IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	ID Nos. 1711013775
	)	1806002839
DAVON CROSBY-AVANT,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Upon Consideration of Defendant's Motion to Withdraw Guilty Plea:

DENIED.

Patrick J. Collins, Esquire, COLLINS PRICE & WARNER, Wilmington, Delaware, *Attorney for Defendant Davon Crosby-Avant*.

John S. Taylor, Esquire, and Timothy G. Maguire, Esquire, Deputy Attorneys General, DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware, *Attorneys for the State of Delaware*.

RENNIE, J.

INTRODUCTION

This memorandum opinion considers, and denies in full, Defendant Davon Crosby-Avant's ("Defendant")[1] Amended Motion to Withdraw Guilty Plea.[2] In the underlying criminal action, after a high-fidelity video recording showed Defendant shooting a firearm toward the head of another person, Defendant pled guilty to Attempted Murder in the First Degree and Possession of a Firearm During the Commission of a Felony ("PFDCF"). He now seeks to withdraw that guilty plea. Conflicting forensic psychiatric evaluations of Defendant have put his competency at issue.

FACTUAL AND PROCEDURAL HISTORY

On November 22, 2017, Defendant and Razzaq Muhammad engaged in a verbal argument in a store in Wilmington. As the two exited the store and Mr. Muhammad began to walk away, Defendant pulled out a firearm and shot towards Mr. Muhammad's head from approximately three feet away. Mr. Muhammad staggered but did not fall. In response, Mr. Muhammad chased Defendant down Catawba Street, shooting a firearm at Defendant. Nearby security cameras recorded some of these events.

[1] Defendant is described elsewhere in the record as "Davon Avant-Crosby."
[2] D.I. 1711013775-73.

Wilmington police officers heard the gunshots, moved towards the sound, and found Defendant lying on the ground next to a firearm on West Seventh Street, suffering from multiple gunshot wounds. The officers arrested Defendant and charged him with Attempted Murder in the First Degree and PFDCF.[3]

On January 2, 2018, a Superior Court grand jury issued a ten-count indictment of Defendant for: (1) Attempted Murder in the First Degree; (2) four counts of PFDCF; (3) Possession of a Firearm by a Person Prohibited ("PFBPP"); (4) Possession or Control of Ammunition by a Person Prohibited; and (5) three counts of Reckless Endangering in the First Degree.[4] Separately, on August 27, 2018, a Superior Court grand jury charged Defendant with three counts of Drug Dealing for conduct alleged to have occurred in October and November 2017.[5]

On March 19, 2018, Cleon L. Cauley, Sr., Esquire ("First Counsel"), entered an appearance on behalf of Defendant. On July 31, 2018, First Counsel, on behalf of Defendant, filed a motion for competency evaluation. There, First Counsel stated that a psychological evaluation of Defendant from Family Court and his conversations with Defendant gave First Counsel concern about Defendant's ability

[3] *Id.* DNA testing showed that Defendant's DNA was on the firearm found near him.
[4] D.I. 1711013775-3.
[5] D.I. 1806002839-1.

to understand the proceedings and assist in the preparation of his own defense.[6] On August 1, 2018, the Court granted that motion.[7]

On September 10, 2018, Douglas S. Roberts, Psy.D, and Monica L. Vega, MD, released a report based on the first forensic psychiatric evaluation of Defendant in this case. Drs. Roberts and Vega concluded that Defendant was not competent to stand trial. They stated that Defendant had reached the eighth grade in school, relying on special education and learning support services, and has a full-scale IQ that falls within the lowest percentile of the general population. Drs. Roberts and Vega found that Defendant had an "oversimplified" understanding of the plea bargain and "significant impairments" in his understanding of the consequences of conviction. They noted, for instance, that Defendant erroneously thought that entering a guilty plea would allow him to return home.[8]

On November 5, 2018, the State wrote to the Court to request that Defendant remain confined at the Delaware Psychiatric Center (the "DPC") and participate in competency restoration before being re-evaluated for competency.[9]

On January 8, 2019, the State wrote to the Court to confirm that Defendant had initially been found incompetent to stand trial in the Attempted Murder case.

[6] D.I. 1711013775-25.
[7] D.I. 1711013775-26.
[8] D.I. 1711013775-27.
[9] D.I. 1711013775-28.

