

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

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. # 1009002844
	)	
	)	
JASON MYERS,	)	
	)	
Defendant.	)	

Date Submitted: May 9, 2013  
Date Decided: September 3, 2013

**OPINION**

*Defendant's Pro Se Motion for Postconviction Relief*  
**DENIED.**

Scott, J.

Upon consideration of the Defendant's Pro Se Motion for Post-conviction Relief and the Commissioner's Report, the Recommendation that Defendant's Pro Se Motion for Post-conviction Relief Should be Denied, the Defendant's Appeal from the Commissioner's Report and the record in this case, it appears that:

On January 18, 2011, Defendant, Jason Myers ("Myers") pled guilty to one count of Robbery Second Degree<sup>1</sup>. As part of the plea agreement, Myers agreed to be sentenced as a habitual offender pursuant to 11 *Del. C.* §4214(a). The State, in return, agreed to cap the sentence recommendation at 5 years at Level 5. On March 25, 2011, the defendant was declared a habitual offender and sentenced to 5 years at Level 5.<sup>2</sup> On December 8, 2011, Myers filed a pro se motion for modification of sentence.<sup>3</sup> In this motion, Myers requests modification of his sentence on three grounds: (1) Mental Health Care, SCI has a history of treating and providing for his mental health needs; (2) His supportive family member lives in Sussex County; and (3) When his sentence is complete, he will be residing in Sussex County with a family member. The transition, as outlined in his motion, would be easier in terms of living with his family and obtaining

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<sup>1</sup> Plea Agreement, Docket Item ("D.I.") 9.

<sup>2</sup> Sentence Order, D.I. 17.

<sup>3</sup> Mot. for Modification of Sentence, D.I. 19.

services. The Motion for Modification of sentence was denied on January 11, 2012 by the Honorable John Parkins.

On March 12, 2012, Myers filed the current motion for Post-conviction relief.<sup>4</sup> In his motion, Myers raises three grounds for Post-conviction relief. Specifically, he claims that he received ineffective assistance of counsel based on: (1) Failure to Argue Diminished Capacity; (2) Failure to Communicate; and (3) Failure to Investigate. On March 20, 2013, the Court referred this motion to Superior Court Commissioner Michael Reynolds pursuant to 10 Del. C. §512(b) and Superior Court Criminal Rule 61 for proposed findings of facts and conclusions of law. The Commissioner issued a briefing schedule on April 3, 2012. On June 14, 2012, Myers filed a pro se Motion for Appointment of Counsel. On September 18, 2012, Myers filed a pro se Motion for Response to Post-conviction Motion. On September 26, 2012, Commissioner Reynolds filed an Amended Order of Briefing. On November 9, 2012, an Affidavit of Counsel in Response to Rule 61 Post-conviction Relief was filed by Mr. DelCollo. On November 28, 2012, Myers filed a pro se Motion for Response. On November 29, 2012, Commissioner Reynolds filed a letter order to counsel and Myers forwarding a copy of Mr. DelCollo's Affidavit

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<sup>4</sup> Mot. for Postconviction Relief, D.I. 22.

thereby making Myers November 28, 2012 Motion for Response Moot and hereby Denied.

On December 13, 2012, Myers filed a reply to the Affidavit of Counsel. On December 14, 2012, Commissioner Reynolds issued a letter order to counsel and Myers indicating the Defendant's Reply to Affidavit of Counsel in Response to Rule 61 Post-conviction Relief is returned unread. The letter order further explained that Myers December 13, 2014 "Reply" was not authorized by the briefing order issued and that only one reply is permitted by Myers and should be incorporated into Movant's reply brief. On January 15, 2013, the State filed a response to Myers' Motion for Post-conviction Relief. On January 31, 2013, Myers filed a reply brief. On April 29, 2013, the Commissioner filed a Report and Recommendation that Myers' Pro Se Motion for Post-conviction Relief should be Denied. Myers' then filed an appeal from the Commissioner's "Report and Recommendation" on May 9, 2013.

Before addressing the merits of a postconviction relief claim, the Court must first determine whether the claims pass through the procedural filters of Rule 61(i).<sup>5</sup> Rule 61(i) imposes four procedural imperatives: 1) the

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<sup>5</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) ("The first inquiry in any analysis of a post-conviction relief claim is whether the petition meets the procedural requirements of Rule 61.") *See also Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

motion must be filed within one year of a final order of conviction; 2) any ground for relief that was not asserted in a prior post conviction proceeding is thereafter barred; 3) any ground for relief must have been asserted at trial or on direct appeal as required by the court rules; 4) any ground for relief must not have been formerly adjudicated in any proceeding leading to the judgment of conviction.<sup>6</sup> The Postconviction Relief Motion is timely filed and not repetitive. The Court will, therefore, consider the merits of the Motion.

In order to establish ineffective assistance of counsel, Movant must satisfy both prongs of the analysis of such claims established in *Strickland v. Washington*.<sup>7</sup>

The *Strickland* test requires the Movant to show first that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness. ...Second, under *Strickland* the Movant must show there is a reasonable degree of probability that but for counsel's unprofessional errors the outcome of the proceedings would have been different, that is, actual prejudice. ...In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.<sup>8</sup>

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<sup>6</sup> Super. Ct. Crim. R. 61(i).

<sup>7</sup> *Strickland v. Washington*, 466 U.S. at 689.

