SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

March 24, 2010

Billy G. Johnson
SBI No. 001
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

RE: State of Delaware v. Billy G. Johnson
Def. ID No. 0611012659
Memorandum Opinion - Motion for Postconviction Relief

Date Submitted: December 30, 2009

Dear Mr. Johnson:

This is my decision on your Motion for Postconviction Relief. You were charged with Delivery of Cocaine and Conspiracy in the Second Degree on November 27, 2006. These charges arose out of the delivery of cocaine by you and your girlfriend to an undercover police officer. Delaware State Police Officer William D. Crotty was participating with other police officers in an undercover drug investigation in the Cool Spring Farm area near Milton, Delaware. He was driving through a neighborhood in this area when you flagged him down. You approached Crotty's car and asked him what he needed. Crotty told you that he wanted some "tree," which is slang for marijuana. When you were unable to get the marijuana quickly, Crotty asked you if he could get some crack cocaine instead of the marijuana. You told Crotty to drive up the road. As Crotty was doing this, you went over to a white female standing near the road and engaged in a hand-to-hand transaction with her. You then pointed Crotty towards the white female. When Crotty approached the

white female, she gave him some crack cocaine. The white female was Lynn Bates. She pled guilty to Delivery of Cocaine. At your trial Bates testified that she was your girlfriend, that you gave her some crack cocaine, and that you told her to give it to Crotty. You were convicted by a jury on both charges on November 11, 2008. The State of Delaware filed a motion to have you sentenced as an habitual offender pursuant to 11 *Del.C.*§ 4214(a). I declared you an habitual offender and sentenced you to seven years at Supervision Level V, suspended after serving five years for probation on November 14, 2008. The Supreme Court affirmed your convictions on July 13, 2009.[1] You filed your Motion for Postconviction Relief on September 25, 2009. This is your first Motion for Postconviction Relief and it was filed in a timely manner. Therefore, it is not barred by Superior Court Criminal Rule 61(i)(1).

You allege that (1) your attorney did not effectively represent you, (2) you were incorrectly sentenced as an habitual offender, and (3) there were various problems in the indictment, evidence and jury instructions regarding accomplice liability. You were represented at trial by Michael R. Abram, Esquire. Abram submitted an affidavit responding to your allegations.

A. Ineffective Assistance of Counsel

You allege that Abram was ineffective because he (1) picked the 12 jurors without you being present, (2) allowed a relative of yours to serve on the jury, (3) agreed with the prosecutor to pick an all-white jury, (4) did not address the elements of the offense of Delivery of Cocaine, and (5) allowed you to be convicted of a non-existent charge. In order

[1] *State v. Johnson*, 976 A.2d 171 (TABLE), 2009 WL 2006881 (Del. July 13, 2009).

to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.[2] First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.[3] Second, the defendant must show that the deficient performance prejudiced the defense.[4] Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."[5] It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing that representation.'"[6] There is no procedural bar to claims of ineffective assistance of counsel.[7] Given the nature of your allegations, I have concluded that there is no need to have a hearing.

1. Jury Selection

You allege that Abram was ineffective because he picked the 12 jurors without you being present. Abram denies your allegation. You allegation is not based on fact. I presided over your trial. I did not allow the 12 jurors to be selected without you being present. This allegation is without merit.

---

[2] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[3] *Id.* at 687.

[4] *Id.*

[5] *State v. Coleman*, 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

[6] *Coleman*, 2003 WL 22092724, at *2, *quoting Strickland*, 466 U.S. at 689.

[7] *Coleman*, 2003 WL 22092724, at *1, *citing State v. Johnson*, 1999 WL 743612, at *1 (Del. Super. Aug. 12, 1999).

2. Pamela Hazzard

You allege that Abram allowed a relative of yours to remain on the jury. You allege that Pamela Hazzard is a distant cousin of yours and that she lied because she did not tell me that she knew you in response to the standard voir dire question asking the prospective jurors if they know the defendant. You allege that you told Abram this while the alternates were being picked. Abram supposedly told you that it was too late to strike Hazzard from the jury, but that he would file a motion later to deal with it. Abram denies your allegations. Moreover, your allegations simply do not make sense. If the conversation between you and Abram took place as you suggest, then Abram could have brought the matter to my attention and Hazzard could have been replaced with an alternate juror if necessary. It would not have made sense for Abram to tell you that he would deal with it later by filing a motion. I also note that you have not offered anything other than your naked assertion to establish that Hazzard is related to you. This allegation is without merit.

