

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 DAVID YARBOROUGH, )  
 )  
 Defendant. )

Cr. ID. No. 1202006406, 1201018253  
1402013417

Submitted: September 11, 2019  
Decided: October 2, 2019

**COMMISSIONER'S REPORT AND RECOMMENDATION  
THAT DEFENDANT'S MOTION FOR POSTCONVICTION  
RELIEF SHOULD BE DENIED**

John W. Downs, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, Attorney for the State of Delaware.

David Yarborough, James T. Vaughn Correctional Center, Smyrna, Delaware,  
*pro se*

**MAYER, Commissioner**

This 2<sup>nd</sup> day of October, 2019, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

**BACKGROUND AND HISTORY OF RELEVANT EVENTS**

Defendant's history and filings with the courts has been protracted and abundant. Relevant to the present matter, beginning in January of 2012, the following occurred:

- On January 25, 2012, Defendant was arrested and charged with twenty-three (23) offenses including Theft Greater than \$100,000, Burglary Second Degree, and Selling Stolen Property (the "Jan. 2012 Case").<sup>1</sup>
- On February 13, 2012, Defendant was again arrested and this time charged with Burglary Second Degree, Theft of a Senior and Conspiracy Second Degree (the "Feb. 2012 Case").<sup>2</sup>
- On October 9, 2012, Defendant was arrested on two charges each of Attempted Theft and Insurance Fraud (the "Oct. 2012 Case").<sup>3</sup> This case was pending in Kent County.

After a series of substitutions of counsel, eventually, Adam Windett, Esquire ("Windett") was appointed to represent Defendant in the Jan. 2012 Case, Feb. 2012 Case and Oct. 2012 Case. However, due to a later conflict of interest (*See* Feb. 2014 Case summary below), John S. Malik, Esquire ("Malik") became counsel of record

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<sup>1</sup> Cr. A. No. 1201018253.

<sup>2</sup> Cr. A. No. 1202006406.

<sup>3</sup> Cr. A. No. 1210003158.

and represented Defendant beginning March 7, 2014 through the conclusion of these cases.<sup>4</sup>

### **February 2014 Arrest**<sup>5</sup>

While the above cases were pending, on February 20, 2014, Defendant was arrested and eventually charged with two (2) counts each of Attempted Assault First Degree, Criminal Solicitation Second Degree, and Stalking (the “Feb. 2014 Case”). Essentially, while out on bail, Defendant attempted to hire a “hitman” (an undercover police officer) to assault both his then defense attorney (Windett) and the prosecutor for one of the pending cases. During this solicitation, Defendant indicated he only had available funds for one individual and an agreement was made for the hitman to attack Defendant’s former defense counsel so that he would be “permanently in a wheelchair.” Defendant was represented by Eugene J. Maurer, Esquire (“Maurer”) in this case.

### **Defendant’s Plea and Sentencing**

On April 9, 2015, the Court held a plea hearing at which time Defendant was represented by both Malik and Maurer. The Plea Agreement resolved all four cases

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<sup>4</sup> On March 19, 2015, after a jury trial, Defendant was found guilty of all charges in the Oct. 2012 Case.

<sup>5</sup> Cr. A. No. 1402013417.

then pending before the Court.<sup>6</sup> Defendant agreed to plead guilty to two charges of Attempted Assault First Degree and two charges of Burglary Second Degree. The Agreement further provided that Defendant acknowledged he was eligible to be sentenced as a habitual offender for certain 2009 and 2010 felony convictions but that the State would cap its recommendation at 20 years at Level V, which would be the minimum/mandatory sentence. In addition, with respect to the October 2012 Case, the State agreed to vacate three of the convictions and that Defendant would be sentenced on a sole count of Insurance Fraud, with a recommended sentence of 2 years at Level V, suspended for probation. Finally, with respect to restitution, the agreement states: "To be imposed for all victims at time of sentencing." Both of Defendant's counsel executed the Plea Agreement with him.

