IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN J. HICKS,	§	
	§	No. 434, 2007
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Kent County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0410015730
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 25, 2008
Decided: August 7, 2008

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

O R D E R

This 7th day of August 2008, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Shawn J. Hicks ("Hicks"), the defendant below, entered into a plea agreement, as a result of which he was subsequently found in violation of his probation ("VOP"). Hicks moved *pro se* for post-conviction relief, arguing that he should be permitted to withdraw his guilty plea on the ground of constitutionally ineffective assistance of counsel. Specifically, Hicks claimed that because of his counsel's ineffective assistance, he was unaware that the plea agreement did not include the dismissal of the VOP charge. On appeal, Hicks claims that the

Superior Court erred in denying his motion. We conclude that the Superior Court committed no error and affirm.

2. In October 2004, while on probation, Hicks was facing new criminal charges and also a VOP charge.[1] The record is unclear as to the nature of the criminal charges and the date of Hicks' indictment (the "2004 charges"). On October 21, 2004, a combined Fast Track Case Review and VOP (commonly referred to as "Track I") hearing was scheduled in an effort to resolve both the 2004 charges and the pending VOP charge. At that hearing, Hicks was offered a plea agreement that apparently would have resolved both the 2004 charges and the VOP charge.[2] Hicks refused the offer. As a result, the 2004 charges were referred to the "trial track," and the VOP hearing was deferred pending the resolution of those new charges. Kevin M. Howard ("Howard"), a private attorney, represented Hicks in connection with the 2004 charges.[3]

3. On January 3, 2005, Hicks was indicted on a different set of five charges (the "2005 charges"). Those charges consisted of possession with intent to deliver cocaine, maintaining a dwelling for keeping controlled substances, distribution of a controlled substance within 300 feet of a park, second degree

[1] The record does not disclose the basis of the VOP charge.

[2] That October 2004 plea offer was apparently for a ten-year incarceration term.

[3] According to a letter dated May 3, 2005 from Howard to Hicks, one of the 2004 charges was delivery of cocaine.

conspiracy, and possession of drug paraphernalia.[4] The Office of the Public Defender initially represented Hicks in connection with the 2005 charges, but because of a conflict of interest within the Office of the Public Defender, Ronald G. Poliquin ("Poliquin") was appointed to represent Hicks.[5]

4. Sometime in April or May 2005, Hicks apparently was offered a new plea agreement, that encompassed both the 2004 and the 2005 criminal charges. That agreement would have required Hicks to agree to an eight-year prison term. Although Hicks initially rejected that offer, Howard attempted to persuade Hicks to accept it. In a letter Howard sent to Hicks on May 3, 2005, Howard stated: "[t]he plea offer to 8 years in jail would resolve *all pending matters* in the Superior Court [and] you would be released once you conclude[] that sentence." Hicks ultimately agreed to enter into a plea agreement. It is unclear what discussions took place between May 3, 2005 and June 20, 2005, when the plea agreement was signed.[6] At the June 20, 2005 plea colloquy, Hicks was represented by Poliquin. Appearing for the State was DAG Jason C. Cohee ("Cohee"), the prosecutor who had extended the October 2004 plea offer to Hicks.

[4] It is unclear what connection, if any, there was between the 2004 and the 2005 charges.

[5] Paul S. Swierzbinski, from the Office of the Public Defender, was Hicks' attorney in connection with the 2005 charges before the conflict of interest arose and Poliquin was appointed.

[6] As discussed below, the terms of the plea agreement ultimately entered into were different from the terms of the April or May 2005 offer, at least with respect to the incarceration term (eight years as opposed to ten years).

5. Under the terms of the written June 20, 2005 plea agreement: (i) Hicks pled guilty to possession with intent to deliver cocaine; (ii) Hicks admitted that he was eligible for sentencing as an habitual offender; (iii) the State agreed to *nolle prosequi* the remaining four 2005 charges and the three 2004 charges; and (iv) the State recommended that Hicks be sentenced to 15 years at Level V imprisonment, suspended after eight years, followed by six months at Level IV Home Confinement or Work Release Center and one year at Level III probation. The Superior Court adopted the State's recommendation and sentenced Hicks immediately.

