

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

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

August 26, 2010

Kevin P. Phillips  
Sussex Correctional Institution  
P.O. Box 500  
Georgetown, DE 19947

**RE: State of Delaware v. Kevin P. Phillips**  
**Cr.A. No. S08-03-0669, et. al. - Def. ID No. 0803007958**  
**Letter Opinion**

Date Submitted: June 15, 2010

Dear Mr. Phillips:

This is my decision on your Motion for Postconviction Relief. You were charged with five counts of Rape in the First Degree, ten counts of Rape in the Second Degree, and 15 counts of Unsolicited Sexual Contact in the First Degree. You committed the offenses while you were babysitting a seven-year-old girl. You pled *nolo contendere* to three counts of Rape in the Third Degree and one count of Rape in the Fourth Degree in exchange for the State of Delaware dismissing the other charges against you. I sentenced you to 35 years at Supervision Level V, suspended after serving seven years at Supervision Level V, followed by ten years at Supervision Level III. You were represented by John P. Daniello, Esquire. This is your first Motion for Postconviction Relief and it was filed in a timely manner.

You allege that Daniello (1) did not investigate the allegations against you, (2) was not prepared to defend you, (3) coerced you into accepting the State's plea offer with the

help of another lawyer from his office, (4) did not communicate with you, (5) prevented you from viewing all of the Children Advocacy Center interviews that were recorded on digital video discs (“DVDs”), (6) did not explain to you the consequences of entering a *nolo contendere* plea, (7) did not explain to you that your sentence on each charge would be served consecutively and not concurrently, and (8) did not explain to you that you could not withdraw your plea. Daniello filed an affidavit responding to your allegations. I have concluded that there is no need to conduct a hearing given the nature of your allegations.

### **DISCUSSION**

The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.<sup>1</sup> In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must show: “(1) counsel’s representation fell below an objective standard of reasonableness; and (2) counsel’s actions were so prejudicial that, but for counsel’s errors, the defendant would not have pled guilty and would have insisted on going to trial.”<sup>2</sup> Further, a defendant “must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.”<sup>3</sup> 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

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>2</sup> *State v. Thompson*, 2003 WL 21244679, at \*1 (Del. Super. April 15, 2003), *citing Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>3</sup> *State v. Coleman* 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

effects of hindsight when viewing that representation.”<sup>4</sup> There is no procedural bar to claims of ineffective assistance of counsel.<sup>5</sup>

## **1. Investigation**

You allege that Daniello did not investigate the allegations against you. Your mother sent Daniello a letter with a number of questions about your case. You allege that if Daniello had investigated the allegations against you thoroughly enough to get answers to your mother’s questions, then he would have been in a better position to defend you. The State’s basic allegation against you is that on a number of occasions you sexually abused a seven-year-old girl that you were babysitting by placing your penis and fingers in her vagina while you were lying on a couch with her covered by a blanket watching television. The police took statements from the victim, her parents and brothers. Some of the interviews were conducted by an interviewer with the Child Advocacy Center and recorded on DVDs. The victim made a number of inconsistent statements. Her brothers could confirm only that they saw you and the victim under the blanket. There was no forensic evidence that you sexually abused the victim. Daniello obtained all of this information through discovery and was well aware of the State’s allegations against you and the inconsistencies in the witnesses’ statements. The fact that Daniello did not answer your mother’s questions is irrelevant. He adequately investigated the allegations against you and was well aware of all of the issues raised in your mother’s letter. Your allegation is

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<sup>4</sup> *Coleman*, 2003 WL 22092724, at \*2, quoting *Strickland*, 466 U.S. at 689.

<sup>5</sup> *Coleman*, 2003 WL 22092724, at \*1, citing *State v. Johnson*, 1999 WL 743612, at \*2 (Del. Super. Aug. 12, 1999); *State v. Gattis*, 1995 WL 790961, at \*2 (Del. Super. Dec. 28, 1995), *aff’d*, 637 A.2d 1174 (Del. 1997).

without merit.

