

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEONTA CARNEY,)
)
 Defendant Below,)
 Appellant,) No. 28, 2023
)
 v.) ON APPEAL FROM THE
) SUPERIOR COURT OF THE
 STATE OF DELAWARE,) STATE OF DELAWARE
) ID Nos. 1910011637A, 1910002022,
) 2009010583
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S AMENDED OPENING BRIEF

Megan J. Davies, Esq. (#6777)
Law Offices of Megan J. Davies
716 N. Tatnall Street
Wilmington, DE 19801
mjd@mjdavieslaw.com
(856) 671-1188

Attorney for Appellant

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NATURE OF PROCEEDINGS

The defendant was charged under three separate indictments relevant to this appeal. A plea offer was extended to the defendant to resolve the open cases. On July 12, 2021, Defendant Carney rejected the offer. (A.22) Following the rejection, the first of the three indictments (Case No. 1910011637) was set for trial to begin on July 20, 2021.

On the date of trial, the defendant indicated that he wished to plead guilty. The State extended a new plea offer which called for the defendant to plead guilty to five charges – two counts of Robbery Second Degree (as lesser included offenses of Robbery First Degree), two counts of Possession of a Firearm by a Person Prohibited (PFBPP), and one count of Illegal Gang Participation. Additionally, the defendant was to admit that, in entering a guilty plea, his probation was automatically violated. In exchange for the plea of guilty, the State agreed to enter a *nollo prosequi* on all remaining charges. (A.22- A.23)

The defendant entered into the offered guilty plea. The court accepted the defendant's plea of guilt. (A.45-A.71) A presentence investigation was ordered, and sentencing was scheduled for September 24, 2021. (A.72)

Prior to sentencing, on August 3, 2021, Defendant filed a *pro se* Motion to Withdraw Guilty Plea. (A.4) On October 21, 2021, trial counsel filed a Motion to Withdraw Guilty plea on his client's behalf, including a copy of the Appellant's

pro se motion as an attachment. (A.4) Given that claims of ineffectiveness were raised, on March 15, 2022, the Court permitted trial counsel to withdraw and appointed new counsel to represent the defendant on his Motion to Withdraw. (A.4) On July 14, 2022, new counsel filed a supplemental brief in support of defendant's Motion to Withdraw. (A.5) The State filed a response. (A.5)

The issue was decided on the papers. On November 18, 2022, the trial Court denied the defendant's Motion to Withdraw Guilty Pleas. (A.21-A.38) On January 6, 2023 the defendant was sentenced pursuant to the plea. (A.39-A.44)

Defendant Carney filed a timely Notice of Appeal. (A.19-A.20). This is Defendant/Appellant's opening brief.

SUMMARY OF ARGUMENT

1. The trial court erred when it denied defendant's Motion to Withdraw Guilty Plea because the *Scarborough* factors weighed in favor of withdraw and, in finding otherwise, the Court abused its discretion in its finding of fact and conclusions of law.

STATEMENT OF FACTS

On July 20, 2021, Defendant Carney engaged in a plea colloquy with the Court, which resolved three open cases under case numbers 2009010583, 1910011637A, 1910002022, as well as a violation of probation. (A.45-A.71) The offer called for Defendant Carney to plead guilty to five charges – two counts of Robbery Second Degree (as lesser included offenses of Robbery First Degree), two counts of Possession, two counts of Possession of a Firearm by a Person Prohibited (“PFBPP”), and one count of Illegal Gang Participation. The offer additionally called upon the defendant to a violation of probation. In exchange the State agreed to enter a *nollo prosequi* on all remaining charges. (A.49-A.51) The sentence, which would be in the Court’s discretion, carried a mandatory minimum sentence of ten years (based upon the two PFBPP charges) with a maximum penalty of 43 years. (A.62)

The defendant admitted to the following factual bases in support of his plea of guilty (1) that on September 21, 2019 in New Castle County, during the course of committing a theft, Defendant Carney used or threatened to use force upon victim T.H. (A.66) ; (2) that, also on September 21, 2019, having been previously convicted of a felony, he knowingly possessed or controlled a firearm (A.67) ; (3) that on August 22, 2019, during the course of committing a theft, Defendant Carney used or threatened to use force upon victim A.F.(A68); (4) that, also on

August 22, 2019, having been previously convicted of a felony, he knowingly possessed or controlled a firearm (A.69); and (5) that between June 1, 2018 and March 19, 2021, he actively participated in a criminal street gang with knowledge that its members engage or have engaged in a pattern of criminal activity and that he did knowingly promote, further, or assist the criminal conduct by the members of that gang. (A.70)

As a result of pleading guilty to offenses which occurred while he was on probation, Defendant Carney admitted that he was in automatic violation of his probation. (A.71)

Prior to sentencing, Defendant Carney filed a *pro se* motion to withdraw from his guilty plea. (A.4) In that motion he raised claims of ineffective assistance of counsel. As a result of the claims, trial counsel sought to withdraw. The withdraw was granted and new counsel was appointed. (A.4) A supplemental brief was filed in support of the motion to withdraw (A.5). In that brief, the defendant identified three of the five *Scarborough* factors supporting his motion. (*See Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007). The defendant argued that (1) his plea was not knowingly, voluntarily, and intelligently entered; (2) he did not have adequate legal counsel during the proceedings; (3) the granting of the motion would not prejudice the State or unduly inconvenience the Court; and (4) there was basis for the defendant to assert legal innocence. (A.25)

The supplemental brief expanded on Defendant Carney's *pro se* ineffective assistance arguments, putting forth the defendant's assertions that he felt his trial attorney was unprepared for trial, and, resultingly Carney felt forced to plead guilty rather than move forward unready counsel. (A.33, A.35) Carney argued that the State would not be prejudiced by the withdraw because the trial, essentially a one witness case, would be simple in preparation and execution, as well as short in duration.(A.37) In balancing the minimal preparation required by the State against the extensive exposure faced by Defendant Carney, Carney argued the factor should weigh in favor of the defendant.

