IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	I.D. No. 1902013833
	)	
v.	)	RK19-03-0327-01 CCDW LIO PFDCF (F)
	)	RK19-03-0329-01 DDeal Tier 4 (F)
MICHAEL K. PALMER,	)	RK19-03-0331-01 DDeal Tier 4 (F)
	)	
Defendant.	)	

COMMISSIONER'S REPORT AND RECOMMENDATION

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

Stephen R. Welch, Jr., Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Michael K. Palmer, *Pro se*.

FREUD, Commissioner
August 18, 2021

The defendant, Michael K. Palmer ("Palmer") pled *nolo contendere* on the day of his trial on October 8, 2019 to one count of Carrying a Concealed Deadly Weapon ("CCDW"), as a lesser included offense of Possession of a Firearm During the Commission of a Felony, 11 *Del. C.* § 1442 and two counts of Drug Dealing, Tier 4, 16 *Del. C.* § 4752(i). He was also charged with four counts of Tier 5 Possession, one count of Tier 3 Possession with Aggravating Factors, one count of Drug Dealing Tier 2 with Aggravating Factors, two counts of Drug Dealing Tier 4, one count of Possession of a Deadly Weapon and Drugs, one count of Possession of a Firearm by a Person Prohibited, one count of Possession of Firearm Ammunition by a Person Prohibited, one count Drug Dealing with Aggravating Factors, one count of Tier 1 Possession, one count of Conspiracy in the Second Degree, one count of

Possession of Marijuana, one count of Possession of Drug Paraphernalia and one count of Possession of Marijuana with Aggravating Factors. As part of the plea deal the State agreed to enter *nolle prosequis* on the remaining charges and along with the defense requested a presentence office investigation. Had Palmer gone to trial and been found guilty as charged he faced many years in jail and the potential for essentially life in prison.

On December 12, 2019 the Court sentenced Palmer to a total of thirty-eight years incarceration suspended after serving ten years, four of which were minimum mandatory, for varying levels of probation. Palmer did not appeal his conviction to the State Supreme Court. He did, however, on January 16, 2020 file a *pro se* motion for reduction of sentence which the Court denied.[1] Next, Palmer filed a *pro se* appeal to the State Supreme Court concerning the denial of his motion for sentence reduction. The Delaware Supreme Court denied Palmer's appeal.[2] Palmer filed the pending motion for postconviction relief pursuant to Superior Court Criminal Rule 61 on July 21, 2020 in which he alleges ineffective assistance of counsel.

FACTS

According to the Affidavit of Probable Cause Palmer was arrested after U.S. Customs and Border Patrol agents intercepted a package on February 18, 2019 addressed to 16 Evergreen Circle, Dover, Delaware. The package was found to contain some 150 grams of MDMA, a controlled substance also known as "Ecstasy." On February 21, 2019 Palmer entered the Dover Post Office and inquired about the package. Arrangements were made for him to pick up the package the following day. On February 22, 2019 officers who were conducting surveillance observed him leaving the residence at 16 Evergreen Circle in a Dodge minivan. Shortly thereafter, the van appeared near the Dover Post Office. After driving to several locations in

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[1] *State v. Palmer*, Del. Super., ID No. 1902013833, Witham, RJ, (Jan. 21, 2020) (ORDER).
[2] *Palmer, v. State*, 237 A.3d 68 (Table), 2020 WL 4275604 (Del.).

what appeared to be an attempt at "counter surveillance," the van returned to the Post Office. Palmer and two other individuals identified as Sheldon Claud and Stanley Stanford all exited the minivan separately and walked into the Post Office. Stanford signed for the package and all three men returned to the vehicle. At this point, officers contacted and arrested all three of them. Inside the van, the officers found close to 200 grams of MDMA (both in the package delivered to the Post Office and in other packages), 45 grams of powdered cocaine, 27.6 grams of crack cocaine, 532.6 grams of marijuana, 196 "doses" of LSD and 1,239 plastic bags containing some 8.6 grams of heroin. Officers also located a loaded 9 mm handgun in the minivan with the drugs. They found $6,904.00 in U.S. currency in the left front pocket of the pants that Palmer was wearing.[3]

PALMER'S CONTENTIONS

In his Motion for Postconviction Relief Palmer raises the following grounds for relief:

Ground one:	Ineffective Assistance of Counsel. Lawyer told me if I did not take plea on second case review I would have trial the following day.
Ground two:	Ineffective Assistance of Counsel. Held evidence which could have helped me in my case (Affidavit which lawyer notarized).
Ground three:	Ineffective Assistance of Counsel. Lawyer entered wrong evidence in suppression motion.
Ground four:	Ineffective Assistance of Counsel. Lawyer did not say anything when I was sentenced to two class C felonies holding no min/mandatory

[3] *State v. Palmer*, Del. Super., ID No. 1902013833, Affidavit of Probable Cause (D.I. 1).

	0 – 15 yrs. instead of two class B felonies 2 – 25 with 2 min/mandatory.
Ground five:	Ineffective Assistance of Counsel. Family had to spend their money hiring a new attorney because of the unprofessional errors he made in my case.
Ground six:	Unfulfilled Plea Agreement. Charges held 2 – 25 years not 0 – 15.
Ground seven:	Coerced Plea. I was told PSI will help me due to my background, if not I'll have four years.
Ground eight:	Ineffective Assistance of Counsel. Lawyer did not submit any papers to Court after 90 days of not being indicted.

The grounds stated above represent all of Palmer's arguments. He did not file a memorandum of law.

DISCUSSION

Under Delaware law, the Court must first determine whether Palmer has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.[4] Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.[5] Palmer's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Palmer's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

None of Palmer's claims were raised previously at his plea, sentencing or on

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

[5] Super. Ct. Crim. R. 61(i)(1).

direct appeal. Consequently they are barred under Superior Court Criminal Rule 61(i)(3) unless he demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.[6] The bars to relief are inapplicable to a jurisdictional challenge or "to a claim that satisfies the pleading requirements of subparagraph (2)(i) or (2)(ii) of subdivision (d) of Rule 61.[7] To meet the requirements of Rule 61(d)(2) a defendant must plead with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted[8] or that he pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United State or Delaware Supreme courts, applies to the defendant's case rendering the conviction invalid.[9] Palmer's motion pleads neither requirement of Rule 61(d)(2).

Each of Palmer's grounds for relief are premised on allegations of ineffective assistance of counsel. Therefore Palmer has alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. Palmer's ineffective assistance of counsel claims are not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Palmer, allege ineffective assistance of counsel in order to overcome the procedural default. "However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards."[10] The United States Supreme Court has held that:

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[6] Super. Ct. Crim. R. 61(i)(3).
[7] Super. Ct. Crim. R. 61(i)(5).
[8] Super. Ct. Crim. R. 61(d)(2)(i).
[9] Super. Ct. Crim. R. 61(d)(2)(ii).
[10] *State v. Gattis*, 1995 WL 790961 (Del. Super.).

> [i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that the responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance;' [i]neffective assistance of counsel then is cause for a procedural default.[11]

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two-part analysis enunciated in *Strickland v. Washington*[12] and adopted by the Delaware Supreme Court in *Albury v. State*.[13]

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[14]. 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.[15] 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.[16] When examining the representation of counsel pursuant to the first prong of the *Strickland* test, there is a

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[11] *Murray v. Carrier*, 477 U.S. 478, 488 (1986),
[12] 466 U.S. 668 (1984).
[13] 551 A.2d 53, 58 (Del. 1988).
[14] *Strickland*, 466 U.S. at 687.
[15] *Somerville v. State*, 703 A.2d 629, 631(Del. 1997) (citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988)) (citations omitted).
[16] *See e.g.*, *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

strong presumption that counsel's conduct was professionally reasonable.[17] This standard is highly demanding.[18] *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to "eliminate the distorting effects of hindsight."[19]

Following a complete review of the record in this matter, it is abundantly clear that Palmer has failed to allege any facts sufficient to substantiate his claims that his attorney was ineffective. I find Defense Counsel's affidavit, in conjunction with the record, more credible than Palmer's self-serving claims that his counsel's representation was ineffective. Palmer's counsel clearly denies the allegations.

Palmer was facing the possibility of many years in jail which would have essentially amounted to life in prison had he been convicted on all counts. The sentence and plea were very reasonable under all the circumstances, especially in light of the eyewitness and physical evidence against him. Prior to the entry of the plea, Palmer and his attorney discussed the case and the plea. The plea bargain was clearly advantageous to Palmer. Counsel was successful in negotiating an extremely beneficial plea bargain with the State. Counsel's representation was certainly well within the range required by *Strickland*. Additionally, when Palmer entered his 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.[20] Consequently, Palmer has failed to establish that his counsel's representation was ineffective under the *Strickland* test.

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[17] *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).
[18] *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)).
[19] *Strickland*, 466 U.S. at 689.
[20] *Mapp v. State*, 1994 WL 91264 at *2 (Del. Supr.) (citing *Sullivan v. State*, 636 A.2d 931, 937-938 (Del. 1994)).

Even assuming, *arguendo*, that counsel's representation of Palmer was somehow deficient, Palmer 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.[21] In an attempt to show prejudice, Palmer simply asserts that his counsel was ineffective because of alleged advice that was given. Nowhere does Palmer claim to be innocent. His primary focus is on the fact that his sentence turned out to be longer than he expected. All of his claims are denied by Defense Counsel who outlined his efforts on behalf of Palmer and his discussions with Palmer in his Affidavit. My review of the facts of the case leads me to conclude that counsel's representation of Palmer was well within the requirements of the Sixth Amendment and no prejudice has been demonstrated. Palmer's statements are insufficient to establish prejudice, particularly in light of the evidence against him. Therefore, I find Palmer's grounds for relief are meritless.

To the extent that Palmer 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.[22] At the *nolo contendere* guilty-plea hearing, the Court asked Palmer whether he understood the nature of the charges, the consequences of his pleading *nolo contendere*, and whether he was voluntarily entering the *nolo contendere* plea. The Court asked Palmer if the State had sufficient evidence to convict him of the charges. The Court asked Palmer if he understood he would waive his constitutional rights if he entered the plea including the right to suppress evidence and to file an appeal; if he

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[21] *Larson v. State*, 1995 WL 38971 at *2 (Del. Supr.) (citing *Younger v. State*, 580 A.2d 552, 556 (Del. 1990)).
[22] *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

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 Palmer if he had discussed his plea and its consequences fully with his attorney. The Court also asked Palmer if he was satisfied with this counsel's representation. Palmer answered each of these questions affirmatively.[23] I find counsel's representations far more credible than Palmer's self-serving, vague allegations.

Furthermore, prior to entering his plea, Palmer signed a Guilty Plea Form and Plea Agreement in his own handwriting. Palmer'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. Palmer is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.[24] I confidently find that Palmer entered his plea knowingly and voluntarily and that Palmer's grounds for relief are completely meritless.

CONCLUSION

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

/s/ Andrea M. Freud
Commissioner

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[23] *State v. Palmer*, Del. Super., ID No. 1901023833 (Oct. 8, 2019) tr. at 3-13.
[24] *Sommerville v. State*, 703 A.2d 629, 632 (Del. 1997).