3. The All-White Jury

You allege that Abram and the prosecutor entered into an explicit agreement to select an all-white jury. Abram denies your allegation. Moreover, there is no factual basis for your allegation. Indeed, the facts suggest otherwise. The prosecutor only struck one prospective juror from the jury. The potential juror was an African-American woman. Abram immediately raised a *Batson*[8] challenge. The prosecutor struck the juror because she had less than a high school education. The prosecutor's rationale was that he wanted jurors with enough education to be able to follow the jury instructions. After questioning

[8] *Batson v. Kentucky*, 476 U.S. 79 (1986).

the prosecutor, I was satisfied that the prosecutor's motives were proper and that his use of a peremptory challenge was not based on race. Furthermore, Abram's *Batson* challenge proves that he did not agree with the prosecutor to pick an all-white jury. If there was such an agreement, then Abram would not have objected to the prosecutor's use of a peremptory challenge to strike the African American juror. This allegation is without merit.

4. The Elements of Delivery of Cocaine

You allege that Abram was ineffective because he did not address the elements of the Delivery of Cocaine charge. In order to find you guilty of Delivery of Cocaine, the jury had to find that (1) the substance was cocaine, (2) you delivered the cocaine, and (3) you acted knowingly. You also allege that because Bates handed the cocaine to Crotty, you are not guilty of the offense. The record does not support your allegation. Abram vigorously argued that the substance tested by the State was not cocaine. Abram also vigorously argued that you were not the one who delivered the cocaine to Crotty. The jury did not accept Abram's arguments. While you did not physically hand the cocaine to Crotty, the theory of accomplice liability enabled the jury to find you guilty of Delivery of Cocaine. A person is guilty of an offense committed by another person when intending to promote or facilitate the commission of the offense he solicits, requests, commands, importunes, or otherwise attempts to cause the other person to commit the offense.[9] The evidence in the record clearly established that you facilitated the crime by providing the crack cocaine to Bates, who in turn provided it to Crotty. This allegation is without merit.

[9] 11 *Del.C.* § 271.

5. The Non-Existent Charge

You allege that Abram allowed you to be convicted of and sentenced on a non-existent charge. Count 1 of the indictment is titled "Delivery of Cocaine." Count 1 alleges the following:

> Lynn M. Bates and Billy G. Johnson, on or about the 21st day of September, 2006, in the County of Sussex, State of Delaware, did knowingly and unlawfully deliver COCAINE, a Narcotic Schedule II Controlled Substance, [as classified under 16 *Del.C.* Section 4716(b)(4)], in violation of Title 16, Section 4751 of the Delaware Code.

The indictment is correct. Cocaine is a Narcotic Schedule II Controlled Substance. 16 *Del.C.* § 4751 makes the delivery of it a crime. The jury was instructed on the elements of Delivery of Cocaine. The jury found you guilty of this offense, and I sentenced you on it. This allegation is without merit.

B. Habitual Offender

You allege that you should not have been sentenced as an habitual offender. The basis of this allegation is your belief that to be sentenced as an habitual offender you had to be found guilty of the same felony offense three separate times, or any felony offense four separate times. You also allege that one of the felonies used to establish your status as an habitual offender was a misdemeanor. Your reading of the statute is incorrect. First, it is not necessary for the predicate felonies be identical. Second, your three prior convictions were all felonies. You have a conviction for Theft of Services Over $500 on January 25, 1994, a conviction for Escape in the Second Degree on April 16, 1997, and a conviction for Delivery of Cocaine on March 5, 1998. In contradiction to your allegation, the conviction of Theft of Services Over $500 was a Class E Felony at the time of your

January 25, 1994 conviction. You were properly sentenced as an habitual offender. This allegation is without merit

C. Accomplice Liability

You have made a number of allegations regarding accomplice liability. You allege that the indictment does not charge you as an accomplice. The indictment does not have to charge you as an accomplice. A person indicted for an offense may be convicted as an accomplice to another person guilty of committing the offense.[10] This is what happened in your case. You also allege that the State's theory of accomplice liability was not based on fact and that the testimony of Bates and Crotty is inconsistent. Crotty testified that he saw you approach Bates and engage in a hand-to-hand transaction with her. You then pointed Crotty towards Bates. When Crotty approached Bates, she gave him some crack cocaine. Bates was charged with and pled guilty to Delivery of Cocaine. She testified at your trial that she was your girlfriend, that you gave her the crack cocaine, and that you told her to give it to Crotty. There is nothing inconsistent about the testimony of Bates and Crotty and it clearly establishes a factual basis for the State's theory of accomplice liability. You also allege that the jury was not properly instructed on accomplice liability. However, you do not point out any errors with the jury instructions on accomplice liability. Lastly, you allege that only one person can be found guilty of Delivery of Cocaine. However, you do not set forth any legal basis for this allegation. All of your complaints about accomplice liability are without merit.

[10] 11 *Del.C.* § 275(a).

CONCLUSION

Your Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office
Department of Justice
Michael R. Abram, Esquire