That same date, Defendant, with counsel, also signed the Truth-in-Sentencing Guilty Plea Form indicating that he was freely and voluntarily deciding to plead guilty to the charges listed in the Plea Agreement, that nothing was promised to him other than what was stated in the agreement, that no one (including his lawyer) forced him to enter the plea, and that by pleading guilty he was waiving certain constitutional rights. Through this process, Defendant was put on notice that the four charges to which he plead guilty included a minimum mandatory of 20 years at

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<sup>6</sup> This included the resolution of the Jan. 2012 Case, the Feb. 2012 Case, the Feb. 2014 Case and re-addressing the conviction already entered in the Oct. 2012 Case.

Level V but the guidelines also allowed for a sentence of 50 years or two life sentences.

On June 1, 2015, the State filed a Motion to Declare David Yarborough a Habitual Offender (the “HO Motion”) pursuant to 11 Del. C. §4214(a) and §4215(b).

The motion cited three previous convictions:

- (1) Identity Theft of a Senior, Cr. A. No. 0902019247  
Offense Date: On or about February 12, 2009  
Conviction and Sentence Date: June 16, 2009
- (2) Perjury Second Degree, Cr. A. No. 0909002817  
Offense Date: On or about July 20, 2009  
Conviction and Sentence Date: September 16, 2009
- (3) Forgery Second Degree, Cr. A. No. 1005017858  
Offense Date: On or about May 19, 2010  
Conviction and Sentence Date: October 13, 2010

In July of 2015, the Office of Investigative Services prepared a Pre-Sentence Investigation Report (“PSI”).

The Court held a sentencing hearing on October 2, 2015, at which time Malik objected to the habitual offender designation on the basis that approximately 34 days had elapsed between two of the predicate convictions and therefore Defendant was not afforded an opportunity for rehabilitation between sentencing and arrest for the subsequent offense. The issue was thoroughly argued at the hearing.<sup>7</sup> However,

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<sup>7</sup> See October 2, 2015 Hearing Transcript (hereinafter the “Oct. 2015 Trans. at \_\_\_”).

everyone was also aware that the evidence against Defendant in the February 2014 Case was “very, very strong” and that Defendant was facing a 50-year minimum mandatory sentence.<sup>8</sup> At the conclusion of the hearing, the Court reserved consideration of the legal authorities and arguments but expressed concern that despite having “two of the most experienced senior defense attorneys in the State of Delaware representing him...” Defendant may not take their advice and jeopardize a favorable plea.<sup>9</sup>

Several days later, the Court issued its decision granting the HO Motion. After consideration of the applicable legal authorities, the Court was satisfied that, albeit short, Defendant had sufficient time for rehabilitation.<sup>10</sup> The Court stated:

The court’s discretion is largely informed by the subsequent offense’s nature. Perhaps, for example, if Defendant had been sentenced for a drug-related offense and 30 days later he committed another drug-related offense, it could be said that Defendant’s rehabilitation turned on his receiving long-termed drug treatment, for which enough time had not elapsed. Here, again, Defendant simply lied. Taking Defendant’s criminal history leading up to his second, predicate offense and the subsequent perjury charge into account, the court is satisfied that the predicate offenses do not overlap and, under the present circumstances, Defendant had an adequate opportunity for rehabilitation.<sup>11</sup>

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<sup>8</sup> Oct. 2015 Trans. at p. 10.

<sup>9</sup> Oct. 2015 Trans. at pp. 16-17.

<sup>10</sup> D.I. # 38. All docket references will be to Cr. A. No. 1402013417 unless otherwise noted.

<sup>11</sup> *Id.*

On December 10, 2015, the Court held a continued sentencing hearing and the HO Motion was again granted and Defendant was sentenced.<sup>12</sup> At the hearing, Defendant was once again represented by both Malik and Maurer. The hearing began with the Court questioning whether there was a “need to review and revisit any aspect of the plea agreement.”<sup>13</sup> Despite several months having passed since the Court’s ruling on the HO Motion, Defendant did not raise any issues with respect to the plea. The Court then acknowledged the habitual offender proceedings and found that “the prior convictions, that is, the predicate convictions have been carefully documented.”<sup>14</sup> After providing an opportunity to respond, defense counsel said there were no issues with respect to that matter and the Court signed the order. Both defense counsel argued for the Court not to impose more than the minimum mandatory consistent with the Plea Agreement. Finally, the State moved for restitution to be awarded in the amount of \$237,816.00 and the Court ordered joint and several liability for that obligation. After the sentence was imposed, Defendant had an opportunity to address the Court and he thanked both of his attorneys but did not contest the sentence or the amount of restitution awarded.

