

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

v.

EVERETT E. SMITH,

Defendant.

)
)
)
)
)
)
)

ID No. 1211004907

Date Submitted: February 7, 2018

Date Decided: March 28, 2018

ORDER

Upon consideration of Defendant Everett E. Smith's Amended Motion for Postconviction Relief¹ and the record in this case, **IT APPEARS THAT:**

1. A Grand Jury indicted Defendant for Robbery Second Degree and Criminal Mischief.² Trial was originally scheduled for April 2013.³ At Final Case Review, Defendant's counsel ("Trial Counsel") advised the Court that Defendant's competency was an issue.⁴ The Court ordered a psychiatric evaluation of Defendant's competency to stand trial and his mental status at the time of the offense, and rescheduled trial for September 2013.⁵ The Delaware Psychiatric Center

¹ D.I. 82.

² D.I. 1. Defendant was indicted for Criminal Mischief in excess of \$1,000 but less than \$5,000. *Id.* The charge was amended at trial to Criminal Mischief after the State determined that it could not meet its burden on the aggravating element of damage in excess of \$1,000 but less than \$5,000. D.I. 45 at 46:6-16.

³ D.I. 5.

⁴ D.I. 74.

⁵ D.I. 9, 11, 22.

(“DPC”) performed a psychiatric evaluation which found the Defendant competent to stand trial. Trial Counsel reviewed the psychiatric evaluation and was given an opportunity to request a competency hearing.⁶ Trial Counsel did not request a competency hearing.⁷

2. Trial began on September 4, 2013.⁸ The State called two witnesses: Gamal Hegab and Detective Shane Sowden.

3. Mr. Hegab testified that he was working as a cashier on October 28, 2012, at Star Pizza in Wilmington.⁹ During Mr. Hegab’s shift, a customer bought some food with a twenty dollar bill.¹⁰ Approximately a half hour later, the customer returned and bought a slice of pizza with two dollars.¹¹ The customer returned again five minutes later and claimed that he paid for the slice of pizza with a twenty dollar bill and a one dollar bill and was, therefore, shortchanged.¹² When Mr. Hegab disputed the customer’s account, the customer began screaming at Mr. Hegab, punched him in the face, and jumped over the counter.¹³ Mr. Hegab fled to the

⁶ D.I. 14.

⁷ *Smith v. State*, 108 A.3d 1226, 2015 WL 504817, at *1 (Del. Feb. 4, 2015) (TABLE).

⁸ D.I. 26.

⁹ D.I. 43 at 15:19–16:13. Mr. Hegab’s first language is Arabic. D.I. 44 at 14:18–22. On September 4, 2013, the State conducted its direct examination of Mr. Hegab without the assistance of a translator. *Id.* at 12:19–16:23. On September 5, 2013, when Trial Counsel began cross examination, Mr. Hegab stated that he could not understand the questions. *Id.* at 9:10–12:18. Following a discussion between the Court and the parties, Mr. Hegab was scheduled to return for cross-examination the next day, when an Arabic interpreter was available. *Id.* at 17:8–19:6.

¹⁰ D.I. 43 at 16:7–17:21.

¹¹ *Id.*

¹² *Id.* at 17:3–19:1.

¹³ *Id.* at 18:16–19:14.

store's walk-in cooler.¹⁴ A few minutes later, when Mr. Hegab looked out of the cooler, he observed the customer attempting to open the cash register.¹⁵ Despite throwing the register on the ground, the customer was not able to retrieve any money from it.¹⁶ Mr. Hegab testified that he did not see the customer take any money, but when he checked the counter following the incident, Mr. Hegab's cell phone and some money that was kept outside the register were missing.¹⁷ A video recording of the incident from Star Pizza's security camera was played for the jury, and Mr. Hegab identified Defendant as the customer who punched him and attempted to access money in the cash register.¹⁸

4. Detective Shane Sowden testified that an image of the customer was taken from the video recording and posted in Star Pizza by the store owner, whereupon Defendant's name was given to police.¹⁹ Detective Sowden acquired a photograph of Defendant and generated a photo line-up, including Defendant's photograph, which Detective Sowden presented to Mr. Hegab.²⁰ Mr. Hegab identified Defendant as the perpetrator.²¹

¹⁴ *Id.* at 19:15–23.

¹⁵ *Id.* at 20:1–21:5.

¹⁶ *Id.* at 21:23–24:6.

¹⁷ *Id.*; D.I. 45 at 4:15–5:20.

¹⁸ D.I. 43 at 34:8–39:22, 43:16–48:22.

¹⁹ D.I. 44 at 28:9–18.

²⁰ *Id.* at 27:7–29:1.

²¹ *Id.* at 29:2–30:11.

