pleas were knowingly, intelligently and voluntarily offered to the Court. Indeed, Alley does not challenge the plea offered or sentence imposed in 2008. He received the benefit of his bargain which was the one of the more serious charges was dismissed. Alley cannot meet the *Strickland* test for ineffective assistance of counsel because he was not prejudiced. To the contrary, Alley was on notice that he would be subject to sentencing as an habitual offender if he was convicted of another felony in the future. Alley acknowledged this potential consequence on the record. Alley's claim of ineffective assistance of counsel fails and his motion must be denied.

NOW, THEREFORE, this 14th day of February, 2014, Robert Alley's Motion for Postconviction Relief is hereby DENIED.

IT IS SO ORDERED.

Andrea L. Rocanelli

Honorable Andrea L. Rocanelli

[17] *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).