

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
)	
v.)	Cr. ID. No. 1202006558
)	
)	
JOHNNY DORAZIO,)	
)	
Defendant.)	

Submitted: October 14, 2014
Decided: November 24, 2014

COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED.
AND
RULE 61 COUNSEL’S MOTION TO WITHDRAW SHOULD BE GRANTED

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Defendant.

MANNING, Commissioner

This 24th day of November, 2014, upon consideration of Defendant's Motion for Postconviction Relief, the Court finds the following:

FACTS

According to the Affidavit of Probable Cause, sworn to by the arresting officer, on February 8, 2012, at 12:03 a.m., Delaware State Police responded to the parking lot of a Taco Bell/KFC restaurant located on West Newport Pike, Delaware. Once there, the officer observed Defendant slumped over the steering wheel sleeping (or possibly passed out) of a maroon in color vehicle. The officer observed the white reverse lights to be illuminated as the car was in the reverse gear. The officer also noticed Defendant's foot resting on the brake pedal.¹ The officer reached into the car, placed it into park and attempted to wake Defendant. The officer was able to wake Defendant after a "few shakes" and he appeared disoriented. Based on these facts, and the officer's knowledge and experience, the officer believed that Defendant may have been under the influence of drugs. The officer attempted to place Defendant into handcuffs pending the arrival of assisting officers so an investigation could be conducted. However, while being handcuffed, Defendant resisted by pulled away from the officer and taking four to five steps, before the officer was able to gain control of him and finish placing him into handcuffs. A search of Defendant's person revealed what appeared to be crack cocaine. A search of Defendant's car revealed hypodermic needles and an unspent Remington buckshot shotgun shell. Defendant was placed under arrest and transported back to Delaware State Police Troop 6. A further search of Defendant located 16 Alprazolam/Xanax pills in his pants pockets. In the rear of Defendant's car police located a Black Marksman 1010 Air Pistol. Defendant was initially charged by police

¹ It is unclear from the record if the engine was running.

with Resisting Arrest, Driving Under the Influence, Driving with a Suspended/Revoked License, Possession of Drug Paraphernalia and Possession of a Controlled Substance.

Additional charges of Possession of Ammunition and Possession of a Firearm by a Person Prohibited were added by indictment on May 7, 2012.

PROCEDURAL HISTORY

At his final case review on October 1, 2012, Defendant Johnny Dorazio pled guilty to Possession of a Firearm by a Person Prohibited in violation of 11 Del. C. § 1447A. Defendant was represented by a lawyer (“Trial Counsel”) and was sentenced the same day to the minimum mandatory sentence of three years at Level Five followed by various levels of probation.² Later that same month, Defendant filed a *pro se* Motion for Postconviction Relief (the “Motion”) under Superior Court Rule 61.³ The Court appointed Defendant counsel (“Rule 61 Counsel”) for his Motion on July 16, 2013. On March 27, 2014, Rule 61 Counsel filed a Non-Merit Brief and Motion to Withdraw as Counsel under Rule 61(e)(2). Trial Counsel filed an Affidavit in response to Defendant’s Motion on June 30, 2014. On August 22, 2014, Defendant filed a *pro se* Amended Motion for Postconviction Relief raising an additional argument regarding the continuing scandal at the Office of the Chief Medical Examiner. The State filed a Response as to all issues raised by Defendant, in both motions, on September 22, 2014. Defendant filed a Reply on October 14, 2014.

² Per the written Plea Agreement, the State agreed not to seek to declare Defendant a Habitual Offender under 11 *Del. C.* § 4214(a) if he accepted the plea offer. Defendant would have faced an additional five years of mandatory Level 5 time, up to life in prison, if he had been declared a Habitual Offender.

³ Defendant did not appeal his conviction to the Delaware Supreme Court.

