

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)	In and for Kent County
)	ID. No. 1609019930
v.)	
)	RK13-10-0076-01
BRIAN L. CROSSMAN,)	Drug Dealing (F)
)	
Defendant.)	

COMMISSIONER'S REPORT AND RECOMMENDATION

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

Gregory R. Babowal, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Brian L. Crossman, *Pro se*.

FREUD, Commissioner
June 29, 2018

The defendant Brian L. Crossman (“Crossman”) pled guilty on May 2, 2017 to one count of Drug Dealing, 16 *Del. C.* § 4754(1). Crossman was also facing another charge of Drug Dealing, two counts of Tier 1 Possession of Methamphetamine, one count of Conspiracy in the Second Degree, one count of Endangering the Welfare of a Child, two counts of Possession of Drug Paraphernalia and two counts of Possession of Marijuana. *Nolle prosequis* were entered by the

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State in exchange for Crossman's guilty plea. After much negotiation Crossman's attorney was able to get the State to recommend a sentence of eight years Level V suspended after serving nine months with credit for time served. The Court agreed with the recommendation and sentenced Crossman accordingly. Additionally, Crossman's attorney and the State agreed to give Crossman credit for two separate periods of pretrial incarceration while Crossman was held on one matter in lieu of posting bail initially and on a [another?] matter held without bail due to his being arrested for new violent felonies pursuant to 11 *Del. C.* § 2116(c).

The charges stemmed from Crossman being found in a vehicle with a large quantity of drugs following a traffic stop for "failing to signal a turn." Inside the vehicle in addition to Crossman and his co-defendant were two children. Crossman was the guardian of one of the children. More drugs were found in a hotel room which Crossman had the key for, following the execution of a search warrant. Also found in the room was a court subpoena with Crossman's name on it. Given this evidence the Plea Agreement that resulted in only a few months additional incarceration was extraordinarily beneficial to Crossman especially in light of the fact that the state's initial plea offer had been for two years incarceration not nine months with credit for time served. Crossman did not appeal his conviction or sentence to the State Supreme Court. He did file several Habeas Corpus motions and a motion for reduction of sentence that this court denied. On July 31 2017, Crossman filed the pending motion for postconviction relief pursuant to Superior Court Criminal Rule 61, in which he alleges, in part, ineffective assistance of counsel.

CROSSMAN'S CONTENTIONS

In his motion, he raises the following grounds for relief:

- Ground one: Ineffective Assistance of Counsel.
I never received a discovery after several requests to challenge sufficiencies. I wasn't able to use the protections guaranteed by the U.S. Constitution and the DE Constitution. I requested a copy of the indictment, motion to severance, invoke U.S. Const. Amend. 4 & 14.
- Ground two: Illegal Detention.
Detention lasted hours longer then an illegal detainment should last.
- Ground three: Illegal Arrest.
The owner of the contraband was already established. Voluntarily (sic) statements were made throughout the course of the incident. I was thoroughly searched and I did not possess anything illegal. I was not wanted and I was not a probationer or fugitive.
- Ground four: Illegal Search.
I was not on probation; nor did I possess anything illegal. No illegal sells were made from the dwelling where contraband was allegedly found. Consent was not given to search. A traffic stop was used to explore with "hope."
- Ground five: Denial of right to confront witness.
My proof positive hearing was rescheduled 4-

5 times allegedly and never taken place which would have allowed me to compel statements from codefendant which were favorable to my case. I would have also been able to get the hold on my bail removed.

- Ground six: Denial of right to subpoena witness.
I made several requests to have Jamie Roy subpoenaed because her statements were favorable to my case and would have changed the outcome.
- Ground seven: Suppression of favorable evidence.
The illegal search of the motel room made the drugs fruits of the poisonous tree. The key to the room was obtained illegally as well.
- Ground eight: Unfulfilled plea agreement
I was prejudiced throughout the process. I didn't even have enough information about the case to aid me. It was impossible to fight without the discovery or proper representation of counsel knowing he did not meet reasonable standards.
- Ground nine: Held without Bail.
I was not allowed to post bail for unknown reasons after several requests for information on my bail. I was never informed why, and I was not facing capital charges. Being held without bail forced me to proceed with the attorney that was misrepresenting me because I wanted to obtain private counsel.

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The above grounds represent all of Crossman's arguments. He did not file a Memorandum with the motion or a Reply to the State's response.

