IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBER
v.	)	
	)	IN-02-05-2287 and IN-02-05-2288
TYRONE PRINGLE	)	
	)	ID No. 0205013378
Defendant	)	

Submitted: October 28, 2011
Decided: November 17, 2011

MEMORANDUM OPINION

Upon Motion of Defendant to Withdraw Guilty Plea - ***DENIED***

Appearances:

Gregory E. Smith, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State of Delaware

Joseph A. Gabay, Esquire, of the Law Offices of Joseph Gabay, Wilmington, Delaware, Attorney for the Defendant.

HERLIHY, Judge

The Supreme Court has remanded this matter to conduct a fact-finding hearing on Tyrone Pringle's motion for postconviction relief and permit rebriefing on the motion after the hearing.[1] As directed this Court appointed counsel to represent Pringle, the parties re-briefed Pringle's postconviction relief claims, and the Court held an evidentiary hearing.[2]

The dispute originates with Pringle's original indictment for (1) burglary first degree, (2) possession of a firearm during the commission of a felony (PFDCF)(the burglary), (3) a second charge of burglary first degree, (4) conspiracy second degree, (5) theft misdemeanor, (6) criminal impersonation – 2 counts, (7) criminal mischief, (8) resisting arrest, and (9) escape third degree.

At final case review on January 3, 2005, Pringle rejected an offer to plead guilty to only PFDCF. On the morning of trial, January 20, 2005, he initially rejected the offer to plead to PFDCF and burglary third degree. A jury, therefore, was selected and sworn, but before opening statements and while it was waiting to come into the courtroom, the State amended its offer by changing the PFDCF offer to one of possession of a deadly weapon during the commission of a felony (PDWDCF). PDWDCF carries with it a

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[1] *Pringle v. State*, 996 A.2d 794 (Del. 2010)(TABLE).

[2] Two evidentiary hearings were scheduled with different counsel representing Pringle each time because Pringle did not like his first court appointed lawyer, and the first hearing could not be held. A second attorney had to be appointed because Pringle refused to cooperate with the first one. The second attorney represented Pringle at that hearing and has filed briefing.

minimum sentence of two years at Level V which cannot be suspended. PFDCF carries with it a three year, non-suspendable minimum Level V sentence.

Pringle decided to accept the modified plea offer. As a result of the plea/rejection history of this case, an exhaustive plea colloquy took place. The Court noted and Pringle acknowledged that he had earlier in the day rejected the State's offer which had included the PFDCF charge. His trial counsel indicated that Pringle had some kind of concern about how a state firearm conviction (the original PFDCF) might affect a federal weapons conviction and sentence. Also, the Court noted during the plea colloquy that he still seemed hesitant to accept even the modified plea.

After the plea was accepted, the Court ordered a presentence investigation. Sentencing was scheduled for April 1, 2005. Pringle, however, sent a letter to the Court dated March 20, 2005 asking that he be allowed to withdraw his plea:

> Your honor, when I stood before you on 1-20-05 you asked me why I was so hesitant on excepting [sic] my plea, (for burglary 3rd & P.D.W.)[sic] For one: I never received my discovery & I only received part of my rule sixteen minutes before my trial was to begin. My lawyer told me, that I would receive less time by excepting [sic] this plea, but I have become very uncomfortable with admitting a weapon that I did not have. These are the reasons why I'm asking you to please allow me to withdrawal [sic] this plea.
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> In short, your honor, during the 29 month's [sic] I spent in Federal Prison before I was transferred here, (Gander Hill State Prison), I made a lot of positive change's [sic] in my life. And on 1-20-05 when I excepted [sic] that plea in front of you, it went against my better judgment. Thank you![3]

[3] Letter from Tyrone Pringle, to the Honorable Jerome O. Herlihy, Judge, Superior Court (continued…)

The Court did not forward this letter to defense counsel. Curiously, Pringle sent the identical letter to the presentence officer who was doing the investigation. That letter is addressed to the investigator and it is an original, not a photocopy of what was addressed to the Court. That letter is in Pringle's presentence file. Pringle did not send his own counsel any kind of copy or "original" of this letter.

