

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

<b>STATE OF DELAWARE</b>	)	ID. No. 1701013193
	)	In and for Kent County
<b>v.</b>	)	
	)	RK17-01-0509-01 Theft (M)
<b>ELIJAH L. CANNON,</b>	)	RK17-01-0510-01 PFDCF (F)
	)	
Defendant.	)	

**COMMISSIONER'S REPORT AND RECOMMENDATION**

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

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

Elijah L. Cannon, *Pro se*

FREUD, Commissioner  
May 24, 2019

The defendant, Elijah L. Cannon (“Cannon”), pled guilty on October 13, 2017 to one count of Possession of a Firearm During the Commission of a Felony (“PFDCF”), 11 *Del. C.* § 1447A and once count of Misdemeanor Theft, 11 *Del. C.* § 841, as a lesser included offense of Robbery in the First Degree. He also faced one count of Possession of a Firearm by a Person Prohibited, one count of Possession of a Firearm Without a Serial Number, one count of Wearing a Disguise During the

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Commission of a Felony, one count of Tampering with Physical Evidence and one count of Conspiracy in the Second Degree which were *nolle prossed* by the State in exchange for Cannon's plea. As part of the plea deal the State and the defense agreed upon a recommended sentence of four years incarceration suspended after serving three years minimum mandatory followed by probation. The Court agreed with the sentence recommendation and sentenced Cannon accordingly. Had Cannon gone to trial and been found guilty as charged he faced a minimum mandatory sentence of six years and the possibility of over fifty years incarceration. Cannon did not appeal his conviction or sentence to the State Supreme Court. Instead Cannon filed the pending motion for postconviction relief pursuant to Superior Court Criminal Rule 61 on July 11, 2018 in which he alleges, in part, ineffective assistance of counsel.<sup>1</sup>

### **FACTS**

The charges stemmed from series of armed robberies in the Milford, Delaware area. These particular charges related to an armed robbery on January 21, 2017 of Mike's Liquor Mart in Milford, Kent County, Delaware. When the police arrived at the scene they spoke to the victim the manager of the store who explained that two black males with their faces concealed entered the store. One with a shotgun and one with a pistol. The suspect with the shotgun pointed it at the victim and demanded he open the various cash registers while the suspect with the pistol stood by the door as

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<sup>1</sup> Cannon also filed a Motion for Modification of Sentence on June 18, 2018 which was denied by the Court. He subsequently filed a second Motion for Modification on October 23, 2018 and a third on January 14, 2019 both of which the Court denied.

a lookout. When the lookout stated someone was coming the two suspects fled. The police were able to track the suspects using a K-9 to a location with fresh car tire tracks. The officers took photographs of the tracks. The police also viewed the store surveillance video which confirmed the victim's statements and showed one of the suspects with a "pistol grip" shotgun. A short while later the police stopped a black Dodge Charger that they suspected was involved in the robbery. Two black males fled from the vehicle but the driver Nakkashea Scott did not flee. She admitted to the police that she had knowingly driven Shaiheme Edwards and a suspect she knew as "E" to the robbery. She stated that "E" had the shotgun which was a pistol grip shotgun with an obliterated serial number and was located in the back of the vehicle where "E" had been. The police also recovered a silver replica BB pistol in the vehicle as well. On January 23, 2017 the police acting on a tip located Cannon (a/k/a "E") who was positively identified. During a post *Miranda* interview Cannon admitted to being involved in the robbery with another suspect whom he refused to identify. Cannon admitted to using the BB gun and to sitting in the back seat of the vehicle, where the shotgun was found. He also admitted to throwing some of his clothing away to avoid detection. Cannon was a person prohibited due to his criminal history.<sup>2</sup>

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<sup>2</sup> See Affidavit of Probable Cause, *State v. Cannon*, Del. Super., ID No. 1701013193, DI 1.

### **CANNON’S CONTENTIONS**

In his motion, Cannon does not specify any grounds for relief but simply states “See Attached [Memorandum of Law in Support of Rule 61 Motion for Post-conviction Relief].” In the memoranda he raises two grounds for relief. They are summarized as follows:

- Ground one:           Ineffective Assistance of counsel.  
                              Failure to advise during Plea Negotiations.
  
- Ground two:           Ineffective assistance of counsel.  
                              Failure to investigate and develop mitigating  
                              evidence that would have supported  
                              defendant’s case during sentencing.

### **DISCUSSION**

Under Delaware law, this Court must first determine whether Cannon has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.<sup>3</sup> This is Cannon’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 motion, are met. None of Cannon’s claims were 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. To some extent each of Cannon’s claims are based on

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<sup>3</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

ineffective assistance of counsel; therefore, he has alleged cause for his failure to have raised them earlier.