DISCUSSION

Under Delaware law, this Court must first determine whether Crossman has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.¹ This is Crossman's first motion for postconviction relief, and it was filed within one year of his conviction becoming final. Therefore, the requirements of Rule 61(i)(1) - requiring filing within one year and (2) - requiring that all grounds for relief be presented in initial Rule 61 motion, are met. None of Crossman'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. Only Crossman's first claim is based on ineffective assistance of counsel; therefore, he has alleged cause for his failure to have raised it earlier. He has failed to allege cause for not raising his remaining claims earlier. They are therefore clearly barred by Rule 61(i)(3).

At this point, Rule 61(i)(3) does not bar relief as to Crossman's first ground for relief, to the extent that Crossman's other claims can somehow be deciphered to be claims of ineffective assistance of counsel, Crossman's counsel denies the allegations. To prevail on his claim of ineffective assistance of counsel, Crossman must meet the

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

two-prong test of *Strickland v. Washington*.² 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.³ The failure to establish that a defendant would not have pled guilty and would have proceeded to trial is sufficient cause for denial of relief.⁴ 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.⁵ 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.⁶ This standard is highly demanding.⁷ *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to “eliminate the

² 466 U.S. 668 (1984).

³ *Id.* at 687.

⁴ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988))(citations omitted).

⁵ *See, e.g., Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del.).

⁶ *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).

⁷ *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990)(quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)).

distorting effects of hindsight.”⁸

Crossman claims that his attorney failed to give him discovery, a claim that his attorney denies. Crossman’s counsel also denies any error in his representation of Crossman. Following a complete review of the record in this matter, it is abundantly clear that Crossman 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 Crossman’s self-serving claims that his counsel’s representation was ineffective. Crossman’s counsel clearly and unequivocally denies the allegations. Counsel states that he discussed Crossman’s suggested arguments with him and that he could not ethically raise them and that for tactical reasons he chose not to raise them.

As noted, the sentence and plea were reasonable under all the circumstances, especially in light of the clear evidence against him. Prior to the entry of the plea, Crossman and his attorney discussed the case. The plea bargain was clearly advantageous to Crossman especially since his attorney was able to negotiate with the State to lower its recommendation from two years Level V to just a few months at Level V. Counsel’s representation was certainly well within the range required by *Strickland*. Additionally, when Crossman entered his guilty plea, he stated he was satisfied with defense counsel’s performance. He is bound by his

⁸ *Strickland*, 466 U.S. at 689.

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statement unless he presents clear and convincing evidence to the contrary.⁹ Consequently, Crossman has failed to establish that his counsel's representation was ineffective under the *Strickland* test.

Even assuming, *arguendo*, that counsel's representation of Crossman was somehow deficient, Crossman 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.¹⁰ In an attempt to show prejudice, Crossman simply asserts that his counsel was ineffective and he would not have accepted a plea. His statements are insufficient to establish prejudice. Therefore, I find all of Crossman's grounds for relief are meritless.

To the extent that Crossman alleges his plea was involuntary, the record contradicts such an allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary, the Court looks to a plea colloquy to determine if the waiver of constitutional rights was knowing and voluntary.¹¹ At the guilty-plea hearing, the Court asked Crossman whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Crossman if he understood he would waive his

⁹ *Mapp v. State*, 1994 WL 91264, at *2 (Del. Mar. 17, 1994)(citing *Sullivan v. State*, 636 A.2d 931, 937-38 (Del. 1994)).

¹⁰ *Larson v. State*, 1995 WL 389718, at *2 (Del. June 23, 1995)(citing *Younger v. State*, 580 A.2d 552, 556 (Del. 1990)).

¹¹ *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

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 Crossman if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Crossman if he was giving the plea of his own free will because he was satisfied that the State had sufficient evidence to convict him. The Court also asked Crossman if he was satisfied with this counsel’s representation. Crossman answered each of these questions affirmatively.¹² I find counsel’s representations far more credible than Crossman’s self-serving, vague allegations.

Furthermore, prior to entering his guilty plea, Crossman signed a Guilty Plea Form and Plea Agreement in his own handwriting. Crossman’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. Crossman is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.¹³ I confidently find that Crossman entered his guilty plea knowingly and voluntarily and that Crossman’s grounds for relief are completely meritless.

CONCLUSION

I find that Crossman’s counsel represented him in a competent and effective manner and that Crossman has failed to demonstrate any prejudice stemming from the

¹² *State v. Crossman*, Del. Super., ID No. 1609019930 (May 2, 2017) tr. at 3-11.

¹³ *Sommerville v. State*, 703 A.2d 629, 632 (Del. 1997).

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representation. I also find that Crossman's guilty plea was entered knowingly and voluntarily. I recommend that the Court *deny* Crossman's motion for post conviction relief as procedurally barred and completely meritless.

/s/ Andrea M. Freud
Commissioner

AMF/dsc
oc: Prothonotary