IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 0702017502
	)	
	)	
CURTIS HAMILTON,	)	
	)	
Defendant.	)	
	)	

Submitted: June 18, 2010
Decided: June 24, 2010

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED.

Paul R. Wallace, Esquire, Chief of Appeals, Department of Justice, Wilmington, Delaware, Attorney for the State.

Joseph M. Bernstein, Esquire, 800 N. King Street, Wilmington, Delaware, Attorney for Defendant.

PARKER, Commissioner

This 24th day of June, 2010, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Following a three day jury trial held on November 1-5, 2007, Defendant Curtis Hamilton was convicted of two counts of first degree robbery and one count of using a hoax devise. On February 8, 2008, Defendant was sentenced to six years at Level V, followed by probation.

2. Defendant filed a direct appeal to the Delaware Supreme Court. His convictions and sentences were affirmed on October 16, 2008.[1] Defendant's motion for reargument was denied by the Delaware Supreme Court on April 21, 2009.

3. On January 25, 2007, Defendant Hamilton entered a Wachovia Bank branch in Wilmington, Delaware, carrying two backpacks. He approached Amy Kasonovic, the bank manager, who asked Hamilton how she could help him. According to Kasonovic, Hamilton responded that "his family . . . was being held, and that he had a bomb and gun and would use it if necessary because he needed money." Hamilton ordered Kasonovic to fill one of his backpacks with money, and then followed Kasonovic to the teller area. Kasonovic instructed Sandra Simmons, a co-worker who was behind the counter, to fill the backpack. Simmons put money in the backpack and handed it to Hamilton, but he told the women that it was not full enough, so they went to another teller to get more money. Hamilton again complained that the backpack was not full enough, but Kasonovic told him that there was no more money, and Hamilton fled.[2]

4. Defendant testified at trial that he was not the bank robber. He claimed that he had given his parka and his backpacks to a down-on-his luck person named "Joseph" whom

[1] *Hamilton v. State*, 2008 WL 4597395 (Del.).
[2] See, Delaware Supreme Court's recitation of facts set forth in *Hamilton v. State*, 2008 WL 4597395 (Del.), at *1.

he met at a gas station. According to Defendant, it must have been this "Joseph" who committed the bank robbery.[3]

5. On February 1, 2010, Defendant filed the subject motion for postconviction relief. Defendant's motion raises ineffective assistance of counsel contentions. Specifically, Defendant claims that his trial counsel was ineffective in the pre-trial and plea negotiation phase of the case for failing to fully inform Defendant concerning the strength of the State's case so that the Defendant could make an informed decision whether or not to accept the State's plea. Defendant further contends that trial counsel was ineffective for failing to determine the existence of any logical defense to the charges or develop any strategy to rebut the State's evidence. Defendant contends that if his counsel had been candid and forceful in telling him that it was a near certainty that he would be found guilty, it is reasonably probable that he would have accepted the State's plea rather than go to trial.

6. At Defendant Hamilton's first case review on June 11, 2007, he was offered a plea to one count of Robbery First Degree. Defense counsel advised Defendant that because of his lack of a prior record, Defendant would likely qualify for the minimum sentence of three years.[4] Defendant refused to consider the plea.

7. The same plea offer was made at Defendant's final case review on August 27, 2007. Whenever the possibility of a plea was broached, Defendant was adamant in expressing his absolute innocence of the charges to counsel. Any indication or

[3] November 5, 2007 Trial Transcript, at pgs. 61-68.
[4] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pg. 5-6; State's Response to Defendant's Rule 61 Motion, at pg. 9.

expression from counsel to Defendant that the State may have a good case was met with accusations from Defendant that counsel was "not on his side" and "didn't believe him."[5]

8. On August 27, 2007, the trial was rescheduled to October 2007. After the trial was rescheduled, on or about September 4, 2007, defense counsel sent Defendant a letter outlining the evidence that would be presented at trial and the possible outcome. In the letter, defense counsel outlined: (1) the State's photographic evidence from the bank video; (2) the witnesses descriptions of the suspect; (3) the State's fingerprint identification evidence; (4) evidence of his $3,000 bank deposit on the date of the robbery; (5) the evidence regarding Defendant's connection to a black Pontiac (the type of vehicle involved in the robbery); and (6) the difficulty in raising a duress defense when Defendant claimed that he did not do it. Defense counsel ended his letter stating that there was a very good chance that Defendant would be convicted as charged and that the minimum mandatory sentence was 6 years. Defense counsel suggested that Defendant reconsider his decision, cut his losses and enter the plea.[6]

9. Specifically, the letter stated:

> Your trial has been continued to _____. My review of the State's evidence that would likely be presented at your trial is:
>
> 1. A photograph(s) of the suspect at the bank. It will be the jury's job to determine if the likeness is that of you or not.
>
> 2. Testimony that the suspect was of the same race and physical characteristics as you. It will be up to the jury to determine what if any weight to give this testimony.
>
> 3. Your fingerprints are in the NJ newspapers located in the duffle bag/knapsack used by the suspect at the bank allegedly containing a bomb.

