

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

| | | |
|--------------------|---|----------------------------------|
| STATE OF DELAWARE, | : | |
| | : | I.D. Nos. 1011000920, 1102016138 |
| v. | : | and 1102016138 |
| | : | |
| CHARLENE COX, | : | |
| | : | |
| Defendant. | : | |

Submitted: September 23, 2011

Decided: October 6, 2011

ORDER

Upon Defendant's Motion to Withdraw
Guilty Plea. *Denied.*

R. David Favata, Esquire for the State of Delaware.

Leroy A. Tice, Esquire, Wilmington, Delaware, attorney for the Defendant.

WITHAM, R.J.

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FACTS

On April 12, 2011, the Defendant, Charleen Cox, entered a plea of guilty with this Court to three charges of forgery in the second degree. The State entered a *nolle prosequi* on the remainder of the charges included in the indictment in accordance with a plea deal with the Defendant. The Defendant attacks her guilty plea on two legal grounds. First, she asserts that the entry of her plea was not knowing and voluntary. Her assertion is rooted in her purported diagnosis of manic depression, for which she allegedly had not received her medication, and the coercive nature of the plea negotiations. Second, she complains that the assistance of counsel provided was ineffective.

Standard of Review

“A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court.”¹ Under Superior Court Criminal Rule 32(d), a defendant bears the burden of showing that there is a fair and just reason to permit the withdrawal.² In evaluating whether to permit a defendant to withdraw his or her guilty plea, the judge must address five questions:

¹*Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007) (quoting *Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999)).

²Superior Court Criminal Rule 32(d):
Plea withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before imposition or suspension of sentence or disposition without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 61.

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1) Was there a procedural defect in taking the plea; 2) Did [defendant] knowingly and voluntarily consent to the plea agreement; 3) Does [defendant] presently have a basis to assert legal innocence; 4) Did [defendant] have adequate legal counsel throughout the proceedings; 5) Does granting the motion prejudice the State or unduly inconvenience the court?³

The factors do not lend themselves to a balancing analysis.⁴ For example, if a serious procedural defect occurs in the plea process, or if it clearly appears that the defendant did not knowingly and voluntarily consent to the plea agreement, a sufficient basis exists for withdraw of the plea regardless of whether a basis for a claim of factual innocence exists or whether there is prejudice to the state.⁵ Only where the judge determines that “the plea was not voluntarily entered or was entered because of misapprehension or mistake of defendant as to his legal rights” should the judge grant the defendant’s request to withdraw his guilty plea.⁶

“[A] defendant’s statements to the Superior Court during the guilty plea colloquy are presumed to be truthful.”⁷ Where a defendant has signed her Truth-in-

³*Scarborough*, 938 A.2d at 649 (citing *State v. Cabrera*, 891 A.2d 1066, 1069-70 (Del. Super. 2005)); *State v. Friend*, 1994 WL 234120, at *2 (Del. Super. May 12, 1994). These five factors are referred to as the “Cabrera factors” or alternatively as the “Friend factors.” For illustrative analysis of the five factors, see *Friend*, 1994 WL 234120, at *2-*4.

⁴*Patterson v. State*, 684 A.2d 1234, 1238-39 (Del. 1996).

⁵*Id.* at 1239.

⁶*Scarborough*, 938 A.2d at 650 (citing *State v. Insley*, 141 A.2d 619, 622 (Del. 1958)).

⁷*Id.* (citing *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)).

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Sentencing Guilty Plea forms and has answered at the plea colloquy that she understands the effects of the plea, the defendant must show *by clear and convincing evidence* that she did not sign those forms knowingly and voluntarily.⁸

DISCUSSION

_____ In a motion to withdraw a guilty plea before sentencing, the sound discretion of the trial court governs.⁹ The Cabrera factors¹⁰ guide the Court’s discretion in this area. The first factor asks, “Was there a procedural defect in taking the plea?”¹¹ The procedure for a plea colloquy is guided by Superior Court Criminal Rule 11 and *Brown v. State*.¹² After reviewing these collective requirements and reviewing the plea colloquy itself, the Court finds that it adequately covered all aspects of Rule 11 and *Brown*.

The second factor asks, “Did [defendant] knowingly and voluntarily consent to the plea agreement?”¹³ The Court had opportunity to hear extensively regarding this factor at the hearing on this motion, including testimony from the Defendant, her former counsel, Public Defender Suzanne Macpherson-Johnson, and a mental health

⁸*Id.* (citing *Savage v. State*, 815 A.2d 349, 2003 WL 214963, at *2 (Del. Jan. 31, 2003) (TABLE)).

⁹*Id.* at 649 (quoting *Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999)).

¹⁰*Cabrera*, 891 A.2d at 1069-70.

¹¹*Id.* at 1069.

¹²250 A.2d 503, 505 (Del. 1969).

¹³*Cabrera*, 891 A.2d at 1070.