5. The jury found Defendant guilty of Criminal Mischief and Attempted Robbery Second Degree, a lesser included offense of Robbery Second Degree.²² Following trial, the State filed a Motion to Declare Defendant an Habitual Offender under 11 *Del. C.* § 4214(a), and Trial Counsel requested an updated psychiatric evaluation to determine Defendant's competency to be sentenced.²³ DPC was unable to evaluate Defendant's competency to be sentenced because defendant refused to take part in the evaluation.²⁴

6. On March 13, 2014, Defendant was sentenced as follows: (1) for Attempted Robbery Second Degree, as an habitual offender under § 4214(a), 7 years at Level V; (2) for Criminal Mischief, 30 days at Level V, suspended for 6 months at Level III.²⁵

7. On direct appeal, Trial Counsel filed a brief and motion to withdraw under Supreme Court Rule 26(c), asserting that, based upon a complete and careful examination of the record, there were no arguably appealable issues.²⁶ In response, Defendant submitted nine arguments for the Supreme Court's consideration: (1) the indictment was faulty; (2) there was no preliminary hearing; (3) there was an interpreter for Mr. Hegab's cross-examination, but not his direct examination; (4)

²² D.I. 26.

²³ D.I. 33, 24.

²⁴ *Smith v. State*, 108 A.3d 1226, 2015 WL 504817, at *2 (Del. Feb. 4, 2015) (TABLE).

²⁵ D.I. 40.

²⁶ D.I.49; *Smith*, 2015 WL 504817, at *1.

the Superior Court included a jury instruction for the lesser included offense of Attempted Robbery Second Degree without any request for such an instruction from the State; (5) the jury instructions were incomplete and did not include an instruction for mitigating evidence; (6) prosecutorial misconduct; (7) judicial misconduct; (8) the State failed to prove Defendant's guilt of Robbery Second Degree beyond a reasonable doubt; and (9) ineffective assistance of counsel.²⁷ On February 4, 2015, the Delaware Supreme Court affirmed the judgment of the Superior Court.²⁸ Because Defendant's claim of ineffective assistance was not decided on the merits in the Superior Court, the Supreme Court did not consider it on direct appeal.²⁹

8. On July 16, 2015, Defendant filed a Motion for Postconviction Relief, which he subsequently amended.³⁰ Pursuant to Superior Court Criminal Rule 61, the Court appointed counsel ("Rule 61 Counsel").³¹ Rule 61 Counsel moved to withdraw as counsel because he concluded, after a thorough and conscientious examination of the record and applicable law, that Defendant's postconviction claims were wholly without merit and that no other substantial grounds for relief are available.³² Rule 61 Counsel's Motion to Withdraw was forwarded to Defendant,

²⁷ *Id.* at *4.

²⁸ *Id.* at *5.

²⁹ *Id.*

³⁰ D.I. 56, 69.

³¹ D.I. 72.

³² D.I. 77.

and Defendant responded, affirming that he wished to pursue the grounds for relief asserted in his Amended Motion.³³

9. On March 13, 2017, Smith filed a “Motion to Restructure.” In the first sentence of the Motion to Restructure, Smith stated that he wanted to withdraw his Rule 61 motion and he wanted the Superior Court to restructure his sentence so that he would be released from Level V upon completion of his minimum mandatory five-year term and he would receive twenty-two months of mental health treatment either within the prison or at the Delaware Psychiatric Center (“DPC”).³⁴

10. By Letter Order dated March 30, 2017, the Court acknowledged Smith's withdrawal of his Rule 61 motion and granted his appointed counsel's motion to withdraw.³⁵ The Court denied Smith's Motion to Restructure because his request to be relocated internally within the Department of Correction's facilities was not within the Superior Court's discretion to order and because Smith's alternative request to be transferred to DPC was not supported by any information from the Department of Health and Social Services as required by 11 *Del. C.* § 406.³⁶ Smith appealed this decision to the Delaware Supreme Court.³⁷

³³ D.I. 78.

³⁴ D.I. 80.

³⁵ D.I. 81.

³⁶ *Id.*

³⁷ *Smith v. State*, 137 A.3d 535, 2017 WL 4786753, at *1 (Del. October 23, 2017) (TABLE).

11. Smith resubmitted his Rule 61 Motion on April 28, 2017 but the Court deferred consideration of it until the Supreme Court ruled on Smith's Motion to Restructure. On October 26, 2017, the Supreme Court affirmed the denial of Smith's Motion to Restructure.³⁸

12. Before considering the merits of a motion for postconviction relief, the Court must determine whether consideration is barred by any of the Rule 61(i) procedural bars. Rule 61(i) bars relief on any ground for postconviction relief that: (1) was not timely filed; (2) was not asserted in prior postconviction motions; (3) was not asserted in the proceedings leading to the judgment of conviction; or (4) was previously adjudicated. Defendant filed his original Motion for Postconviction Relief within a year of when his judgment of conviction was made final, and Defendant's Motion only asserts claims of ineffective assistance of counsel.³⁹ Rule 61(i) does not bar consideration of the merits in this case.

