

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE)	
)	
v.)	RK08-02-0416-01
)	Murder 2 nd (F)
ERIC DOLBY)	RK08-02-0417-01
)	Conspiracy 1 st (F)
Defendant.)	RK08-02-0420-01
ID. No. 0801036191)	Arson 1 st (F)

O R D E R

On this 29th day of November, 2011, upon consideration of Defendant’s Motion for Postconviction Relief, the Commissioner’s Report and Recommendation and the record in this case, it appears that:

(1) The defendant, Eric Dolby, Jr. (“Dolby”), pled guilty on the day he was scheduled to go to trial on two capital murder charges to Murder in the Second Degree, 11 *Del. C.* § 635(1), as a lesser included offense of Murder in the First Degree; one count of Conspiracy in the First Degree, 11 *Del. C.* § 512; and one count of Arson in the First Degree, 11 *Del. C.* § 803. He was also charged with an additional First Degree Murder count and a Conspiracy in the Second Degree count. All of the remaining charges were *nolle prossed* by the State in exchange for Dolby’s plea. A presentence investigation was ordered. On June 25, 2009, the Court sentenced Dolby to life in prison plus eighteen years incarceration.

(2) Dolby did not appeal his conviction or sentence to the Delaware Supreme Court.

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(3) Dolby filed the pending Rule 61 motion in which he alleges ineffective assistance of counsel along with two additional claims.

(4) The Court referred this Motion to the Superior Court Commissioner Andrea M. Freud pursuant to 10 *Del. C.* §512(b) and Superior Court Criminal Rule 61 for proposed findings of facts and conclusions of law.

(5) The Commissioner has filed a Report and Recommendation concluding that the Motion for Postconviction Relief should be denied because it is procedurally barred and meritless.

(6) No objections to the report have been filed.

NOW, THEREFORE, after careful and *de novo* review of, and for reasons stated in the Commissioner's Report and Recommendation dated August 19, 2011,

IT IS ORDERED that the Commissioner's Report and Recommendation is adopted by the Court and the Defendant's Motion for Postconviction Relief is **DENIED**.

/s/ Robert B. Young
J.

RBV/sal
oc: Prothonotary
cc: The Honorable Andrea M. Freud
Counsel
Defendant
File

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COMMISSIONER'S REPORT AND RECOMMENDATION

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

Gregory R. Babowal, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Eric Dolby, *Pro se*.

FREUD, Commissioner
August 19, 2011

The defendant, Eric Dolby, Jr. (“Dolby”), pled guilty on the day he was scheduled to go to trial on two capital murder charges to Murder in the Second Degree, 11 *Del. C.* § 635(1), as a lesser included offense of Murder in the First

Degree; one count of Conspiracy in the First Degree, 11 *Del. C.* § 512; and one count of Arson in the First Degree, 11 *Del. C.* § 803. He was also charged with an additional First Degree Murder count and a Conspiracy in the Second Degree count. All of the remaining charges were *nolle prossed* by the State in exchange for Dolby's plea. A presentence investigation was ordered. On June 25, 2009, the Court sentenced Dolby to life in prison plus eighteen years incarceration.

The charges stemmed from a brutal and random murder which involved Dolby and his codefendant locking the victim in the trunk of a car and setting the car on fire. Had Dolby gone to trial and been found guilty on all counts, he could have faced the death penalty. Clearly, his plea was extraordinarily beneficial to him. Dolby did not appeal his conviction or sentence to the Delaware Supreme Court. Now Dolby has filed the pending Rule 61 motion in which he alleges ineffective assistance of counsel along with two additional claims.

DOLBY'S CONTENTIONS

In his motion, Dolby raises the following three grounds for relief:

- Ground One: Ineffective Assistance of Counsel.
Counsel failed to request for a competency hearing before permitting defendant to enter a plea of guilty.
- Ground Two: Violation of Constitutional rights –
Abuse of discretion.
The state impermissively (sic) burdened petitioner with the threat of death penalty as an inducement to plead guilty which made the plea defective.

Ground Three: Abuse of discretion.
The district court failed to carry out its burden to inform the defendant of the nature of the offense.

DISCUSSION

Under Delaware law, this Court must first determine whether Dolby has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.¹ This is Dolby's first motion for postconviction relief, and it was filed within one year of his conviction becoming final. Therefore, the requirements of Rule 61(i), (1) requiring filing within one year and (2) requiring that all grounds for relief be presented in initial Rule 61 motions, are met. Dolby's claims were not raised at the plea, sentencing, or on direct appeal. Therefore, they are barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice. Only Dolby's first claim is based on ineffective assistance of counsel; therefore, he has alleged cause for his failure to have raised it earlier. Dolby's remaining claims are clearly procedurally barred by his complete failure to allege cause for his failure to have raised them prior to his plea or on direct appeal to the State Supreme Court.

