IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	ID #0006014607
MOHAMMAD KHAN,	)	
	)	
Defendant.	)	

Submitted: April 4, 2003
Decided: June 2, 2003

On Defendant's Postsentence "Motion to Withdraw Guilty Plea and/or for Postconviction Relief…." DENIED.

ORDER

This 2nd day of June, 2003, upon consideration of a postsentence "Motion to Withdraw Guilty Plea and/or for Postconviction Relief…" filed by defendant Mohammad Khan ("Defendant") it appears to the Court that:

1. Defendant, through counsel, has filed a motion to withdraw his September 18, 2000 plea of guilty to a single count of Possession with Intent to Deliver Marijuana,[1] on the grounds that he entered such plea under

[1] See DEL. CODE ANN. tit. 16, § 4752 (1995).

"extreme duress and coercion."[2] In the motion, Defendant also advises of a then-pending deportation action to which he is now apparently subject, which action is apparently affected by his conviction. In his Reply to the State's Response to his motion, Defendant has also asked for an evidentiary hearing.

Because the colloquy held by the Court when Defendant pleaded guilty indicates that Defendant's plea was free of "extreme duress and coercion" in that it was made knowingly, voluntarily and intelligently (and because the Truth-in-Sentencing Guilty Plea Form executed by Defendant at that time confirms the same), this Court now determines that Defendant is not entitled to the evidentiary hearing he seeks; Defendant has otherwise failed to sufficiently corroborate his allegations of "extreme duress and coercion," and his motion is accordingly **DENIED**.

2. On June 19, 2000, Defendant was driving a vehicle owned by a third person. That person, along with two other individuals, was then a passenger in the car. Defendant was stopped by the New Castle County Police for speeding. A search of the vehicle revealed marijuana and an

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[2] Def.'s Mot. ¶ 11. Defendant further alleges that "his guilty plea was the result of severe psychological and physical intimidation and threats made upon him and his family and/or serious physical injury if he did not admit to [ ] ownership and possession of [a] handgun and marijuana [found when Defendant was stopped for a motor vehicle violation]." Def.'s Mot. ¶ 10.

unloaded 9mm handgun. At some point Defendant apparently admitted to the police that the marijuana and the handgun were his.

As a result, Defendant was charged with: Possession with Intent to Deliver Marijuana; Maintaining a Vehicle; Possession of a Firearm During the Commission of a Felony; Carrying a Concealed Deadly Weapon; Speeding; Driving an Unregistered Motor Vehicle; Failure to Destroy a Temporary Registration Tag; and Driving with an Expired Temporary Registration Tag. On September 18, 2000, Defendant accepted the State's plea offer to plead guilty to a single count of Possession with Intent to Deliver Marijuana, with the remaining charges being nolle prossed. The State recommended a five-year sentence at Level V, suspended for five years at Level III, suspended after 18 months for the balance at Level II.

Defendant had retained counsel at the time of the negotiation of the State's offer. At the time of the guilty plea colloquy, Defendant's counsel twice stated that he considered the offer to be "an exceptionally good plea" for the Defendant.[3] Counsel also informed the Court that he believed Defendant's willingness to accept the State's offer was a "knowing, voluntary and intelligent plea[ ][.]"[4]

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[3] Guilty Plea H'rg Tr. of 9/18/00 at 2, 8.

[4] Id. at 3.

The Court reviewed the Truth-in-Sentencing Guilty Plea Form with Defendant, and otherwise engaged in the required Rule 11 colloquy.[5] The form indicated that if convicted of a criminal offense, non-citizens could potentially face deportation. It also indicated that Defendant had not been threatened or forced into entering the plea, and that he was satisfied with his attorney's representation of him. When asked if he had reviewed the plea agreement thoroughly and carefully with his attorney before signing it, Defendant replied, "Yes, sir."[6]

Also at the colloquy, when the Court asked Defendant if he believed that he was knowingly, voluntarily and intelligently pleading guilty, Defendant responded, "Yes, sir."[7] Defendant similarly indicated on his Truth-in-Sentencing Guilty Plea Form that he had "freely and voluntarily decided to plead guilty to the charges listed in [his] written plea agreement."[8] When asked if he had committed the offense of Possession with Intent to Deliver, Defendant again answered, "Yes, sir."[9]

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[5] See SUPER. CT. CRIM. R. 11(c) (describing the procedure that this Court must follow before accepting a plea of guilty to any felony charge); Guilty Plea H'rg Tr. of 9/18/00 at 4-7.