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<sup>12</sup> D.I. #s 40, 43.

<sup>13</sup> December 10, 2015 Hearing Transcript at p. 3 (hereinafter “Dec. 2015 Trans. at \_\_\_”).

<sup>14</sup> Dec. 2015 Trans. at p. 6.

### **Defendant's Post-Conviction Proceedings**

Despite the plea, Defendant pursued numerous post-conviction avenues for relief. The record is replete with motions, supplements and amendments that cannot all be set forth here due to length. The more relevant pleadings for the determination at bar are summarized herein.

First, Defendant filed a Motion to Vacate the Habitual Offender determination. On February 26, 2016, the Court denied the motion on the basis that the issue had already been litigated before two other judicial officers (in October and December of 2015) and to the extent Defendant was seeking reargument, the motion was untimely.<sup>15</sup>

Next, Defendant appealed his conviction to the Delaware Supreme Court. On September 28, 2016, the Supreme Court affirmed the final judgment of the Superior Court “on the basis of the court’s letter order dated October 9, 2015.”<sup>16</sup> On October 14, 2016, the Supreme Court issued its mandate.

On January 27, 2017, Defendant filed a Motion for Postconviction Relief as the first step in his Rule 61 process.<sup>17</sup> The record was expanded and the Court

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<sup>15</sup> D.I. # 46.

<sup>16</sup> Supreme Court Case No. 15, 2016.

<sup>17</sup> D.I. # 61.



directed both trial counsel to submit affidavits responding to allegations in the Motion. Defendant was given permission to amend his Motion and multiple requests for an extension of time were granted. Defendant then filed several pleadings over a period of months that created uncertainty and confusion regarding the totality of his claims.<sup>18</sup> As such, the Court directed Defendant to file one cohesive pleading including all of his arguments.<sup>19</sup> Defendant responded, and the Court confirmed that his intent was to stand by the Memorandum in Support of Motion for Postconviction Relief filed on May 10, 2018 as D.I. # 96 (the “Motion”).<sup>20</sup> Defendant’s trial counsel each submitted an Affidavit in Response to the Rule 61 Motion for Postconviction Relief.<sup>21</sup> The State filed a Response<sup>22</sup> in opposition. Despite the scheduling orders clearly delineating only one right of reply, Defendant filed multiple additional submissions: (1) Response to Maurer’s Affidavit;<sup>23</sup> (2) Memorandum in Support of Defendant’s Motion for Postconviction Relief;<sup>24</sup> (3) Defendant’s Response to the

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<sup>18</sup> See e.g. D.I. # 83, 84, 85, 88, 95, 96.

<sup>19</sup> D.I. # 99.

<sup>20</sup> D.I. #s 101 – 102.

<sup>21</sup> D.I. # 103 & 107.

<sup>22</sup> D.I. # 111.

<sup>23</sup> D.I. # 117. In this response, Defendant states he was satisfied with the result obtained by Maurer. See para. 10.

<sup>24</sup> D.I. # 118. This document appears to be an unauthenticated statement collectively signed by three individuals reciting conversations with Malik. The Affidavits from trial counsel directly

State's Affidavit filed February 20, 2019,<sup>25</sup> and (4) Response to Former Counsel's Affidavit.<sup>26</sup> The record is now complete. After reviewing the briefs and record, I recommend that the Motion be denied.

### **LEGAL ANALYSIS OF CLAIMS**

Before considering the merits of the claims, the Court must first determine whether there are any procedural bars to the Motion.<sup>27</sup> This is Defendant's first motion for post-conviction relief and it was timely filed.<sup>28</sup> However, 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

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contradict the interpretation of events. In addition, the Court did not permit the filing of extraneous materials outside the record pursuant to Super. Ct. Crim. R. 61(g). Therefore, this document will not be considered part of the evidentiary record.