On behalf of the parties, the State requested that the Attempted Murder and Drug Dealing cases be put on an indefinite pause until Defendant's competency was restored.[10] On the same day, the Court wrote to the parties that the Drug Dealing case would be "controlled" to the Attempted Murder case due to the ongoing efforts to restore Defendant's competency.[11]

On July 10, 2019, Andrew Donohue, DO, conducted the second forensic psychiatric evaluation of Defendant in this case. On August 14, 2019, the DPC released a report based on this evaluation. Dr. Donohue concluded that Defendant was competent to stand trial. Still, Dr. Donohue noted that Defendant would benefit from assistive accommodations in the representation, including family support in decisions related to his case and "his attorney taking additional time to explain topics, particularly topics that are abstract in nature when discussing the defendant's options."[12]

By February 2020, Ralph D. Wilkinson, Esquire ("Second Counsel"), had been appointed to represent Defendant. On February 7, 2020, a Superior Court

[10] D.I. 1806002839-9.
[11] D.I. 1806002839-10. "Controlled" means that the cases were placed on a control calendar, whereby both cases could be scheduled at a time in the future after Defendant's competency was restored. *See, e.g.*, *State v. Sells*, 2013 WL 1654317, at *3 (Del. Com. Pl. Apr. 17, 2013) (". . . [T]he Court determined that the misdemeanor charges would not be adjudicated until the outcome of the pending felony charges in the Superior Court[.] The Court then put the case on a control calendar so it could monitor the status of the felony proceedings and scheduled subsequent status hearings.").
[12] D.I.s 1711013775-31, 1711013775-86, 1806002839-39.

Commissioner wrote to the parties that "[a]fter reviewing the files, it appears that Mr. Avant-Crosby's last psychological evaluation filed on August 14, 2019 stated that he is competent." Accordingly, the Commissioner placed the matter on the trial calendar to consider issues related to Defendant's competency.[13] On February 21, 2020, the State wrote to the Commissioner about trial scheduling. Counsel for the State noted that he had "spoken with DPC regarding Mr. Avant-Crosby, and they indicate to me that he is now competent to proceed to trial."[14]

One year and five months passed without major developments in the case. On July 15, 2021, the Court wrote a letter to Defendant's Second Counsel requesting a status update about trial scheduling. The Court stated that, based on the July 10, 2019 competency evaluation, it "appears that he [Defendant] now is competent to stand trial."[15]

On October 11, 2021, Defendant pled guilty to Attempted Murder in the First Degree (Class A Felony) and PFDCF (Class B Felony).[16] The plea carries a minimum mandatory sentence of eighteen years of incarceration.[17]

During the plea colloquy, Second Counsel stated that Defendant had been found competent and that Second Counsel had no concerns about Defendant's

[13] D.I.s 1711013775-35, 1806002839-12.
[14] D.I.s 1711013775-39, 1806002839-16.
[15] D.I. 1711013775-42.
[16] D.I. 1711013775-46.
[17] D.I. 1711013775-73.

competency to enter the plea.[18] Defendant told the Court that he had understood and signed the plea agreement and had no questions. Later on during the plea colloquy, when addressing the effect of the plea on Defendant's trial and constitutional rights, Defendant asked if he could appeal the Court's decision if he lost at trial. The Court noted that entering a guilty plea waives the right to a trial. Second Counsel took a moment to discuss the matter with Defendant. After this discussion, Defendant indicated that he had not changed his mind about entering a guilty plea. The Court accepted Defendant's guilty plea.[19] As part of the plea bargain, the State entered *nolle prosequi* on the pending Drug Dealing charges against Defendant.

Approximately two weeks later, on October 27, 2021, Defendant filed a *pro se* motion to withdraw his guilty plea. In this motion, Defendant stated that he had not understood the substance of his guilty plea when he made it, that he had thought the plea carried a minimum mandatory sentence of fifteen years of incarceration, rather than eighteen years. Also, Defendant expressed disapproval of the representations by First Counsel and Second Counsel, requesting that the Court allow him to withdraw his guilty plea and provide him with time to seek a new attorney.[20]

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[18] D.I. 1711013775-72 at A65 ("He understands the trial rights that he waives. He is doing this knowingly, intelligently, and voluntarily. . . . He is competent. There is a report that he is competent. [In t]he discussions I have had with him, I haven't had any concern as to his competency.").
[19] *Id.* at A70-75.
[20] D.I.s 1711013775-48, 1806002839-18.

On November 10, 2021, the Court issued an order in which it directed that Defendant be transported to a Level V detention facility. The Court based this decision on the conclusion from the July 10, 2019 competency evaluation that Defendant was competent to stand trial.[21]

On November 29, 2021, Second Counsel wrote to this Court regarding Defendant's desire to withdraw his guilty plea:

> Counsel had discussed with Mr. Crosby-Avant the charges and the evidence against him on a number of occasions. We discussed, in detail, that there was a clear video of the incident and the factual circumstances as to how he was arrested. Mr. Crosby-Avant made clear to me that he had seen the actual video with prior counsel. Present counsel showed Mr. Crosby-Avant still photos taken from the video that showed his face. Furthermore, it is true that Counsel and Mr. Timothy Maguire, DAG, did both speak to Mr. Crosby-Avant prior to the plea. Mr. Maguire laid out his case to Mr. Crosby-Avant as counsel had done previously with him.
>
> Counsel carefully went over with Mr. Crosby-Avant the maximum and minimum mandatory sentencing provisions on a number of occasions. Prior to taking the plea, Mr. Crosby-Avant had communicated to Counsel his willingness to take a plea considering the evidence against him, the sentencing recommendations by the State, and the charges and other case that would be nolle prossed upon taking his plea.[22]

[21] D.I. 1711013775-49.
[22] D.I.s 1711013775-51, 1806002839-22. Defendant states that Second Counsel contacted him to discuss the case on March 2, 2021, October 9, 2021, and twice on October 10, 2021. D.I. 1711013775-73.

On December 1, 2021, the Court received a letter from Defendant. Defendant stated that he was dissatisfied with Second Counsel's representation and had told Second Counsel that he would seek other representation.[23]

On December 3, 2021, the State filed a brief in opposition to Defendant's motion to withdraw his guilty plea. The State asserted that Defendant had failed to satisfy his burden to show any fair and just reason to withdraw his plea.[24]

On December 23, 2021, Second Counsel filed a motion to withdraw as counsel. Second Counsel stated that Defendant's allegations of ineffective assistance of counsel warranted an assignment of conflict counsel. On December 27, 2021, the Court granted Second Counsel's motion to withdraw as counsel.[25]

On January 4, 2022, the Court requested that the Office of Conflicts Counsel select conflict counsel for Defendant.[26] On January 6, 2022, Patrick Collins, Esquire ("Third Counsel"), was appointed to represent Defendant in this case.[27] On April 7, 2022, the Court granted Defendant's unopposed motion to unseal documents, which released the reports based on the previously conducted competency evaluations to Third Counsel.[28]

[23] D.I.s 1711013775-52, 1806002839-21.
[24] D.I.s 1711013775-53, 1806002839-23.
[25] D.I.s 1711013775-57, 1806002839-26.
[26] D.I.s 1711013775-58, 1806002839-27.
[27] D.I.s 1711013775-59, 1806002839-28.
[28] D.I. 1711013775-67.

On June 8, 2022, Defendant, through Third Counsel, filed an amended motion to withdraw his guilty plea (the "Motion"). Pursuant to Superior Court Criminal Rule 32(d), Defendant requests that the Court allow him to withdraw his guilty plea due to the constraints that his intellectual functioning limitations placed on his comprehension of the proceedings that led to his guilty plea.[29] On June 30, 2022, the State filed a brief in opposition to Defendant's amended Motion. The State asserts that the Motion should be denied because Defendant has failed to show any fair and just reason to withdraw his guilty plea.[30]

On September 26, 2022, the Court sent a letter to the parties. The Court expressed a reluctance to rule on the Motion on the papers alone due to remaining concerns about Defendant's competency. The Court requested a status conference with counsel to discuss. On October 11, 2022, the Court issued an order in which it required that Defendant undergo a psychological evaluation for competency to determine whether he could proceed with the Motion.[31]

On November 15, 2022, forensic psychologist Laura Cooney-Koss, Psy.D, performed the third forensic psychiatric evaluation of Defendant in this case.[32] Dr.

[29] D.I. 1711013775-73. This most recent version of the Motion is titled the "Corrected Amended Motion to Withdraw Guilty Plea" because it corrects the names of the psychologists who performed Defendant's September 18, 2018 competency evaluation. On May 20, 2022, Defendant had filed an "Amended Motion to Withdraw Guilty Plea." D.I. 1711013775-71.
[30] D.I. 1711013775-74.
[31] D.I.s 1711013775-75, 76, 1806002839-31.
[32] D.I. 1711013775-77. On January 3, 2023, Defendant confirmed that he had submitted Dr. Cooney-Koss's report to this Court. D.I. 1711013775-79.

Cooney-Koss concluded that Defendant was not competent to stand trial due in large part to his cognitive functioning limitations. Further, she stated that she did not believe that Dr. Donohue's recommended accommodations had been followed.[33]

On February 15, 2023, the Court issued an order in which it required that Defendant undergo another psychological evaluation for (1) competency to stand trial; (2) determination of treatment; (3) competency to enter a guilty plea; and (4) competency to withdraw a guilty plea.

