IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	ID No. 0602013039
JAMES R. RUNYON,	)	
	)	
Defendant.	)	

Submitted: May 19, 2008
Decided: June 26, 2008

On Defendant James R. Runyon's Motion for Postconviction Relief. **DENIED.**

MEMORANDUM OPINION

James R. Runyon, Defendant, *Pro Se*

JOHNSTON, J.

PROCEDURAL CONTEXT

On September 7, 2006, Runyon pled guilty to Attempted Robbery First Degree and Assault Second Degree. On November 17, 2006, Runyon was sentenced as a habitual offender only on the Assault Second Degree charge. Runyon's previous convictions include: (1) Aggravated Harassment (2006); (2) Escape After Conviction (2002); (3) Receiving Stolen Property (March 1996); (4) Assault First Degree (December 1996); and (5) Conspiracy Second Degree (1994). On March 13, 2008, Runyon filed a *pro se* motion for postconviction relief.

On April 22, 2008, Runyon filed a Motion for Discovery/Expansion of Record. Runyon sought discovery in order to support his *Pro Se* Motion for Postconviction Relief. On April 22, 2008, Runyon filed a Motion for Plea Colloquy and Sentencing Transcripts at State Expense for Rule 61 Proceedings. On May 7, 2008, the Court granted the Motion to transcribe: the September 7, 2006 Plea Colloquy and the November 17, 2006 Sentencing Hearing, at State expense.

STATEMENT OF FACTS

Kathryn van Amerongen, Esquire was appointed as Runyon's defense counsel through the Public Defender's Office. Van Amerongen filed a "Public Defender Declaration of Conflict/Request for Appointment of Counsel." The Declaration explained that another attorney with the Public Defender's Office represented a client in a Family Court proceeding in which Runyon was an alleged

perpetrator. Runyon learned of this conflict of interest and counsel's subsequent withdrawal by letter. Kathryn van Amerongen's husband, Jan van Amerongen, was appointed as Runyon's contract attorney.

Runyon's Memorandum of Law in support of his *Pro Se* Motion for Postconviction Relief asserts six separate claims of ineffective assistance of counsel, as the basis for withdrawal of his guilty plea and a new trial.[1] These six claims present 3 substantive issues: (1) whether defense counsel's representation was defective due to an actual conflict of interest; (2) ineffective assistance of counsel; and (3) whether the trial Court erred in accepting defendant's guilty plea because defendant lacked the requisite capacity.

[1] (i) "plea unintentionally entered where it was made involuntarily, unintelligently, and unknowingly while counsel was in a conflict of interest;" (ii) "violation of Due Process Clause led to a 'Plain Error' where the Court failed to establish a record where Movant was on various medications and that the possibility of side effects hindered Movant from making intelligently, knowingly, and voluntary choices to plead guilty, is reversible error;" (iii) "Ineffective Assistance of Counsel renders plea unconstitutionally entered where Counsel failed to inform Movant of the elements or critical elements of the charges that he was pleading guilty to;" (iv) "Ineffective Assistance of Counsel renders plea unconstitutionally entered where counsel failed to: (1) Do any type of investigation, communicate with Movant, and put the state's case to an adversarial challenge in the pre-trial stages; and (2) Investigate the evidence, facts, and law of the case before having Movant plead guilty;" (5) " 'plain error' by the Court and ineffective assistance of counsel where Movant pled guilty while being mentally incompetent violated 'Due Process' of the Fifth and Fourteenth Amendment against such and the Sixth Amendment and right to counsel at all critical stages;" and (vi) "Deprived of direct appeal of conviction and sentence where Counsel not only failed to inform; should have filed one on behalf of Movant where the Supreme Court would have had to address the legality and 'plain errors' that occurred at the time of plea, and the conflict of interest by counsel of record."

STANDARD OF REVIEW

In evaluating a postconviction relief motion, the Court must first ascertain if any procedural bars of Superior Court Criminal Rule 61(i) apply.[2] If a procedural bar is found to exist, the Court should refrain from considering the merits of the individual claims.[3] This Court will not address claims for postconviction relief that are conclusory and unsubstantiated.[4]

Pursuant to Rule 61(a), a motion for postconviction relief must be based on "a sufficient factual and legal basis." According to Rule 61(i)(1), a postconviction relief motion may not be filed more than one year after judgment of conviction is final or one year after a newly-discovered, retroactively-applicable right is recognized by the United States Supreme Court or the Delaware Supreme Court. Pursuant to Rule 61(b)(2), "the motion shall specify all the grounds for relief which are available to movant… and shall set forth in summary form the facts supporting each of the grounds specified."

Any ground for relief not asserted in a prior postconviction relief motion is thereafter barred unless consideration of the claim is necessary in the interests of

[2] *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[3] *See id*.