At this point, Rule 61(i)(3) does not bar relief as to Dolby's first ground for relief, provided he demonstrates that his counsel was ineffective and that he was prejudiced by counsel's actions. To prevail on his claim of ineffective assistance of

¹ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

counsel, Dolby must meet the two-prong test of *Strickland v. Washington*.² In the context of a guilty plea challenge, *Strickland* requires a defendant show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial and that the result of a trial would have been his acquittal.³ The failure to establish that a defendant would not have pled guilty and would have proceeded to trial is sufficient cause for denial of relief.⁴ In addition, Delaware courts have consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.⁵ When examining the representation of counsel pursuant to the first prong of the *Strickland* test, there is a strong presumption that counsel's conduct was professionally reasonable.⁶ This standard is highly demanding.⁷ *Strickland* mandates that, when viewing counsel's representation,

² 466 U.S. 668 (1984).

³ *Id.* at 687.

⁴ *Somerville v. State*, 702 A.2d 629, 631 (Del. 1997) (citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988) (citations omitted).

⁵ See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Bughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

⁶ *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).

⁷ *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990)(quoting *Kimmelman v. Morrison*, 477 (continued...)

this Court must endeavor to “eliminate the distorting effects of hindsight.”⁸

Dolby claims that his counsel was ineffective for failing to request a competency hearing. Following a complete review of the record in this matter, it is abundantly clear that Dolby has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find counsel’s affidavit, in conjunction with the record, more credible than Dolby’s claim that his counsel’s representation was ineffective. Dolby’s counsel clearly and unequivocally denies the allegations. In fact, Dolby counsel did have him assessed by a medical professional who concluded that Dolby was competent to stand trial.

As noted by counsel. Dolby was facing the death penalty had he been convicted, and the sentence and plea were reasonable under all the circumstances, especially in light of the evidence against him. Prior to the entry of the plea, Dolby and his attorney discussed the case extensively. The plea bargain was clearly advantageous to Dolby. Counsel's representation was certainly well within the range required by *Strickland*. Additionally, when Dolby entered his guilty plea, he stated he was satisfied with defense counsel's performance. He also acknowledged that he was waiving his right to a direct appeal. He is bound by his statements unless he presents clear and convincing evidence to the contrary.⁹ Consequently, Dolby has

⁷(...continued)
U.S. 365, 383 (1986)).

⁸ *Strickland*, 466 U.S. at 689.

⁹ *Mapp v. State*, 1994 WL 91264, at *2 (Del. Supr.) (citing *Sullivan v. State*, 636 A.2d (continued...))

failed to establish that his counsel's representation was ineffective under the *Strickland* test.

Even assuming, *arguendo*, that counsel's representation of Dolby was somehow deficient, Dolby must satisfy the second prong of the *Strickland* test, prejudice. In setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk dismissal.¹⁰ In an attempt to show prejudice, Dolby simply asserts that his counsel should have requested a competency hearing. His statements are insufficient to establish prejudice especially in light of the licensed clinical social worker's assessment that Dolby was in fact competent to stand trial. Dolby cannot demonstrate any prejudice. Therefore, I find Dolby's first ground for relief meritless.

To the extent that Dolby alleges his plea was involuntary, the record clearly contradicts such an allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary, the Court looks to the plea colloquy to determine if the waiver of constitutional rights was knowing and voluntary.¹¹ At the guilty-plea hearing, the Court asked Dolby whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Dolby if he understood he would waive his

⁹(...continued)
931, 937-938 (Del. 1994)).

¹⁰ *Larson v. State*, 1995 WL 389718, at *2 (Del. Supr.)(citing *Younger*, 580 A.2d 552, 556 (Del. 1990)).

¹¹ *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

constitutional rights if he pled guilty; if he understood each of the constitutional rights listed on the Truth-in-Sentencing Guilty Plea Form (“Guilty Plea Form”); and whether he gave truthful answers to all the questions on the form. The Court asked Dolby if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Dolby if he was giving the plea of his own free will because he was in fact guilty. The Court also asked Dolby if he was satisfied with his counsel’s representation. Finally, the Court asked Dolby if he was in fact guilty of the charges. Dolby answered each of these questions affirmatively.¹² I find counsel’s representations far more credible than Dolby’s self-serving, vague allegations.

Furthermore, prior to entering his guilty plea, Dolby signed a Guilty Plea Form and Plea Agreement in his own handwriting. Dolby’s signatures on the forms indicate that he understood the constitutional rights he was relinquishing by pleading guilty¹³ and that he freely and voluntarily decided to plead guilty to the charges listed in the Plea Agreement. Dolby is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.¹⁴ I confidently find that Dolby entered his guilty plea knowingly and voluntarily and that Dolby’s first ground for relief is completely meritless.

CONCLUSION

I find that Dolby’s counsel represented him in a competent and effective

¹² *State v. Dolby*, ID No.0801036191 at 5-9 (Del. Super. Apr. 20, 2009) (Transcript).

¹³ Including the right to appeal.

¹⁴ *Sommerville*, 703 A.2d at 632.

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manner and that Dolby has failed to demonstrate any prejudice stemming from the representation. I also find that Dolby's guilty plea was entered knowingly and voluntarily. I recommend that the Court *deny* Dolby's motion for postconviction relief as procedurally barred and totally meritless.

/s/Andrea Maybee Freud
Commissioner

AMF/dsc

oc: Prothonotary
cc: Hon. Robert B. Young
Benjamin A. Schwartz, Esq.
Alexander W. Funk, Esq.
Eric Dolby, VCC
File