

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
)
) Cr. ID No. 1501018069
)
KADIR MCCOY,)
)
)
 Defendant.)
)

Submitted: June 10, 2019
Decided: July 17, 2019

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED
AND
DEFENDANT’S MOTION FOR THE APPOINTMENT OF COUNSEL
SHOULD BE DENIED.**

Periann Doko, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Kadir McCoy, James T. Vaughn Correctional Center, Smyrna, Delaware,
pro se.

PARKER, Commissioner

This 17th day of July 2019, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND, FACTS AND PROCEDURAL HISTORY

1. On April 13, 2015, Defendant Kadir McCoy was indicted on three counts of Robbery First Degree, two counts of Aggravated Menacing, Conspiracy Second Degree, Wearing a Disguise During the Commission of a Felony, Carrying a Concealed Deadly Weapon, two counts of Possession of a Firearm by a Person Prohibited, two counts of Possession of Ammunition by a Person Prohibited, and Resisting Arrest.
2. On August 31, 2015, McCoy was reindicted for the above charges and additional charges including Illegal Gang Participation, two counts of Murder First Degree and multiple firearm and conspiracy offenses. The Illegal Gang Participation charge stemmed from McCoy's membership in the Touch Money Gang, also known as "TMG".
3. One count of Murder First Degree was for the murder of Devon Lindsey. The murder occurred on January 18, 2015 on E. 29th Street in Wilmington, Delaware. The victim was shot in the head after three suspects fired inside a minivan where the victim was a passenger. McCoy was developed as a suspect through video surveillance footage of the homicide and witness statements.

4. The second count of Murder First Degree was for the murder of William "Billy" Rollins. The murder occurred on January 24, 2015 at W. 21st Street and Washington Street, Wilmington, Delaware. The victim was found with eleven gunshot wounds on the left side of his body and his right temple. Fifteen 9mm shell casings were located at the scene. The 9mm shell casings were ballistically matched to a 9mm handgun found in a backpack that had been tossed by McCoy on January 29, 2015, when he was fleeing from a WSFS Bank after committing a robbery. Two projectiles recovered at the homicide scene appeared to be fired by a .357 firearm. A search warrant executed at the residence of McCoy on February 3, 2015 uncovered a .357 Taurus firearm.

5. One of the Robbery First Degree charges stemmed from the robbery on January 29, 2015 at WSFS Bank located at Union Street, Wilmington, Delaware. Two masked suspects showed guns, demanded money, and seized approximately \$15,000 in cash. Officers responded to the crime scene as the suspects were fleeing. After a brief foot chase, McCoy and his co-conspirator (Cordele Stewart) were arrested. McCoy was seen tossing a red backpack. Inside the backpack was the stolen money and a 9mm Ruger P85. The 9mm was matched to shell casings fired at the scene of the William Rollins homicide on January 24, 2015.

6. On March 3, 2017, McCoy pled guilty to two counts of Murder Second Degree (lesser-included offenses of Murder First Degree), two counts of Possession of a Firearm during the Commission of a Felony, two counts of Conspiracy First Degree, one count of Robbery First Degree, and one count of Illegal Gang Participation.¹

7. In exchange for the guilty plea, the State agreed to dismiss all the other charges in the indictment.² Although McCoy was facing two life sentences if convicted of the Murder in the First Degree charges, and hundreds of years of prison time for the multiple robbery and firearm related charges, as part of the plea, the State agreed to cap its sentence recommendation to the minimum-mandatory period of 39 years of unsuspended Level V time.³

8. On August 10, 2017, McCoy filed a motion to withdraw his guilty plea. The Superior Court denied the motion by Order dated August 17, 2017.⁴ In deciding the motion, the Superior Court held that there was no procedural defect in taking the plea; that McCoy knowingly and voluntarily consented to the plea agreement; that McCoy had no basis to assert a claim of legal

¹ Superior Court Docket No. 61- Plea Agreement of March 3, 2017.

² Superior Court Docket No. 61- Plea Agreement of March 3, 2017.