[4] *See id.* at 555.

justice.[5] Grounds for relief not asserted in the proceedings leading to the judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for the procedural default; and (2) prejudice from violations of movant's rights.[6] Any formerly-adjudicated ground for relief, whether in a proceeding leading to the judgment of conviction, in an appeal, or in a postconviction proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.[7]

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's errors were so grievous that counsel's performance fell below an objective standard of reasonableness; and (2) actual prejudice, that is, that there is a reasonable degree of probability that but for counsel's errors, the outcome of the proceedings would have been different.[8] In making a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.[9] Although the *Strickland* standard is a two-part test, the showing of prejudice is so central to this

[5] Super. Ct. Crim. R. 61(i)(2).

[6] Super. Ct. Crim. R. 61(i)(3).

[7] Super. Ct. Crim. R. 61(i)(4).

[8] *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

[9] *Younger*, 580 A.2d at 556; *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989).

claim that "[i]f it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice, which we expect will often be so, that source should be followed."[10] In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representations were true, the claim may be dismissed on this basis alone.

To overturn a conviction on the basis of an allegation of attorney conflict of interest, a defendant must prove: (1) that an actual conflict of interest existed; and (2) that the conflict of interest adversely affected the attorney's performance.[11] To be precise, an actual conflict of interest means a conflict of interest that actually "affected counsel's performance -- as opposed to a mere theoretical division of loyalties."[12] Thus, a defendant who shows that "a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."[13] There is a presumption of prejudice when counsel is burdened by an actual conflict of interest.[14]

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[10] *Strickland*, 466 U.S. at 697.

[11] *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

[12] *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005).

[13] *Cuyler*, 446 U.S. at 349-50.

[14] *Smith v. Robbins*, 528 U.S. 259, 287 (2000).

The plea bargaining stage is a critical stage to which the right to effective assistance of counsel attaches.[15] The accused relies on counsel to make an independent examination of the facts, circumstances, pleadings, laws involved, and relevant comparative sentences.[16]

ANALYSIS

Conflict of Interest

Runyon claims that his attorney represented him while under an actual conflict of interest, in violation of his Sixth Amendment right to counsel and his due process rights.

Runyon believes that because his contract counsel is the husband of Runyon's former public defender, an actual conflict of interest existed. However, the public defender withdrew due to an imputed conflict of interest related to another public defender. The other public defender represented an opposing party in an unrelated matter in Family Court.

Runyon suspects contract counsel of being hostile due to the conflict of interest involving counsel's wife. This mere suspicion is wholly unsubstantiated. Contract counsel are appointed precisely to avoid conflicts of this type. There is no ethical bar to the substituted representation in this case. Runyon has failed to

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[15] *United States v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982).

[16] *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (citing *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948)).

identify anything in the record, or to specify any actions of contract counsel that support allegations of an actual conflict of interest. There is no suggestion that any confidential information detrimental to Runyon was exchanged. There was no actual conflict of interest. The Court finds Runyon's allegation entirely conclusory and without merit.

Ineffective Assistance of Counsel

Runyon argues ineffective assistance of counsel, because contract counsel failed to properly investigate the facts, and did not discuss tactics and strategy with Runyon. Runyon does not assert that defense counsel refused to convey such information when requested, instead Runyon asserts that "counsel never contacted [Defendant] as to any type of defense, much less anything else, but left [Defendant] in the dark concerning his future."

During the September 7, 2006 plea colloquy, Runyon stated that he fully understood the proceedings, and that he was satisfied with counsel's performance:

THE COURT	Do you feel that you fully understand everything that is going on today?
THE DEFENDANT	Yes.
THE COURT	Have you discussed these documents with your counsel?
THE DEFENDANT	Yes.

THE COURT Are you satisfied with Mr. Van Amerongen's representation of you?

THE DEFENDANT Yes.

THE COURT Do you understand that you could be facing a three-year minimum mandatory penalty if you are sentenced as an habitual offender on the Assault 2nd?

THE DEFENDANT I'm not really understanding those things, because it's – I'm saying I get three years mandatory, I didn't know I was going to be sentenced as an habitual. I thought this would be a plea agreement to be 11 years.

THE COURT Do you understand that you're eligible to be sentenced as an habitual offender because of your prior record?

THE DEFENDANT No, I didn't understand that, Your Honor.

THE COURT Okay. Do you understand that now?

THE DEFENDANT Yes.

THE COURT All right. And because of that, first of all, do you understand that I could sentence you up to 33 years in prison if I chose to?

THE DEFENDANT But if you don't follow the State's guidelines, the prosecutor –

THE COURT That's right. I can do whatever I want. Do you understand that?

THE DEFENDANT Yes, I know.