Additionally, the defendant asserted a claim of legal innocence as to the PFBPP charge alleged to have occurred on August 22, 2019. Carney argued that innocence of one claim void his plea to all charges incorporated in the same agreement, and support his claim that his trial counsel had been ineffective. Finally, because the defendant was led by counsel to plead to a crime which did not factually occur, the defendant argued that his plea was not knowingly, voluntarily and intelligently made. (A.28 – A.32, A.25)

The State's evidence relating to the August 2019 PFBPP charge clearly indicated that it was the accomplice, and not Defendant Carney, who possessed the weapon. In support, Carney referred to the report of the lead detective, which

documented the statement of the victim, and State's only eye-witness. There, the detective wrote:

“The victim stated that the unknown black male accomplice was in possession of the silver handgun. During the incident S1 (Deonta Carney BMN and DOB [redacted]) was stating to the younger black male suspect, ‘just shoot him.’ However, during the incident, no shots were fired.” (A.31)

The trial court denied the defendant's motion to withdraw, finding that (1) the plea was knowingly, intelligently, and voluntarily entered; (2) Carney's trial counsel was not ineffective, (3) granting the motion would prejudice the State and inconvenience the Court, and (4) the defendant was not actually innocent of the PFBPP charge because all three elements of constructive possession needed to support the charge were met despite the accomplice disobeying Carney's command to “just shoot him,” and because the defendant had admitted guilt to this charge during his colloquy. (A.21 – A.38)

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE *SCARBOROUGH* FACTORS WEIGHED IN FAVOR OF WITHDRAW AND , IN FINDING OTHERWISE, THE COURT ABUSED ITS DISCRETION IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. QUESTION PRESENTED.

Did the trial court err in denying Defendant Carney’s Motion to Withdraw Guilty Plea? This issue was preserved by defendant’s *pro se* Motion to Withdraw filed on August 3, 2021, by trial counsel’s Motion to Withdraw Guilty Plea incorporating the *pro se* motion filed on October 21, 2021, and by the supplemental brief in support filed by appointed conflict counsel on July 14, 2022.

B. SCOPE OF REVIEW.

The standard of review for the Superior Court’s denial of a motion withdraw a guilty plea is abuse of discretion. *Patterson v. State*, 684 A.2d 1234, 1237 (Del. 1996). An important factor in the exercise of that discretion is the timing of a motion to withdraw a guilty plea. *Id.* Superior Court Criminal Rule 32(d) provides that if a motion to withdraw a plea of guilty “is made before imposition of sentence the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.”

C. MERITS OF THE ARGUMENT

A proper balancing of the *Scarborough* factors weighs in favor of permitting the withdraw of the defendant's guilty plea. In denying the defendant's motion, the trial court abused its discretion.

Pursuant to Delaware Superior Court of Criminal Procedure Rule 32(d), a defendant may seek to withdraw his guilty plea at any time prior to sentencing upon a showing of any fair and just reason. In evaluating whether any fair and just reason exists to allow a defendant to withdraw their guilty plea, the Court must weigh and consider five factors, known as the "*Scarborough* factors,": (1) whether there was a procedural defect with the plea; (2) whether the defendant knowingly and voluntarily consented to the plea agreement; (3) whether there is a present basis for the defendant to assert legal innocence; (4) whether the defendant had adequate legal counsel during the proceedings; and, (5) whether granting the motion prejudices the State or unduly inconveniences the Court. *Reed v. State*, 258 A.3d 807 (Del. 2021); see *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007).

In weighing the *Scarborough* factors, most specifically the third factor as to legal innocence, the trial Court abused its discretion in its findings of fact and conclusions of law.

Prior to sentencing, Defendant Carney argued that he should be permitted to withdraw his plea because he was legally innocent of the August 22, 2019 PFBPP charge to which, upon the advice of counsel, he pled guilty. The defendant argued

that the State's evidence, specifically the interview of the State's victim, and only eye-witness, clearly indicated that the defendant was not the individual who possessed the handgun at the time of the robbery. The trial Court agreed that the evidence did not show the defendant himself had *actually* possessed a firearm, but found that there was sufficient evidence for a factual basis supporting *constructive* possession. This conclusion of law is incorrect.

In order for the defendant to be guilty of PFBPP via constructive possession, there must be evidence that (1) the accused knew the location of the firearm, (2) he the ability and intention, at the time, to exercise control over it; and (3) he intended to guide its destiny. *Lecates v. State*, 987 A.2d 413, 426 (Del. 2009). Here, the analysis would fail at element two, because the evidence demonstrates that the defendant did not have the ability, at the time, to exercise control over the weapon.