[5] Id.
[6] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pgs. 2-4.

4. Your bank statement indicated a declining balance until a $3000 deposit (cash?) on the day of the Robbery.

5. Testimony that the suspect fled in a black car (Pontiac).

6. Possibly a photo array wherein you are identified. I asked the DAG to provide more specific information on this issue.

Since you made a statement to the police (I have asked for a better copy of the audio tape but the police report indicates the original was of poor quality). Enclosed is a summary of the statement from the police report. If you take the stand to testify in your trial (which is your sole decision) it will be difficult to change your testimony from that of your prior statement and have the jury believe it unless you have a good reason. Moreover, if you testify, the State will be permitted to cross examine you about a wide range of issues concerning your statement.

Your statement places you in Delaware on the date of the robbery in a black Pontiac (and volunteers information about the green parka and black knapsack without the police telling you any thing about the facts of the robbery). It is very likely that the State will introduce the substance of your statement in their case to support their theory of the case. Your statement/defense as I see it, is that "Joseph" did the Robbery, not you. Balanced against this is that "Joseph" or the suspect is of the same physical characteristics as you, the possibility that the jury will see your likeness in the bank photo, that the suspect got into a car like yours (when Joseph did not have a car) your fingerprints are on the newspapers and the balance in your bank account.

Finally, there are the statements that the suspect made (that he was being forced to commit the robbery under duress) and his sad facial appearance. This might be good evidence (if it could be sufficiently corroborated with hard evidence) of a defense of Duress. However, in order to assert this defense, the defendant must be willing to admit that the act (a robbery) was in fact committed. My understanding is that you are not willing to admit to the act so apparently this defense is not available to you.

All in all, there is a very good chance that your (sic) will be convicted as charged and the minimum mandatory sentence is 6 years. I suggest you re-consider your decision, cut your losses and enter the plea. As I told you this is not about who has the smarter or better lawyer. The facts are the facts and

> **speak for themselves. What the lawyers say is not evidence. At trial, the jury will make the final decision.[7] (emphasis added)**

10. During the intervening months from the defense counsel's letter, September 4, 2007, advising Defendant to reconsider his refusal to accept the plea offer, to the time of trial November 1, 2007, Defendant continued to refuse to accept the plea offer.

11. Defendant remained adamant in expressing his absolute innocence of the charges. Any indication or expression from defense counsel to Defendant that the State may have a good case was met with accusations from Defendant that counsel was "not on his side" and "didn't believe him." Defendant advised defense counsel he would never take a plea to anything because he did not do the crime.[8]

12. At the time of jury selection on October 30, 2007, defense counsel again broached the subject of a plea with the State and Defendant. Defense counsel attempted to negotiate a *nolo contendere* plea to the first degree robbery charge offered by the State. The State agreed to offer a *nolo contendere* plea. The provisions of a no contest plea were explained to Defendant, but he still refused to accept the plea.[9]

13. Defense counsel made a notation in the Public Defender database on October 30, 2007, that Defendant again refused plea offer stating that he was not pleading

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[7] Defense counsel was unable to locate a copy of this letter, but advised by supplemental submission of June 18, 2010, that it was his practice to type his correspondence to his clients and then email the correspondence to his secretary for finalization and mailing. After he composes the correspondence, it is his practice to cut and paste the letter to the Public Defender's case data base for that client. Defense counsel provided a copy of Defendant Hamilton's Public Defender's data base notes which included the date and text of the letter.

[8] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pg. 5.