THE COURT Has anyone promised you what your sentence will be?

THE DEFENDANT No, but now I'm scared.

THE COURT Well, you should be. Has anyone offered you anything in exchange for this plea?

THE DEFENDANT No.

THE COURT The reason I said that you should be is, you're facing some serious charges; on the other hand, if Mr. Runyon had gone to trial, and had been found guilty on all these charges, what would he be facing?

MR. VAN AMERONGEN Your Honor, if the State intended to seek habitual-offender status on each and every felony for which he was convicted, it would be my understanding of what the prosecutor intended to do, it would be a 25-year minimum mandatory on Attempted Robbery; a 25 minimum, Possession of a Deadly Weapon During the Commission of a Felony; an eight-year minimum mandatory on Assault 2nd, I believe that's it.

THE COURT So, you would have been facing 58 years minimum mandatory had you gone to trial had you been found guilty. And if the State had moved to have you sentenced as an habitual offender on all these charges, which my guess is they would have, you would potentially be facing the rest of your natural life in prison. Do you understand that?

THE DEFENDANT Through the plea agreement?

THE COURT No, if you had gone to trial.

THE DEFENDANT Okay, I follow you. Yeah.

THE COURT So, even though you don't have good options, if you decide to take the plea you will not be facing 58 years minimum mandatory. Do you understand that?

THE DEFENDANT Yes, Your Honor.

THE COURT So, I think you understand what you're facing. It appears to the Court that you had a hard decision to make, but that you understand that neither of your options were very good at this point

THE DEFENDANT Yes.[17]

Runyon challenges contract counsel's strategy and tactics. Runyon asserts that defense counsel "failed to put the state's case to an adversarial challenge in the pre-trial stages." Runyon makes other related complaints pointing to the strength and the amount of the evidence against him. Runyon argues that counsel did not "question the victim about the conflict of evidence in the police reports and how [Defendant] told the police that the incident did not occur as [the] victim had reported."

The Court finds that counsel's actions were reasonable and well within acceptable advocacy of an attorney. The State's evidence included corroborated eye-witness testimony sufficient to establish Runyon's guilt. Strategic and tactical decisions are the exclusive province of defense counsel.[18] Acceptance of the plea avoided the virtual certainty of Defendant being sentenced as an habitual offender

[17] Plea Tr. At 6:17-10:1.

[18] *Jones v. Barnes*, 463 U.S. 745, 753 (1983).

on multiple offenses (should he have been found guilty), resulting in a 58-year minimum mandatory sentence. Balancing the possible difference in minimum mandatory sentences alone, it is clear that the plea offer was a viable and logical defense strategy.

Runyon also asserts that he was unaware of the "essential elements of the crime that he was pleading guilty to." The plea colloquy demonstrates the contrary:

THE COURT	Did you, on or about July 21st, 2005, in New Castle County, Delaware when in the course of attempting to commit theft, you intentionally threatened immediate force upon William Phillips, who was not a participant in the crime; is that correct?
THE DEFENDANT	Yes.
THE COURT	Did you on or about July 21st, 2005, in New Castle County, Delaware, intentionally or recklessly cause physical injury to William Phillips with a stick, which is a deadly weapon or a dangerous instrument?
THE DEFENDANT	Yes.
THE COURT	How do you plead?
THE DEENDANT	Guilty.

The indictment also clearly sets forth the elements of each offense. The Court finds that counsel's actions were well within the parameters of effective assistance of counsel. In the absence of attorney conduct that is unreasonable or

unacceptable, the Court need not conduct any inquiry into the prejudicial effects of counsel's performance.

Defendant's Capacity to Enter a Guilty Plea

Runyon may demonstrate competency to enter a guilty plea through his "understanding of the proceedings throughout the hearing, to the satisfaction of both the Court and defense counsel."[19] Such observations by the Court satisfy due process. The error alleged by a defendant must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[20] When the record is clear that the trial court conducted a careful and complete guilty plea colloquy prior to accepting a guilty plea, there was no plain error.[21]

Runyon asserts that his plea was unconstitutionally entered because it was involuntary, unintelligent, and unknowing. Runyon is challenging his capacity to enter a plea, and in conjunction argues that his counsel was ineffective for failing challenge capacity. Runyon claims that the Court had a duty to *sua sponte* conduct a hearing into Runyon's capacity.

Runyon claims that at time of the plea colloquy, he was on medications which should have "sparked a red flag…as to Defendant's competency" and that

[19] *Id.*

[20] *Chance v. State*, 685 A.2d 351, 354 (Del. 1996).

[21] *Abdul-Akbar v. State*, 1999 Del. LEXIS 177, at *5.

he was incompetent at the time of the plea colloquy "where [his] mental capacity was so incoherent that movant just signed the plea."