On March 22, 2023, Dr. Donohue performed the fourth forensic psychiatric evaluation of Defendant in this case.[34] Dr. Donohue concluded that Defendant was competent to stand trial despite his "borderline" intellectual capabilities. Dr. Donohue observed that Defendant's comprehension of court procedures and his legal options had improved since 2019. To Dr. Donohue, Defendant "seemed more competent" than he had then. Dr. Donohue could not conclude whether Defendant's attorney had taken enough time to explain legal topics before Defendant entered his guilty plea, as Dr. Donohue had recommended, but nothing led him to believe that his recommended accommodations were not followed.[35]

[33] D.I.s 1711013775-86, 1806002839-39.
[34] This was the second forensic psychiatric evaluation of Defendant in this case to be conducted by Dr. Donohue.
[35] D.I.s 1711013775-86, 1806002839-39.

On November 7, 2023, the Court held a hearing on Defendant's competency. Drs. Cooney-Koss and Donohue testified, describing the processes by which they reached their respective conclusions on Defendant's competency. At the conclusion of the hearing, the Court stated that three issues of competency are central to the determination of Defendant's Motion: (1) whether Defendant was competent to enter his guilty plea; (2) whether Defendant is competent to withdraw his guilty plea; and (3) whether Defendant is competent to stand trial, should his guilty plea be withdrawn.[36]

LEGAL ANALYSIS

Pursuant to Superior Court Criminal Rule 32(d), if a defendant moves to withdraw a guilty plea before the Court imposes a sentence, the Court "may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason."[37] A finding of incompetency is a "fair and just reason" in favor of withdrawal.[38]

The same standards apply to determine whether a defendant is competent to enter a guilty plea, competent to withdraw a guilty plea, and competent to stand trial.[39] The State bears the burden to establish competency by a preponderance of

[36] D.I.s 1711013775-86, 1806002839-39.
[37] Super Ct. Crim. R. 32(d).
[38] *State v. Rodgers*, 1994 WL 164573, at *5 (Del. Super. Apr. 14, 1994) ("A finding of incompetency would constitute such 'fair and just reason.'").
[39] *State v. Marino*, 1993 WL 603345, at *3 (Del. Super. May 24, 1993) (competency to enter guilty plea); *State v. Perry*, 2023 WL 8187300, at *3 (Del. Super. Nov. 27, 2023) (competency to

the evidence. Competency is based on "whether or not the defendant has sufficient present ability to consult with his lawyer rationally and whether he has a rational as well as a factual understanding of the proceedings against him."[40] The trial judge is the arbiter of competency.[41]

To be competent, the defendant must be able to assist in the preparation of his defense. The threshold determination is whether the defendant is as competent as the average criminal defendant, not as competent as a reasonable person. Competency is a low standard, neither demanding nor exacting.[42] A determination of competency is a "fact-specific inquiry that takes into account the totality of the circumstances and does not necessarily turn upon the existence or nonexistence of any factor."[43] Expert testimony can be helpful, but "where there is conflict in expert testimony, the fact-finder is free to adopt the opinions of some and reject others."[44] "Mere lack of intelligence, or an attorney's having to break down complex topics

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withdraw guilty plea); *Kostyshyn v. State*, 51 A.3d 416, 420 (Del. 2012) (competency to stand trial).

[40] *Tucker v. State*, 2014 WL 7009954, at *2 (Del. Nov. 21, 2014).

[41] *Perry*, 2023 WL 8187300, at *5 (citing *Feliciano v. State*, 2017 WL 897421, at *13 (Del. Mar. 3, 2017)).

[42] *Tucker*, 2014 WL 7009954, at *2; *State v. Leatherberry*, 2018 WL 2733367, at *4 ("It is not necessary under the current state of the law that the defendant have the same level of knowledge or understanding of the trial process as does the lawyer or a person who wishes to represent him or herself.").

[43] *Perry*, 2023 WL 8187300, *4. "It is extremely difficult for trial courts to reach a decision on a defendant's competency to stand trial if the defendant is neither manifestly unable to understand the proceedings against him and to assist in his own defense nor manifestly able to understand the proceedings against him and to assist in his own defense. Competency is not something a person wears like a coat." *State v. Shields*, 593 A.2d 986, 1005 (Del. 1990).

[44] *Perry*, 2023 WL 8187300, at *5 (quoting *Shields*, 593 A.2d at 1011).

for a defendant to better understand, is not enough to establish incompetency."[45] A defendant is "competent to stand trial if he understands questions, terms, and proceedings which are put to him in simple words, perhaps using very concrete examples."[46]

In reaching a decision on the instant Motion, the Court considers three issues: (1) whether Defendant was competent to enter and withdraw his guilty plea; (2) whether Defendant is competent to stand trial, should his guilty plea be withdrawn; and (3) whether Defendant has stated any fair and just reason to withdraw his guilty plea. The Court addresses the issues in that order.