[9] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pg. 5-6; State's Response to Defendant's Rule 61 Motion, at pg. 9.

to something he didn't do. Defense counsel asked State about a no contest plea and the State agreed to offer a no contest plea but the Defendant still refused the plea.[10]

14. On the first day of trial, November 1, 2007, Judge Peggy Ableman, the trial judge, had a conversation with Defendant which was apparently sparked by defense counsel's candid assessment of Defendant's poor choice to proceed to trial.[11]

15. The plea offer of a no contest plea with a recommended three year minimum sentence was placed on the record. It was also noted that if Defendant proceeded to trial and was convicted, he was facing a minimum sentence of six years.[12]

16. Defendant expressed to the Court his dissatisfaction with defense counsel because Defendant did not like the manner in which defense counsel advised Defendant that he would probably not prevail at trial. The Court observed that defense counsel was, in all likelihood, giving an honest, objective assessment that Defendant was probably not going to win the case and was forcefully trying to encourage Defendant to accept the plea offer. The Court observed that Defendant was probably not facing reality. The Court pointed out to Defendant that when a defendant's fingerprints are located at the scene of the crime, it usually results in a conviction.[13]

17. Despite the Court's observations, despite the defense counsel's forceful attempts to make Defendant realize that he was unlikely to prevail at trial and that he should accept the plea offer, Defendant continued to adamantly refuse to accept the plea.

18. Defendant went to trial and as defense counsel predicated was convicted and thereafter sentenced to six years at Level V.

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[10] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pg. 6; June 18, 2010 letter enclosing Defendant's Public Defender's data base notes.
[11] November 1, 2007 Trial Transcript, pgs. 5-9.
[12] November 1, 2007 Trial Transcript, pgs. 8-9.
[13] November 1, 2007 Trial Transcript, pg. 7-9.

19. Defendant now comes before the Court and contends that his defense counsel was ineffective for not having done more to convince Defendant to accept the plea.

20. It is first noted that Defendant's ineffective assistance of counsel claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a claim, even where it has not been previously raised.[14]

21. To prevail on an ineffective assistance of counsel claim, the defendant must show that his counsel's efforts "fell below an objective standard of reasonableness" and that, but for his counsel's alleged errors, there was a reasonable probability that the outcome would have been different.[15] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[16] It is the defendant's burden to show, under the totality of the circumstances, that counsel was so incompetent that the accused was not afforded genuine and effective legal representation.[17]

22. A defendant's burden to establish a claim of ineffective assistance of counsel is difficult to meet since there is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[18] Defendant must also overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.[19]

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[14] *Malin v. State,* 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State,* 654 A.2d 821, 829 (Del. 1994).
[15] *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).
[16] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[17] *State v. Archie*, 2002 WL 1922466 (Del.Super.), at *2.
[18] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).
[19] *Strickland*, 466 U.S. at 681.

23. Here, Defendant's ineffective assistance claims are undermined by the record and fail to satisfy *Strickland.* Defendant fails to state a legitimate ground for relief against his counsel.

24. Defendant's first contention is that defense counsel failed to advise Defendant as to the strength of the State's case so that Defendant could make an informed decision whether to accept the State's plea offer. Defendant contends that defense counsel never explained the significance of the State's evidence and instead merely provided the defendant with the police reports and other documents provided by the State.[20]

25. Defendant's contention is directly contrary to the record. The record reflects that defense counsel could not be any clearer that Defendant was likely to be convicted at trial given the State's overwhelming direct, circumstantial and forensic evidence linking Defendant to the robbery. Far from evidencing any deficiency on defense counsel's part, the record reflects that Defendant was fully informed of the plea and his prospects at trial.

26. To say the very least, defense counsel more than sufficiently fulfilled his obligation to communicate the terms of the plea offer to Defendant, and defense counsel's conduct in conveying the State's plea offer met reasonable professional standards.[21] To go a step further, it is hard to envision what more defense counsel could be expected to do to pry Defendant from his intractable position. Defense counsel could not, of course, override Defendant's adamant refusal to take the plea and accept it against

[20] Defendant's Rule 61 motion, pg. 2.
[21] See, *State v. Archie*, 2002 WL 1922466 (Del.Super.), at *2-4.

Defendant's wishes.[22] Other then strongly and forcefully urging Defendant to take the plea given the overwhelming evidence against him, there does not appear to be anything more that defense counsel could have done.

27. The record reflects that defense counsel fully and intelligently informed Defendant of the plea offer. The record reflects that defense counsel discussed the charges against Defendant, the State's evidence against Defendant, Defendant's possible defenses, the fact that Defendant was unlikely to prevail at trial, the plea deal offered to Defendant, and other aspects of the case. Defendant knowingly took the risks of trial.