³ Superior Court Docket No. 61- Plea Agreement of March 3, 2017.

⁴ Superior Court Docket No. 65- Order dated August 17, 2017 denying Motion to Withdraw Guilty Plea.

innocence; and that McCoy had adequate legal counsel throughout the proceedings.⁵

9. The Superior Court further noted that McCoy was satisfied with his counsel's representation at the time of the plea, and that, as a practical matter, the plea agreement was McCoy's only option to avoid spending the remainder of his life in jail.⁶

10. The Superior Court in denying McCoy's motion to withdraw his plea ruled that McCoy had failed to set forth any basis to warrant the withdrawal of his plea.⁷

11. On August 18, 2017, McCoy was sentenced to the minimum-mandatory period of 39 years of unsuspended Level V time, followed by probation.

12. McCoy did not file a direct appeal to the Delaware Supreme Court.

MCCOY'S RULE 61 MOTION

13. On October 16, 2018, McCoy filed the subject Rule 61 motion.

14. While the Rule 61 motion was pending, McCoy filed an almost identical Rule 61 motion on January 17, 2019, in which he again raised the same issues that he raised in his initial motion.

⁵ *Id.*

⁶ *Id.* at pg. 3.

⁷ *Id.* at 4.

15. In the subject motion, McCoy raises three claims: (1) that his trial counsel provided ineffective assistance of counsel arising out of improprieties with his plea; (2) that trial counsel was ineffective for filing a motion to withdraw the guilty plea too late to be considered by the Court; and (3) that there was newly discovered evidence in that the firearms and tool marks examiner was subsequently arrested for “fraudulent and illegal activity.”

16. Before making a recommendation, the record was enlarged and McCoy’s trial counsel was directed to submit an Affidavit responding to McCoy’s claims. Thereafter, the State filed a response to the motion. McCoy was given the opportunity to file a reply thereto.⁸

17. For the reasons discussed below, McCoy’s Rule 61 motion is time-barred and otherwise procedurally barred, waived and without merit.

McCoy’s Claims Are Procedurally Barred

18. Prior to addressing the substantive merits of any claim for postconviction relief the court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.⁹ If a procedural bar exists, then the claim is barred and the court should not consider the merits of the postconviction claim.¹⁰

⁸ Super.Ct.Crim.R. 61(g).

⁹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁰ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

19. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹¹ (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances (ie. discovery of *new* evidence that creates a strong inference of defendant's actual innocence or *new* rule of constitutional law that would render the conviction invalid) warranting a subsequent motion being filed; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any prior proceeding. The bars to relief however do not apply to a claim that the court lacked jurisdiction or to a claim that new evidence exists that movant is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.¹²

20. In the subject action, Rule 61(i)(1) precludes this court from considering McCoy's claims raised herein because McCoy's motion is time-barred.¹³ To be timely, a motion for postconviction relief must be filed within one year after the judgment of conviction is final.¹⁴ McCoy's conviction

¹¹ Super.Ct.Crim.R. 61(i)(1).

¹² Super.Ct.Crim.R. 61 (effective June 4, 2014).

¹³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁴ Super.Ct.Crim.R. 61(i)(1).

became final on or about September 17, 2017.¹⁵ This motion was filed on October 16, 2018, outside the applicable one-year limit. McCoy's claims, at this late date, are time-barred.

21. Rule 61(i)(2) and Rule 61(i)(5) further preclude this court's consideration of McCoy's motion since McCoy has not satisfied the pleading requirements for proceeding with this motion. Since McCoy's motion was not timely filed, in order to overcome the procedural hurdles, McCoy must establish that the court lacked jurisdiction; or that *new* evidence exists that creates a strong inference that defendant is actually innocent of the underlying charges for which he was convicted; or that the existence of a *new* rule of constitutional law made retroactive to this case would render his convictions invalid.

22. In the subject motion, McCoy is unable to overcome the procedural hurdles of Rule 61(i)(3) by showing an exception in Rule 61(i)(5) applies. McCoy has not established that the court lacked jurisdiction, that any new evidence existed to create a strong inference that he is actually innocent of the underlying charges, or that a new rule of constitutional law exists that would render his conviction invalid. As such, McCoy has failed to meet the pleading requirements allowing him to proceed with his Rule 61 motion.