DEFENDANT’S RULE 61 MOTION

Defendant’s Motion raises the following grounds for relief: (1) Actual Innocence, (2) Prosecutorial Misconduct, (3) Malicious Prosecution, (4) Ineffective Assistance of Counsel #1, (5) Ineffective Assistance of Counsel #2, (6) Scandal at the State Crime Lab Office, and (7) No Suppression Motion.⁴

All of Defendant’s arguments are either procedurally barred or without merit.⁵ Each will be address below.

LEGAL STANDARD

To prevail on an ineffective assistance of counsel claim, the 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.⁶ 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 the defendant to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.⁷

When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.⁸

⁴ As a matter of convenience and thoroughness, the Court has combined and summarized Defendant’s various arguments from the first *pro se* Motion filed on October 31, 2012, the Amended Motion filed on August 22, 2014, and the Reply to the State’s Response, filed on October 6, 2014.

⁵ Defendant’s Motion is evaluated under Rule 61 as it existed on the date the Motion was originally filed.

⁶ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

⁷ *Id.*

⁸ *Id.* at 697.

Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.⁹ An error by defense counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.¹⁰

Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that defense counsel's conduct fell within a wide range of reasonable professional assistance.¹¹ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.¹²

In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from the defense counsel's perspective at the time decisions were being made.¹³ It is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.¹⁴ A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided.¹⁵

The United States Supreme Court recognized that there are countless ways to provide effective assistance in any given case. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing

⁹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁰ *Strickland*, 466 U.S. at 691.

¹¹ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. Oct. 31, 2008).

¹² *Strickland at* 466 U.S. 688-689.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

court, trial counsel observed the relevant proceedings, knew of materials outside the record, and interacted with his client, opposing counsel, and the judge.¹⁶

Even the best criminal defense attorneys would not defend a particular client in the same way. Consequently, defense counsel must be given wide latitude in making tactical decisions.¹⁷ Counsel's representation must be judged by the most deferential of standards. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.¹⁸

Finally, a Motion for Postconviction Relief under Rule 61 is not a substitute for having contested the State's evidence at trial, nor is it a substitute for a direct appeal. The Court must first apply the procedural bars of Rule 61(i) before considering the merits of Defendant's specific claims.¹⁹

It is against this backdrop that each of Defendant's claims for relief are considered.

GROUND ONE: ACTUAL INNOCENCE

Defendant's first claim encompasses two issues: (1) that he is "actually innocent" because he did not knowingly possess a firearm, and (2) that the gun is actually only a BB-gun, and not a firearm as defined by Delaware law.

In his Motion, Defendant claims that he did not know the gun was in the vehicle because he had borrowed it from one Mr. Luther Mcilvian. This is a sound argument; however, it is one that he should have made to a jury and not in a Rule 61 motion. By pleading guilty and not taking his case to trial, Defendant waived this argument and it is

¹⁶ *Harrington v. Richter*, 131 S.Ct. 770, 787- 88 (2011).

¹⁷ *Id*

¹⁸ *Strickland*, 466 U.S. at 689; *Harrington v. Richter*, 131 S.Ct. 770 (2011).

¹⁹ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1997).

procedurally barred under Rule 61(i)(3).²⁰ Furthermore, Defendant has not alleged any cause for relief from procedural default as to this argument.

Defendant's second claim is without merit. From both the State's Response and Trial Counsel's Affidavit, it is clear that this question was raised prior to the entry of the guilty plea, legal research was conducted, and that all parties, including Defendant, were aware that the gun in this case met the statutory definition for a firearm.²¹ The gun, a Marksman 1010 Air Pistol, is a hybrid that is capable of firing BBs *and* "darts or bolts."²² At sentencing, in open court with Defendant present, the State explained that the gun in this case met the definition of a firearm under Delaware law.²³ With this understanding, Defendant pled guilty and was sentenced. If Defendant wished to pursue this issue, he should have gone to trial. In any event, he did not and this argument is without merit.

