

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)	ID. No. 1503020875
)	In and for Kent County
v.)	
)	RK15-04-0219-01
GERARD T. SCHWEIGER,)	Perjury 1st (F)
)	RK15-04-0221-01
Defendant.)	Conspiracy 2 nd F)

COMMISSIONER'S REPORT AND RECOMMENDATION

Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61

Brian J. Robertson, Esquire, Deputy Attorney General, Department of Justice, for
the State of Delaware.

Gerard T. Schweiger, *Pro se*.

FREUD, Commissioner
October 26, 2017

The defendant, Gerard T. Schweiger ("Schweiger"), pled guilty on November 25, 2015 to one count of Perjury in the First Degree, 11 *Del. C.* §1223, and one count of Conspiracy in the Second Degree, 11 *Del. C.* § 512. He was also facing one additional count of perjury in the First Degree and one count of Bribing a Witness. *Nolle prosequis* were entered by the State on the additional charges in exchange for Schweiger's plea. As part of the Plea Agreement the parties agreed to recommend a sentence of ten years at Level V. Schweiger faced an additional

eight years incarceration on the additional pending charges had he gone to trial and been found guilty as charged. Schweiger did not appeal his conviction or sentence to the Delaware Supreme Court, instead he filed a motion for modification of sentence that was denied on January 20, 2016. Next, he filed *pro se*, a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 and motion to compel on February 3, 2016. A briefing order was issued but on May 24, 2016, Schweiger filed a “Motion to Dismiss Postconviction Motion Without Prejudice.” The Court deemed Schweiger’s Motion to Dismiss a “Motion to Withdraw, Without Prejudice” and issued an Order to that effect on July 7, 2016. Schweiger also filed a second motion to withdraw guilty plea, a second motion to compel, a motion for transcripts, and four motions for appointment of counsel. All motions were denied. On October 7, 2016, Schweiger filed a motion for postconviction relief which was designated his “first” motion as the previous motion had been withdrawn, without prejudice. In the motion he listed two grounds for relief. On December 2, 2016, Schweiger filed a “Supplemental First” motion for postconviction adding two more grounds.

FACTS

The charges stem from Schweiger’s own Perjury and Conspiracy with his co-defendant Phillip Wright, (“Wright”), to commit perjury during Schweiger’s trial for First Degree Murder. In part, as a result of the perjury, Schweiger was found not guilty on the Murder charge. Following his acquittal Schweiger was taped in a phone conversation stating how he got away with murder and admitting to

committing perjury during his murder trial. Additionally Wright was confirmed to have been incarcerated on the date he had claimed, in his testimony during the Murder trial, to have met Schweiger which purported to establish an alibi for Schweiger. Delaware Criminal Justice Information System (“DELJIS”) records established Wright had in fact been incarcerated when he claimed to have met Schweiger thus demonstrating his Perjury. Further as Wright told police Schweiger had approached him and asked him to lie at trial and wrote down what he wanted Wright to say.

SCHWEIGER’S CONTENTIONS

In Schweiger’s motion for postconviction relief filed October 4, 2016, he raises the following grounds for relief:

Ground one: Ineffective Assistance of Counsel.
When entering my plea on Nov. 25, 2015, 1 year of probation was added to my sentence. After, I signed my plea, with (sic) over sentenced me and my legal counsel failed to object to my legal rights being violated.

Ground two: Prosecutorial Misconduct
Conspiracy against defendant with/defendants Counsel in order to ashore (sic) conviction at any cost.

In Schweiger’s Supplemental First Motion for Postconviction Relief filed December 2, 2016 he raises the following grounds for relief:

Ground one: Ineffective Assistance of Counsel.
When I signed my plea on November 25, 2015, I did so under protest from my court appointed lawyer, Mr. Eugene Maurer. I did not know I was giving up my constitutional rights to appeal, or to a trial by a jury. I did not fully comprehend what I was signing, and Mr. Maurer was ineffective because he aggressively forced me to sign the plea without telling me what it meant, or the consequences.

Ground two: Prosecutorial Misconduct
Conspiring against defendant with defendant's counsel in order to ashore (sic) conviction at any cost.¹

DISCUSSION

Under Delaware law, the court must first determine whether Schweiger has met the strict procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.² This is Schweiger's first motion for post conviction relief and it was filed within one year of his conviction becoming final. Therefore, the requirement of Rule 61(i), (1) - requiring filing within one year; and (2) - requiring all grounds for relief be

¹ This ground is a repeat of the Ground two above.

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

presented in the initial Rule 61 motion, are met. None of Schweiger's claims were raised at the plea, sentencing or on direct appeal. Therefore, they are barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice. To some extent each of Schweiger's allegations can be construed as based on ineffective assistance of counsel; therefore, the Court could treat these claims as having alleged cause for his failure to have raised them earlier.

Rule 61(i)(3) would not bar relief as to Schweiger's grounds for relief,³ provided he demonstrates that his counsel was ineffective and that he was prejudiced by counsel's actions. To prevail on his claim of ineffective assistance of counsel, Schweiger must meet the two prong test of *Strickland v. Washington*.⁴ In the context of a guilty plea challenge, *Strickland* requires a defendant show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial and that the result of a trial would have been his acquittal.⁵ The failure to establish that a defendant would not have plead guilty and

³ Only assuming that he passed the initial time bar.

⁴ 466 U.S. 668 (1984); *Larson v. State*, 1995 WL 389718 (Del. June 23, 1995); *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992); *Albury v. State*, 551 A.2d 53 (Del. 1988).

