

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	I.D. No. 0810018223
)	
THOMAS GORDON)	
)	
Defendant)	

Submitted: August 25, 2011
Decided: November 15, 2011

Upon Defendant's Motion for Postconviction Relief.
DENIED.

Upon Defendant's Motion for Modification of Sentence.
DENIED.

ORDER

Kevin M. Carroll, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Thomas J. Gordon, Wilmington, Delaware, *pro se*.

COOCH, R.J.

This 15th day of November 2011, upon consideration of Defendant's Motion for Postconviction Relief and contemporaneous Motion for Modification of Sentence, it appears to the Court that:

1. Defendant Thomas Gordon filed this Motion for Postconviction Relief claiming ineffective assistance of counsel and judicial “abuses of discretion.” The Court must analyze whether Defendant procedurally defaulted his claims by not previously raising them, absent good cause and without prejudice. Additionally, the Court must determine whether Defendant’s counsel misrepresented immediately prior to sentencing that Defendant’s maximum possible sentence was only six months. The Motion is denied regarding both claims because the defendant procedurally defaulted his abuse of discretion claim by failing to demonstrate prejudice, and failed to prove legal errors constituting ineffective assistance of counsel.
2. Defendant pled guilty to Assault Second Degree, as a lesser-included offense of an indicted charge of Assault in a Detention Facility, on November 17, 2009. On February 5, 2010, Defendant was sentenced to four years at level V incarceration, suspended after one year and six months, for one year at level IV Plummer Center, suspended after three months for the balance to be served at level III probation. For both the plea agreement and the sentencing, Defendant’s attorney was Kathryn van Amerongen.
3. In February and August of 2010, Defendant filed two separate Motions for Modification of his Sentence. Both motions were subsequently denied. Defendant filed this Motion for Postconviction Relief on January 28, 2011.
4. When the defendant entered his plea agreement in November of 2009, the Court and the defendant engaged in the following plea colloquy, reproduced herein in pertinent part:

The Court: Has anyone promised you in this case what your sentence will be?

Defendant: No

The Court: Has anyone threatened you or coerced you in any way to accept this plea of guilty?

The Defendant: No¹

5. After accepting Defendant's plea, the Court ordered a presentence investigation and delayed sentencing until a later date. The defendant's claims for ineffective assistance of counsel and abuse of discretion largely evolve from the sentencing proceeding, which occurred three months after the plea colloquy. As to both claims, Defendant argued in support of those claims in his Motion for Postconviction Relief as follows, in pertinent part:

"After thinking over the States evidence, I had made up my mind to withdraw my plea agreement and proceed to trial.

Once in the presence of my counsel (Kathryn Van Amerongen) I informed her of my decision to proceed to trial and shortly after I informed the Court of the same. The Court then begin to instruct me on the rules to withdrawing a plea agreement and when finished, instructed me to converse with my counsel.

Once alone with my counsel she informed me that my presentence investigation report was in my favor and that the Judge would sentence me to 6 months level 5 max. After hearing such good news I decided to continue on with my sentencing. I was not aware that this was a lie used to trick me into continuing ahead with my sentencing.

Before being sentenced by the Court my counsel begin to address the Court with a speech that destroyed my character instead of helping my character, of which I believe was intentionally done to prejudice the Court against me, of which it no doubt did. The speech went something like: 'You Honor, I would love to say that my client will not commit anymore assaults, but I cannot, because he will assault people again, and again, and again!'

...After hearing all of this I was stunned and tried to address the Court about the statements that my counsel made and the time that I had received which was way more then the 6 months provided to me by my counsel. However, Judge Cooch quickly cut me off and dismissed me from the courtroom.

¹ Plea Colloquy Tr. at 8.

Had I known that my counsel's promise of me receiving 6 months level 5 at the max was not going to be enforced by the Court, I would have withdrawn my plea and proceeded to trial as I told the Court I wanted to at the beginning of the sentencing proceeding. Also, had I known that my counsel had prepared to say the biased, prejudiced, character damaging statements that she said at my sentencing, I would have definitely have never listened to her at all and would have not only proceeded to trial after withdrawing my plea but would have proceeded to trial pro se as well."²

6. Regarding what the Defendant describes as the character disparaging statement, the transcript provided Ms. van Amerongen's statement, in pertinent part:

"The other thing, Your Honor, is while the Court has heard probably more times than it can count people who self-medicate for bipolar [disorder], and depression, and that sort of thing, this is not this case. This case involves somebody—while I'm in no way making light of those mental health disorders in any way, this is much more serious in terms of mental health.