During the plea colloquy, the Court addressed in detail the issue of Runyon's mental capacity:

THE COURT	Mr. Runyon, I'm reviewing a plea agreement, and a Truth-in-Sentencing guilty plea form. Did you wish to add anything, Mr. Van Amerongen?
MR. VAN AMERONGEN	Only, Your Honor, it indicates on the Truth-in-Sentencing Guilty-Plea Form, we indicated yes that he has been a patient in a mental hospital for one week in 2004 and one week in 2005. He was an inpatient at Meadowood and Wilmington Psychiatric Hospital. With respect to being under the influence of alcohol or drugs at this time, Your Honor, we checked off no; however, he's taking prescription Prozac and Seroquel, neither of which compromise his ability to understand or comprehend any of our discussions, nor would it compromise his understanding of what's going on today.
THE COURT	All right. Let's begin with that, Mr. Runyon. You've heard your attorney talk about you taking medication. What effect does that have on you?
THE DEFENDANT	It doesn't affect my judgment. If anything it makes it better.
THE COURT	All right. And do you have any residual effects from your hospitalizations at Meadowood?
THE DEFENDANT	I might have, but they should be dealt with mental-health counselors. I guess I have to go to them to deal with it. They come to see me on a regular basis.

THE COURT Do you feel that you fully understand everything that's going on today?

THE DEFENDANT Yes.[22]

The Court and contract counsel were aware of Runyon's prior hospitalization and Defendant's prescription medication. Runyon affirmed his understanding of the proceedings, and expressed his views on his condition. The Court personally observed Runyon's apparent physical condition and demeanor, and concluded that the hearing could proceed. The Court clearly found that Runyon had the capacity to enter a voluntary, intelligent, and knowing plea and that additional investigation into Runyon's capacity was unwarranted.

Motion for Discovery/Expansion of the Record

Pursuant to Rule 61(g), the judge may direct that the parties expand the record by the inclusion of additional materials relevant to the determination of the

[22] Plea Tr. at 5:7-6:19.

merits of the motion. Runyon requested discovery in fifteen areas.[23] Runyon's overbroad discovery expansion request includes only two categories that could possibly be pertinent to his Motion for Postconviction Relief: (1) exculpatory evidence; and (2) transcript of the preliminary hearing. The State is required to disclose exculpatory and impeachment evidence, *i.e.*, *Brady* material, prior to trial.[24] There is no evidence in the record that indicates that the State failed to disclose *Brady* material. Further, Runyon's Motion for Postconviction Relief does not allege that the State withheld any *Brady* material.

Preliminary hearing transcripts may be relevant to a Motion for Postconviction Relief where Defendant alleges ineffective assistance of counsel. However, any expansion of the record is discretionary. After the Court's review of the transcript of the February 21, 2006 preliminary hearing, the Court finds no

[23] (1) identification of all tests or examinations conducted regarding this case; (2) identity, rank, work history, training, certifications, and copies of any internal or public complaints regarding such individuals; (3) reports of all of the aforementioned tests, and any supporting documents that explain the basis or underlying theories behind such tests; (4) chain of custody relevant to all evidence or reports relating to the tests conducted concerning this case; (5) all physical evidence regarding this case; (6) an accurate and clear copy of all video or sound recordings made regarding this case; (7) any statements written, transcribed, recorded, or summarized made by Defendant; (8) the names of all possible witnesses with their names and addresses; (9) all police reports, memorandum, memobooks, logbooks, investigative reports, etc., related to this case; (10) copies of any statements given to any law enforcement officer by witnesses regarding this case; (11) names and curriculum vitae of all experts consulted regarding this case whether or not the prosecution planned to call them as witnesses; (12) transcripts of all grand jury testimony regarding this case; (13) all medical records of the victim regarding this case with the dates they were originally obtained with an affidavit from hospital staff; (14) any and all evidence in any form, which may exculpate the Defendant; and (15) transcripts of the preliminary hearing.

[24] *State v. Block*, 2000 WL 303351, at *2 (Del. Super.); *see also Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the prosecution must disclose any exculpatory or impeachment evidence).

evidence to justify the exercise of the Court's discretion to expand discovery to include the preliminary hearing transcript.

CONCLUSION

Runyon's Motion for Postconviction relief is without merit. Defense counsel did not have an actual conflict of interest. Contract counsel's performance was not ineffective. During the plea colloquy, the Court found that Runyon had the requisite capacity to enter a guilty plea. Runyon's Motion for Discovery/Expansion of the Record to support his Motion for Postconviction Relief is unnecessary to support his Rule 61Motion.

THEREFORE, Runyon's *Pro Se* Motion for Postconviction Relief and his subsequent Motion for Discovery/Expansion of the Record are hereby **DENIED**.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston