

MAYER, Commissioner

This 5th day of December, 2017, upon consideration of Defendant's Motion for Postconviction Relief and the record in this matter, the following is my Report and Recommendation.

BACKGROUND, FACTS AND PROCEDURAL HISTORY

On December 5, 2011, Defendant was indicted on twenty-four felony charges relating to certain events that culminated in the murder of a New Castle County police officer. The case was specially assigned and intensely scrutinized by the court, the State of Delaware and appointed counsel for Defendant. At the time of the incident, Defendant was on probation for other felony convictions as well. Defense counsel moved for a proof positive hearing and the court eventually held that there was sufficient evidence supporting two of the Murder First Degree charges for Defendant to be held without bail.¹ Extensive discovery was exchanged, numerous motions were filed, and Defendant underwent a psychiatric/psychological evaluation. Defendant eventually plead guilty but mentally ill to 15 criminal charges.² After consideration of the psychological reports, the Court issued findings that Defendant was competent to enter a plea and that the plea was entered knowingly and voluntarily.³ On January 17, 2014, Defendant was sentenced to two

¹ See D.I. # 22.

² D.I. # 136.

³ D.I. # 165 (the "GBMI Order").

life sentences, plus 157 years.⁴ Defendant did not appeal his conviction. On October 16, 2017, Defendant filed a *pro se* Motion for Postconviction Relief.⁵

LEGAL ANALYSIS

Pursuant to Super. Ct. Crim. R. 61(d)(5) the Motion may be summarily dismissed because it plainly appears from the record in the case that the motion is procedurally barred and movant is not entitled to relief. As such, the Court should not consider the merits of the claims.⁶

As an initial matter, Defendant's Motion is barred by Super. Ct. Crim. R. 61(i)(1) for having been filed more than one year after the judgment of conviction became final. Defendant's judgment of conviction became final on February 16, 2014.⁷ This Motion, having been filed more than 3 ½ years later, is untimely.

⁴ D.I. # 166. Defendant was sentenced for two pending violations of probation as well as two counts of Murder First Degree, four counts of Possession of a Deadly Weapon During Commission of a Felony, two counts of Possession of a Deadly Weapon by a Person Prohibited, Assault Second, four counts of Burglary Third Degree, Attempted Robbery First Degree, and Resisting Arrest.

⁵ D.I. # 174.

⁶ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990); *Paul v. State*, 2011 WL 3585623 (Del. Aug. 15, 2011), at *1 ("Delaware law provides that the Superior Court must first consider whether the defendant has satisfied the procedural requirements of Rule 61 before considering the merits of his postconviction motion.")

⁷ *See* Super. Ct. Crim. R. 61(m)(1). If the defendant does not file a direct appeal, the judgment of conviction becomes final 30 days after the Superior Court imposes sentence.

Further, pursuant to Super. Ct. Crim. R. 61(i)(3) and (4), any ground for relief that was not previously raised is deemed waived, and any claims that were formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, are thereafter barred.

Defendant first claims that he was held “in cognito” by New Castle County Police for questioning at Christiana Care before being charged with crimes. It is difficult to discern the legal basis of Defendant’s claim, however what is clear is that this claim was waived when Defendant plead guilty and/or is procedurally defaulted because Defendant failed to raise it in the original proceedings.

Defendant next presents several allegations of illegal searches and seizures by claiming his mother’s house was raided, his truck impounded, his father’s ashes impounded, and his girlfriend’s property taken on “trumped up charges.” Each of these issues was addressed by the Court’s Opinion⁸ denying Defendant’s Motion to Suppress Searches. These claims were previously adjudicated and are now barred.

Defendant also argues that he gave a confession under a drug induced state. The Opinion addressed the Defendant’s Motion to Suppress Statements, noted the State withdrew its opposition to the motion, and granted it in part. Like the previous

⁸ D.I. # 133 (hereinafter the “Opinion”).

issue, this matter was already adjudicated, in this instance favorably to Defendant, and will not now be reconsidered.

To the extent Defendant argues his plea was given while under the influence of pharmaceutical drugs, this is not untrue, but it does not afford Defendant relief. Defendant's use and need for mental health medication was well known to the parties and the Court and in fact, was a basis for his guilty but mentally ill defense.