[6] Guilty Plea H'rg Tr. of 9/18/00 at 6.

[7] Id. at 7.

[8] See Ex. "C" to State's Resp. to Def.'s Mot.

[9] Guilty Plea H'rg Tr. of 9/18/00 at 7.

The Court thereafter accepted Defendant's plea of guilty, as well as the State's sentencing recommendation.[10] The Court immediately sentenced Defendant to five years at Level V, suspended for five years at Level III, suspended after 18 months for the balance at Level II.

This motion followed approximately 28 months later. Defendant did not include an affidavit or other sworn evidence in connection with the application, other than a Motion for Postconviction Relief appended to the motion and signed by both Defendant and his attorney, which contains the blunt assertion "Passengers threatened to kill…[him] and all his family if he didn't admit to ownership and knowledge of drugs and weapon."[11]

3. Defendant[12] seeks to withdraw his guilty plea because, as he now contends, "[i]mmediately prior to the actual stop by the police…[I] was advised by the three…[other occupants of the vehicle I was driving] that they had marijuana and a weapon in the car and that they would kill [me] if [I] did not admit to ownership of…[it all]."[13] Defendant further contends

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[10] The guilty plea was accepted under former Superior Court Criminal Rule 11(e)(1)(C), which provided that the State and a defendant could agree that a specific sentence "[wa]s the appropriate disposition of [a] case."

[11] Def.'s Mot. for Postconviction Relief ¶ 1 (Ex. "A" to Def.'s Mot.).

[12] In connection with the motion, Defendant is represented by the same lawyer who assisted him in negotiating his plea agreement.

[13] Def.'s Mot. ¶ 5.

that he “only learned that the[ ] [drugs and weapon] were in the car when he began to pull over[,]” and that the illegal items “were owned by the passengers [there]in….”[14] Defendant states that “due to…fear [I] failed to advise [my] parents of the threats against [my] life and [my] family and also failed to advise…counsel…of same.”[15] Additionally, Defendant discloses that he “ha[d] a green card and [had been] arrested and taken into custody by INS agents and is fighting a deportation hearing in Pennsylvania which is…in the Third Circuit Court of Appeals[ ][,]” and that he will be deported “if his guilty plea as…entered…stands[ ][.]”[16] While no such request was made in his original motion, Defendant states in his Reply that he should be granted “an opportunity to present evidence concerning the threats and intimidation exerted upon him by the passengers in [the] vehicle who were the owners and actual possessors of the marijuana and firearm….”[17]

In response, the State argues that Defendant has presented only “unsubstantiated allegations and conclusory statements” that fail to establish

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[14] Def.’s Mot. for Postconviction Relief ¶ 1.

[15] Def.’s Mot. ¶ 7.

[16] Id. ¶ 9.

[17] Def.’s Reply ¶ 8.

the duress and coercion of which Defendant now complains.[18] The State contends that Defendant is bound by his Rule 11 colloquy and written plea agreement, and also highlights the fact that the Truth-in-Sentencing Guilty Plea Form indicates that conviction of a criminal offense by a non-citizen may result in deportation. The State contends that "[a]t no time prior to the filing of []his motion, did the [D]efendant advise…that he had been threatened[ ]"[19] and therefore "submits that the collateral issue of deportation is the basis for [D]efendant's unsubstantiated claim of duress and/or coercion."[20] The State characterizes Defendant's current application as "a desperate attempt to avoid being deported."[21]

4. After sentencing, "a plea may be set aside only by motion under Rule 61."[22] Accordingly, "a motion to withdraw a guilty plea…is subject to the requirements of Rule 61, including its bars of procedural default."[23] Therefore, "[a]ny ground for relief that was not asserted in the proceedings

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[18] State's Resp. ¶ 7.

[19] Id. ¶ 4.

[20] Id.

[21] Id. ¶ 7.

[22] SUPER. CT. CRIM. R. 32(d).