<sup>8</sup> *State v. Gattis*, 1995 WL 790961, \*4 (Del.Super.); *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

Ground One of Myers' Motion argues ineffective assistance of counsel because trial counsel failed to argue diminished capacity. Myers claims he was under the influence of mind altering psychotropic and/or psychological drugs at the time of the plea. In the Affidavit of Counsel <sup>9</sup>, Trial Counsel states:

“Based on Counsel’s many interactions with Mr. Myers, review of the facts of the case, review of the Public Defenders’ intake interview and review of Mr. Myers previous Public Defender case files, it was determined that Mr. Myers mental health issues did not rise to a potential legal defense of his crimes and, therefore, there was no basis to file for a competency evaluation/hearing.”

Trial Counsel’s Affidavit further states:

“Counsel also reviewed case files for Mr. Myers previous criminal cases. Counsel reviewed a Public Defender PFE Report from 2007 which concluded that Mr. Myers does suffer from mental health issues, however, it is his inability to stop using illegal drugs which causes his criminal behavior.”

Myers executed the Court's Truth-in-Sentencing Guilty Plea form indicating he was not forced or threatened into entering his plea and the Court reviewed these questions with him during the plea colloquy.<sup>10</sup> In addition, counsel disclosed to the Court during the plea colloquy that Myers

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<sup>9</sup> Affidavit, Dean C. Delcollo, 2-3 (Nov. 9, 1212)(D.I. 38).

<sup>10</sup> Truth in Sentencing Guilty Plea Form, D.I. 9.

had a history of mental illness and that he was currently on medication for his mental illness. Myers denied, however, to the judge that he was under the influence of drugs.

The guilty plea form further indicates that the penalty for Robbery Second Degree is 5 years to life, which takes into consideration Myers' prior history. Myers signed the forms acknowledging that he understood the penalty range for Robbery Second Degree. In the absence of clear and convincing evidence to the contrary, Myers is bound by his answers on the guilty plea form and by his testimony at the plea colloquy.<sup>11</sup>

Ground Two of Myers' Motion argues ineffective assistance of counsel because of counsel's failure to communicate.

Trial Counsel's Affidavit states:

“Counsel met with Mr. Myers many times and explained to him his situation and options. Mr. Myers was initially scheduled to resolve this case by plea on January 13, 2011. Mr. Myers, in the middle of the plea colloquy decided to reject the plea. Counsel then met with Mr. Myers and answered his questions. Mr. Myers was then given a new plea date and finally accepted the plea on January 18, 2011. ...A full and thorough plea colloquy was conducted by the Honorable Calvin L. Scott with Mr. Myers on that date. ...Counsel explained to and Mr. Myers knew the State was going to declare him a habitual offender. Counsel explained to and Mr. Myers understood the penalty range for the offense he pled to. Mr. Myers

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<sup>11</sup> See *State v. Stuart*, 2008 WL 4868658, \*3 (Del. Super. Oct. 7, 2008) citing *Savage v. State*, 815 A.2d 349 (Del. 2003).

chose to accept the plea and agreed he was habitual eligible.”<sup>12</sup>

On the Truth-in-Sentencing Guilty Plea form, Myers indicated that he was fully satisfied with defense counsel’s representation, that defense counsel fully advised him of his rights and that he understood all of the information contained on the form. There is nothing in the record to support Myers’ contention that he wanted to go to trial or that his counsel failed to represent his intentions at that time. In return for pleading guilty to one count of Robbery Second Degree, the State agreed to cap its sentence recommendation at 5 years at Level 5. Even though Myers was declared a habitual offender, he clearly benefited from pleading guilty. Because Myers fails to make the requisite showing under *Strickland*, his claim is denied.

Ground Three of Myers’ Motion argues ineffective assistance of counsel because of counsel’s failure investigate Myers’ medical records and argue a defense of diminished capacity. As was quoted above, counsel investigated, was aware and made the court aware of Myers’ mental illness issues. The State’s Response to the Motion for Post-conviction, further supports this assertion.

The Response States:

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<sup>12</sup> Affidavit, Dean C. Delcollo, at 3 (Nov. 9, 2012)(D.I. 38). See Plea Colloquy at 2-3 (Jan. 18, 2011.)



“As stated before, defense counsel was able to use Defendant’s mental health issues to procure a better plea offer with the State, which resulted in the State’s recommendation of only 5 years at Level 5.”<sup>13</sup>

The Superior Court accepted the plea agreement and sentenced him accordingly. Based upon these circumstances, the Court concludes that counsel’s conduct did not fall below the reasonable level of professional assistance.

Myers has a history of convictions and arrests. Considering his criminal history, the nature of his arrest, and the evidence against him, the plea agreement Myers accepted significantly outweighed the risks posed by going to trial. There was nothing more his attorney could have done to mitigate the sentence on the charges he pled guilty to. The Court finds that counsel took professionally reasonable steps to address Defendant’s concerns regarding the evidence. Nothing supports the contention that Myers failed to understand because he was under the influence of psychotropic or psychological drugs at the time of his court proceedings or that he, in fact, disagreed with the aspects of his plea agreement.

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<sup>13</sup> State’s Response, Caterina Gatto, at 5 (Jan. 23, 2013)

Now, for the reasons stated in the Commissioner's Report and Recommendation that Defendant's Motion for Post-conviction Relief should be denied,

IT IS ORDERED that the Commissioner's Report(s), including the recommendations, is adopted by the Court. Defendant's Motion for Post-conviction Relief is DENIED.

**IT IS SO ORDERED.**

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**Judge Calvin L. Scott, Jr.**