13. In his Motion, Defendant asserts that Trial Counsel provided ineffective assistance because: (1) he failed to "file the follow up motion to have the court open the results of [DPC's competency] evaluation [p]rior to trial;" (2) he failed to "file a

³⁸ *Id.*

³⁹ *Sahin v. State*, 7 A.3d 450, 451 (Del. 2010) ("Generally, [the Delaware Supreme Court does] not consider claims of ineffective assistance of counsel in a direct appeal. The reason for that practice, in part, is to develop a record on that issue in a Superior Court Rule 61 post-conviction proceeding.").

motion to have the court open the motion to read the results [of DPC’s competency evaluation] prior to sentencing;” and (3) he failed to request a competency hearing.⁴⁰

14. Claims of ineffective assistance of counsel are governed by the *Strickland v. Washington* two-prong test.⁴¹ To establish a claim of ineffective assistance of counsel under *Strickland*, a defendant must show: (1) counsel’s performance fell below an objective standard of reasonableness; and (2) prejudice, meaning that, but for counsel’s unprofessional errors, there is a reasonable probability the result of the proceeding would have been different.⁴²

15. In his first ground for relief, Defendant argues that Trial Counsel should have filed a motion to “open” the results of DPC’s April 16, 2013 evaluation prior to trial.⁴³ The April 16, 2013 DPC evaluation was sealed by order of the Court, but a copy was provided to Trial Counsel for his consideration of what action, if any, was warranted in light of DPC’s opinion that Defendant was competent to stand trial.⁴⁴ Trial Counsel read the April 16, 2013 DPC evaluation and decided not to request a competency hearing.⁴⁵ It was not necessary to “open” the April 16, 2013

⁴⁰ D.I. 82.

⁴¹ 466 U.S. 668 (1984).

⁴² *Id.* at 694.

⁴³ D.I. 82.

⁴⁴ D.I. 14. DPC’s April 16, 2013 evaluation, D.I. 11, was sealed by order of the Court, but a copy was included by Defendant as an exhibit to his Amended Motion for Postconviction Relief. D.I. 69.

⁴⁵ D.I. 68.

DPC evaluation because Trial Counsel and the Court had access to it. Defendant's first ground for relief is without merit.

16. In his second ground for relief, Defendant argues that Trial Counsel should have filed a motion to "open" the April 16, 2013 DPC evaluation and have the Court read the results prior to sentencing.⁴⁶ Following trial, the Court ordered Investigative Services to conduct a presentence investigation and ordered DPC to evaluate Defendant's competency to be sentenced.⁴⁷ Defendant refused to take part in that competency evaluation.⁴⁸ At sentencing, when Defendant raised the issue of his mental illness with the Court, the Court affirmed that any sentence imposed would take into account Defendant's mental health needs.⁴⁹ In Defendant's Sentence Order, the Court ordered a mental health evaluation and required Defendant to meaningfully engage in any recommended mental health treatment, ordered Defendant to take medications as prescribed, and ordered Defendant to engage in counseling for trauma.⁵⁰ At the time of sentencing, the Court identified the following mitigating factors: Defendant's significant and longstanding mental health issues, his organic brain injury, and his long history of trauma.⁵¹ The record reflects that the Court was very familiar with Defendant's history of mental illness

⁴⁶ D.I. 82.

⁴⁷ D.I. 26, 34.

⁴⁸ *Smith*, 2015 WL 504817, at *2.

⁴⁹ D.I. 41 at 7:9–15.

⁵⁰ D.I. 40

⁵¹ *Id.*

and considered it carefully in rendering its sentence. The Court read the evaluation before sentencing. Defendant's allegation that Trial Counsel provided ineffective assistance because he did not specifically present the April 16, 2013 evaluation at sentencing is meritless.

17. In his third ground for relief, Defendant argues that Trial Counsel should have requested a competency hearing based on the April 16, 2013 DPC evaluation.⁵² In its April 16, 2013 evaluation, DPC found, within a reasonable degree of psychological certainty, that Defendant had an adequate factual and rational understanding of the pending legal proceedings, and an adequate capacity to assist his attorney in his defense.⁵³ DPC concluded, without equivocation, that Defendant was competent to stand trial.⁵⁴ Based on these findings, Trial Counsel did not request a competency hearing.⁵⁵ Defendant's assertion that DPC was inconclusive regarding his competency to stand trial is not supported by the record.⁵⁶ Given DPC's findings, Trial Counsel's decision not to request a competency hearing was reasonable.

⁵² D.I. 82.

⁵³ *Id.*

⁵⁴ *Id.*

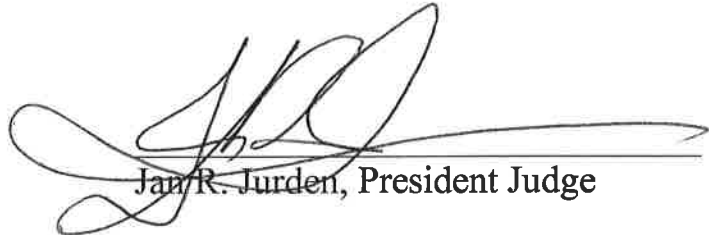
⁵⁵ D.I. 68.

⁵⁶ D.I. 78.

18. The Court has reviewed the record carefully and has concluded that Defendant's Amended Motion for Postconviction Relief is wholly without merit and the record is devoid of any other substantial ground for relief.

NOW THEREFORE, for the foregoing reasons, Defendant's Amended Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

Original to Prothonotary:
cc: Everett Smith (SBI# 00176038)