GROUND TWO: PROSECUTORIAL MISCONDUCT

Defendant's second claim is that the Prosecutor engaged in misconduct when, at some point prior to the guilty plea, the prosecutor sent an email to Trial Counsel stating that Defendant "had a plethora of stolen items linking [Defendant] to several home burglaries."²⁴ Defendant maintains, citing a police report that was provided to him after his guilty plea that this information is false, and the Prosecutor knew it.²⁵

Defendant argues that "[t]his lie impacted [his] decision to enter the guilty plea, and affects the integrity of the judicial process." While this latter statement may be

²⁰ Superior Court Criminal Rule 61(i)(3) Procedural Default. Any ground for relief that was not asserted in the proceedings below leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless movant shows (1) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights.

²¹ 11 *Del. C.* § 222(12).

²² Trial Counsel's Affidavit, Exhibit A.

²³ *Id.* at Exhibit B, P. 4. (citing *State v. Congo*, 2010 WL 1891700 (Del. Super. May 12, 2010, Slight, J.).

²⁴ Defendant's Amended Motion, p 3.

²⁵ *Id.*

somewhat true as a general proposition, Defendant does *not* state that had he *known* about this falsehood he would have rejected the plea offer and proceeded to trial. As such, Defendant's argument does not make a claim under Rule 61 and is inchoate, at best.²⁶ Even if the Prosecutor was operating under some type of mistaken impression regarding the other items in the car, there is no evidence it effected the outcome of the case. In fact, Defendant was offered a plea that did *not* seek to declare him a Habitual Offender and the same Prosecutor agreed to recommend only the minimum mandatory period of incarceration at Level Five – three years out of a possible eight. Even if Defendant had explicitly claimed in his Motion that he would not have entered into the plea agreement had he known this information, the Court finds the argument to be specious and without merit.

GROUND THREE: MALICIOUS PROSECUTION

Defendant's third claim is couched as malicious prosecution, but is in reality just a six-page diatribe against the actions of the Prosecutor in this case, rehashing much of what was argued in Ground One and Two. Defendant argues, *again*, that the gun in this case is merely a BB-gun and that he "was maliciously prosecuted with a charge that did'nt [sic] fit the crime, by a prosecutor who went out of his way to fabricate a firearm by a person prohibited charge for a BB-gun."²⁷ Defendant expends much ink arguing that the Prosecutor manipulated the Grand Jury into a false indictment, violated the Rules of Professional Conduct for Lawyers, and sought only a conviction and not justice, among other things. All of Defendant's claims are conclusory arguments unsupported by facts in the record and are without merit.

²⁶ It is relevant to note that Defendant was never charged with any of the suspected stolen items located in the car and the plea agreement entered into by Defendant encompassed only the firearm charge.

²⁷ Defendant's Amended Motion, p.6.

GROUND FOUR: INEFFECTIVE ASSISTANCE OF COUNSEL #1

Defendant argues two things: (1) Trial Counsel “never provided [him] with a copy of his Discovery and police report,” and (2) “[he] would not have entered a guilty plea, especially not to a firearm by a person prohibited for a BB-gun.”

Setting aside the fact that Defendant is asserting, in essence, the same argument as Ground Two, this argument is also without merit. If it is indeed true that Trial Counsel did not provide Defendant with a complete copy of his Rule 16 Discovery, that is lamentable and certainly not the best practice. However, it is not legally required under Delaware law or Rule 16 that counsel provide a defendant with a copy of the Rule 16 provided by the State.²⁸ In his Affidavit, Trial Counsel denies this allegation and states that “Discovery was discussed and reviewed with the Defendant.” Defendant fails to make any showing, other than the arguments previously discussed, as to how this alleged failure by Trial Counsel prejudiced him. This is particularly true in light of the fact that Defendant’s chief complaint concerns comments made by the Prosecutor in an email to Trial Counsel. However, even if the Prosecutor was mistaken, the items in question were not relevant to the case or any of the charges Defendant pled guilty to. Defendant does not demonstrate how the outcome of his case might reasonably have been different even if he had his Discovery.