## **2. Defense**

You allege that Daniello was not prepared to defend you because he was so focused on persuading you to accept the State's plea offer that he did not prepare for trial. Daniello readily acknowledges that he thought it was best for you to accept the State's plea offer. This does not mean that he was not prepared to defend you at trial. Daniello was thoroughly familiar with the evidence against you and was prepared to defend you by arguing that (1) there were no witnesses other than the victim to the sexual abuse, (2) the victim's brothers were present in the room with you and the victim when the sexual abuse occurred, but did not actually see you sexually abuse the victim, (3) there was no forensic evidence supporting the State's allegations that you sexually abused the victim, and (4) the victim made a number of inconsistent statements about what happened. Your allegation is without merit.

## **3. Coercion**

You allege that Daniello and Dean C. Johnson, another attorney with the Public Defender's Office, coerced you into accepting the State's plea offer by talking harshly to you, keeping you from talking to your mother, and telling you that you would be found guilty at trial, receive a lengthy sentence, and never see your family again outside of prison. Your allegations are not borne out by your answers to questions in the documents that were submitted with your plea and your statements during the plea colloquy. On the Truth-In-Sentencing Guilty Plea form you answered "No" when asked if your lawyer, the State, or anyone else threatened or forced you to enter this plea. I also discussed this matter with

you when I took your plea. You stated the following under oath during the plea colloquy:

The Court:	Did anybody force you to take this plea?
The Defendant:	No, sir.
The Court:	Did anybody promise you anything in exchange for it?
The Defendant:	No, sir.

You are bound by the sworn statements you made during the plea colloquy.<sup>6</sup> Your allegation is without merit.

#### **4. Communication**

You allege that Daniello did not communicate with you and that his failure to do so hindered your preparation for trial. Daniello and other attorneys with the Public Defender's Office did communicate with you many times. An attorney with the Public Defender's Office interviewed you by videophone while you were at the Sussex Correctional Institution on March 11, 2008. Daniello met with you at the Sussex Correctional Institution on April 17, 2008. An attorney with the Public Defender's Office met with you at the Sussex Correctional Institution on May 19, 2008. Daniello met with you at the Sussex County Courthouse at your case review on June 16, 2008. An attorney with the Public Defender's office interviewed you by videophone while you were at the Sussex Correctional Institution on June 28, 2008. Daniello met with you at the Sussex Correctional Institution on July 1, 2008. Daniello talked to your mother on July 18, 2008, and met with her on October 7, 2008. Daniello met with you at the Sussex County Courthouse at your final case review to discuss your case, the plea negotiations, and to watch the witness interviews that were recorded on the DVDs on October 8, 2008. Your allegation is without merit.

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<sup>6</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

## **5. Digital Video Discs**

You allege that Daniello did not show you the full interviews that were recorded on the DVDs. Specifically, you allege that he only showed you those portions of the interviews that he wanted you to see. You also allege that the witnesses made inconsistent statements that were recorded on the DVDs and that they would have helped your defense at trial. The victim and her brothers were interviewed by an interviewer with the Child Advocacy Center. He recorded their interviews on DVDs. Daniello, you and your mother knew that the victim had made inconsistent statements about what had happened to her. Her brothers only saw you under the blanket with the victim. They did not see you sexually abuse the victim. Their statements were documented in the police reports, which Daniello gave to you to read. You and Daniello watched the critical portions of the DVDs at your final case review before you entered your plea on October 8, 2008. Thus, contrary to your allegations, you were well aware of the statements made by the victim and witnesses and any inconsistencies in those statements before you entered your plea. Your allegation is without merit.

## **6. *Nolo Contendere* Plea**

You allege that you did not understand that the consequences of taking a *nolo contendere* plea were identical to those of taking a guilty plea. The consequences of taking either one of these pleas are that you waive your trial rights, acknowledge that you are either guilty or that the State has enough evidence to convict you, and that you will, as a felon, also lose certain other rights. All of this was set forth in the documents that you filled out and signed as part of your plea. I also discussed this with you during the plea

colloquy. The consequences of taking a *nolo contendere* plea are set forth in the Truth-In-Sentencing Guilty Plea form that you signed before I took your plea. The following is an excerpt from the Truth-In-Sentencing Guilty Plea form: Do you understand that because you are pleading guilty you will not have a trial, and you therefore waive (give up) your constitutional right:

1. To have a lawyer represent you at trial;
2. To be presumed innocent until the State can prove each and every part of the charge(s) against you beyond a reasonable doubt;
3. To a speedy and public trial by jury;
4. To hear and question the witnesses against you;
5. To present evidence in your defense;
6. To testify or not testify yourself; and,
7. To appeal, if convicted, to the Delaware Supreme Court with the assistance of a lawyer?

I also went over this with you when you entered your plea. The following is an excerpt from your plea colloquy:

The Court: You have certain rights, Mr. Phillips. Those rights are listed on the Truth-In-Sentencing Guilty Plea form. Do you see those rights?

The Defendant: Yes, sir.

The Court: Did you discuss them with your attorney?

The Defendant: Yes, sir.

The Court: Do you understand those rights?

The Defendant: Yes, sir.

The Court: Do you understand that you are waiving them by entering into this plea?

The Defendant: Yes, sir.

The Court: You understand that there won't be a trial now?

The Defendant: Yes, sir.

The Court: I understand that you are making a business decision, Mr. Phillips, and you may dispute the facts, but would you agree with me that if the jury heard the evidence against you as outlined by the prosecutor and accepted that as true it could find you guilty of these four offenses?

The Defendant: Yes, sir, they could.

There is no doubt that you understood that, as a consequence of taking a *nolo*

*contendre* plea, you were waiving and forfeiting certain rights, that there would not be a trial, and that you had acknowledged that the State had enough evidence to convict you. Your allegation is without merit.

## **7. Sentence**

You allege that you did not understand that your sentence on each charge would have to be served consecutively instead of concurrently. Once again, your allegation is inconsistent with the documents you filled out and signed as part of your plea and the statements you made during the plea colloquy. The Truth-In-Sentencing Guilty Plea form discussed the maximum sentence and minimum mandatory sentence that you faced for each offense. For example, it stated that for each charge of Rape in the Third Degree you faced a sentence of up to 25 years in prison and that you had to serve at least two years in prison. It also stated that you faced a “Total Consecutive Maximum Penalty” of incarceration for 90 years at Supervision Level V. You signed the Truth-In-Sentencing Plea form. You are bound by your answers to the questions in it. It makes it clear that your sentence for each charge had to be served consecutively. Otherwise, you would not have faced a maximum sentence of 90 years. I also discussed this with you during the plea colloquy. The following is an excerpt of the plea colloquy:

The Court:	Do you understand the maximum period of incarceration that you face for those two offenses?
The Defendant:	Yes, Sir.
The Court:	Do you understand that on each count of Rape in the Third Degree that you must serve at least two years in jail?
The Defendant:	Yes, sir.

Once again, you are bound by the sworn statements that you made during the plea colloquy. Your allegation is without merit.



## **8. Plea Withdrawal**

You allege that you did not know that you could not withdraw your *nolo contendere* plea and that you wanted to withdraw it almost immediately after you took it. A motion to withdraw a guilty plea is controlled by Superior Court Criminal Rule 32(d). The rule states that the Court “may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.” To determine whether you had a “fair and just reason,” the Court will consider the following factors: (a) Was there a procedural defect in taking the plea; (b) Did the defendant knowingly and voluntarily consent to the plea agreement; (c) Does the defendant presently have a basis to assert legal innocence; (d) Did the defendant have adequate legal counsel throughout the proceedings; and (e) Does granting the motion prejudice the State or unduly inconvenience the Court.”<sup>7</sup> In reviewing whether you have a fair and just reason to withdraw your plea, you have not shown that there was a procedural defect in taking your plea, that you did not knowingly and voluntarily consent to the plea agreement, demonstrate a basis to assert legal innocence, or show you had ineffective assistance of counsel. I have no idea what made you think that you could withdraw your *nolo contendere* plea simply because you now have second thoughts about taking it. You were certainly happy with the State’s plea offer when you accepted it, as indicated by the following excerpt from your plea colloquy:

The Court:            Are you certain that this is how you want to resolve all the charges against you?

The Defendant:    Yes, Sir.

Your allegation is without merit.

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<sup>7</sup> *State v. Friend*, 1994 WL 234120, at \*1-2 (Del. Super. May 12, 1994).

**CONCLUSION**

Your Motion for Postconviction Relief is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

/s/ E. Scott Bradley

oc: Prothonotary's Office  
cc: Department of Justice  
John P. Daniello, Esquire