⁵ *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Strickland*, 466 U.S. at 688, 694; *accord Larson*, 1996 WL 389718; *Blanchfield v. State*, 1994 WL 590536 (Del. Oct.18, 1994); *Skinner*, 607 A.2d at 1172; *Albury*, 551 A.2d at 58.

would have proceeded to trial is sufficient cause for denial of relief.⁶ In addition, Delaware courts have consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.⁷ When examining the representation of counsel pursuant to the first prong of the *Strickland* test, there is a strong presumption that counsel's conduct was professionally reasonable.⁸ This standard is highly demanding.⁹ *Strickland* mandates that when viewing counsel's representation, this Court must endeavor to "eliminate the distorting effects of hindsight."¹⁰

Following a complete review of the record in this matter, it is abundantly clear that Schweiger has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find counsel's affidavit, in conjunction with the record, more credible than Schweiger's unsubstantiated contention that his counsel's representation was ineffective. Schweiger's counsel clearly and unequivocally denies the allegations. The crux of Schweiger's allegations revolve around his complaint that his attorney gave him bad advice and misguided him into entering

⁶ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

⁷ *Younger*, 580 A.2d at 556; *Skinner*, 1994 WL 91138 (Del. Supr.).

⁸ *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. 689); see also *Larson*, 1995 WL 389718; *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

⁹ *Flamer*, 585 A.2d at 754.

¹⁰ *Strickland*, 466 U.S. at 639.

his guilty plea. Schweiger and his attorney discussed the case multiple times prior to the entry of the plea. The plea bargain was clearly advantageous to Schweiger who was caught on tape admitting to lying under oath to get out of being found guilty of First Degree Murder and also admitting to committing the Murder. Counsel's representation was certainly well within the range required by *Strickland*. Additionally, when Schweiger entered his guilty plea, he stated he was satisfied with defense counsel's performance. He is bound by his statement unless he presents clear and convincing evidence to the contrary.¹¹ Consequently, Schweiger has failed to establish that his counsel's representation was ineffective under the *Strickland* test.

Even assuming, *arguendo*, that counsel's representation of Schweiger was somehow deficient, Schweiger must satisfy the second prong of the *Strickland* test, prejudice. In setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk dismissal.¹² In an attempt to show prejudice, Schweiger simply asserts that his counsel was ineffective. His statements are insufficient to establish prejudice. Schweiger cannot demonstrate any prejudice.

To the extent that Schweiger alleges his plea was involuntary, the record clearly contradicts such an allegation. When addressing the question of whether a

¹¹ *Blanchfield*, 1994 WL 590536; *Mapp v. State*, 1994 WL 91264 (Del. Mar. 17, 1994) (citing *Sullivan v. State*, 636 A.2d 931, 937-938 (Del. 1994)).

¹² *Larson*, 1995 WL 389718; *Younger*, 580 A.2d at 556.

plea was constitutionally knowing and voluntary, the Court looks to the plea colloquy to determine if the waiver of constitutional rights was knowing and voluntary.¹³ At the guilty plea hearing, the Court asked Schweiger whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Schweiger if he understood he would waive his constitutional rights if he pled guilty, if he understood each of the constitutional rights listed on the Truth-in-Sentencing Guilty Plea Form (“Guilty Plea Form”), and whether he gave truthful answers to all the questions on the form. The Court asked Schweiger if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Schweiger if he was giving the plea of his own free will because he was in fact guilty. The Court also asked Schweiger if he was satisfied with his counsel's representation. Finally, the Court asked Schweiger if he was in fact guilty of the charges. Schweiger answered each of these questions clearly and affirmatively.¹⁴ I find counsel's representations far more credible than Schweiger's self-serving, vague allegations.

Furthermore, prior to entering his guilty plea, Schweiger signed a Guilty Plea Form and Plea Agreement in his own handwriting. Schweiger's signatures on the forms indicate that he understood the constitutional rights he was relinquishing by pleading guilty and that he freely and voluntarily decided to plead guilty to the charges listed in the Plea Agreement. Schweiger is bound by the statements he

¹³ *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

¹⁴ *State v. Schweiger*, Del. Super., ID No. 1503020875 (Nov. 25, 2015), Tr. at 2 - 11.

made on the signed Guilty Plea Form unless he proves otherwise by clear and convincing evidence.¹⁵ I confidently find that Schweiger entered his guilty plea knowingly and voluntarily and that Schweiger's grounds for relief are completely meritless.

I find that Schweiger's counsel represented him in a competent and effective manner and that Schweiger has failed to demonstrate any prejudice stemming from the representation. I also find that Schweiger's guilty plea was entered knowingly and voluntarily. Consequently, I recommend that the Court *deny* Schweiger's motion for postconviction relief as procedurally-barred and meritless.

/s/ Andrea M. Freud

Commissioner

AMF/dsc

¹⁵ *Sommerville, v. State*, 703 A. 2d 629, 632 (Del. 1997); *Hickman v. State*, 1994 WL 590495, at *1 (Del. Oct. 11, 1994); *Smith v. State*, 1990 WL 1474, at *1 (Del. Jan. 22, 1990). *See also Sullivan v. State*, 636 A.2d at 938 (ruling the fact that defendant filled out Truth In Sentencing Guilty Plea Form in defendant's own handwriting supported the Superior Court's conclusion that defendant's decision to plead guilty was knowing and voluntary).