[23] Blackwell v. State, 736 A.2d 971, 972-973 (Del. 1999) (affirming trial court's denial of a post-sentencing motion to withdraw guilty plea on the ground that the plea was not involuntary due to the non-disclosure of the driver's license revocation penalty).

leading to the judgment of conviction…is thereafter barred, unless the movant shows…[c]ause for relief…and…[p]rejudice….”[24] In evaluating procedural default, this Court “will not address claims…that are conclusory and unsubstantiated.”[25]

Here, Defendant asserts for the first time that his guilty plea was not voluntarily entered. This assertion comes almost halfway through Defendant's five-year probationary sentence. In his motion, he asserts (by means of representations contained within the appended Motion for Postconviction Relief and without further factual support) that he only learned that the marijuana and a 9mm handgun that he was "forced" to claim ownership of were in the car "when he began to pull over."[26]

Procedurally, the Delaware Supreme Court has held that "[t]he proper practice [in disposing of a motion to withdraw a guilty plea] contemplates testimony or affidavits presented to the trial judge."[27] Nevertheless, under

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[24] SUPER. CT. CRIM. R. 61(i)(3).

[25] State v. Zimmerman, ID #86010843DI, 1991 WL 190298, at *1 (Del. Super. Sept. 17, 1991) (denying claims of prosecutorial misconduct where claims were supported by neither factual evidence nor legal authority).

[26] Def.'s Mot. for Postconviction Relief ¶ 1.

[27] State v. Insley, 141 A.2d 619, 622 (Del. 1958). Even though Defendant has submitted no affidavit, any affidavit that could have been submitted that conformed to counsel for Defendant's unsworn representations in the body of the motion would not alter the essential facts established at the Rule 11 colloquy held by the undersigned judge.

Rule 61, an evidentiary hearing is to be held only if "desirable,"[28] *i.e.*, the holding of a hearing is discretionary.[29] And "where the trial court ma[kes] extensive inquiries before accepting [a] defendant's guilty plea, its refusal to conduct an evidentiary hearing on [a] defendant's motion to withdraw [a] guilty plea [will] not [be] an abuse of discretion."[30] This rule stems from the fact that a defendant's representations during the guilty plea colloquy "pose a [ ] formidable barrier in any subsequent collateral proceedings[ ]."[31]

Furthermore, at least one treatise on federal criminal procedure has addressed when a court should hold a hearing in connection with a postsentence motion to withdraw a guilty plea. Thus a federal court "must hold a plenary hearing where material issues of fact, not resolvable from the record, are raised by the allegations in the motion,[ ] which, if true, would

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[28] Rule 61 states in (h)(1) that "the judge shall determine whether an evidentiary hearing is desirable[ ]" and in (h)(3) that "[i]f it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates."

[29] See Maxion v. State, 686 A.2d 148, 151 (Del. 1996) (holding that if the trial court "determines in its discretion that an evidentiary hearing is unnecessary…then summary disposition…is entirely appropriate[ ]").

[30] 22 C.J.S. Criminal Law § 416 (1989) (citations omitted).

[31] Somerville v. State, 703 A.2d 629, 632 (Del. 1997) (citations omitted) (holding in the context of allegations of ineffective assistance of counsel that the defendant was bound by his answers on Truth-in-Sentencing Guilty Plea Form and by his sworn testimony prior to acceptance of his guilty plea). See also LARRY W. YACKLE, POSTCONVICTION REMEDIES § 102, at 401 (1981) (stating that petitioners must contend against the Rule 11 colloquy and are therefore "at a substantial disadvantage[ ]").

entitle the defendant to relief."[32] However, despite the foregoing, no hearing is necessary in a federal court where:

> the record on its face either shows that the defendant is not entitled to relief or conclusively and irrefutably contradicts the allegations in support of withdrawal[ ][;] the trial court made extensive Rule 11 inquiries prior to accepting the defendant's plea[ ][;] the allegations contained in the motion are mere conclusions not supported by specific facts or are inherently unreliable[ ][;] [or] the allegations in the motion are not grounds for withdrawal even if true.[33]

Here, Defendant indicated both in his Truth-in-Sentencing Guilty Plea Form and in the Rule 11 colloquy that he had reviewed the plea agreement thoroughly and carefully with his attorney before signing it, and that he was entering a plea of guilty knowingly, voluntarily and intelligently. In collaterally attacking these facts, Defendant has the burden to show that the plea was not voluntarily entered.[34] Defendant has not met that burden.