At this point, Rule 61(i)(3) does not bar relief as to Cannon's grounds 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 counsel, Cannon must meet the two-prong test of *Strickland v. Washington*.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> When examining the representation of counsel pursuant

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<sup>4</sup> 466 U.S. 668 (1984).

<sup>5</sup> *Id.* at 687.

<sup>6</sup> *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988))(citations omitted).

<sup>7</sup> See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at \*1 (Del. Supr.)).

to the first prong of the *Strickland* test, there is a strong presumption that counsel's conduct was professionally reasonable.<sup>8</sup> This standard is highly demanding.<sup>9</sup> *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to “eliminate the distorting effects of hindsight.”<sup>10</sup>

Following a complete review of the record in this matter, it is abundantly clear that Cannon has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find trial counsel’s affidavit, in conjunction with the record, more credible that Cannon’s self-serving claims that his counsel’s representation was ineffective. Cannon’s counsel clearly denies the allegations.

Cannon was facing the possibility of six years minimum mandatory in prison had he been convicted and the possibility for substantially more jail time. The sentence and plea were very reasonable under all the circumstances, especially in light of the overwhelming evidence against him. Prior to the entry of the plea, Cannon and his attorney discussed the case. The plea bargain was clearly advantageous to Cannon. Counsel was successful in negotiating an extremely lenient plea bargain with the State based upon counsel’s opinion that Cannon could be a successfully rehabilitated and have a productive life. Counsel’s representation was certainly well within the range required by *Strickland*. Additionally, when Cannon

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<sup>8</sup> *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).

<sup>9</sup> *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990)(quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)).

<sup>10</sup> *Strickland*, 466 U.S. at 689.

entered his guilty plea, he stated he was satisfied with defense counsel's performance. He is bound by his statement unless he presents clear and convincing evidence to the contrary.<sup>11</sup> Consequently, Cannon has failed to establish that his counsel's representation was ineffective under the *Strickland* test.

Even assuming, *arguendo*, that counsel's representation of Cannon was somehow deficient, Cannon 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.<sup>12</sup> In an attempt to show prejudice, Cannon simply asserts that his counsel was ineffective. His statements are insufficient to establish prejudice, particularly in light of the evidence against him. Therefore, I find Cannon's grounds for relief are meritless.

To the extent that Cannon alleges his plea was involuntary, the record contradicts such an allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary, the Court looks to a plea colloquy to determine if the waiver of constitutional rights was knowing and voluntary.<sup>13</sup> At the guilty-plea hearing, the Court asked Cannon whether he understood the nature of the

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<sup>11</sup> *Mapp v. State*, 1994 WL 91264, at \*2 (Del.Supr.)(citing *Sullivan v. State*, 636 A.2d 931, 937-938 (Del. 1994)).

<sup>12</sup> *Larson v. State*, 1995 WL 389718, at \*2 (Del. Supr.)(citing *Younger*, 580 A.2d 552, 556 (Del. 1990)).

<sup>13</sup> *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

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charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Cannon if he understood he would waive his constitutional rights if he pled guilty including the right to suppress evidence; 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 Cannon if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Cannon if he was entering into the plea as he was guilty of the charges. The Court also asked Cannon if he was satisfied with this counsel’s representation. Cannon answered each of these questions affirmatively.<sup>14</sup> Cannon also apologized for his actions and took full responsibility for crimes I find counsel’s representations far more credible than Cannon’s self-serving, vague allegations.

Furthermore, prior to entering his guilty plea, Cannon signed a Guilty Plea Form and Plea Agreement in his own handwriting. Cannon’s signatures on the forms indicate that he understood the constitutional rights he was relinquishing by pleading guilty and that he freely and voluntarily decided to plead guilty to the charges listed in the Plea Agreement. Cannon is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.<sup>15</sup> I confidently find that Cannon entered his guilty plea knowingly and voluntarily and

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<sup>14</sup> *State v. Cannon*, Del. Super., ID No. 1701013193 (Oct. 3, 2017) Tr. at 5-14.

<sup>15</sup> *Sommerville* 703 A.2d at 632.



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that Cannon's grounds for relief are completely meritless.

### CONCLUSION

I find that Cannon's counsel represented him in a competent and effective manner and that Cannon has failed to demonstrate any prejudice stemming from the representation. I also find that Cannon's guilty plea was entered knowingly and voluntarily. I recommend that the Court *deny* Cannon's motion for postconviction relief as procedurally barred and completely meritless pursuant to Superior Court Criminal Rule 61(i)(3).

/s/ Andrea M. Freud

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Commissioner

AMF/dsc  
oc: Prothonotary