<sup>25</sup> D.I. # 119. Here, Defendant raises one new argument: the State was precluded from relying on the three predicate offenses because a similar motion to declare defendant a habitual offender was denied in Case # 1302021132 at D.I. # 29. The motion though was denied for lack of service, not on the merits, and does not bar the State from relying on the predicate offenses in the cases at bar. This argument is also barred under Super. Ct. Crim. R. 61(i)(3) to the extent Defendant failed to present it during the underlying proceedings.

<sup>26</sup> D.I. # 120. Defendant's cover letter notified the Court that his Motion is now "complete."

<sup>27</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>28</sup> See Super. Ct. Crim. R. 61(i)(1) (motion must be filed within one year of when conviction becomes final); Super. Ct. Crim. R. 61(m)(2) (If the defendant files a direct appeal, the judgment of conviction becomes final when the mandate is issued).

postconviction proceeding, or in a federal habeas corpus proceeding, are thereafter barred.<sup>29</sup>

Almost all of Defendant's claims, although couched as ineffective assistance of counsel claims, take issue with the Court's decision to grant the HO Motion. That issue has been litigated numerous times with the same result. To the extent Defendant is attempting to seek reconsideration of that issue, any such arguments are barred by Super. Ct. Crim. R. 61(i)(4). Defendant's remaining claims that challenge the award of restitution, were waived pursuant to Super. Ct. Crim. R. 61(i)(3) because he failed to present them through the trial court proceedings or on appeal. Defendant has not presented any basis to apply any of the exceptions to these bars to relief.<sup>30</sup>

Despite the above, Defendant frames his arguments as concerns 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

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<sup>29</sup> See also Super. Ct. Crim. R. 61(i)(5) and (d)(2)(i), (ii) (setting forth exceptions to the procedural bars).

<sup>30</sup> Defendant does not argue that the court lacked jurisdiction, the existence of new evidence demonstrating that he is actually innocent of the acts giving rise to the conviction, nor does he argue that a new rule of constitutional law applies to render his conviction invalid. Further, Defendant has not established cause for relief from any procedural default or prejudice from a violation of his rights. Super. Ct. Crim. R. 61(i)(3), (5) and (d)(2)(i)-(ii).

for postconviction relief.<sup>31</sup> 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.<sup>32</sup> To prevail in the context of a case involving a guilty plea, Defendant must show that but for counsel's errors, there is a reasonable probability that he would not have pleaded guilty and instead would have insisted on going to trial.<sup>33</sup> Defendant must also overcome a strong presumption that counsel's conduct was reasonably professional under the circumstances.<sup>34</sup> Further, mere allegations of ineffectiveness will not suffice, rather, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>35</sup> 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.<sup>36</sup>

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<sup>31</sup> *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).

<sup>32</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Hitchens v. State*, 757 A.2d 1278 (Del. 2000).

<sup>33</sup> *Albury v. State*, 551 A.2d 53, 59 (Del.1988) (quoting *Strickland*, 466 U.S. at 694).

<sup>34</sup> *State v. Wright*, 653 A.2d 288, 293-94 (Del. Super. 1994) (citations omitted).

<sup>35</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>36</sup> *State v. Miller*, 2013 WL 871320, at \*4 (Del. Super., Feb. 26, 2013).

## **Trial Counsel was Not Ineffective**

### **I. Defendant was not given any false assurances**

Defendant first contends that trial counsel advised him that the State's attempts to declare him a habitual offender would fail because he did not have adequate time for rehabilitation. At one point in his briefing, Defendant states that "[a]lthough I knowingly and voluntarily entered this plea, I was strongly under the impression from Mr. Malik that the State would be unsuccessful in declaring me a habitual offender because of the short time between my felony convictions."

Malik's Affidavit clearly refutes the allegations and facts as presented by Defendant. Malik met with Defendant on "numerous occasions" to discuss plea negotiations and the State's intent to have him declared a habitual offender, and the impact that may have on his sentence. Malik also attests that when Defendant chose to accept the plea, he was aware there was no guarantee that the Court would accept his arguments refuting his status as an habitual offender. Malik intentionally preserved Defendant's right to appeal that issue in the event he was unsuccessful. Maurer also discussed the habitual offender issues with Defendant before he accepted his plea.