A. Competency to Enter and Withdraw a Guilty Plea

Competency to enter a guilty plea and competency to withdraw a guilty plea both require that the defendant was competent at the time when he entered his plea.[47] When a defendant requests to withdraw his guilty plea based on a lack of competency at the time that he entered the plea, "the burden of proof still rests with the State to establish a defendant's competency by a preponderance of the evidence."[48] The strongest evidence of a defendant's competency at the time that the plea was entered is "his participation in the plea proceedings."[49] In determining

[45] *Id.* at *4. "Mental [slowness] by itself is not usually sufficient to support a finding of incompetence to stand trial." *Shields*, 593 A.2d at 1007.
[46] *Shields*, 593 A.2d at 1008.
[47] *See supra* note 39.
[48] *State v. Rodgers*, 1994 WL 164573, at *5 (Del. Super. Apr. 14, 1994).
[49] *Id.* at *6.

competency, the trial court is "entitled to rely on a defendant's counsel's statement that a defendant is competent."[50]

The results of the two forensic psychological evaluations conducted in the years before Defendant entered his guilty plea present a conflicted picture of Defendant's competency. Defendant has intellectual functioning limitations that affect the speed at which he processes information, but, over time, competency restoration efforts and instructional explanations from his attorney and the Court have improved Defendant's understanding of the proceedings and his legal options.

In September 2018, Drs. Roberts and Vega found that Defendant was incompetent because he had a lowest-percentile IQ, an oversimplified understanding of plea bargains, and a misunderstanding about the consequences of entering a plea. By January 2019, competency restoration efforts were underway. In August 2019, Dr. Donohue found that Defendant was competent, while acknowledging that Defendant would still benefit from accommodations in the representation to improve his comprehension of the proceedings and his legal options.[51] In July 2021, the Court confirmed that Defendant appeared to be competent based on Dr. Donohue's findings. Ultimately, in October 2021, Defendant entered his guilty plea.

[50] *Id.* at *5-6.
[51] *See supra* note 12 and accompanying text.

Before and during the plea colloquy, Defendant consulted with his lawyer rationally and exhibited a factual understanding of the proceedings against him. Second Counsel wrote to this Court that, after discussing the legal options with Defendant, Defendant expressed a willingness to enter a guilty plea based on the evidence against him, the State's sentencing recommendations, and the charges against him that could be *nolle prossed* if Defendant entered the plea. By conferring productively with Second Counsel about his legal options, Defendant demonstrated an ability to assist in the preparation of his defense.

During the plea colloquy, with the help of assistive accommodations, Defendant successfully navigated the challenges in comprehension that come from his intellectual limitations. At one point in the plea colloquy, Defendant expressed confusion about whether an appeal to the Delaware Supreme Court would be available. The Court explained to Defendant that by entering a guilty plea, he waived his right to a trial and other constitutional rights. Defendant asked to discuss that concept with more depth. At the end of the Court's explanation, Defendant asked "If I lose at trial, I can appeal it?"[52] Defendant's question at that point in the plea colloquy suggests that he did not fully understand that there would be no trial if he entered a guilty plea at that time. However, after conferring with Second Counsel, Defendant stated that he "didn't know you can appeal it.," that the

[52] D.I. 1711013775-72 at A71.

conclusion of a trial typically triggered a right to appeal.[53] Defendant's consultation with Second Counsel corrected Defendant's understanding of the proceedings, his legal options, and their consequences. After developing his knowledge of these concepts, Defendant stated that the legal explanations did not change his decision to enter his guilty plea.

The record shows that, in September 2018, Defendant initially appeared to lack the competency required to enter or withdraw a guilty plea. However, over the following three years, competency restoration efforts and instructional consultations with his attorneys developed Defendant's comprehension of the proceedings to the point that they satisfied the non-exacting minimum standard for competency by the time that he entered his plea.[54] Defendant's discussions with Second Counsel before and during the plea colloquy on the available legal options indicate that Defendant was as competent as the average criminal defendant when he entered his guilty plea. He need not have been ideally or exceptionally competent when he entered his guilty plea to satisfy the standard. Defendant demonstrated an adequate ability to rationally consult with a lawyer, factually understand the proceedings, and help prepare in his legal defense, so long as his lawyer made certain helpful accommodations due to

[53] *Id.* at A72.

[54] This makes sense. At the competency hearing, Dr. Donohue testified that individuals like Defendant with borderline intellectual capabilities, in contrast to those with very low intellectual functioning who are nonverbal, can benefit from the academic component of the competency restoration program, which involves "education, learning, [and] teaching about the court." D.I.s 1711013775-86, 1806002839-39.

Defendant's cognitive limitations. Second Counsel implemented those accommodations in this case by investing the time and attentiveness needed to thoroughly yet simply explain the available legal options to Defendant.

Based on the record in this case, the State has established beyond a preponderance of the evidence that Defendant was competent when he entered his guilty plea. Defendant reached the non-demanding, non-exacting minimum threshold for competency. Accordingly, Defendant was competent to enter and withdraw that plea. If the Court were to grant Defendant's motion to withdraw his guilty plea, the issue of competency would not create a barrier to that withdrawal.