A defendant's statements to the Court during the guilty plea colloquy are presumed to be truthful and Defendant is bound by his statements to the Court.⁹ At the Plea Hearing, the Truth-in-Sentencing Form and Plea Agreement were presented to the Court and acknowledged by Defendant. Trial Counsel notified the Court that Defendant was under the influence of prescribed medications but that he had been given the appropriate amounts, at the appropriate time, with the desired effect. Trial counsel believed Defendant was thinking clearly and understood the proceedings. The Court then addressed Defendant and asked about the prescribed medication. Defendant acknowledged that the medication kept him from having adverse symptoms and that he was not under the influence of any other drugs or alcohol. The Court's colloquy with Defendant was thorough and addressed each of the

⁹ *Windsor v. State*, 2015 WL 5679751, at *3 (Del., Sept. 25, 2015) (holding that absent clear and convincing evidence to the contrary, defendant is bound by his sworn statements). *See also*, *State v. Brown*, 2010 WL 8250799, at *3 (Del. Super., Apr. 14, 2010), citing, *Somerville v. State*, 703 A.2d 629 (Del. 1997).

charges, as well as all rights that were being waived through Defendant's plea of guilty but mentally ill. Defendant stated no one made any threats or forced him in any way to enter into the agreement and he was satisfied with his counsel's representation. After a detailed review of the charges, plea and sentence, the Court found that based upon the colloquy with Defendant, the plea was knowledgeable, voluntary and based in fact. Further, the Court's GBMI Order specifically states:

The Court, based upon its observations of the Defendant at the time of the plea, his responsiveness to the Court's questions, and counsels' representations regarding their ability to communicate with the Defendant regarding the consequences of entering a plea, and finding nothing contrary in the expert reports provided, finds that the Defendant was competent to enter a plea and the plea was entered knowingly and voluntarily and there was a basis in fact for the plea.¹⁰

In light of the above, I find no reason to deviate from the Court's acceptance of the plea.¹¹

Defendant's last argument raises various claims of ineffective assistance of counsel. Ineffective assistance of counsel claims cannot be raised at any earlier stage in the proceedings and are properly presented by way of a motion for postconviction

¹⁰ D.I. # 165.

¹¹ See also *State v. Runyan*, 2008 WL 2690277 (Del. Super., June 26, 2008) (denying motion for postconviction relief when defendant challenged guilty plea given while under the influence of prescribed medication).

relief.¹² However, an ineffective assistance of counsel claim is still subject to the timeliness bar of Rule 61(i)(1) and therefore, Defendant's claims in this regard have been asserted too late.

Even if the Court were to consider Defendant's remaining claims, in order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and the deficiencies in counsel's representation caused the defendant actual prejudice.¹³ When a defendant has plead guilty, he must show that counsel's actions were so prejudicial that there is a reasonable probability that, but for counsel's errors, the defendant would not have plead guilty and would have insisted on going to trial.¹⁴ Defendant must also overcome a strong presumption that counsel's conduct was reasonably professional under the circumstances.¹⁵ Mere allegations of ineffectiveness will not suffice, rather, a defendant must make and substantiate

¹² *Whittle v. State*, 2016 WL 2585904, at *3 (Del. Apr. 28, 2016); *State v. Evan-Mayes*, 2016 WL 4502303, at *2 (Del. Super. Aug. 25, 2016).

¹³ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Hitchens v. State*, 757 A.2d 1278 (Del. 2000).

¹⁴ *State v. Hess*, 2014 WL 6677714, at * 6 (Del. Super., Nov. 20, 2014) (citations omitted).

¹⁵ *State v. Wright*, 653 A.2d 288, 293-94 (citations omitted).

concrete allegations of actual prejudice.¹⁶ Great weight and deference are given to tactical decisions by the trial attorney and counsel cannot be deemed ineffective for failing to pursue motions that lack merit.¹⁷

Defendant argues that (i) trial counsel¹⁸ was ineffective by waiving his right to a speedy trial and not contesting the evidence against him; (ii) trial counsel erred in failing to challenge the State's investigation techniques of opening mail and questioning persons who sent mail to Defendant;¹⁹ and (iii) trial counsel erred by advising him that going to trial would result in the death penalty because capital punishment no longer exists in Delaware.