On April 1st defense counsel professed to be hearing for the first time that his client wished to withdraw his guilty pleas. Again, curiously, the prosecutor handling the sentencing calendar was aware of Pringle's desire to withdraw his pleas.[4] On the date of sentencing, the Court confirmed directly with Pringle that he wanted to withdraw his plea:

[PROSECUTOR]:	Good morning, Your Honor. I need to find out first if Mr. Pringle wants to withdraw his guilty plea. The State moves the sentencing or withdraw [sic] of the plea of Tyrone Pringle.
[DEFENSE COUNSEL]:	This is news to me, Your Honor.
The Court:	I'll show you the letter I received, Mr. [Defense Counsel]. I'll hand it to the bailiff.

(Pause.)

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[3](…continued)
of Delaware (dated Mar. 20, 2005) (the letter is actually addressed to the Honorable Judge Joseph Hurley; however the Court recognizes this was a mistake and the intended recipient of the letter was the Honorable Jerome O. Herlihy).

[4] The Court did not provide a copy of the letter or information of its contents to the prosecutor. The Court is unaware of how the State knew of Pringle's desire to withdraw his plea while defense counsel lacked that knowledge.

The Court:	Mr. Pringle, the Court has received from you a letter dated March 20th in which you asked to withdraw your guilty plea.
The Defendant:	Yes.
The Court:	Do you want to do that?
The Defendant:	Yes.
The Court:	Okay. I'll allow you to do that. The matter will be set for trial. The plea is undone. You'll go to trial as originally charged.[5]

Pursuant to his wishes, Pringle went to trial. He was convicted of one count of burglary first degree, PFDCF, resisting arrest, criminal impersonation and theft. He was sentenced for these convictions on February 10, 2006. The convictions were affirmed on direct appeal.[6] While on direct appeal, Pringle asked that appellate counsel (who was also trial counsel) be "disqualified." The Supreme Court remanded the matter to this Court to determine if Pringle was indigent and capable of representing himself. After conducting a hearing to address those issues, this Court in a letter of June 12, 2000, to the Supreme Court, found, among other matters, Pringle was capable of representing himself.

The Supreme Court accepted that finding and Pringle was allowed to represent himself on his direct appeal. One issue Pringle argued was a claim that it was error for

[5] Sentencing Hr'g Tr. 2: 6-22, Apr. 1 2005.

[6] *Pringle v. State*, 941 A.2d 1019 (Del. 2007)(TABLE).

this Court to allow him to withdraw his guilt plea. In response to that argument, the Supreme Court said:

> (6) Pringle next argues that the Superior Court erred in granting his motion to withdraw his guilty plea. Ordinarily, this Court reviews the denial of a motion to withdraw a plea for abuse of discretion. *MacDonald v. State*, 778 A.2d 1064, 1070 (Del. 2001). In this case, because Pringle obviously did not object to the Superior Court's granting of his motion to withdraw his plea, we review the Superior Court's decision for plain error. *See* Del. Supr. Ct. R. 8 (issues not raised below will only be reviewed on appeal for plain error).
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> (7) Superior Court Criminal Rule 32(d) provides that the Superior Court may permit withdrawal of a guilty plea, any time prior to the imposition of sentence, "upon a showing by the defendant of any fair and just reason." Del. Super. Ct. Crim. R. 32(d) (2007). In this case, Pringle wrote to the Superior Court two months prior to sentencing and requested to withdraw his plea because, as he put it, he was not comfortable admitting to possessing a weapon that he did not have. On the date scheduled for sentencing, the Superior Court asked Pringle if he still wished to withdraw his plea. Pringle responded affirmatively, and the Superior Court granted his request, which was unopposed by the State. Given the timing of Pringle's motion, the State's lack of opposition to it, and the reasons Pringle set forth for his request, we find no plain error in the Superior Court's decision to grant Pringle's motion permitting him to exercise his constitutional right to a jury trial.[7]

Subsequently, Pringle filed a motion for postconviction relief, which was denied in this Court but reversed on appeal in the decision remanding this matter noted earlier. When the Court was finally able to hold an evidentiary hearing (delayed due to Pringle's dissatisfaction with counsel first appointed to represent him on remand), the obvious and

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[7] *Pringle v. State*, 2007 WL 4374197, at *2 (Del. Dec. 17, 2007).

not surprising was divulged: it was that trial counsel, who had not been told of Pringle's desire to withdraw his plea, if given the opportunity, would have advised him not to do so.

Other evidence also developed at the hearing. Trial counsel testified: (1) Pringle was reluctant to plead, (2) he did not change his mind to plead until he was in the courtroom on the day of the originally scheduled trial after jury selection, (3) he "urged" Pringle to take the plea that he reluctantly but ultimately accepted, (4) Pringle kept trying to get the least possible recommended sentence, (5) the State had a "very strong" case against him, (6) he gave Pringle all of the discovery material despite claims to the contrary, and (7) Pringle is not a neophyte in the criminal justice system and is familiar with it.[8]

An important part of trial counsel's testimony was that he was not sure if he had advised Pringle to not withdraw his plea, whether Pringle would have followed that advice.

Pringle did not testify at the postconviction relief evidentiary hearing nor has he supplied any affidavit unequivocally stating he would now like to accept the plea he withdrew.[9]

Parties' Contentions

[8] The presentence report reveals two prior Pennsylvania felony convictions and one federal firearm conviction – all pre-dating the offenses in this case.

[9] This Court would be dubious about an affidavit. It is not subject to cross-examination.

Pringle argues the Court should not have considered his *pro se* motion to withdraw his plea. He was, at the time he sent it to the Court represented by counsel, which meant as a *pro se* motion, it should not have been entertained. Even if it could have been entertained, he was denied his right to counsel by not being given the opportunity to consult with his trial counsel about withdrawing the plea. Pringle contends the Court abused its discretion in allowing him to withdraw his plea.

Finally, Pringle asserts trial counsel was ineffective for not responding to the Court's decision to allow him to withdraw his plea. Counsel, he argues, should have said something to stop the Court from acting so promptly in response to his own request.

Despite the Supreme Court's directive to analyze Pringle's case under *United States v. Cronic*,[10] the State argues the more appropriate approach remains under *Strickland v. Washington*.[11] It contends it was harmless error for the Court to allow Pringle to withdraw his plea under the circumstances.

Discussion

Pringle is correct that, ordinarily, this Court will not entertain *pro se* motions when a defendant is represented by counsel.[12] Further, as a general rule when this Court receives a motion to withdraw a guilty plea, it is shared with counsel in advance and

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[10] 466 U.S. 648 (1984).

[11] 466 U.S. 668 (1984).

[12] Super. Ct. Crim. R. 47; *In re Haskins*, 551 A.2d 65 (Del. 1988).

sometimes new counsel is appointed. Usually that happens, however, where the defendant complains that he or she did not receive effective assistance of counsel.

Pringle's letter did not claim trial counsel was ineffective.[13] He offered two bases for his request; one being that trial counsel said he would get less prison time if he accepted the plea, and the other being that he was "uncomfortable" with admitting to a weapon that "I did not have."[14] The evidence adduced at the later trial, however, shows the folly of this latter claim.

The comment in his letter about what trial counsel told him concerning jail time is curious. What counsel said about a lesser sentence is correct in that the two year minimum mandatory sentence for PDWDCF is/was less than the three year minimum required for a conviction of PFDCF, which he rejected at final case review and earlier in the day of his trial, before eventually taking the plea to PDWDCF.

This Court disagrees with the State's argument to not use *Cronic* in its analysis, and agrees with the reason for the Supreme Court's remand to examine, in effect, this matter in light of *Cronic*. *Cronic* has been applied in a situation with far more dire consequences than this case, namely, *Cooke v. State,*[15] which is an instructive case for Pringle's claims.

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[13] He claims he did not receive his "discovery" but the testimony at the evidentiary hearing contradicts that.

[14] Letter from Tyrone Pringle, to the Honorable Jerome O. Herlihy, Judge, Superior Court of Delaware (dated Mar. 20, 2005).

[15] 977 A.2d 803 (Del. 2009).

In *Cooke*, the defendant wanted to plead not guilty. Highly qualified defense counsel proceeded, against Cooke's wishes, with a plea and trial strategy of guilty but mentally ill. The Supreme Court held that trial counsel's actions violated Cooke's Sixth Amendment rights.[16]

Under the *Strickland v. Washington* standard, a defendant can show ineffective assistance of counsel where (1) the attorney's conduct fell below an objective standard and (2) but for such conduct the result of the proceeding would have been different which is often stated "merely" as prejudice.[17] *Cronic* holds there are three areas where the second *Strickland* prong, that of prejudice, is presumed: (1) complete denial of counsel, (2) counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where counsel is asked to provide assistance in circumstances where competent counsel likely could not.[18]

This case, however, cannot be so easily pigeonholed but, as such, it bears close resemblance to *Cooke* in that it fundamentally involves a defendant's right to chose the plea he wants to enter and, as the Supreme Court held on direct appeal, exercise his right to a jury trial. Pringle had competent trial counsel at all stages of the proceedings. Counsel was able to work with the prosecutor to get charges carrying a potential sentence of three

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[16] *Id.* at 842.

[17] *Strickland*, 466 U.S. at 688, 694.

[18] *Cronic*, 466 U.S. at 659-60.

to fifty-three years reduced to charges carrying a two year minimum and significantly less maximum exposure to jail time.[19]

The problem is that all along Pringle really did not want to plead guilty. He did not plead until (1) after the jury was selected and waiting to enter the courtroom, and (2) he was physically in the courtroom. Mere hours earlier, he turned down a plea which would have resulted in one additional year of minimum mandatory Level V time.

When he entered his plea, he did so with sufficient reluctance that the Court noted it and questioned him more closely during the plea colloquy on January 20, 2005. His letters to the Court and the Investigative Services officer are dated March 20, 2005. His sentencing was scheduled for April 1, 2005, a date which he had known for quite some time. His decision to withdraw the plea cannot be described as an impulsive act.

It is noteworthy and not coincidental that Pringle wrote this Court and the Investigative Service officer, who had interviewed him, but not his lawyer. As the court said in *Cooke*, "One of the fundamental decisions reserved for the defendant alone to make is the plea decision."[20]

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[19] The Court observes it is this kind of eleventh hour plea reduction by the State which encourages defendants to delay resolution of their cases ever seeking – and too often getting – a better deal. It is also reflected in the number of cases where the disposition is more than a hundred and twenty days from indictment. It clearly played a role in this case being where it is now.

[20] *Cooke v. State*, 977 A.2d at 842 (footnote omitted).

The totality of the record in this case demonstrates Pringle's choice was to plead not guilty. He is not new to the criminal justice system. His real desire not to plead guilty is shown by his refusal to take various prior plea offers, including the earlier one on the morning of trial, and his reluctance to even take the plea he did later in the day. *His* choice to withdraw his plea -- firmly stated in his March 20th letters -- was reconfirmed in Court eleven days later.

The record as expanded at the evidentiary hearing clarified that his trial counsel, if he had had the opportunity to discuss Pringle's change of mind with him, would have urged him not to withdraw his guilty plea. But that's all that is known. Since Pringle did not testify and has not personally stated his intentions, it is not known if he would have heeded former trial counsel's advice and proceeded with the plea as entered and sentencing. In short, Pringle has failed to meet the "but for" test under *Strickland*.

Additionally, the record firmly supports the conclusion when not copying or sending a separate copy to trial counsel and sending separate letters to the Court and to the Investigative Services officer, he was exercising his singular right to choose what to do. Arguably he was waiving his right to consult with counsel about his decision. One has to take into account the totality of the record and not a perfunctory review here to have that proper context. The record includes the Supreme Court allowing him to proceed *pro se* and argue his own appeal. Further, one cannot overlook the possibility that Pringle was and is "gaming the system."