The Plea Agreement and the Truth-in-Sentencing Form support this recitation of events. Defendant executed the Truth-in-Sentencing Form and agreed that no promises were made and he understood that he was facing the possibility of 50 years

or two life sentences of incarceration. Defendant correspondingly entered into the Plea Agreement knowing the State was going to file the HO Motion. Further, at the Plea Hearing on April 9, 2015, Defendant fully understood that the State would pursue the HO Motion, and that the recommended sentence would be 20 years. He then admitted guilt to the charges in the agreement. A defendant is bound by his statements to the Court during the plea colloquy and a valid guilty plea waives his right to challenge any alleged errors, deficiencies or defects occurring prior to the entry of the plea.<sup>37</sup> In light of the record in this case, there is nothing to support Defendant's allegations that he was misled or that counsel's actions fell below an objective standard of reasonableness.

## **II. Defendant's gambling addiction was considered**

Next, Defendant argues he received ineffective assistance of counsel because trial counsel failed to raise his gambling addiction as a mitigating factor. Defendant points to the PSI which revealed his gambling addiction. In response, Malik notes that although there was a record that Defendant suffered from a gambling addiction, both the Superior Court and the Supreme Court concluded that Defendant had sufficient time for rehabilitation to support a finding that he qualified as a habitual offender.

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<sup>37</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2004).

Although defense counsel has a general duty to investigate potential mitigating evidence, there is no requirement for counsel to pursue all lines of investigation.<sup>38</sup> A defendant's claim that counsel failed to properly conduct an investigation, and the resulting determination of whether Defendant was prejudiced as a result, depends upon the likelihood that the additional effort by counsel would have led to a change in counsel's recommendation as to the plea.<sup>39</sup>

The PSI was issued in July of 2015. Therefore, at the time of the Court's ruling on the habitual offender determination (October 2015), the Court had the benefit of the investigation of the Defendant's gambling addiction. That information was likewise available to the Court at the time of sentencing,<sup>40</sup> when the Court re-affirmed the October 2015 decision to grant the HO Motion.

Defendant was given an opportunity to contest the issues surrounding the habitual offender determination at the time he entered the Plea Agreement, at the Plea Hearing, at the Sentencing Hearing in October 2015, at the Sentencing Hearing in December 2015 and again on appeal. At the December hearing – approximately two months after the ruling on the habitual offender issue, the Court specifically

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<sup>38</sup> *Alston v. State*, 2015 WL 5297709, at \*2 (Del. Sept. 4, 2015), quoting *Flamer v. State*, 585 A.2d 736, 756 (Del. 1990).

<sup>39</sup> *Alston v. State*, at \*3, quoting *Albury v. State*, 551 A.2d 53, 59 (Del. 1998) (citing *Hall v. Lockhart*, 474 U.S. 52, 58-59 (1985)).

<sup>40</sup> Dec. 10, 2015 Trans. at p. 14.

asked “does the court need to review and revisit any aspect of the plea agreement?”<sup>41</sup> Defendant did not contest the plea or attempt to unwind any agreements. The Court then addressed the HO Motion, acknowledged the previous ruling and asked “Is there any issue with respect to this matter?”<sup>42</sup> Defendant did not object or ask to be heard. At the conclusion of the December 2015 hearing, Defendant addressed the Court. He thanked his attorneys, spoke about his family and told the judge that he was “going to do anything I can to make this right...” Defendant did not at any time ask to withdraw his guilty plea or for reconsideration of the court’s orders.

Delaware has consistently held that in order for an individual to be declared an habitual offender, there must be three successive convictions and at least some chance of rehabilitation. “Some chance of rehabilitation” requires only that some time elapse between sentencing on each predicate conviction and the commission of the offense resulting in the later felony conviction.<sup>43</sup> The lack of psychological treatment (or other treatment) is not a bar to this determination.<sup>44</sup> After considering the many opportunities given to Defendant to voice any objections, the Court’s

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<sup>41</sup> Dec. 10, 2015 Trans. at p. 3.

<sup>42</sup> Dec. 10, 2015 Trans. at pp. 5-6.