The relevant portion of the police report read, "the victim stated that the unknown black male accomplice was in possession of the silver handgun. During the incident S1 (Deonta Carney BMN and DOB: [redacted]) was stating to the younger black male suspect, 'Just shoot him.' However, during the incident, no shots were fired."

After quoting this portion of the report in its opinion, the trial court held that all three elements of constructive possession were established, specifically finding

that, “the fact that the accomplice disobeyed Carney’s command does not alter this conclusion.”

This finding is an incorrect application of the law. The accomplice’s refusal to follow Defendant Carney’s instruction should have altered the trial court’s conclusion, because it provides actual evidence that the defendant did not have the ability to exercise control over the weapon, a requisite to constructive possession. The fact that the defendant could not instruct his accomplice on how to use the weapon demonstrates that the defendant did not have the **ability to exercise control** over the firearm.

This differs from this Court’s holding in *Lecates, supra*, upon which the trial Court relied. In *Lecates*, as herein, the defendant conceded that the State could meet some elements of constructive possession, but challenged the proofs relating to the defendant’s ability to control the firearm. The *Lecates* Court found that constructive possession could be found through circumstantial evidence, and that such circumstantial evidence existed against defendant Lecates. Specifically, the *Lecates* Court found that, because the co-defendants committed a crime together, and because the gun used in the crime was concealed in the defendant’s vehicle, and because the defendant repeatedly lied to police about his ownership of that vehicle, there was adequate circumstantial evidence to show that the defendant had the ability to exercise dominion and control over the gun.

Here, in contrast, there is direct evidence that the defendant *did not* have the ability to exercise dominion and control over the gun. Specifically, when the defendant attempted to exercise control over the gun, in telling his accomplice to discharge the weapon, the accomplice, who physically controlled the gun, refused to follow the desire of the defendant. The State's own evidence, uncontradicted by the trial court, demonstrates that the defendant had no ability to control the gun held by his accomplice. Therefore, because the evidence refutes the existence of an element of the offense, the defendant is legally innocent of the charge of PFBPP alleged to have occurred in August of 2019.

The trial Court further found the defendant's assertion of factual innocence failed because the defendant had admitted to committing the offense when the court questioned him during the plea colloquy. While it is correct that statements made during a plea colloquy are "presumed to be truthful,"¹ a person cannot be punished for a crime which, under the law, did not actually occur. If anything, the defendant's plea admission supports the defendant's arguments that he did not have adequate legal counsel during the proceedings, and did not knowingly enter into the plea. A youthful defendant cannot be expected to have an understanding of the intricacies of what constitutes an element of a crime or the legal distinctions

¹ *Somerville v. State*, 703 A.2d 629,632 (Del. 1997)

which create or refute a finding of constructive possession. The defendant would need to rely upon counsel to review, apply and explain the evidence and the law.

Effective counsel is one who conducts a thorough investigation of law and facts prior to making decisions and advising his or her client. *Ploof v. State.*, 75 A.3d 840, 852 (Del. 2013). If counsel failed to advise his client of the elements needed for a conviction, or inappropriately advised of the likelihood of guilt because he had not conducted a thorough investigation of law and facts, the Defendant, especially such a young defendant, cannot be faulted for not understanding this nuance in the law on his own. The plea of guilt should not stand in a situation where the crime did not legally occur.

The fact that trial counsel permitted his client to plead guilty to a crime for which he was factually innocent corroborates the defendant's assertion that he felt forced to enter into a plea, rather than proceed to trial with unprepared counsel. Mr. Carney's exposure was significant, and he was unable to trust that his attorney was prepared to proceed to trial as an effective advocate. The fact that his attorney permitted Mr. Carney to plead guilty to an offense, when the only evidence plainly showed he had not committed the offense, demonstrates trial counsel's lack of familiarity with the evidence and lack of preparation.

The defendant was prejudiced by the failures of trial counsel. The defendant, only 18 years of age and barely an adult at the time of the offenses, was facing an

extensive amount of time in prison. Such a youthful offender requires effective counsel to guide him in his understanding of the law and the decision to plead guilty or proceed to trial.

The defendant did suffer prejudice. While the defendant was prejudiced as a whole, because he felt he was forced into a guilty plea out of fear of his counsel's lack of preparation, and denied his right to trial, the defendant was also specifically prejudiced in his plea to a crime for which he was legally innocent. That charge of PFBPP itself carried a five year mandatory minimum sentence, a sentence to be served consecutively to the remainder of his sentence. An additional, unwarranted, five years' incarceration is a prejudicial effect. Therefore, the trial Court abused its discretion in not weighing this factor in favor of the defendant.

Finally, the trial Court abused its discretion in not weighing the final factor raised by the defendant, that granting the motion to withdraw would not prejudice the State or unduly inconvenience the Court. Surely, any withdrawn plea will, to some extent, be unpreferred by the State, and will inconvenience the Court. However, if there were a case in which the factor weighs in favor of the defendant, it should be this case which involves only one eye-witness and a simple fact pattern. There was no evidence recovered from search warrants which required law enforcement testimony, no DNA, fingerprint or firearms evidence which required

expert testimony. The State's case-in-chief could be easily presented in a few hours.

The *Scarborough* factors weighed in favor of withdraw. The trial Court abused its discretion in denying the defendant's motion.

CONCLUSION

Mr. Carney respectfully requests this Honorable Court to reverse the decisions of the trial court which denied his Motion to Withdraw Guilty Plea.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Megan J. Davies". The signature is written in a cursive style and is positioned above the typed name and contact information.

Megan J. Davies, Esq. (#6777)
Law Offices of Megan J. Davies
716 N. Tatnall Street
Wilmington, DE 19801
(856) 671-1188

Attorney for Appellant

EXHIBIT A

This 18th day of November, 2022, upon consideration of Defendant Deonta Carney's ("Carney") Motion to Withdraw Guilty Plea and the State's responses, it appears to the Court that:

1. On July 12, 2021, Carney rejected a plea offer in case number 1910011637.¹ The plea would have resolved four cases encompassing 27 charges.² The plea offer called for Carney to plead guilty to five charges - two counts of Robbery Second Degree (as lesser included offenses of Robbery First Degree), two counts of Possession of a Firearm by a Person Prohibited ("PFBPP"), and Illegal Gang Participation and to admit to a violation of probation.³ In exchange, the State agreed to entered a *nollo prosequi* on all remaining charges, recommend the minimum mandatory sentence at Level V (10 years), and agreed that the "VOP be reimposed with no additional unsuspended level five time."⁴

2. Following the plea rejection, case number 1910011637 was set for trial on July 20, 2021.⁵ However, before opening statements and upon learning the State's out-of-state "critical civilian witness" was present,⁶ Carney informed the

¹ D.I. 12. (Unless indicated otherwise, D.I. numbers are from ID No. 1910011637A.)

² *Id.*; DUC# 2009010583 (eight charges); DUC# 1910011637A (six charges); DUC# 1910002022 (five charges); DUC# 1611010891 (eight charges).

³ *Id.*

⁴ *Id.*

⁵ D.I. 15.

⁶ Tr., at 2 (References to the transcript are to the Plea Colloquy hearing on July 20, 2021), D.I. 22.

State through counsel that he wished to plead guilty.⁷ The State extended the same offer Carney had rejected before, but with a notable difference – the State removed the cap on its sentencing recommendation.⁸ While less favorable to Carney than the earlier rejected plea offer, this plea offer benefitted Carney by limiting his exposure to minimum mandatory sentences and lowering his overall statutory maximum punishment.⁹ Carney accepted the plea.

3. After executing a Plea Agreement and Truth-in-Sentencing Guilty Plea Form, the Court conducted an extensive colloquy with Carney.¹⁰ He was informed again of the minimum mandatory and maximum possible penalties,¹¹ the rights he was giving up by pleading guilty,¹² and asked whether he was coerced into pleading or dissatisfied with his representation.¹³ Carney responded that he was neither coerced nor dissatisfied.¹⁴ The Court found “the plea to be knowingly, voluntarily

⁷ *Id.*, at 3.

⁸ MR. TAYLOR: “It is not the plea that was previously on offer; it was gotten worse [...] It is the same plea, but there is no State’s cap, so it is open sentencing.” *Id.*, at 3:7–9; 3:13–15.

⁹ MR. MALIK: “By virtue of the plea that’s been entered in this case, Mr. Carney is avoiding an additional eight years of minimum mandatory time for each of the robbery charges, and it’s effectively reducing the maximum on each by 35 years.” *Id.*, at 8:5–11.

¹⁰ *Id.*

¹¹ *Id.*, at 15–18. (Counsel had discussed potential sentences with Carney prior to the colloquy. *Id.*, at 8–9.)

¹² *Id.*, at 13–14.

¹³ *Id.*, at 13; 20.

¹⁴ *Id.*, at 13:8–19; 20:16–19.

and intelligently offered and [accepted all pleas].”¹⁵ A presentence investigation was ordered, and sentencing was scheduled for September 24, 2021.¹⁶

4. Despite the extensive colloquy, Carney developed second thoughts. He filed a *pro se* Motion to Withdraw Guilty Plea on August 3, 2021 which was referred to his counsel.¹⁷ On October 21, 2021, John S. Malik, Esquire filed a Motion to Withdraw Guilty Plea on Carney’s behalf, including a copy of Carney’s *pro se* motion as an attachment.¹⁸ Counsel represented, and the *pro se* motion argued, that Carney was seeking to withdraw his guilty pleas in part because they were the product of ineffective assistance of counsel.

5. At a hearing on March 15, 2022, the Court permitted counsel to withdraw and confirmed with Carney that he desired that counsel be appointed for him to assist his in attempting to withdraw his guilty pleas.¹⁹ The Court ordered that new counsel be appointed for Carney and Megan J. Davies, Esquire subsequently was appointed to represent Carney. The Court then ordered that the State provide Ms. Davies with

¹⁵ *Id.*, at 27:4–6.

¹⁶ D.I. 15; 16.

¹⁷ Def.’s *pro se* Mot. to Withdraw Guilty Plea, D.I. 18 (attached as Ex. C to the Motion to Withdraw Guilty Plea filed by Mr. Malik, D.I. 20).

¹⁸ Def.’s Mot. to Withdraw Guilty Plea, Ex C, D.I. 20.

¹⁹ D.I. 24.

certain discovery by June 24, 2022 and that she file any supplemental material or an amended motion to withdraw guilty plea by July 15, 2022.²⁰

6. On July 14, 2022, Carney's current counsel, Ms. Davies, filed his third and final submission in the form of a supplemental brief.²¹ The State has filed two responses in opposition – the first in response to the original motion filed by Mr. Malik and the second in response to Ms. Davies' supplemental brief.²²

7. Carney argues that he should be allowed to withdraw his plea because it was the product of ineffective assistance counsel,²³ it was not knowingly, voluntarily, and intelligently entered, and it was entered despite him being innocent of one of the PFBPP charges.²⁴ He also contends that the State would not be prejudiced if his motion is granted.²⁵

²⁰ D.I. 25.

²¹ Supp. Br. in Support of Def.'s Mot. to Withdraw Guilty Plea, D.I. 26.

²² State's Resp. to Mot. to Withdraw Guilty Plea, D.I. 23; State's Resp. to Supp. Mot. to Withdraw Guilty Plea, D. I. 27.

²³ Almost as an afterthought, and without any documentation, Carney argues that as a young adult his ongoing brain development made him especially susceptible to his lawyers' comments. He also claims that he "had not fully processed what was occurring nor the ramifications of his acceptance." The Court does not find that the mere fact of Carney youth is a sufficient reason to allow him to withdraw his guilty pleas. It finds that Carney remains bound by his in-court representations, including his satisfactory representation. Supp. Br. in Supp. of Def.'s Mot. to Withdraw Guilty Plea, at ¶ 23, D.I. 26; *see Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

²⁴ *E.g.*, Def.'s Mot. to Withdraw Guilty Plea, at ¶ 9, D.I. 20

²⁵ *Id.*, at ¶ 11.

8. The State counters that Carney has no grounds for withdrawing his guilty plea – he is not actually innocent of the PFBPP charge; his counsel was not ineffective; and the State would be unduly prejudice if the Motion were granted.²⁶ It argues that granting the Motion would give Carney another opportunity to make sure the witnesses appear, only to change his mind and plead guilty at the 11th hour if they do.²⁷

9. A guilty plea may be withdrawn before sentencing,²⁸ but a defendant has no absolute right to do so.²⁹ The defendant bears the “substantial”³⁰ burden of showing “any fair and just reason” for withdrawal.³¹ The decision to grant or deny withdrawal is within the Court’s discretion.³²

10. To determine whether there is a “fair and just” reason for withdrawal of a guilty plea, the Court must address the following:

- a) Was there a procedural defect in taking the plea;

²⁶ State’s Resp. to Def.’s Mot. to Withdraw Guilty Plea, D.I. 23; State’s Resp. to Def.’s Supp. Mot. to withdraw Guilty Plea, D.I. 27.

²⁷ State’s Resp. to Def.’s Supp. Mot. to Withdraw Guilty Plea, D.I. 27. Of course, the State is not obliged to offer a plea at any future trial should the Court grant the Motion.

²⁸ Super. Ct. Crim. R. 32(d).

²⁹ *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005) (internal citations omitted).

³⁰ *United States v. Jones*, 336 F.3d 245, 252 (3d. Cir. 2003)

³¹ Super. Ct. Crim. R. 32(d).

³² *Id.* (“the court *may* permit withdrawal of the plea”) (emphasis added); *State v. Phillips*, 2007 WL 3105749 at *1 (Del. Super. Ct. 2007) (quoting *Brown v. State*, 250 A.2d 503, 504 (Del. 1969)).

- b) Did the defendant knowingly and voluntarily consent to the plea agreement;
- c) Does the defendant presently have a basis to assert legal innocence;
- d) Did the defendant have adequate legal counsel throughout the proceedings; and
- e) Does granting the motion prejudice the State or unduly inconvenience the Court.³³

The Court does not balance these factors.³⁴ Instead, “[c]ertain of the factors, standing alone, will themselves justify relief.”³⁵

11. **There were no procedural defects in the plea colloquy.** Carney admits that there were no defects in the colloquy.³⁶ The Court agrees and finds that the “numerous protections” afforded to Carney were honored.

12. **Carney’s plea was entered into knowingly, intelligently, and voluntarily.** Barring clear and convincing evidence to the contrary, defendants are bound by the representations they make during their plea colloquy.³⁷ These statements are “presumed to be truthful”³⁸ and pose a “formidable barrier to a collateral attack on a guilty plea.”³⁹ At no point during his colloquy did Carney so

³³ *State v. Friend*, 1994 WL 234120, at * 2 (Del. Super. Ct. 1994) (internal citations omitted); see *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007); *McNeill v. State*, 2002 WL 31477132, at * 1–2 (Del. 2002).

³⁴ *Patterson v. State*, 684 A.2d 1234, 1239 (Del. 1996).

³⁵ *Id.*

³⁶ Def.’s Mot. to Withdraw Guilty Plea, at ¶ 9, D.I. 20. “Defendant Carney does not contend that there was a [procedural] defect with his guilty plea.”

³⁷ *Somerville*, 703 A.2d at 632.

³⁸ *Somerville*, 703 A.2d at 632 (citing *Davis v. State*, 1992 WL 401566 (Del. 1992)); *Bramlett v. A.L. Lockhart*, 876 F.2d 644, 648 (8th Cir. 1989)).

³⁹ *Blackledge v. Allison*, 431 U.S. 63, 64 (1977).

much as insinuate his plea was not knowingly, intelligently, and voluntarily entered.⁴⁰ He informed the court that he was satisfied with his attorney's representation.⁴¹ He denied being forced into pleading guilty.⁴² and he stated that he understood all the terms of the of his plea agreement.⁴³ In addition to his own words, his trial counsel's representations to the Court support the conclusion that Carney entered into the plea with a full understanding of it. Specifically, Mr. Malik stated that he believed that "based upon [his] discussions with him, that Mr. Carney is prepared at this time to enter a knowing, voluntary and intelligent plea before the Court."⁴⁴ Based on the above record, and as it did when the plea was entered, the Court finds that Carney entered his guilty plea knowingly, intelligently, and voluntarily.

13. Carney does not have a basis to establish factual or legal innocence.

When seeking to withdraw their guilty pleas, criminal defendants remain presumptively bound by their representations to the Court.⁴⁵ So, after pleading guilty, a defendant must present "some other support" to overcome their plea and to

⁴⁰ *See*, Tr., D.I. 22.

⁴¹ *Id.*, at 20:16–19.

⁴² *Id.*, at 13:16–19.

⁴³ *Id.*, at 11–13.

⁴⁴ *Id.*, at 10:5–9.

⁴⁵ *Somerville*, 703 A.2d at 632.

assert innocence.⁴⁶ There is no mention of innocence in Carney's *pro se* filing.⁴⁷

The first mention of this consideration is in trial counsel's follow-up motion where counsel simply states that:

[s]ubsequent to the filing of his *pro se* motion to withdraw his guilty plea, Mr. Carney has indicated to counsel his belief that alleged inconsistencies in the police reports provide a basis to claim factual innocence given alleged misidentification of the perpetrators of the robbery by the alleged victim.⁴⁸

In his third submission, Carney explains that he plead guilty to PFBPP in case 1910011637 despite being innocent.⁴⁹ He argues that he neither actually possessed nor jointly possessed the gun.⁵⁰ Carney bolsters this argument by pointing to the uncertainty in Det. Hayman's Investigative Narrative as to who possessed the gun and when.⁵¹ The date of the alleged incident described in Det. Hayman's report is August 22, 2019.⁵² For Carney, these points justify withdrawal.

14. The State first correctly points out that Carney misidentifies the case number for which he claims innocence. Carney references Det. Hayman's report to

⁴⁶ *State v. McNeill*, 2001 WL 392465, at * 3 (Del. Super. Ct. 2001) (citing *Russell v. State*, 734 A.2d 160 (table) (Del. 1999)).

⁴⁷ Def.'s Mot. to Withdraw Guilty Plea, Ex. C., D.I. 20.

⁴⁸ *Id.*, at ¶10.

⁴⁹ Supp. Br. in Support of Def.'s Mot to Withdraw Guilty Plea, at ¶11, D.I. 26.

⁵⁰ *Id.*, at ¶¶ 11–14. Carney argues against joint possession by pointing to the fact that despite his call for his co-conspirator to fire the weapon no shots were fired. *Id.* at n. 1.

⁵¹ *Id.*, at Ex. A.

⁵² *Id.*

support his claim.⁵³ Det. Hayman's report relates to case number 1910002022, not case number 1910011637 as Carney states.⁵⁴ More substantively, the State argues that Det. Hayman's report supports a conclusion that Carney, at a minimum, is guilty of constructive possession of the firearm.⁵⁵

15. The proper starting point for addressing Carney's contention that he is innocent of one of the PFBPP charges to which he pled guilty is the plea colloquy. Before accepting his pleas, as to each charge, the Court read that particular count to Carney, asked him if he understood the charge, asked him if he committed that offense, and asked him what his plea was.⁵⁶ Specifically, as to the charge for which Carney now claims innocence, the exchange between the Court and Carney was as follows:

THE COURT: The next charge is possession of a firearm by a person prohibited, which is Count IV of that same indictment that includes the last robbery charge, and it reads that you, on or before [sic] the 22nd day of August in 2019, in New Castle County, Delaware, did knowingly possess or control a firearm, as defined under Delaware law, after having been convicted of criminally negligent homicide, a felony, in case number 1611010891 in the Superior Court of the State of Delaware, in and for New Castle County, on or about February 27th, 2019.

Do you understand that charge?

⁵³ *Id.*, at ¶¶ 11, 12.

⁵⁴ State's Resp. to Def's Supp. Mot. to Withdraw Guilty Plea, D.I. 27.

⁵⁵ *Id.*

⁵⁶ Tr., at 21-27, D.I. 22.

THE DEFENDANT: Yes.

THE COURT: Did you commit that offense?

THE DEFENDANT: Yes.

THE COURT: What's your plea to that charge?

THE DEFENDANT: Guilty.⁵⁷

The record establishes that Carney understood he was pleading guilty to, and was in fact guilty of, the PFBPP count associated with the robbery charge that occurred on August 22, 2019.⁵⁸ That incident is the one for which Det. Hayman authored the police report upon which Carney now relies to establish his innocence.⁵⁹ Obviously, the Court views with skepticism Carney's newly discovered understanding that he was innocent of that charge all along.

16. The Court finds that there was sufficient factual basis to convict Carney of PFBPP in the August, 2019 incident as described in Det. Hayman's report. The relevant portion of the report reads, "The victim stated that the unknown black male accomplice was in possession of the silver handgun. During the incident S1 (Deonta Carney BMN and DOB: 10/28/2000) was stating to the younger black male suspect, 'Just shoot him.' However, during the incident, no shots were fired."⁶⁰ In order to

⁵⁷ *Id.*, at 25-26.

⁵⁸ *Id.*, at 24-25.

⁵⁹ State's Resp. to Def.'s Supp. Mot. to Withdraw Guilty Plea, at Ex. A, D.I. 27.

⁶⁰ *Id.*

establish constructive possession, the State must show that Carney: (1) knew the location of the firearm; (2) had the ability and the intention, at the time, to exercise dominion and control over it; and (3) intended to guide its destiny.⁶¹ Circumstantial evidence may prove constructive possession.⁶² The Court finds all three elements of constructive possession are established in the quoted portion of Det. Hayman's report. Carney knew the location of the firearm and appeared to have the ability and intention to exercise control over it and to guide its destiny when he commanded his accomplice to "Just shoot him." The fact that the accomplice disobeyed Carney's command does not alter this conclusion, particularly in light of Carney's admission that he committed the offense when the Court questioned him.

17. **Carney had effective legal counsel throughout his proceedings.** To prevail on his ineffective assistance of counsel claim, Carney must satisfy the two-factor standard originally outlined in *Strickland v. Washington*.⁶³ When it comes to withdrawal of a guilty plea, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were so prejudicial "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on

⁶¹ *Lecates v. State*, 987 A.2d 413, 426 (Del. 2009).

⁶² *Id.*, at 420-421.

⁶³ 466 U.S. 668 (1984); see *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

going to trial.”⁶⁴ When evaluating counsel’s performance, “[a] court must indulge in a *strong presumption* that counsel’s conduct falls within the wide range of reasonable professional assistance.”⁶⁵

18. The crux of Carney’s argument is that he was strong-armed into pleading guilty because he lost faith in his counsel after receiving the “misleading advice” that he likely would be convicted.⁶⁶ The State counters that “Defendant is attempting to impose his own subjective and emotional view of the case and asks the Court to disregard what two seasoned and respected attorneys advised him, and to disregard his own words spoken to the Court when being given the plea colloquy on July 20, 2021.”⁶⁷ The Court examines both attorneys’ conduct individually.

19. Kevin P. Tray, Esquire represented Carney before Mr. Malik. It is not clear at all to the Court what Mr. Tray had to do with Carney’s eventual decision to plead guilty which occurred 10 months after Mr. Tray’s representation ended.⁶⁸ Nevertheless, the Court looks at Carney’s arguments about Mr. Tray. Those arguments revolve around a letter Carney received from Mr. Tray while Mr. Tray

⁶⁴ *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

⁶⁵ *Strickland*, 466 U.S. at 669 (emphasis added); *see also Albury*, 551 A.2d at 59.

⁶⁶ Def.’s Mot. to Withdraw Guilty Plea, D.I. 20; Supp. Br. in Support of Def.’s Mot. to Withdraw Guilty Plea, at ¶¶ 21, D.I. 26.

⁶⁷ State’s Resp. to Def’s Supp. Mot. to Withdraw guilty Plea, D.I. 27.

⁶⁸ Mr. Malik entered his appearance on September 15, 2020, D.I. 7. Carney entered his pleas on July 20, 2021., D.I. 15.

was his attorney.⁶⁹ He argues that Mr. Tray's letter is indicative of coercion and a lack of willingness to advocate on his behalf because Mr. Tray states that "a trial would be a slow-motion guilty plea."⁷⁰

20. To the extent that comment matters in the context of Carney's decision to plead guilty, the Court disagrees with Carney's conclusion. The quotation is the last sentence in a three-paragraph letter written more than a year before Carney pled guilty.⁷¹ Earlier sections of the letter provide context for the statement. The statement comes after Mr. Tray tries to preserve confidentiality, explains his preferred means of communication, implores Carney to give him names of helpful witnesses, and notes "the strength of the evidence" against Carney.⁷² The comment that Carney claims deprived him of effective assistance of counsel from Mr. Tray is, "I strongly suggest that you bring [helpful witnesses] to my attention. Otherwise, you can see from the strength of the evidence, a trial would be a slow-motion guilty plea."⁷³ The Court fails to see how this letter constitutes anything but effective assistance. Criminal defense attorneys, indeed, all lawyers, are supposed to give their clients honest appraisals of the relative strength of the evidence in their cases

⁶⁹ Def.' Mot. to Withdraw Guilty Plea, at Ex. A to Ex. C, D.I. 20.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

so that clients can make informed decisions. Mr. Tray's realistic assessment, albeit somewhat colorful, is just such an appraisal.

21. Carney also claims that Mr. Malik "pressured" him into pleading guilty by pointing out that "he would be convicted if the State's witness took the stand."⁷⁴ According to Carney, this comment indicates that Mr. Malik "had pre-determined the outcome of the case and would not act as the zealous advocate to which Mr. Carney was entitled."⁷⁵ This argument underscores Carney's fundamental misunderstanding of the role of an attorney. A lawyer is not a cheerleader, and the fact that a lawyer gives a client a realistic assessment of the evidence does not preclude the lawyer from zealously advocating for the client at trial. Further, the plea colloquy belies any such contention that Carney was coerced into pleading guilty.⁷⁶ In fact, Carney expressly acknowledged that he had "freely and voluntarily decided to plead guilty to the charges in the plea agreement."⁷⁷ He disavowed that "Mr. Malik, the State, or anybody threatened or forced him to plead guilty."⁷⁸ Crosby further told the Court that he was satisfied with Mr. Malik's representation of him and that Mr. Malik had fully advised him of his rights.⁷⁹ Mr. Malik informed

⁷⁴ Supp. Br. in Support of Def.'s Mot. to Withdraw Guilty Plea, at ¶ 18, D.I. 26.

⁷⁵ *Id.*

⁷⁶ Tr., at 7-27, D.I. 22.

⁷⁷ *Id.*, at 13:8-11.

⁷⁸ *Id.*, at 13:16-19.

⁷⁹ *Id.*, at 20:16-20.

the Court that he was prepared to proceed with trial, but that after seeing the out-of-state victim/witness, Carney decided to plead guilty.⁸⁰ Even before trial, Mr. Malik's filings demonstrate that he was actively engaged in the advocacy process by filing a discovery request,⁸¹ moving for bail to be reduced,⁸² and submitting proposed *voir dire* questions.⁸³

22. Neither attorney's conduct constitutes ineffectiveness under *Strickland*. Carney remains bound by his avowals that he was satisfied with his counsel's performance and that neither of his attorneys forced or coerced him into pleading guilty.⁸⁴

23. **Granting withdrawal would prejudice the State and unduly inconvenience the Court.** The State "need not show [...] prejudice when a defendant has failed to demonstrate that the other factors support a withdrawal of the plea."⁸⁵ Here, as detailed above, Carney failed to establish a sufficient basis for withdrawing his plea. Denial, therefore, is appropriate on that basis alone.⁸⁶ The Court, however, briefly addresses the parties' arguments regarding prejudice and

⁸⁰*Id.*, at 2:12–14; 3-4.

⁸¹ D.I. 11.

⁸² D.I. 8.

⁸³ D.I. 13.

⁸⁴ Tr., *passim*, D.I. 22; see *Somerville*, 703 A.2d at 632.

⁸⁵ *United States v. Jones*, 336 F.3d 245, 255 (3d Cir. 2003) (citing *United States v. Harris*, 44 F.3d 1206, 1210 (3d Cir. 1995)).

⁸⁶ *United States v. Martinez*, 785 F.2d 111, 116 (3d Cir. 1986).

inconvenience. Carney argues that the State would not be prejudiced because “trial [would be] incredibly simple.”⁸⁷ He claims that balancing this “simple” preparation against the “extensive exposure” Carney faces “should sway the Court in [his] favor[.]”⁸⁸ The State counters that it spent weeks preparing for trial, including securing evidence and ensuring that all witnesses (one out-of-state victim is from Kansas) would be present.⁸⁹ Allowing Carney to withdraw his guilty plea would result in undue prejudice and unfairly give Carney another opportunity to “change his mind at the 11th hour and accept a guilty plea.”⁹⁰

24. Carney’s decision to plead guilty was calculated - he intended to proceed with trial if the victim did not appear, anticipating the charges would be dropped, and would accept a plea offer if the victim did appear.⁹¹ Upon being informed the victim was present, Carney changed his mind and chose to plead guilty. But, “[a] shift in defense tactics, *a change of mind*, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty, and risk of

⁸⁷ Supp. Br. in Support of Def.’s Mot. to Withdraw Guilty Plea, at ¶ 24, D.I. 26.

⁸⁸ *Id.*

⁸⁹ State’s Resp. to Def.’s Mot. to Withdraw Guilty Plea, at 7, D.I. 23; State’s Resp. to Def.’s Supp. Mot. to Withdraw Guilty Plea, D.I. 27.

⁹⁰ State’s Resp. to Def.’s Supp. Mot. to Withdraw Guilty Plea, D.I. 27. *See, e.g., State v. Drake*, 1995 WL 654131 at * 6 (Del. Super. Ct. 1995) (finding that the State would be prejudiced from a plea withdrawal because it was prepared for trial when the plea was entered).


⁹¹ Tr., at 3:1–3; 19–22, D.I. 22.

trying a defendant who has already acknowledged his guilt by pleading guilty.”⁹²

Allowing Carney to withdraw his plea now only would reward his gamesmanship.

THEREFORE, Defendant Deonte Carney’s Motion to Withdraw Guilty Plea is **DENIED**. The presentence investigation previously ordered shall be completed and a sentencing date shall be set.

IT IS SO ORDERED



Ferris W. Wharton, J.

⁹² *United States v. Iavarone*, 186 F. App’x 274, 276 (3d Cir. 2006) (citing *United States v. Brown*, 250F.3d 811, 815 (3d Cir. 2001)).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|--------------------|---|----------------------------------|
| DEONTA CARNEY, |) | |
| |) | |
| Defendant Below, |) | |
| Appellant, |) | No. 28, 2023 |
| |) | |
| v. |) | ON APPEAL FROM THE |
| |) | SUPERIOR COURT OF THE |
| STATE OF DELAWARE, |) | STATE OF DELAWARE |
| |) | ID Nos. 1910011637A, 1910002022, |
| |) | 2009010583 |
| Plaintiff Below, |) | |
| Appellee. |) | |

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION**

1. Appellant’s Opening Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word Office 365.
2. Appellant’s Opening Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 2985 words, which were counted by Microsoft Word Office 365.

Dated: March 31, 2023



Megan J. Davies, Esq. (#6777)
Law Offices of Megan J. Davies
716 N. Tatnall Street
Wilmington, DE 19801
(856) 671-1188