¹⁵ Super.Ct.Crim.R. 61(m)(1).

23. Rule 61(i)(3) further prevents this court from considering any claim raised by McCoy at this late date that had not previously been raised. McCoy was aware of, had time to, and the opportunity to raise the claims presented herein in a timely filed motion.

24. McCoy has not established any prejudice to his rights and/or cause for relief. McCoy had time and opportunity to raise any issue raised herein in a timely filed postconviction motion. There is no just reason for McCoy's delay in doing so. Having been provided with a full and fair opportunity to present any issue desired to be raised in a timely filed motion, any attempt at this late juncture to raise, re-raise or re-couch a claim is procedurally barred.

25. Finally, Rule 61(i)(4) precludes this court's consideration of the claims presented herein since the claims regarding McCoy's guilty plea have already been formally adjudicated in McCoy's motion to withdraw his guilty plea. The Superior Court has already held that McCoy failed to set forth any basis that would warrant the withdrawal of the plea. The Superior Court already ruled that there were no procedural defects in the taking of the plea, which McCoy entered into the plea knowingly and voluntarily, with full knowledge

of the consequences.¹⁶ This claim cannot now be re-stated, refined and re-raised in order to again seek review.¹⁷

26. The claims raised in McCoy's Rule 61 motion are time-barred and otherwise procedurally barred.

McCoy's Claims Were Waived Upon the Entry of His Plea

27. In addition to McCoy's claims being procedurally barred, his claims were also waived upon the entry of his plea.

28. A defendant is bound by his answers on the guilty plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.¹⁸ In this case, the Superior Court, when deciding McCoy's Motion to Withdraw his Guilty Plea, already concluded that the plea was made knowingly and intelligently. The Superior Court already held that the decision to enter into the plea was made with a full understanding of the nature of the charges and the consequences of the plea. The Superior Court already noted that the decision to enter into the plea was well informed and that the

¹⁶ Superior Court Docket No. 65- Order dated August 17, 2017 denying Motion to Withdraw Guilty Plea, *3-4.

¹⁷ *Johnson v. State*, 1992 WL 183069, *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

¹⁸ *State v. Harden*, 1998 WL 735879, *5 (Del. Super.); *State v. Stuart*, 2008 WL 4868658, *3 (Del. Super. 2008).

plea represented a fair and appropriate resolution of the cases against McCoy.¹⁹

29. Indeed, the plea colloquy and McCoy's answers on the Truth-In-Sentencing Guilty Plea Form reflect that McCoy was satisfied with his counsel's representation, that he was voluntarily entering into his guilty plea, that he was guilty of each of the charges for which he was pleading guilty, and that he understood the trial and appellate rights he was waiving by entering into the plea agreement.²⁰

30. McCoy has not presented any clear, contrary evidence to call into question his testimony at the plea colloquy, Plea Agreement or answers on the Truth-in-Sentencing Guilty Plea Form.

31. Since McCoy's plea was entered into voluntarily, intelligently and knowingly, he waived his right to challenge any alleged errors, deficiencies or defects occurring prior to the entry of his plea, even those of constitutional proportions.²¹ McCoy's claims presented herein stem from allegations of defects, errors, misconduct and deficiencies which existed at the time of the

¹⁹ Superior Court Docket No. 65- Order dated August 17, 2017 denying Motion to Withdraw Guilty Plea.

²⁰ See, March 3, 2017 Plea Transcript, *11-18, Truth-in-Sentencing Guilty Plea Form dated March 3, 2017.