<sup>43</sup> *Kirby v. State*, 1999 WL 734743, at \*1 (Del. Sept. 9, 1999), citing *Hall v. State*, 473 A.2d 352, 357 (Del. 1984).

<sup>44</sup> *Id.*, citing *Eaddy v. State*, 1996 WL 313499 (Del. May 30, 1996).



for postconviction relief.<sup>31</sup> 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.<sup>32</sup> To prevail in the context of a case involving a guilty plea, Defendant must show that but for counsel's errors, there is a reasonable probability that he would not have pleaded guilty and instead would have insisted on going to trial.<sup>33</sup> Defendant must also overcome a strong presumption that counsel's conduct was reasonably professional under the circumstances.<sup>34</sup> Further, mere allegations of ineffectiveness will not suffice, rather, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>35</sup> 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.<sup>36</sup>

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<sup>31</sup> *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).

<sup>32</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Hitchens v. State*, 757 A.2d 1278 (Del. 2000).

<sup>33</sup> *Albury v. State*, 551 A.2d 53, 59 (Del.1988) (quoting *Strickland*, 466 U.S. at 694).

<sup>34</sup> *State v. Wright*, 653 A.2d 288, 293-94 (Del. Super. 1994) (citations omitted).

<sup>35</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>36</sup> *State v. Miller*, 2013 WL 871320, at \*4 (Del. Super., Feb. 26, 2013).

access to the PSI, and trial counsel's awareness of the governing legal authorities, it is difficult to discern what, if anything, trial counsel could have done differently.<sup>45</sup> Defendant has not met the minimum required to show ineffective counsel under *Strickland*.

### **III. Restitution was properly awarded**

Defendant believes trial counsel ineffectively advised him to plead guilty to a plea that included an obligation to pay \$243,144.00 in restitution without any investigation or authentication of the amount owed. Through his submissions to the Court, Defendant presented a letter dated December 7, 2017 that he sent to the State Auditor. In that letter, he indicates that he, and his co-defendant Kenneth D. Yarborough, were arrested for a home burglary (*i.e.* one of the burglary charges at issue herein). He then states, “[d]uring the interrogation of Kenneth, he verified that the items reported stolen by Ms. Davis were true and correct. As a result, I plead guilty in the Superior Court for burglary and other related offenses. The Court imposed restitution in the amount of \$243,144.00.” Thus, Defendant does not seem to dispute the significant value of the items or the relationship to his conviction.<sup>46</sup>

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<sup>45</sup> Although Defendant argues counsel should have obtained a psychological evaluation, Maurer's Affidavit indicates one was obtained and provided to the State.

<sup>46</sup> Defendant's response at D.I. # 119 also indicates that he admitted that he was responsible for \$10,000.00 but that his co-defendant accepted responsibility for the remainder. Defendant ignores the fact that a defendant may be ordered to pay restitution for the accts of a co-conspirator. *See State v. Rodriguez*, 2017 WL 1192916, at \*3 (Del. Super. Mar. 29, 2017), quoting *Moore v. State*, 673 A.2d 171, 172 (Del. 1996).

Defendant also had an opportunity to contest the amount of restitution to be awarded when the Court considered the PSI at the Sentencing Hearing. Defendant did not raise any objections and accepted responsibility for his actions. To the extent Defendant is attempting to contest the award of restitution, he waived the right to do so when he entered the plea and later failed to raise the issue through the trial proceedings or on appeal. Even were this to be considered an attack on counsel's actions, counsel's actions were not objectively unreasonable under the circumstances, especially in consideration of the admission by Defendant's co-defendant, his willingness to accept responsibility, and the PSI and recommendation to the Court.

**IV. The remaining claims lack merit**

Defendant argues that his counsel showed him an affidavit from his co-defendant that would have aided his defense. Malik attests that Defendant was aware of the investigation of the co-defendant and they discussed the matter. Despite the possible value of the affidavit, it would not aid Defendant with the Burglary Second Degree charges or the Attempted Assault First Degree charges and therefore, based on the totality of the circumstances, the plea was in his best interest. In light of the great weight and deference afforded trial counsel, I cannot find error in counsel's

conduct. In addition, Defendant waived any claims with respect to the evidentiary record when he entered into the Plea Agreement and/or for his failure to raise this claim during the trial proceedings.

Defendant also raises a claim that his prior counsel (Windett) had negotiated a plea involving a total of ten (10) years at Level V. Presumably, Defendant is arguing trial counsel was ineffective for failing to secure that deal. Malik responds that he was never notified of any such plea or that it was still available. Taking into consideration the charges set forth in the Feb. 2014 Case, it is very likely any plea offer that was limited to ten (10) years, was no longer a possibility. Regardless, Defendant accepted the Plea Agreement and he is now bound by it.

Defendant submits an additional claim of ineffective assistance of counsel by re-couching his contentions with the habitual offender determination. Here, he argues that counsel erred by not investigating his criminal history and realizing that his convictions overlapped, or that 34 days was not enough time for rehabilitation. Trial counsel challenged the HO Motion in the trial proceedings and on appeal. This claim is wholly without merit. Finally, Defendant vaguely argues he had a June 2009 conviction of Theft of Rental Property that could not be used to support the habitual offender designation. According to the record, the Court did not rely on this conviction in declaring Defendant a habitual offender and the charges did not overlap with sentencing in this matter. Therefore, this claim is likewise unsupported.

### **Defendant Cannot Establish Prejudice**

Defendant argues that he did not benefit from the Plea Agreement and suffered prejudice as a result because if he had received a sentence as a non-habitual offender, it would not have included the mandatory sentence. The issue was firmly decided and Defendant was properly sentenced as a habitual offender. Defendant received the sentence he had negotiated with the State and sentencing took the path he agreed to bound by. Defendant's only possible basis of prejudice is to convince the Court that if he had gone to trial, he would have achieved a more favorable result.

As a result of the Plea Agreement, the State agreed to cap its sentence recommendation to 20 years at Level V. Defendant was sentenced as a habitual offender on the two counts of Burglary Second Degree, which carried a mandatory minimum of eight (8) years on each count. Defendant avoided three trials on thirty-two (32) charges. According to Maurer's Affidavit, if the Feb. 2014 Case went to trial, the State planned to offer into evidence video of the conversations whereby Defendant solicited the "hitman" to harm counsel. The State also had a post-Miranda statement from Defendant confessing to trying to hire someone to seriously injure either his attorney or the prosecutor. The evidence in that case was strong. If Defendant had been convicted and sentenced as a habitual offender in that matter alone, he was facing at least fifty (50) years to life at Level V. The State originally offered 20 years at Level V to resolve *only* the Feb. 2014 Case. Trial Counsel

eventually negotiated an agreement for a recommendation by the State of a total of 20 years for *all* of Defendant's cases (which represented the minimum mandatory for the four offenses). Clearly a significant benefit. A sentence of twenty (20) years is dwarfed by what he may have otherwise faced if he had proceeded to trial. At the conclusion of the Plea Hearing, Defendant spoke as follows:

I want to take this opportunity to thank Mr. Maurer, and Mr. Malik, what I consider number one and two attorneys in the State. I will let them figure out who is one and two. Also, would like to [sic] my parents are here, I would like to thank them for making sure I had proper counsel, and my fiancée who is here, understand 20 years is a lengthy period of time, and ultimately I think I made the right decision, and my goal is to do everything I can do in Department of Correction to be somewhat of a model inmate so I can see my children...

Defendant's own words demonstrate he received effective assistance of counsel and that counsel zealously advocated to achieve the best result possible.

### **CONCLUSION**

In summary, Defendant has failed to establish that trial counsel's performance was ineffective or that trial counsel could have done something different that would have resulted in a more favorable outcome. Even if Defendant could establish an error occurred, Defendant has not established that he was prejudiced by the outcome of the proceedings. Finally, considering the overwhelming evidence in the Feb. 2014 Case, the possible penalty if convicted in that case (and the others), and the

very favorable plea/sentence Defendant received, Defendant has not established that he likely would have insisted on going to trial.

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

**IT IS SO RECOMMENDED.**



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Commissioner Katharine L. Mayer

Cc: Prothonotary  
John W. Downs, Esquire  
David Yarborough