B. Competency to Stand Trial

Competency to stand trial requires that the defendant be presently competent to stand trial. The results of two forensic psychological evaluations of Defendant that were conducted in the years after he entered his guilty plea present nearly the same conflicted picture of Defendant's competency as the two evaluations that were conducted before he entered the plea. Defendant remains subject to intellectual functioning limitations that affect his information processing speed,[55] but competency restoration efforts and attentive guidance from his attorney have developed his understanding of the proceedings, the legal options available to him,

[55] The persistence of Defendant's intellectual limitations is consistent with Dr. Donohue's description of how the condition works. He explained that intellectual limitations generally do not "wax and wane" but remain consistent. D.I.s 1711013775-86, 1806002839-39.

and their consequences. In November 2022, Dr. Cooney-Koss concluded that Defendant was incompetent due to his intellectual functioning limitations. Dr. Cooney-Koss found that Defendant had "really struggled with being able to understand the evidence against him, the fact that it was there, the significance of that evidence, how that evidence would be potentially utilized to convict him, and how that would relate to overall sentencing."[56] In her view, apparent inconsistencies in Defendant's knowledge of law and fact meant that he was not competent to stand trial.[57] In contrast, in March 2023, Dr. Donohue concluded that Defendant was competent. In this evaluation, Dr. Donohue found that Defendant's intellectual limitations fell "somewhere between Borderline Intellectual Functioning and Mild Intellectual Disability." Dr. Donohue's opinion was that "at the time of [his] evaluation (March 22, 2023) the defendant had an intact rational and factual understanding of the proceedings against him and was able to assist in his defense."[58]

Defendant demonstrated adequate competency when he entered his guilty plea, and the record does not give the Court any reason to believe that Defendant's competency has deteriorated since that time. For instance, the record does not show that Defendant's intellectual limitations increased in severity during this period.

[56] D.I.s 1711013775-86, 1806002839-39.
[57] *Id.*
[58] These quotations come from Dr. Donohue's report on the March 22, 2023 forensic psychiatric evaluation of Defendant.

Defendant has demonstrated the ability to rationally consult with his lawyer, rationally and factually understand the proceedings, and assist in the preparation of his defense. So long as abstract or complex topics are broken down, concrete examples are given, family support is made available, and additional time is invested to discuss legal consequences and options, Defendant's intellectual limitations do not fully deprive him of competency. These accommodations have been implemented in this case.

Based on the record in this case, the State has established by a preponderance of the evidence that Defendant is competent to stand trial. If the Court were to permit Defendant to withdraw his guilty plea, he would be competent as a matter of law to participate in subsequent criminal proceedings in a manner consistent with the foregoing.

C. Fair and Just Reason to Withdraw Guilty Plea

In the instant Motion, Defendant argues that the Court should allow him to withdraw his guilty plea. Defendant asserts that he has stated a fair and just reason to support withdrawal based on the five factors of *Scarborough v. State*.[59] The State disagrees that Defendant has satisfied the *Scarborough* factors and argues that the Court should not allow Defendant to withdraw his guilty plea.[60]

[59] 938 A.2d 644 (Del. 2007); D.I. 1711013775-73.
[60] D.I. 1711013775-74.

Even when the defendant is found competent to withdraw his guilty plea, the Court has discretion to grant or deny the request to withdraw the plea. A defendant has no absolute right to withdraw a plea prior to sentencing.[61] Indeed, a defendant can withdraw a guilty plea before sentencing only if he satisfies a "substantial" burden to show "any fair and just reason" for withdrawal.[62] Whether a stated reason for withdrawing a plea is fair and just depends on the Court's application of the following *Scarborough* factors: (1) whether there was a procedural defect in taking the plea; (2) whether the defendant knowingly and voluntarily consented to the plea agreement; (3) whether the defendant presently has a basis to assert legal innocence; (4) whether the defendant had adequate legal counsel throughout the proceedings; and (5) whether granting the motion prejudices the State or unduly inconveniences the Court.[63]

1. Procedural Defect

First, Defendant acknowledges that there was no obvious defect in the plea colloquy, though he asserts that his intellectual limitations may have led him to misunderstand the plea process. The State responds that there was no defect in the plea process and that Defendant has stated as much himself.

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[61] *State v. Carney*, 2022 WL 17087057, at *3 (Del. Super. Nov. 18, 2022).
[62] *Id.*
[63] *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007). The Court does not balance these factors, and any of the factors satisfy the burden on its own. *Id.* Aside from these factors, "the Court may allow the Defendant to withdraw a plea of guilt for any reason deemed just." *State v. Harden*, 1998 WL 735879, at *7 (Del. Super. Jan. 13, 1998).