²¹ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *Modjica v. State*, 2009 WL 2426675 (Del. 2009); *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2004).

entry of the plea. McCoy's claims were waived when he knowingly, freely and intelligently entered his plea.²²

McCoy's Claims Are Without Merit

32. In addition to McCoy's claims being procedurally barred and waived, McCoy's claims are also without merit.

33. Turning first to McCoy's claim that following his plea there was new evidence that the firearms and tool marks examiner was arrested for "fraudulent and illegal activity." This "new evidence" does not give rise to an actionable claim in a case in which the defendant resolved his criminal charges by way of a plea agreement.²³

34. Carl Rone, a firearms and tool mark examiner for the Delaware State Police was arrested for theft by false pretense and falsifying business records for falsifying his time sheets.²⁴ The Delaware Supreme Court, in *Davenport*, held that Mr. Rone's arrest and charges do not give rise to any claim by a defendant who entered into a guilty plea.²⁵

35. The Delaware Supreme Court held that when a defendant enters into a guilty plea, the defendant waives certain constitutional trial and appellate

²² See, *Mills v. State*, 2016 WL 97494, at *3 (Del.).

²³ *Davenport v. State*, 2019 WL 2513771 (Del.).

²⁴ See, *Davenport v. State*, 2019 WL 2513771, *3 (Del.).

²⁵ See, *Davenport v. State*, 2019 WL 2513771, *3 (Del.).

rights. Evidence that challenges the credibility of a witness constitutes impeachment evidence. A defendant has no constitutional right to receive impeachment evidence before deciding to plead guilty, and a defendant's knowing, intelligent and voluntary plea waives any right he had to test the strength of the State's evidence against him at trial, including the weight of any firearms evidence.²⁶

36. McCoy represented to the court at the time of his plea hearing that he knowingly waived his rights to test the strength of the State's evidence against him at trial.²⁷ In so doing, McCoy waived his right to test the State's evidence by cross-examining the firearms examiner.

37. Furthermore, the record is devoid of any evidence to suggest that the ballistics report in this matter was incorrect in any regard or that there is any basis to assert a claim of legal innocence. This claim is without merit.

38. McCoy's remaining two claims involve allegations of ineffective assistance of counsel.

39. In order 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"

²⁶ *Davenport v. State*, 2019 WL 2513771, *3 (Del.).

²⁷ March 3, 2017 Plea Transcript, at pgs. 11-12; Truth-in-Sentencing Guilty Plea Form dated March 3, 2017.

and that, (2) the deficient performance prejudiced the defense.²⁸ 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 him 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.²⁹

40. In the context of a plea challenge, it is not sufficient for the defendant to simply claim that his counsel was deficient. The defendant must also establish that counsel's actions were so prejudicial that there was a reasonable probability that, but for counsel's deficiencies, the defendant would not have taken a plea but would have insisted on going to trial.³⁰ Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.³¹

41. The United States Supreme Court has reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.³² The United States Supreme Court cautioned that in reviewing ineffective

²⁸ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

²⁹ *Id.* at 687-88, 694.

³⁰ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997); *Premo v. Moore*, 131 S.Ct. 733, 739-744 (2011).

³¹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

³² *Premo v Moore*, 131 S.Ct. 733, 739-744 (2011).

assistance of counsel claims in the context of a plea bargain, the court must be mindful of the fact that “[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.”³³

42. In the subject case, it is important to emphasize that McCoy received a significant benefit by pleading guilty. As the Superior Court previously noted, this plea agreement was, as a practical matter, McCoy’s only option to avoid spending the remainder of his life in jail.³⁴ McCoy’s guilty plea represented a rational choice given the pending charges, the evidence against him, and the possible sentences he was facing.

43. In the subject motion, McCoy claims that trial counsel was ineffective for failing to provide discovery and other “legal work”, pressuring him to enter into the guilty plea and not properly explaining the plea agreement. McCoy contends that he did not know he was facing a minimum-mandatory sentence of 39 years, and thought he was instead facing a minimum mandatory sentence of 26 years.

44. McCoy’s claim is directly at odds with his representations at the time of the entry of his plea. The record reflects that McCoy entered into his plea

³³ *Id.*, at pg. 741.

