

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

ANTHONY DORIO

Defendant

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CRIMINAL ACTION NUMBERS

IN-09-09-2061-R1 IN-09-09-2061-R1

IN-09-09-2144-R1 IN-09-09-2144-R1

ID NO. 0909016967

Submitted: December 2, 2011

Decided: February 27, 2012

MEMORANDUM OPINION

*Upon Motion of the Defendant
for Post-Conviction Relief - **DENIED***

HERLIHY, Judge

On June 17, 2010, defendant Anthony Dorio pled guilty to burglary second degree (reduced from burglary first degree), assault first degree, assault third degree and terroristic threatening. He was sentenced by a different judge on September 3, 2010 to twenty-five years at Level V, suspended after thirteen years followed by probation.

Dorio appealed his sentence. Trial counsel filed a brief pursuant to Supreme Court Rule 26(c). After being permitted to withdraw, Dorio did not file anything, i.e, made no separate claims to be considered on appeal. The State's motion to affirm was granted.¹ The mandate was issued April 14, 2011. On April 6, 2011, the sentencing judge denied Dorio's motion for reduction of sentence.

The current motion for post-conviction relief was filed December 2, 2011, claiming ineffective assistance of counsel in being misled in to the prison time he would receive. The Court forwarded it to counsel who represented Dorio at his plea before this judge. Counsel responded and that response, in turn was sent to Dorio for comment. He submitted a "Reply Affidavit."

Discussion

Before undertaking consideration of Dorio's motion the Court must determine if there are any procedural impediments to doing so.² Dorio's motion was filed within a year

¹ *Dorio v. State*, 16 A.3d 937, 2011 WL 1161741 (Del. March 29, 2011)(TABLE).

² *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

of his conviction becoming final so it is not time barred.³ His claim is ineffective assistance of counsel could not have been raised on direct appeal.⁴ Therefore, there are no procedural bars.⁵

The best way to understand Dorio's claim is to quote it:

I understand that the court went over my sentencing range with me and that I signed the T.I.S. Guilty Plea form which stated the range but my attorney advised me that I wouldn't receive a sentence that exceeded 8 years at level V, and he did not qualify it by saying it was a guess, an estimate or his opinion. I also acknowledged that no body [sic] promised me what my sentence would be because no one did, my attorney only said it wouldn't exceed 8 years, which to me wasn't a promise of what it would be only a range of what it wouldn't be which left open a whole range of what it could be. Had I been advised by my attorney that I would have or could have received a sentence greater than 8 years I would have rejected the plea and insisted on going to trial.⁶

Counsel replied that, while not recalling his exact wording when discussing penalty with Dorio, he never states the potential penalty with certainty and does not use the word "promise." He states he advised Dorio what he was likely to receive but does not have a specific recollection of what that was.

Dorio raises a question about the date of counsel's affidavit which the Court at the attributes to sloppiness and no more. He repeats that he is not saying counsel promised

³ Super. Ct. Crim. R. 61(i)(1).

⁴ *Tatum v. State*, 941 A.2d 1009, 1010 (Del. 2007).

⁵ Super. Ct. Crim. R. 61(i)(3).

⁶ Dorio's Motion for Post-Conviction Relief.

him a sentence of no more than eight years, but is apparently saying between his motion and his response to counsel's affidavit, that counsel said the sentence would likely not exceed eight years. This, of course, is not the forbidden promise or guarantee.

His claim flies in the face of the record. First, on the Plea Agreement, the State did not indicate what its sentencing recommendation would be at the later sentencing date. Second, on the TIS Guilty Plea form, Dorio acknowledged no one had promised him what his sentence would be. Third, during the plea colloquy, he verbally acknowledged that no one had promised or guaranteed what his sentence would be. Dorio is, in the absence of clear and convincing evidence to the contrary, bound by these statements.⁷ He has not provided that clear and convincing evidence.

There is a fourth reason not to convert his semantical argument into substance. On the TIS Guilty Plea form, which he said he read and understood before signing, it is stated the maximum sentence he could receive is thirty-five years. Just before telling the Court no one had promised what his sentence would be, he stated he knew the maximum sentence could be thirty-five years.

If anything Dorio is confusing what he would like to hear with what he was told both by the Court and on the form he signed after reading.

Dorio clearly understood the risks. He understood what the sentence could be. He got the benefit of the State entering a *nolle prosequi* on two charges of possession of deadly

⁷ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

weapon during the commission of a felony as well as the burglary first degree charge in this domestic violence case was reduced to burglary second degree.

In his reply to counsel's affidavit, he claims counsel pressured him during the break taken while the Court was engaged in the plea colloquy with him. There was such a break. Dorio said he wanted more time to speak to counsel and the Court gave it to him. When he returned after the break, he then said he had now had enough time to speak with counsel. He also said he had been thinking of entering guilty pleas previously and had been discussing with counsel doing so. He was satisfied pleading guilty was what he wanted to do and was satisfied with his attorney's advice. Again, he is bound by these statements.

The Court sees no merit in his claim.

Conclusion

For the reasons stated herein, defendant Anthony Dorio's motion for post-conviction relief is **DENIED**.

IT IS SO ORDERED.

J.