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

STATE OF DELAWARE	)	
	)	
v.	)	ID: 0208020744
	)	
KEVIN McCRAY,	)	
	)	
Defendant.	)	

ORDER

Upon Defendant's Third Motion for Postconviction Relief and After Remand – *DENIED.*

1. This case's unique procedural history is far more complicated than is the ultimate decision. But, the procedural history is important to understanding the decision.

2. On July 29, 2003, Defendant pleaded guilty to a bank robbery, a couple of burglaries and an attempted burglary. The elaborate, intentional crimes to which Defendant pleaded guilty were thought-out and planned in detail. In the bank robbery, Defendant and his accomplices used tools to cut a hole in a bank's roof. They lowered themselves into the bank by rope and lay in wait. Dressed in black and wearing ski masks, they confronted a bank employee as she opened for business. At

gun point, they demanded cash. Before fleeing, they identified and discarded dye packs, given to them along with over $40,000. The bank robbery was not Defendant's first, he had a prior conviction in 1985.

3. The burglaries and the attempted burglary were just as elaborate as the bank robbery. In the attempted burglary, Defendant and his accomplices attempted to burglarized a Walmart by cutting through the roof with an acetylene torch. The details matter because Defendant now calls his competence into question. Yet, his crimes, over time, speak to an alert and calculating state of mind.

4. When Defendant pleaded guilty in 2003, the court conducted a colloquy including direct questioning. The court concluded the plea was knowing, voluntary and intelligent.

5. In his pre-sentence interview, Defendant was lucid and responsive. He blamed his crimes on drugs. He made no mention of mental health treatment, much less a prior admission to a mental health facility. Defendant gave no one - the police, his lawyer, the pre-sentence officer, the judge who took his plea, nor the judge who sentenced him - reason to suspect that he had mental health issues, much less that he was incompetent at the time of the offenses or when he pleaded guilty.

6. In fact, at the sentencing hearing, there was further colloquy. Because the 1985 robbery was a sentencing aggrevator, the court offered to let

Defendant withdraw his guilty plea. After the further colloquy, the court, again, found the plea knowing, voluntary and intentional. Thus, it can be said Defendant's guilty pleas were accepted by two judges, on two occasions. (Because of this unique procedural wrinkle, the judge who first accepted the plea and the judge who reconsidered the plea have both reviewed the record and agree on the outcome here.)

7. Shocked by Defendant's repetitive criminal history and his professionalism, the court sentenced Defendant to prison on December 5, 2003.

8. As it happened, while Defendant was being prosecuted in Delaware, he was also facing federal charges stemming from robberies at three cash checking stores in New Jersey. Those crimes were also planned and thought-out. As those cases came to trial in December 2004, Defendant began acting-up. His counsel reported to the federal court that Defendant's mental condition had "deteriorated." It was reported that Defendant had been in a mental institution at some point. Accordingly, the trial was aborted and Defendant was evaluated by a psychiatrist. That was January 2005.

9. The psychiatrist opined that Defendant had chronic mental illness and was not competent to stand trial. A government psychologist further concluded Defendant suffered from PTSD, psychotic disorder and mild mental retardation.

Defendant was transferred to a federal medical center, where he reportedly refused to cooperate with further evaluation and treatment. It was also reported that Defendant's evaluation was complicated by lack of "a detailed, objective history."

10. Based on a variety of things, the mental health professionals concluded, in July 2006, that Defendant had an antisocial character and there were signs of malingering as to cognitive intellectual limitations. This court takes that to mean Defendant has a criminal disposition and may be more clever than he pretends. Anyway, the mental health professionals also recommend anti-psychotics to restore Defendant to competence. Defendant, however, refused treatment. That refusal seems to have worked to his advantage in the federal system.

11. In January 2007, the federal court issued an elaborate decision refusing to order involuntary treatment involving forced medication.[1] In significant part, the federal decision expressly turned on the long prison sentence Defendant received here in 2003, and the fact that Delaware's "prison system is equipped to accommodate the mental health needs of prisoners such as Defendant." [2]

12. After Defendant's federal trial was aborted and that prosecution was at a standstill, Defendant filed his first motion for postconviction relief here,

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[1] *U.S. v. McCray*, 474 F.Supp. 2d 671 (D.N.J. 2007).