³⁴ Superior Court Docket No. 65- Order dated August 17, 2017 denying Motion to Withdraw Guilty Plea, *3.

knowingly and intelligently, that he was satisfied with his counsel's representation, and that he entered into the plea with full knowledge of the nature of the charges and the consequences of the plea

45. At the plea hearing, McCoy's counsel represented that they had reviewed all the charges, discovery and evidence. That they discussed any viable defenses that may or may not exist. That they discussed the sentencing ranges and the penalties. That McCoy understood that the parties would be jointly requesting the 39 minimum-mandatory prison sentence. That 39 years was the minimum-mandatory prison sentence that the court must impose.³⁵

46. In trial counsel's Affidavit in response to McCoy's Rule 61 motion, he reiterated the representations made during the plea colloquy.³⁶

47. During the plea colloquy, the Superior Court also advised McCoy that the minimum-mandatory sentence that must be imposed was 39 years of prison time.³⁷

48. Despite McCoy's present claim that there was a miscommunication and misunderstanding about the plea, McCoy represented to the court at the time of his plea that he was aware of the 39 year minimum-mandatory sentence

³⁵ March 3, 2017 Plea Transcript, at pgs. 4-8.

³⁶ Superior Court Docket No. 78- Affidavit of Trial Counsel in Response to Rule 61 motion, at pgs. 1-3.

³⁷ March 3, 2017 Plea Transcript, at pgs. 10-13.

that must be imposed.³⁸ The 39 year minimum-mandatory sentence was also noted on the Truth-in-Sentencing Guilty Plea Form, which McCoy represented he read and understood.³⁹

49. McCoy's claim that he was not provided discovery, was not adequately advised of the minimum-mandatory sentence he was facing, was not properly explained the plea agreement, or that his decision to enter into the plea was not voluntary, is belied by the record and is without merit.

50. McCoy's remaining claim is that his counsel was ineffective because he filed a motion to withdraw the guilty plea too late to be considered by the Superior Court. This claim is without merit because the Superior Court did, in fact, fully and thoroughly consider McCoy's motion to withdraw his guilty plea on its merits.⁴⁰

51. McCoy has failed to meet his burden to establish that trial counsel's conduct was deficient in any regard and he has failed to establish actual prejudice as a result of any alleged deficiency. McCoy's ineffective assistance of counsel claims are without merit.

³⁸ March 3, 2017 Plea Transcript, at pgs. 10-11.

³⁹ March 3, 2017 Plea Transcript, *9-10, 17; Truth-in-Sentencing Guilty Plea Form dated March 3, 2017.

⁴⁰ See, Superior Court Docket No. 65- August 17, 2017 Order denying McCoy's Motion to Withdraw Guilty Plea.

REQUEST FOR APPOINTMENT OF COUNSEL IS DENIED

52. Defendant's request for the appointment of counsel is denied. Defendant's conviction resulted from a guilty plea. Rule 61 provides that counsel is to be appointed in a first filed Rule 61 motion to assist a defendant whose conviction resulted from a guilty plea only in certain limited exceptional situations.⁴¹

53. First, in order to qualify for the appointment of counsel, the Rule 61 motion must be timely filed. Here, the motion was not timely filed, it was filed after the one-year period had elapsed. Second, counsel is to be appointed in Rule 61 motions stemming from guilty pleas only in those situations in which the defendant has stated a substantial claim that he received ineffective assistance of counsel and has established that exceptional circumstances warrant the appointment of counsel.⁴²

54. Having fully, thoroughly and carefully considered McCoy's motion and the evidentiary record, McCoy has not set forth a substantial claim that he received ineffective assistance of counsel nor is there the existence of an exceptional circumstance that would give rise to the entitlement to the appointment of counsel. Since Defendant has failed to overcome the


⁴¹ Superior Court Criminal Rule 61(e)(2).

⁴² Superior Court Criminal Rule 61(e)(2)(ii) and (iv).

procedural hurdles warranting the appointment of counsel, the appointment of counsel is denied.⁴³

For all of the foregoing reasons, McCoy's motion for postconviction relief and his request for the appointment of counsel should be DENIED.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc: Prothonotary
Andrew J. Witherell, Esquire

⁴³ See, Super.Ct.Crim.R. 61(e)(2).