My client was diagnosed as being severely emotionally troubled at the age of eight. He has been placed in the past on psychotropic medications, which, of course, is a whole different class of mental health problems and pharmacology, if you will.

I would also like to say to the Court this will never happen again, but I think it will happen again. I think it will happen again and again. And the reason for that is because his diagnosis is oppo-defiant, which is kind of the kiss of death for somebody who is in custody and has to deal with an authority, an authoritative figure...It's not a good placement for him, and it's never going to be one. I would ask the Court to, please, put him at [sic] DPC (Delaware Psychiatric Center.)"³

² Def's Br. at 1-2; All errors and parenthesis in original.

³ Sentencing Tr. at 4-5. Whether the result of court reporter error or a misstatement by counsel, the transcript reads "DCC," rather than "DPC." The context of the statement, however, makes clear that counsel was stating that Defendant was mentally unstable and was best suited for incarceration at a psychiatric facility that could address his psychiatric condition.

7. In response to Defendant's ineffective assistance of counsel claim, Ms. van Amerongen filed an affidavit addressing the allegations.⁴ In pertinent part, Ms. van Amerongen stated:

“Defense counsel did not advise her client that he would only receive six months. Defense counsel always advises clients...that all sentences are in the Court's discretion. Defense counsel's [alleged character disparaging] comments at the time of sentencing were not intended to appear biased, prejudiced, and character damaging. Rather, these comments were meant to convey to the Court that Defendant's behavior was borne of his mental illness, not because Defendant is evil or malicious.”⁵ (internal quotation marks omitted)

8. The Delaware Superior Court Rules provide procedural bars that foreclose postconviction relief if a movant fails to fulfill particular procedural requirements.⁶ The particular bars apply where a motion is filed too tardily, repetitively, or the underlying claim is procedurally defaulted because the claim “was not asserted in the proceedings leading to the judgment of conviction.”⁷ A claim “not asserted in the proceedings leading to the judgment of conviction,” is barred “unless the movant shows (A) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant's rights.”⁸ These two factors operate as a two-pronged exception providing relief from an otherwise procedural default.
9. These particular bars are inapplicable where “the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”⁹

⁴ State's Br. Ex. A; van Amerongen Aff. at 1; Defendant's trial counsel inadvertently misidentified the case on her affidavit. The affidavit is identified as pertaining to a case with a different caption and identification number. This mistake has been addressed by counsel and it is clear that the substance of the affidavit itself pertains to the instant action.

⁵ *Id.*

⁶ Super Ct. Crim R. 61(i).

⁷ Super Ct. Crim R. 61(i)(1-3).

⁸ Super Ct. Crim R. 61(i)(3)(a-b).

⁹ Super Ct. Crim R. 61(i)(5).

10. Defendant seemingly argues that the procedural bars are inapplicable to his claim because the two claims constituted sufficient constitutional violations undermining his sentencing proceeding. Although stated unclearly, Defendant apparently asserts that his attorney's representation was so deficient that it violated his Sixth Amendment right to counsel.
11. Defendant argues that he provided sufficient justifications to permit Defendant to withdraw his guilty plea immediately prior to sentencing. Defendant stresses however, that he does not wish to withdraw his guilty plea simply because of unhappiness with his sentence, but rather because of his belief that without his counsel's ineffectiveness, he would have sought to withdraw his guilty plea based upon his belief that the State lacked evidence.
12. Procedurally, the State argues that Defendant has defaulted under Super Ct. Crim R. 61(i)(3). In other words, the State argues that Defendant may not seek a postconviction remedy because the defendant failed to raise either of his two postconviction claims at sentencing.
13. The State contends that Defendant decided to proceed with sentencing and forego any pro se motions to withdraw his guilty plea. It is the State's contention that only a pro se motion at sentencing to withdraw Defendant's guilty plea would provide proper procedural grounds for relief. Additionally, the State asserts that Defendant failed to demonstrate any cause or prejudice attributable to the alleged violation of Defendant's rights under Super Ct. Crim R. 61(i)(3).
14. On procedural grounds alone, the Court does not find that Defendant is entirely barred from seeking a postconviction remedy. The two claims which Defendant claims in this Motion were not possibly raised during or prior to the sentencing. The alleged ineffective assistance of counsel claim and the abuse of discretion claims both arose from alleged actions occurring during the sentencing proceeding. Defendant cannot be presently forbidden from pursuit of those claims since the claims only first arose at the close of the judgment of conviction.