The best time for Defendant to have raised the issue of his missing Discovery was when he was standing before a judge at one of his two case reviews, not in a Rule 61 Motion. In fact, during the guilty plea colloquy, Defendant was specifically asked if he: (1) had enough time to talk to his lawyer about the facts of the case, and (2) had enough time to talk to his lawyer about possible defenses to this charge. Defendant answered in

²⁸ See *State v. Miller*, 2007 WL 3287943 (Del. Super. 2007).

the affirmative as to both questions.²⁹ Based on this record, there is no basis for the Court to find that Trial Counsel’s conduct fell below an objective standard of reasonableness or that Defendant was actually prejudiced, in any way, as required under *Strickland*.

GROUND FOUR: INEFFECTIVE ASSISTANCE OF COUNSEL #2

In this section, Defendant makes various arguments as to how his lawyer “abandoned him” and had an “obligation to protect him from being prosecuted on a charge that does not match the crime.” Defendant also argues that Trial Counsel acted “on behalf of the prosecutor by presenting the ‘*Congo v. State*’ case to convince his own client that a BB-gun is a firearm...” Defendant also returns to the familiar argument that the gun in question is a BB-gun and not a firearm.

Defendant does not make a single concrete allegation in this section that is cognizable under Rule 61 or has not already been addressed. Defendant’s arguments under this section are repetitive, conclusory and without merit.

GROUND SIX: SCANDAL AT THE CRIME LAB OFFICE

Defendant argues that had he known about the “corruption taking place at the crime lab. . . he wouldn’t have entered any kind of plea deal at all.” Defendant’s argument might have *some* merit if he had actually pled guilty to a charge involving the suspected drug evidence that police recovered. However, Defendant pled guilty to a firearm charge and all other charges were dropped. Defendant makes no showing how this “scandal” prejudiced him in any way whatsoever. Defendant’s argument is illogical, unsupported by the record and without merit.

²⁹ Sentencing Transcript, p. 9.

GROUND SEVEN: NO SUPPRESSION MOTION

Defendant's final argument alleges that he was "never advised of a suppression issue," and that "[h]ad there been a suppression Hearing [Trial Counsel] could have challenged the indictment therefore dropping the firearm charge."³⁰ Presumably, Defendant is arguing that he was denied the right to a suppression hearing by Trial Counsel, and that had such a hearing occurred, the firearm would have been suppressed and the charge dropped.³¹ The relevant facts surrounding Defendant's initial detention and arrest were previously discussed.

Trial Counsel denies this allegation and states that he reviewed the issues with Defendant and determined that "there was not a sufficient legal or factual basis to file a motion for suppression" in this case."³² The Court is also satisfied, after an independent review of the facts, that Trial Counsel's failure to file a suppression motion was not objectively unreasonable under *Strickland*. Based on the facts presented, the police officer acted reasonably when he approached Defendant sleeping in his car and commenced an investigation. The officer's actions appear justified and reasonable under 11 *Del. C.* § 1902, or under the community caretaker function of police.³³ It is also worth noting that at the point in time Defendant pulled away from the officer, the officer then had probable cause to arrest Defendant for Resisting Arrest under Delaware law. Based on these facts, this Court does not find that Trial Counsel's failure to file a suppression motion was unreasonable, nor is there a reasonable probability that had such a motion

³⁰ Defendant's October 31, 2012 Motion, p. 5.

³¹ The Court has properly framed this issue for Defendant as a matter of fairness and will address the argument for the sake of completeness.

³² Trial Counsel's Affidavit, p. 2.

³³ See *Moore v. State*, 997 A.2d 656, 664-665 (Del. 2010).

been filed, it would have been successful. Therefore, Defendant's argument as to this issue fails under the *Strickland* standards.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be DENIED and Rule 61 Counsel's Motion to Withdraw should be GRANTED.

IT IS SO RECOMMENDED.

/s/ Bradley V. Manning
BRADLEY V. MANNING,
Commissioner

oc: Prothonotary
cc: Defendant