The Court finds that there was no manifest procedural defect in the plea colloquy process. Defendant asked questions about the plea process, and Second Counsel and the Court answered those questions. Defendant communicated his intention to enter a guilty plea, entered that plea, and the Court accepted it. Accordingly, this factor does not weigh in favor of withdrawal.

2. Knowingly and Voluntarily Consented

Second, Defendant argues that he did not knowingly or voluntarily consent to the plea agreement due to his intellectual functioning deficits. He asserts that he lacked the time and consultation needed to understand the legal options available to him. The State responds that Defendant entered his guilty plea knowingly and voluntarily. The State highlights the fulsome plea colloquy conducted by the Court.[64] Further, the State asserts that when Defendant signed the Truth-in-Sentencing Form, Defendant agreed that he had freely and voluntarily decided to plead guilty, had read and understood the applicable information, and had not been coerced to enter his plea.

Upon a motion to withdraw a guilty plea, a defendant who signed the guilty plea forms and participated in a guilty plea colloquy has the burden to prove by clear

[64] Specifically, the State emphasizes the following statement of the Court at the plea colloquy: "And your attorney has indicated that he has spent significant time going over the plea agreement with you, and you have asked questions about the case, you have talked about sentencing, and the like." D.I. 1711013775-72 at A67.

and convincing evidence "that he or she was incapable of entering a knowing and voluntary guilty plea at the time that he entered into the plea agreement."[65]

The record indicates that Defendant sufficiently understood the proceedings before deciding to enter his guilty plea. At the plea colloquy, Second Counsel stated that Defendant "understands the trial rights that he waives. He is doing this knowingly, intelligently, and voluntarily."[66] Defendant stated that he was not taking any medication that might cause him to have difficulty understanding the hearing. And he agreed with the Court that he understood "exactly what is taking place today."[67] When Defendant expressed confusion about whether an appeal to the Delaware Supreme Court would be available after entering his guilty plea, the Court and Second Counsel slowed and simplified the colloquy to explain Defendant's legal options to him. After these explanations, Defendant expressed that his understanding of his legal options and their consequences had improved and that this understanding did not change his decision to enter a guilty plea.

These considerations indicate that Defendant knowingly, intelligently, and voluntarily entered into the plea agreement. Defendant signed the Truth-in-Sentencing Form, indicated that he understood the procedures and consequences for

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[65] *State v. Perry*, 2023 WL 8187300, at *3 (Del. Super. Nov. 27, 2023). Further, this same "burden would also apply to any claim by the defendant that he or she was incompetent at the time of the plea." *Id.*
[66] D.I. 1711013775-72 at A65.
[67] *Id.* at A67.

entering a guilty plea, and requested and received clarification when he appeared to have difficulty understanding part of the process. Second Counsel's statements further support the notion that Defendant's conduct was knowing, intelligent, and voluntary. Hence, this factor does not weigh in favor of withdrawal.

3. Basis to Assert Innocence

Third, Defendant acknowledges that he has little-to-no present basis to assert legal innocence, given that the shooting in the case was captured on a high-quality video recording, his DNA was discovered on the firearm found on the ground next to him, and no new evidence has emerged since he entered his plea.

A criminal defendant is presumptively bound by his representations in court. Accordingly, to overcome a prior guilty plea, the defendant must present "some other support" for his innocence.[68] Defendant has not presented such support here. He concedes that he lacks a present basis to assert legal innocence, given the highly persuasive character of the evidence against him. Hence, this factor does not weigh in favor of withdrawal.

4. Adequate Legal Counsel

Fourth, Defendant affirms that he had generally adequate legal counsel during the proceedings. Nonetheless, he asserts that Second Counsel should have requested

[68] *State v. Carney*, 2022 WL 17087057, at *4 (Del. Super. Nov. 18, 2022) (quoting *State v. McNeill*, 2001 WL 392465, at *3 (Del. Super. Apr. 5, 2001)).

an independent forensic psychiatric evaluation of Defendant because the results of Dr. Donohue's first competency evaluation contained ambiguities. Further, Defendant argues that Second Counsel failed to provide Defendant with the accommodations that had been recommended by Dr. Donohue, such as additional time for deliberation and simplified discussions, which would help Defendant to better understand his legal options.

The State responds that Defendant had adequate legal counsel throughout the proceedings. In the State's view, Defendant's attorneys spent enough time explaining the legal options and answering questions to satisfy the recommended accommodations. The State acknowledges that public defender case activity log entries suggest that Defendant only met with Second Counsel a few times before entering his plea. Still, the State asserts that Second Counsel met with Defendant at least four times during the proceedings. Ultimately, the State maintains that Defendant had sufficient time and opportunity to contemplate whether to enter a guilty plea and to ask any questions he had to Second Counsel.