[2] *Id.* at 681 n.10.

on August 5, 2005. The judge who first took the plea denied the motion on August 18, 2005. Defendant then copied the denied motion and re-filed it on October 27, 2005, directing the second motion to the sentencing judge. The second motion was summarily dismissed on December 19, 2005.

13. On September 23, 2008, Defendant filed motions for psychiatric evaluation and appointment of counsel. Because there was nothing then pending here, on October 3, 2008, the court summarily denied the motions. So, on October 15, 2008, Defendant filed this, his third motion for postconviction relief.

14. Defendant also filed an appeal from the 2008 denial of a psychiatric evaluation and counsel. Someone decided the evaluation and counsel were sought "in order to pursue postconviction relief." Perhaps, the post-filed, third motion for postconviction relief, filed here while the appeal was pending, was noticed and taken into account.

15. In any event, although the motion for evaluation and counsel was out of order and its denial was proper, on appeal,

> the Attorney General filed a motion asking ...[for remand] with instructions to appoint counsel to represent McCray and to order a psychiatric evaluation to determine if McCray had regained competence in order to pursue postconviction relief.

16. The Supreme Court granted the Attorney General's motion on Defendant's behalf, on February 2, 2009. In obedience to the remand, the court appointed "conflict counsel,"and transferred Defendant to Delaware Psychiatric Center for a current and retrospective competency evaluation. The court also obtained the formal transcripts leading up to and including Defendant's guilty plea in 2003 and the sentencing on December 5, 2003. All of this came at taxpayers' expense, at the Attorney General's request.

17. On May 31, 2011, having conducted a full evaluation, including an interview, testing, and review of documents from the record, a licensed psychologist concluded that there was "no compelling evidence to suggest that Mr. McCray was incompetent when he entered a guilty plea in 2003." The psychologist also concluded "that Mr. McCray is suitable for participation in post-conviction relief." Not surprisingly, considering the record, the psychologist found evidence that Mr. McCray is malingering.

18. Now, the Attorney General informs this court: "the State is satisfied that the question of Mr. McCray's mental health, both now and at the time of his 2003 plea, has been resolved." From that, the court infers that the Attorney General accepts the psychologist's opinion.

19. Of course, the court shared the psychologist's opinion with Defendant's newly appointed counsel, and it asked whether there was further reason to question Defendant's competence to pursue his third motion for postconviction relief. Counsel responded "the matter is ripe for decision. . . ."

20. The court then asked for and received counsel's response to this pending Rule 61 motion. Taking everything into consideration, including the psychologist's report and the record on which it is based, it appears that Defendant's third motion for postconviction relief is untimely and procedurally barred under Superior Criminal Rule 61(i)(3). Defendant's claims were procedurally defaulted when he failed to take a direct appeal from the December 5, 2003 sentence. He has not shown cause for relief from his defaults, nor prejudice.

21. Also, the interest justice exception to the bars is not implicated. It appears that Defendant knew what he is doing when he admittedly committed the elaborate, premeditated crimes for which he was sentenced. It continues to appear that his guilty plea was knowing, voluntary and intelligent. It does not appear that Defendant was not guilty by reason of mental illness, or otherwise. Nor does it appear that he was incompetent when he pleaded guilty and was sentenced. To the contrary, taking Defendant's criminal history and criminal conduct in 2003 into account, the interest of justice dictates that Defendant should serve the sentence

lawfully imposed on December 5, 2003.

For the foregoing reasons, based on the expanded record, Defendant's third motion for postconviction relief, filed on October 15, 2008, is **DENIED**.

IT IS SO ORDERED.

Date: November 21, 2011 /s/ Fred S. Silverman
Fred S. Silverman, Judge

Date: November 21, 2011 /s/ Peggy L. Ableman
Peggy L. Ableman, Judge

oc: Prothonotary (Criminal)
pc: James T. Wakley, Deputy Attorney General
Christopher D. Tease, Esquire
Kevin McCray, Defendant