6. As noted above, Hicks' VOP charge had been deferred pending resolution of the 2004 charges. On July 8, 2005, a VOP hearing was held, where Hicks was represented by Paul S. Swierzbinski ("Swierzbinski") from the Office of the Public Defender. Cohee appeared on behalf of the State. At that hearing the probation officer stated that Hicks violated three of his probation conditions because Hicks: (i) had been convicted of a new drug offense as a result of his June 20, 2005 guilty plea; (ii) had tested positive for drugs during a random urine test administered on October 18, 2004; and (iii) had failed to pay certain court fees.

7. With respect to the first ground, Cohee informed the Superior Court judge that he (Cohee) "did not make any specific recommendation as to the VOP [charge] as part of th[e] [June 20, 2005] plea." Swierzbinski responded that Hicks' "understanding was that the eight-year sentence [received as a result of his June 20, 2005 guilty plea] also covered the sentence on the VOP." Swierzbinski also

informed the trial court that he was not familiar with the details of Hicks' plea agreement, because at the June 20, 2005 proceedings Hicks was represented by Poliquin.

8. On that particular day, Poliquin happened to be at the courthouse, and appeared before the Superior Court judge. Stating that he was "not aware ... that there was going to be a hearing [that] day," Poliquin informed the trial judge that "[i]t was [his] understanding ... that the sentencing covered the VOP," and added that he was "almost 100 percent sure." As a result of Poliquin's statements, the Superior Court judge postponed the VOP hearing until July 22, 2005 and "ask[ed] Mr. Poliquin to be present on the 22nd to address the issue." The docket also reflects that "Poliquin [was] to check if the VOP was to be resolved with [the] plea on [the] other charges."

9. Four days after the VOP hearing, Cohee sent a letter to the Superior Court judge, stating:

> [T]here was some question as to whether the VOP was part of the plea [Hicks] entered on June 20, 2005. [...] I have enclosed a copy of the plea agreement. It does not contain any language about recommending the dismissal of the VOP. Therefore, the VOP was not dismissed by that plea agreement. [...] [T]his VOP was originally postponed from the Track I calendar when the Track I plea was rejected by the Defendant. This may be the basis of the confusion. Because my Track I offer would have included dismissing the VOP. However, it is my practice not to ask to dismiss any pending VOP once a Track I offer has been rejected.

10. The VOP hearing was held on July 29, 2005. Although the docket indicates that Poliquin was subpoenaed to appear, he was not present at that hearing. By this point Hicks was represented by a third attorney, Kathleen A. Amalfitano ("Amalfitano"), who informed the Superior Court judge that she had "talked to Mr. Poliquin [that] morning[,] … [and that Poliquin] … indicated that he didn't know anything about the VOP." Amalfitano stated that she had "hear[d] some rumblings that [Poliquin] did know something about [the VOP], but he didn't know where the VOP stood." Hicks testified that he was under "the impression that [his] plea included the violation." The Superior Court, however, found Hicks in violation of his probation, and sentenced him to five years at Level V imprisonment, suspended after three years.

11. On November 17, 2006, Hicks moved *pro se* for post-conviction relief, seeking leave to withdraw his June 20, 2005 guilty plea. Hicks' motion advanced three grounds for the relief requested, only one of which is pursued on this appeal: constitutionally ineffective assistance of counsel.[7] Hicks claimed that Poliquin had misinformed him about the terms of the plea agreement.

12. In connection with Hicks' motion, Poliquin filed a sworn affidavit, pursuant to Superior Court Criminal Rule 61(g)(2). Poliquin's affidavit relevantly stated that:

[7] The two other grounds were not briefed and are therefore deemed abandoned. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

> 9. When reviewing the truth in sentencing form with [Hicks], he was asked whether he was on probation … at the time of [the] offense[.] [The form] states that "a guilty plea may constitute a violation." [...]
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> 10. [Hicks] answered yes[,] confirming that he understood that a guilty plea may constitute a violation of his probation.
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> 11. I informed [Hicks] that the plea would resolve all remaining charges on the indictment. [...]
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> ***
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> 13. I was never appointed to represent [Hicks] in any of his appearances for a violation of probation. [...]
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> ***
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> 15. Concerning any representations I made on July 8, 2005 at [Hicks'] VOP hearing, it is clear that I was not certain as to the resolution of the plea agreement. [...]
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> ***
>
> 17. After reviewing my file, the court's docket, and considering my past practice concerning plea agreements, I would not have informed the defendant that the VOP charges would be dropped unless it was stated on the plea agreement.

13. The Superior Court referred Hicks' motion to a Commissioner under Superior Court Criminal Rule 62 for proposed findings and recommendations. The Commissioner found that "it is abundantly clear that Hicks has failed to substantiate his claim that his attorney was ineffective," and recommended that Hicks' motion be denied. By order dated July 25, 2007, the Superior Court adopted the Commissioner's report and recommendation and denied the motion. This appeal followed.

14. The sole issue presented is whether the Superior Court erred in denying Hicks' motion for post-conviction relief. Hicks claims that he should have been allowed to withdraw his guilty plea because his counsel provided constitutionally

ineffective assistance. This Court reviews the denial of a motion for post-conviction relief, including one based upon a claim of constitutionally ineffective assistance of counsel, under an abuse of discretion standard.[8]

15. To prevail on a claim of ineffective assistance of counsel in the context of a guilty plea, a movant must show that: (i) "counsel's representation fell below an objective standard of reasonableness,"[9] and (ii) "there is a reasonable probability that, but for counsel's errors, [the movant] would not have pleaded guilty and would have insisted on going to trial."[10] In our view, Hicks has failed to meet the first prong of that test. Hicks claims that Poliquin "failed to inform and/or misinformed [him] that his ... plea of 'guilty' in his pending criminal matter did not contemplate the resolution of the pending [VOP]." This conclusory allegation, without more, is insufficient to rebut the "strong presumption" that counsel's conduct was professionally reasonable.[11]

16. Nor does the record support Hicks' claim. Poliquin declared in his sworn affidavit—and it is undisputed—that he reviewed the Truth-in-Sentencing Guilty Plea Form with Hicks. That form asked whether the defendant was on

[8] *Capano v. State*, 889 A.2d 968, 974 (Del. 2006); *Guinn v. State*, 882 A.2d 178, 181 (Del. 2005); *Outten v. State*, 720 A.2d 547, 551 (Del. 1998); *MacDonald v. State*, 778 A.2d 1064, 1070 (Del. 2001); *Wilson v. State*, 834 A.2d 68, 72 (Del. 2003).

[9] *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *See also Albury v. State*, 551 A.2d 53, 60 (Del. 1988).

[10] *Guinn*, 882 A.2d at 181 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)).

[11] *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689). *See also Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

probation at the time of the offense. It also advised that "[a] guilty plea may constitute a violation." Hicks checked the "yes" box on the form in his own handwriting. Thus, Hicks was informed that his guilty plea may result in a VOP. Poliquin did not represent Hicks in connection with either the 2004 charges or the VOP proceedings, and the record contains no evidence that Poliquin was aware that the initial (October 2004) plea offer encompassed the VOP charge. In these circumstances, even if Poliquin did not specifically inform Hicks that the new (June 2005) plea agreement did not include the VOP charge, Poliquin's conduct was not professionally unreasonable.

17. Finally, there is no evidence that Poliquin affirmatively told Hicks that the VOP charge would be dismissed.[12] The only document that could be construed as informing Hicks that his VOP charge would be included in the plea agreement was Howard's letter, which stated that "[t]he plea offer to 8 years in jail would resolve *all pending matters* in the Superior Court [and] you would be released once you conclude[] that sentence." (italics added) Howard (not Poliquin) sent that letter to Hicks. Howard was Hicks' counsel in connection with the 2004 charges (but not the VOP charge), and he did not participate in the June 20, 2005 plea colloquy.

[12] Poliquin represented in his sworn affidavit: "After reviewing my file, the court's docket, and considering my past practice concerning plea agreements, I would not have informed the defendant that the VOP charges would be dropped unless it was stated on the plea agreement."

18. For these reasons, we conclude that Hicks has failed to establish that Poliquin's representation fell below the objective standard of reasonableness. We therefore do not reach the second prong of the inquiry (*i.e.*, whether there is a reasonable probability that Hicks would not have pleaded guilty and would have insisted on going to trial). We do note, however, that the State's case against Hicks was strong, and that Hicks would likely have been sentenced as an habitual offender. Thus, had Hicks gone to trial and was found guilty, he would have potentially faced a mandatory life sentence.

19. Hicks separately argues that he did not "knowingly and voluntarily"[13] enter the guilty plea because, irrespective of whether or not his counsel adequately represented him, he was unaware that the VOP charge was not included in the plea agreement. That contention also lacks merit. The plea colloquy establishes that Hicks "understood precisely what charges the plea agreement was resolving."[14]

20. Hicks reviewed and signed both the plea agreement and the Truth-in-Sentencing Guilty Plea Form. Both documents clearly showed that only two cases

[13] *State v. Cabrera*, 891 A.2d 1066, 1069-70 (Del. Super. 2005) (in evaluating under Superior Court Criminal Rule 32(d) whether to permit a defendant to withdraw a plea, the judge must consider five factors: "1) Was there a procedural defect in taking the plea; 2) Did [the defendant] knowingly and voluntarily consent to the plea agreement; 3) Does [the defendant] presently have a basis to assert legal innocence; 4) Did [the defendant] have adequate legal counsel throughout the proceedings; and 5) Does granting the motion prejudice the State or unduly inconvenience the Court.").

[14] *Wilson v. State*, 834 A.2d 68, 72 (Del. 2003) (upholding the Superior Court's denial of defendant's motion for post-conviction relief in substantially similar circumstances, where defendant who entered a guilty plea had several pending sets of criminal charges, and was represented by different attorneys in connection with those different sets of charges).

were being resolved by the plea, and mentioned the two case numbers, as well as the criminal action numbers of the charges being resolved. Hicks responded "no" to the question on the Truth-in-Sentencing Guilty Plea Form that asked whether he had been "promised anything that is not stated in [the] written plea agreement," and he provided the same answer at the plea colloquy. Finally, the transcript of the plea colloquy indicates that the prosecution stated on the record that the plea agreement would only resolve the two sets of criminal charges: "This plea encompasses two cases. All remaining charges on both of those cases will be nolle prosequied after acceptance of the plea." Because there was no mention that the VOP charge was also being resolved by the plea agreement, Hicks could not reasonably have understood that the VOP charge would be included. Therefore, the Superior Court properly concluded that Hicks had entered into the plea agreement "knowingly and voluntarily."

21. Despite the foregoing resolution of the matter, this Court is deeply concerned with what the record shows was a woeful lack of communication between the array of attorneys serially appointed to represent Hicks—Howard, for the 2004 charges; Swierzbinski and then Poliquin, for the 2005 charges; and the ever-changing counsel (including Swierzbinski and Amalfitano) who represented Hicks in connection with the VOP charge.[15] Defective coordination between counsel is

[15] The record does not reflect who represented Hicks in connection with the VOP charge before it was removed from Track I and deferred pending resolution of the 2004 charges.

especially troubling in cases like this, where the defendant faces several sets of criminal charges that appear to be related, and where one or more of those charges could result in a VOP.[16] In such cases, all attorneys involved (past and current) must communicate effectively, to assure that the defendant is clearly informed of the precise scope of any plea offer or guilty plea agreement. The charges to be resolved by a guilty plea *i.e.*, both the charges to which the defendant pleads guilty and the charges that will be *nolle prosequied* as a result of the plea agreement, should be identified (by title, and not merely by number) during the plea colloquy. To ensure that these recommendations are followed, the Clerk of the Court is directed to send copies of this Order to the Office of the Attorney General, the Office of the Public Defender, and to the President Judge of the Superior Court for such action as they deem appropriate.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[16] In this case, the lack of coordination is extremely troubling, given that two of the attorneys involved in representing Hicks (Howard and Poliquin) were and are members of the same law firm, Young, Malmberg and Howard, P.A.