Defendant's claim that counsel waived his right to a speedy trial and to contest evidence against him is simply untrue. Defendant himself waived these rights. When Defendant entered into the Plea Agreement and executed the Truth-in-Sentencing Guilty Plea Form, he waived his right to a speedy trial and to contest the

¹⁶ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁷ *State v. Miller*, 2013 WL 871320, at *4 (Del. Super., Feb. 26, 2013).

¹⁸ Defendant was represented by three experienced defense attorneys.

¹⁹ Although these claims are barred for other reasons, I would also note that Defendant has offered no reasonable basis by which the Court should find that the actions here (if any) violated the principles set forth in *Stroud v. United States*, 251 U.S. 380 (1919) and its progeny.

evidence against him.²⁰ Defendant had a full and fair opportunity to raise these issues in the prior proceedings and his failure to do so bars his ability to raise them at this late juncture and/or the claims were waived upon entry of the plea.

To the extent Defendant believes that trial counsel erred in failing to file motions on his behalf, he presents nothing more than a general assertion that certain arguments/motions should have been pursued but fails to provide any additional details in support. Absent concrete allegations of actual prejudice, trial counsel will not be deemed ineffective for failing to pursue meritless motions.²¹ I also note that trial counsel did in fact pursue numerous motions on Defendant's behalf. Trial counsel sought a proof positive hearing and pursued three Motions to Suppress,²² a Motion for Relief from Prejudicial Joinder of Offenses,²³ a Motion to Preclude the State from Seeking the Death Penalty,²⁴ a Motion for Attorney-Conducted Voir

²⁰ See also, *Brown v. State*, 108 A.3d 1201 (2015) (affirming denial of request for new trial on the basis that defendant pled guilty and gave up his right to trial and contest evidence).

²¹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

²² D.I. #s 43, 46, 50.

²³ D.I. # 44.

²⁴ D.I. # 48.

Dire,²⁵ three Motions in Limine,²⁶ and a Motion to Compel Discovery.²⁷ Defendant has not shown any error in trial counsel's representation.

Defendant's remaining claim that trial counsel erred by advising him he may face the death penalty is also unsupported by law and fact. Trial counsel filed a Motion to Preclude the State from Seeking the Death Penalty. That motion was denied but would be revisited at sentencing if appropriate. Although the death penalty has subsequently been suspended in Delaware,²⁸ at the time of Defendant's trial, it was very much a likelihood due to the nature of the offenses.

Defendant has also failed to establish any prejudice arising from trial counsel's representation. Defendant was facing 24 very serious charges.²⁹ The plea provided Defendant with a clear benefit – the death penalty was no longer on the table. In consideration of the totality of the facts and circumstances herein, Defendant has failed to offer any basis for reconsideration of the plea or that the

²⁵ D.I. # 49.

²⁶ D.I. #s 65, 94, 129.

²⁷ D.I. # 89.

²⁸ See *Rauf v. State*, 145 A.3d 430 (Del. 2016). Delaware's death penalty statute was found unconstitutional in August of 2016, more than two years after Defendant was scheduled for trial.

²⁹ Defendant also had a violation of probation charge pending that was resolved by way of the plea.

outcome of the proceedings would have been different if he had not pled guilty to the charges. Defendant has thus failed to rebut the presumption of reasonable professional conduct under the circumstances.³⁰

Finally, the bars to relief set forth above will not apply to a claim that (i) the court lacked jurisdiction, (ii) pleads with particularity that new evidence exists creating a strong inference that the movant is actually innocent in fact of the acts underlying the conviction, or (iii) a new rule of constitutional law, made retroactive to cases on collateral review, applies to render the conviction invalid.³¹ Defendant does not argue the Court lacked jurisdiction, has not plead any new evidence or facts demonstrating that he is innocent of the acts giving rise to the conviction, nor has he asserted that a new rule of constitutional law affects his conviction. As such, Defendant has failed to establish an exception to the procedural bars.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be SUMMARILY DISMISSED.

IT IS SO RECOMMENDED.



Commissioner Katharine L. Mayer

oc: Prothonotary
cc: David A. Salasky

³⁰ See also, *Brown v. State*, 108 A.3d 1201 (Del. 2015) (affirming denial of request for new trial on the basis that defendant pled guilty and waived certain constitutional rights).

³¹ See Super. Ct. Crim. R. 61(i)(5) and (d)(2)(i)-(ii).