15. That it was impossible for Defendant to raise both claims prior to the judgment of conviction, represents sufficient cause under Super Ct. Crim R. 61(i)(3)(a). Super Ct. Crim R. 61(i)(3)(b), however, states that a procedurally defaulted claim may be revived when a movant demonstrates both adequate cause demonstrating why the claim was not raised, and prejudicial effects suffered as a result of the violation alleged.
16. It is this secondary requirement of prejudice to the defendant which is dispositive regarding whether both claims were procedurally barred. Regarding the ineffective assistance of counsel claim, the Court finds that sufficient prejudice would be placed upon the defendant. In other words, if the Court finds that defense counsel did promise Defendant a sixth-month maximum sentence, the defendant would have been prejudiced in relying upon his attorney's promise.
17. Conversely, the defendant's abuse of discretion claim is barred. The defendant, despite good cause shown, failed to raise an abuse of discretion claim during the proceedings leading to the judgment of conviction. To be able to presently assert the abuse of discretion claim, Defendant must demonstrate good cause for the procedural default as well as the prejudicial effect of the alleged abuse of discretion. The Court finds that Defendant has failed to adduce any prejudice in his allegations.
18. The defendant asserts that the Court abused its discretion by dismissing the defendant from the courtroom at the close of the sentencing proceeding and interrupting Defendant's attempts to address the Court. Additionally, in briefing subsequent to the quoted Motion, the Defendant suggested that the Court also abused its discretion earlier in the sentencing proceeding, by failing to ask the defendant why he wished to withdraw his guilty plea before removing him to allow Defendant to speak with his counsel.¹⁰
19. Neither of the two acts by the Court were prejudicial to the defendant. As the plea colloquy makes clear, three months earlier

¹⁰ Defendant's Reply Br. at ¶ 7.

the defendant attested that no one had promised him what his sentence would be and that he was not coerced to accept the plea. The defendant's responses to the questions in the plea colloquy indicate Defendant's awareness that the sentence was a matter of judicial discretion and Defendant's acceptance of the plea demonstrates Defendant's acceptance of the Court's discretion.¹¹

20. On account of Defendant's awareness of the Court's discretion to sentence as the Court found appropriate, the defendant cannot claim prejudice when the Court exercises that discretion. The Defendant was given an opportunity to address the Court during sentencing and spoke at length regarding his pending sentence. Throughout his statement, Defendant attempted to explain his actions and pled with the Court to "take everything into account" when issuing a sentence.¹² The defendant's statement at sentencing clearly demonstrates Defendant's awareness that sentencing was in the Court's discretion and that no sentence was guaranteed.
21. Similarly, the defendant was not prejudiced by the alleged abuse of discretion when the Court did not ask why he initially wished to withdraw his guilty plea. The Court requested that the defendant speak with his counsel before making a decision regarding his attempted plea. The Court did so to ensure that Defendant's decision was well-reasoned and that Defendant understood the decision's implications. The defendant was not prejudiced by having a moment to discuss the decision first with his counsel.
22. At no time during the sentencing proceeding was Defendant empowered to make pro se motions because at all times relevant to this Motion, Defendant was represented by counsel and never was granted permission to act as his own co-counsel.¹³ Since the defendant had never been granted that status, the Court was within its province to inform defense counsel of Defendant's request and direct the defendant and counsel to discuss the issue. Any

¹¹ Sentencing Tr. at 9-10.

¹² *Id.* at 10.

¹³ *See* Super. Ct. Crim R. 47("The court will not consider pro se applications by defendants who are represented by counsel unless the defendant has been granted permission to participate with counsel in the defense.").

prejudice suffered resulting from the conversation with counsel, is only redressable through the defendant's ineffective assistance of counsel claim.

23. For all the reasons stated above, the defendant's abuse of discretion claim is deemed procedurally barred and is not revived by the exceptions to Rule 61 because Defendant has not adduced sufficient prejudice. Although the defendant demonstrated good cause for not addressing the claim earlier, the defendant was not prejudiced on account of the Court's actions at the sentencing.¹⁴
24. Since the defendant's ineffective assistance of counsel claim was not procedurally defaulted, the Court must address the merits of that claim. The defendant's ineffective assistance of counsel claim and supporting arguments were explained in Defendant's Motion, cited *supra*.
25. The State responds to Defendant's claims by first arguing that Gordon is simply unhappy with his level V sentence and that this is evidenced by the two prior motions filed by Defendant seeking sentence relief. The State suggests that Defendant's instant Motion is flawed because he never suggested his plea was involuntary, nor has he demonstrated any justification allowing him to withdraw his plea. The State argues that simply changing one's mind does not afford a Defendant the right to withdraw a guilty plea. Furthermore, the State argues that unhappiness with the sentence alone does not afford Defendant a basis to withdraw his plea.¹⁵