In Somerville, the Delaware Supreme Court plainly articulated that "absent clear and convincing evidence to the contrary," a defendant "is bound by his answers on the Truth-in-Sentencing Guilty Plea Form and by his sworn testimony prior to the acceptance of the guilty plea."[35] Given the

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[32] 9 Fed. Proc. § 22:908 (l. ed. 1993) (citation omitted).

[33] Id. (citations omitted).

[34] See Insley, 141 A.2d at 622 (stating under former Rule 32(d) that the "burden of proving manifest injustice [*i.e.*, that a plea was not voluntarily entered or was entered because of misapprehension or mistake of legal rights] is on the defendant[ ]").

[35] Somerville, 703 A.2d at 632.

above recitation of facts and analysis, it is clear that Defendant should be held to those narrations, and that an evidentiary hearing is not "desirable."[36]

First, and perhaps foremost, and although Defendant now asserts that he did not advise either his family or his attorney of the claimed "extreme duress and coercion" he was allegedly then experiencing, the motion comes nearly halfway through Defendant's probationary sentence (a sentence that Defendant's counsel himself recognized as "an exceptionally good plea")[37] and is seemingly in response to the deportation proceeding Defendant represents he was involved with at the time of the filing of the motion. Second, at the time sentence was imposed, additional charges were nolle prossed by the State—an action that may prove difficult to undo in terms of the State then bringing a renewed criminal prosecution, were the Defendant successful in his withdrawal of the guilty plea. Third, there is value in finality in sentencing, particularly a sentencing stemming from a voluntary and properly-counseled guilty plea.[38]

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[36] SUPER. CT. CRIM. R. 61(h). The Court notes that in the somewhat analogous context of post-conviction *habeas corpus* proceedings, "it is not necessary to grant a hearing…which may appear to be good on paper but is conclusively refuted by the files and records of the case…." 16 Fed. Proc. § 41:496 (l. ed. 1993) (citation omitted).
[37] Guilty Plea H'rg Tr. of 9/18/00 at 2.

[38] See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.5(a), at 195-196 (2d ed. 1999) (stating that "a high[ ] post-sentence standard for withdrawal is required by the settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea[ ]") (citations omitted).

Defendant's motion rises and falls on the record of the Rule 11 colloquy and on the Truth-in-Sentencing Guilty Plea Form that he had executed. In reviewing those statements, the Court finds that there does not exist "clear and convincing evidence"[39] contrary to the otherwise voluntary demonstration of guilt Defendant then exhibited.[40] The transcript does not reflect any concern voiced by the undersigned judge over Defendant's demeanor, and Defendant is therefore bound by his actions in entering his plea of guilty.[41] Defendant has failed to corroborate his claims of "extreme duress and coercion,"[42] and the Court agrees with the State's assertion that "the collateral issue of deportation is [most likely] the basis for [D]efendant's unsubstantiated claim of duress and/or coercion."[43]

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[39] Somerville, 703 A.2d at 632.

[40] And under Delaware law, "the custodian [*i.e.*, driver] of an automobile is presumed, by reason of [ ]status…to have dominion and control of contraband found in the automobile [ ][.]" Holden v. State, 305 A.2d 320, 322 (Del. 1973).

[41] Although Defendant asserts that due to fear he did not discuss the claimed "extreme duress and coercion" with his family or with his lawyer (and also that his guilty plea was the result of that fear), the Court notes that three months had passed from the time of the June 19, 2000 vehicle stop and the time of the September 18, 2000 guilty plea entry.

[42] Def.'s Mot. ¶ 11.

[43] State's Resp. ¶ 4.

Accordingly, under Rule 61(i)(3), Defendant has not show the cause and prejudice necessary to escape procedural default.[44]

5. For all of the above reasons, Defendant's postsentence "Motion to Withdraw Guilty Plea and/or for Postconviction Relief…" is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary
xc: Robert H. Surles, Esquire, Deputy Attorney General
Gordon L. McLaughlin, Esquire
Office of Investigative Services

[44] See Blackwell, 736 A.2d at 972-973 (stating "a motion to withdraw a guilty plea…is subject to the requirements of Rule 61, including its bars of procedural default[ ]").