Pringle was not denied his right to counsel at a crucial stage nor was there a "complete" denial of counsel at a critical stage. He has not presented *any evidence* that if he had consulted with trial counsel or any other counsel, he would have changed his mind about withdrawing his plea. It would have been very easy for Pringle to testify he would have heeded trial counsel's advice to not withdraw his plea or was even now willing to take the plea he withdrew. One problem is the genuineness of such (missing) testimony in light of the subsequent convictions for offenses much more serious than the plea entered and withdrawn. Of course, in light of his conviction, it would be easy for him to say he would have heeded his lawyer's advice. But he did not even do that. To do so, would also have to overcome a lot of the procedural history in this case; the history recited above. In short, Pringle has not shown that any of the three "presumed prejudice" situations under *Cronic* exist. As *Cooke* demonstrates, a defendant even in the face of overwhelming culpable evidence, as here too, is entitled to make that fundamental plea decision.

The only possible presumed prejudice under *Cronic* is that this Court did not first allow trial counsel and Pringle to consult prior to granting Pringle's request to withdraw his plea. That would be a facile but incorrect analysis. To find this is presumed prejudice would ignore Pringle's wishes and his ability to exercise his right to chose the plea he wanted to enter. It would also ignore what the Supreme Court said on direct appeal, that he was exercising his - not his lawyer's - right to have a jury trial. Additionally, to find presumed prejudice would ignore trial counsel's testimony that he does not know what

Pringle would have done even if they had consulted. And it would ignore the lack of any showing even now of what he would do.

In short, as directed, this Court employing *Cronic*, cannot find there was a complete denial of counsel. Further, neither of the other two *Cronic* presumed prejudice factors exist in this case.

Pringle has argued that the Court abused its discretion in allowing him to withdraw his plea. He cites Superior Court Criminal Rule 47 in his argument that the Court should not have considered his *pro se* motion to withdraw the plea. Pringle is correct that Rule 47 generally prohibits the Court from considering a motion by a litigant not endorsed by counsel.[21] The holding in *Cooke*, however, and now with *Cronic* becoming part of Delaware jurisprudence, casts doubt on the applicability of Rule 47 to the facts of the present case. The decision whether or not to enter a guilty plea is ultimately left to the defendant himself. After consultation with counsel, it is the defendant who must inform the Court how he wishes to proceed. The Court, of course, must allow the defendant sufficient time to consult with counsel regarding the plea decision, but it is not required to ascertain whether defense counsel agrees with the defendant's decision. It is an abuse of discretion, if not a constitutional violation (*Cooke*), for a court to allow defense counsel to override the wishes of the defendant in a strategy decision as important as the one in the

[21] *See Chavous v. State*, 953 A.2d 282, 286 (Del. 2008) ("as long as [defendant] was represented by counsel, his *pro se* motion to withdraw his guilty plea was a legal nullity until it was endorsed by counsel").

present case. Pringle had more than ample opportunity to discuss his case with defense counsel. The fact that Pringle did not discuss his motion to withdraw his plea with defense counsel prior to or the date of sentencing does not mean his right to counsel was presumptively violated. The Court finds Pringle had adequate access to counsel in the events leading up to his decision to withdraw his plea and now with the benefit of new counsel, still has not said he wants to withdraw his request to withdraw his guilty plea. His ability to represent himself, recognized by the Delaware Supreme Court, implicitly acknowledges his ability to make up his mind and, in effect, negates any consequence of not consulting with trial counsel about withdrawing his plea.

The Court allowed Pringle to withdraw his plea for two reasons. First, because he unequivocally wanted to do so. It was a plea reluctantly entered and his letters to the Court to request that the plea be withdrawn were not spur of the moment. Normally, the judge who takes a plea in this Court is not the sentencing judge. That usual process did not occur in this case because the plea came after jury selection. This judge was already familiar on the date of sentencing with the record of the circumstances of the rejection of prior plea offers and of the taking of the original plea, especially Pringle's reluctance to enter it. Second, the Court found Pringle had sufficient access to defense counsel during and before his personal deliberations to decide whether or not to take the plea. The fact that he did not consult with defense counsel on April 1, 2005 does not mean that Pringle did not have the benefit of his previous discussions with counsel. Original defense counsel

has made it clear that he recommended to Pringle that he take the plea. The record is sufficient for this Court to determine that Pringle made an informed and unequivocal decision to pursue a different trial strategy than the one recommended by defense counsel. That decision is one that must ultimately be left to the defendant. There was no denial of due process or abuse of discretion.

Conclusion

For the reasons stated herein, defendant Tyrone Pringle's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

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J.