¹⁴ Even assuming, *arguendo*, that the Court were to deem defendant's abuse of discretion claims as not procedurally defaulted, the alleged abuses of discretion themselves are not compelling. The Court did not abuse its discretion by allowing the defendant opportunity to speak with its counsel to ensure a well-informed decision, rather, the fact that the Court encouraged the defendant to discuss this important decision with his attorney, was in the defendant's best interest. As to the alleged interruption of the defendant, the Court did not abuse its discretion by closing the sentencing proceeding once business was completed, especially since the defendant was previously given time to address the Court.

¹⁵ See e.g., *Smith v. State*, 451 A.2d 837 (Del. 1982) ("Where a guilty plea is sought to be withdrawn long after sentence, defendant has the burden of showing prejudice amounting to manifest injustice.").

26. Additionally, the State argues that even if the Court assumes *arguendo* that defense counsel guaranteed a six month sentence, such a fact provides no basis for Defendant to now withdraw his guilty plea. The State argues that the plea colloquy sufficiently informed Defendant that the ultimate sentence is left open to judicial discretion and as such, even if defense counsel guaranteed a result, a defendant cannot plead ignorance to that fact.¹⁶
27. The United State’s Supreme Court has set forth a test for Defendants to establish a claim of ineffective assistance of counsel. The defendant must demonstrate that: 1) Defense counsel’s representation fell below an objective standard of reasonableness; and 2) there exists a reasonable probability that, but for Defendant’s counsel’s unprofessional errors, the outcome of the trial would have been different.¹⁷
28. “A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.”¹⁸ Moreover, “actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.”¹⁹
29. The Court “must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.”²⁰ Thus, the defendant must identify particular defects in counsel’s performance and specifically allege prejudice.²¹
30. In this case, the defendant’s accusation that his defense counsel promised him a specific sentence, might satisfy the *Strickland* test if it were proven with sufficient evidence. If, as alleged, defense

¹⁶ The Court is persuaded by this argument. However, it is not necessary for the Court to reach that analysis in this case’s ultimate conclusion as Defendant’s ineffective assistance of counsel claim is denied on preliminary grounds.

¹⁷ *Strickland v. Washington*, 466 U.S. 668, 687 (1994).

¹⁸ *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996)

¹⁹ *Strickland*, 466 U.S. at 693.

²⁰ *Id.* at 696.

²¹ *Dawson*, 673 A.2d at 1196.

counsel told the defendant that he was guaranteed only a six-month sentence, such a misrepresentation might fall below the objective standard of reasonableness. However, as a result of defense counsel's direct rebuttal of that claim under oath, sufficient counter-evidence is provided which compels the Court that Defendant's burden has not been fulfilled. Since the defendant cannot meet the initial requirement under *Strickland*, that the attorney's representation fell below an objective standard of reasonableness, further analysis against the *Strickland* framework is unnecessary.

31. Defendant's argument is not enhanced by Ms. van Amerongen's allegedly character disparaging statement to the Court at the sentencing. Understood in its context, the statement was clearly intended for the purpose of petitioning the Court to sentence the defendant for psychiatric care. This point is strengthened by the statement itself, as well as by Ms. van Amerongen's affidavit. Additionally, it is conceivable that Ms. van Amerongen did explain to the defendant that the presentence report was a factor in Defendant's favor. Neither Ms. van Amerongen's appeal that Defendant be sentenced to the Delaware Psychiatric Center, nor her relating to Defendant information about the presentence report add any persuasiveness to Defendant's ineffective assistance of counsel claim.
32. Therefore, at its core, Defendant argues that his attorney promised him a particular sentence. His attorney directly refutes that statement under oath. Without more, Defendant has failed to carry the initial burden required under *Strickland* and its progeny and as such, is not entitled to postconviction relief.
33. In conclusion, Defendant's claim of abuse of discretion is procedurally defaulted for a lack of prejudice suffered and the claim of ineffective assistance of counsel is denied.

Therefore, Defendant's Motion for Postconviction Relief is **DENIED**. The Defendant's contemporaneously filed Motion for Reduction/Modification of Sentence is also **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services