For this factor, the Court performs the same analysis used to consider an ineffective assistance of counsel claim. There is a "strong presumption that counsel's conduct was professionally reasonable."[69] The defendant must demonstrate that "counsel's actions fell below an objective standard of

[69] *Jones v. State*, 2022 WL 1134744, at *3 (Del. Apr. 18, 2022).

reasonableness" and that "there exists a reasonable probability that, but for counsel's unprofessional errors, [the defendant] would have chosen to proceed to trial." The trial judge acts as the "sole judge of credibility" for these purposes.[70]

Defendant has not demonstrated that the representation by Second Counsel fell below an objective standard of reasonableness. He has not shown with reasonable probability that he would have proceeded to trial if not for unprofessional errors by his attorney. At the plea colloquy, the Court gave Second Counsel and Defendant adequate time to confer before Defendant entered his plea. Over the course of the litigation, Second Counsel spoke with Defendant, answered his questions, took time to explain his legal options, and counseled him that withdrawing his guilty plea is contrary to his best interests. Hence, this factor does not weigh in favor of withdrawal.

5. Prejudice to the State or Undue Inconvenience to the Court

Fifth, Defendant argues that allowing him to withdraw his guilty plea would not prejudice the State. Defendant asserts that proceeding to trial would not require the State to expend substantial additional resources, given that the trial testimony would likely come mainly from police officers, the video recording of the events, and an expert on DNA. Further, Defendant asserts that withdrawing the guilty plea would not unduly inconvenience the Court because conducting trials is a normal

[70] *Id.*

function of the Court. The State responds that permitting Defendant to withdraw his plea would prejudice the State. Because this matter is several years old, the State asserts, witnesses originally subpoenaed for an earlier trial date are less likely to cooperate now.

When the defendant has failed to demonstrate that the other *Scarborough* factors support withdrawal of the plea, the State need not demonstrate prejudice.[71] This is the case here: Defendant has not established that the other factors weigh in favor of his request to withdraw his plea, so the State need not show that allowing Defendant to withdraw his guilty plea would prejudice the State.[72]

Applying the five *Scarborough* factors, Defendant has not established a fair and just reason to withdraw his guilty plea. There was no apparent procedural defect in the plea colloquy, and Defendant knowingly, intelligently, and voluntarily consented to the plea agreement. Defendant has not shown any basis to assert his legal innocence, and he was adequately represented by Second Counsel during the proceedings. Accordingly, the State need not show prejudice. Hence, though Defendant is competent to withdraw his guilty plea, he has not established any fair and just cause for the Court to permit him to repudiate his guilty plea.

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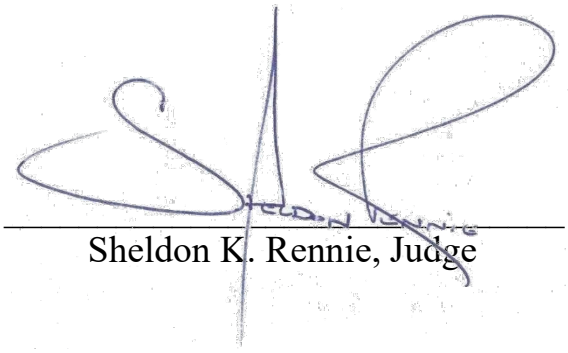
[71] *Carney*, 2022 WL 17087057, at *7 (quoting *United States v. Jones*, 336 F.3d 245, 255 (3d Cir. 2003)).

[72] Still, the State would be prejudiced and resources would be unjustifiably expended if the Court granted the Motion. This case is several years old, such that previously subpoenaed witnesses may be less likely to cooperate due to the passage of time.

CONCLUSION

After considering all of the applicable facts and case law in this case, the Court finds that Defendant was competent to enter his guilty plea, was competent to withdraw his guilty plea, and would be competent to stand trial if the Court permitted him to withdraw his guilty plea. Nonetheless, Defendant has failed to meet his substantial burden to show a fair and just reason for the Court to allow him to withdraw his plea. He has failed to demonstrate that any of the *Scarborough* factors weigh in favor of withdrawal. Defendant's subsequent disappointment about his guilty plea, aggravated by the challenges that he experiences due to his intellectual limitations, are not a proper reason to strike his guilty plea in favor of a trial in this case. Though Defendant may regret entering the plea, "his second thoughts about pleading guilty do not provide a basis for withdrawing his plea."[73] Hence, Defendant's Motion is **DENIED.**

IT IS SO ORDERED, this 31st day of May, 2024.



Sheldon K. Rennie, Judge

[73] *Russell v. State*, 1999 WL 507303, at *2 (Del. June 2, 1999).