28. Defendant contends that there is somehow a factual dispute as to what he was told about the strength of the State's case. The colloquy on the first day of trial between the Court and Defendant, in and of itself, belies Defendant's assertion. Indeed, the record reflects that defense counsel fully detailed the State's evidence against Defendant and the strength of the State's case against him.

29. Defendant faults his trial counsel for not prying him from his intractable position yet Defendant never waivered in his adamant refusal to accept the plea. Any indication or expression from counsel to Defendant that the State may have a good case was met with accusations from Defendant that counsel was "not on his side" and "didn't believe him." Defendant advised counsel he would never take a plea to anything.

30. Defense counsel's conduct does not appear to be deficient in any regard.

31. Next, Defendant contends that defense counsel was ineffective because he failed to develop a logical defense. The record reflects, however, that defense counsel

[22] *Cooke v. State*, 977 A.2d 803, 841-42 (Del. 2009) (certain decisions regarding the exercise or waiver of basic trial rights are so personal to the defendant that they cannot be made for the defendant by a surrogate. The defendant has ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty, waive a jury, testify in his own behalf or take an appeal. These fundamental personal decisions cannot be made by anyone other than the defendant.).

did attempt to exploit any perceived weaknesses in the State's case. The public defender's office met with Defendant on several occasions and investigated Defendant's assertions. Defendant related to the public defender's office that he did not commit the crime but that another person named "Joseph" must have committed the robbery. Defendant told the public defender's office that he had stayed at the Trump Plaza hotel prior to the robbery. Defense counsel investigated this assertion and learned from Trump Casino that it had no information that Defendant had, in fact, stayed there on the dates in question.[23]

32. The public defender special investigator's report also indicated that Defendant had rented a black Pontiac car and returned it on the date of the robbery at 1:51 p.m. in Virginia. Witnesses at the crime scene noted that the suspect had fled in a black Pontiac. Defendant contended that "Joseph" did not have a car, Defendant however did.[24]

33. Defendant, in his Rule 61 motion, contends that defense counsel never told Defendant that if he denied any involvement in the robbery, he could not claim that he was under "duress" when the robbery was committed. Yet, Defendant did not ever indicate to defense counsel that he was a victim of duress during the commission of the crime.[25] Defendant's consistent, unretractable position was that he did not commit the crime, not that he did it under duress. Moreover, defense counsel in his September 4, 2007 letter did in fact so advise Defendant that in order to assert a defense of duress the defendant must be willing to admit that he committed the robbery.

[23] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pg. 5-6; Trump Plaza letter of June 19, 2007 attached to defense counsel's affidavit.
[24] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pg. 5-6;
[25] Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pg. 5-6;

34. Given the overwhelming direct, circumstantial and forensic evidence linking Defendant to the robbery, there was not really much of a defense available to Defendant at trial, and as the record shows, this was explained to Defendant. Defendant nevertheless continued to assert his innocence and refused to consider accepting the plea offer. Defense counsel did, however, attempt to lessen the effect of the Defendant being convicted of both counts of robbery by arguing at closing to the jury and motioning the Court at the conclusion of the trial and sentencing for a merger of the two robbery counts.[26] Defense counsel continued to raise this issue on appeal to the Delaware Supreme Court.[27]

35. Defense counsel's conduct in this regard was not deficient in any respect.

36. Finally, Defendant contends that if he had been fully informed as to the strength of the State's case and the lack of any real defense strategy, it was "reasonably probable" that Defendant would have decided to accept the State's plea.[28]

37. Defendant's contention in this regard is simply creating revisionist history. The reality of the situation is that Defendant was, in fact, fully informed as to the strength of the State's case. Defendant was, in fact, advised of the lack of any real defense strategy. Defendant merely dug in his heels and adamantly refused to accept the plea offer. Defense counsel laid out exactly what Defendant could expect if he did not accept the plea offer and continued to trial. Defense counsel precisely predicted the outcome. Defense counsel can only do so much. Defense counsel can do no more than to articulate his advices to Defendant. Defense counsel's conduct was not deficient in any respect.

[26]Affidavit of Timothy J. Weiler in Response to Rule 61 Motion, at pgs. 6-7.
[27] See, *Hamilton v. State*, 2008 WL 4597395 (Del.).
[28] Defendant's Rule 61 motion, pg. 3.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

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Commissioner Lynne M. Parker

oc: Prothonotary
Timothy J. Weiler, Assistant Public Defender