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evaluator employed by the Public Defender's Office, James Dunn. The Defendant raises two arguments disputing her plea. She testified that she suffers from manic depression, a condition for which she had not received medication on the day of her plea. She also feels that she was coerced into signing her plea agreement with the State. Addressing the coercion argument first, the Court specifically asked in the plea colloquy, "Has anyone forced or threatened you to enter this plea?"¹⁴ The Defendant answered in the negative.¹⁵ Further, the Defendant indicated on her Truth-in-Sentencing form, through her counsel, that she had not been coerced into signing the plea. At the motion hearing, no reputable evidence came to light regarding coercion of the Defendant. Therefore, the Court is satisfied that no coercion affected the Defendant's plea.

As to the Defendant's claim that she had not been properly medicated, the Court heard ample testimony. She stated that on the day of her plea, she did not have medication for her manic depression, and this resulted in a plea that was not knowing and voluntary. Although the Court was not made aware of the Defendant's mental health background at the time of her plea, it is nevertheless satisfied that this lack of medication did not affect the knowing and voluntary nature of her guilty plea. The Defendant's former counsel astutely referred her to Mr. Dunn upon receiving information that she may suffer from mental illness. Through the testimony of Mr.

¹⁴Plea Tr. at 8 (Apr. 12, 2011).

¹⁵*Id.*

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Dunn, the Court is certainly aware of the transient nature of mental states. Nevertheless, the Court will not ignore the fact that Mr. Dunn specifically addressed the competency of the Defendant while she was not medicated and found her to be competent. On the morning of the plea, Mrs. Macpherson-Johnson, who has extensive experience in her position, did not observe any indication that the Defendant's mental illness was affecting her ability to make a knowing and voluntary plea. This included an interaction with the Defendant for roughly half an hour that day. If anything had been out of the ordinary, it is very likely that Mrs. Macpherson-Johnson would have noticed and protected her client accordingly. Thus, the Court finds that the Defendant failed to present clear and convincing evidence that her plea was not entered into knowingly and voluntarily.¹⁶

Moving to the third factor, "Does [defendant] presently have a basis to assert legal innocence?"¹⁷ The Defendant admitted guilt during her plea colloquy.¹⁸ At the hearing on this motion, the Defendant asserted no basis for innocence. The Court finds that the Defendant has no basis to assert legal innocence.

The fourth factor states, "Did [defendant] have adequate legal counsel throughout the proceedings?"¹⁹ This is the second main area that the Defendant

¹⁶*Scarborough*, 938 A.2d at 650 (citing *Savage v. State*, 815 A.2d at *2).

¹⁷*Cabrera*, 891 A.2d at 1070.

¹⁸Plea Tr. at 8.

¹⁹*Cabrera*, 891 A.2d at 1070.

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attacks. In order to prevail on a claim of ineffective assistance of counsel, the Defendant must satisfy the test under *Strickland v. Washington*²⁰ as articulated by the Delaware Supreme Court in *Mapp v. State*.²¹ The Defendant must show that “(1) defense counsel’s conduct fell below ‘an objective standard of reasonableness’; and that (2) counsel’s actions were prejudicial, i.e., there is a reasonable probability that, but for counsel’s errors [the defendant] would not have entered a guilty plea and would have insisted on going to trial.”²²

The Defendant complained that her former counsel did not negotiate adequately by considering her alleged hardship, that her former counsel did not raise the issue of her client’s mental illness, and that her former counsel played a role in coercing her into accepting the plea deal. On the testimony heard in this motion, there is no basis for the allegation that Mrs. Macpherson-Johnson did not adequately negotiate this plea agreement nor that she coerced her client into accepting the deal. Mrs. Macpherson-Johnson negotiated at least three modifications to the deal. She met with her client once via video conference and for roughly half an hour on the morning of the plea deal.

Although Mrs. Macpherson-Johnson did not bring her client’s mental illness to the attention of the Court, which the Court would have preferred, she made sure

²⁰466 U.S. 668 (1984).

²¹642 A.2d 837, 1994 WL 91264, at *1-*2 (Del. Mar. 17, 1994) (TABLE).

²²*Id.* at *1.

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that the Defendant was examined by Mr. Dunn, who found the Defendant to be competent at the time of his examination. Further, the Defendant did not mention her mental illness at the time of her colloquy. The Court does not find either prong of *Strickland* to be satisfied. Thus, the Defendant had adequate legal counsel.

The fifth factor states, “Does granting the motion prejudice the State or unduly inconvenience the court?”²³ The State did not introduce any evidence on this factor, and the Court would not be unduly inconvenienced by withdrawing the Defendant’s guilty plea.

CONCLUSION

_____After analyzing the preceding five factors and given the Defendant’s answers during her plea colloquy and on her Truth-in-Sentencing form, the Court finds no fair and just reason to allow withdrawal of the Defendant’s guilty plea. She entered her plea voluntarily and she understood her legal rights. The motion is hereby *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

xc: R. David Favata, Esquire

Leroy A. Tice, Esquire

²³*Cabrera*, 891 A.2d at 1070.