SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

June 24, 2010

Calvin L. Allen
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: Defendant ID No. 0802010603(R-1)

Dear Mr. Allen:

The Court is in receipt of your Motion for Postconviction Relief that was filed on June 18, 2010. Upon reviewing same, one claim is denied as to the merits, and the second claim is procedurally barred.

BACKGROUND

Following a jury trial in August of 2008, you were convicted of three (3) counts of delivery of cocaine. On one count you received 12 years, which was suspended after 4 years for 18 months Level 3 probation. On the second count, you received a sentence of 10 years suspended after 4 years for 2 years of Level 3 probation. On the third count, you were sentenced to 10 years suspended after 3 years for 6 months Level 4 Violation of Probation Center, followed by 1 year of Level 4 Work Release followed by 18 months Level 3 probation.

On direct appeal, your conviction was affirmed. *Allen v. State*, 2009 WL 1658182 (Del. June 15, 2009), 976 A.2d 170 (TABLE) (Del 2009).[1]

[1]The one year for filing a motion for postconviction relief under Rule 61(i)(1) begins not from the date of the order but from the date of the return of the mandate from the Supreme Court. That took place on July 7, 2009, and therefore, the present Motion is timely.

GROUNDS ALLEGED

You allege your attorney was ineffective due to his failure to determine that you were not habitual-offender-eligible pursuant to 11 *Del. C.* § 4214(a).

The docket shows the following relevant information.

On March 6, 2008, you were arraigned and requested a jury trial. Case review was set for April 7, 2008. The case was not resolved and final case review was set for May 21, 2008, with a trial scheduled for May 27, 2008. On May 21, 2008, you did not appear and a capias was issued. The capias was not returned until July 1, 2008. A new case review was set for August 6, 2008. The case was not resolved by way of plea negotiations and trial commenced on August 13, 2008.

At the first case review, you were provided an initial plea offer in which the State alleged you were a habitual offender and sought a sentence of 3 years pursuant to 11 *Del. C.* §4214(a). In your Rule 61 Motion, you state you declined the first plea agreement offer "hoping for a better offer at the next review".

This is one of those cases where the plea offer did not get better as the trial date approached. Following your return on the capias, the plea offer was raised to a recommendation of 5 years pursuant to 11 *Del. C.* §4214(a). You further allege that plea negotiations on August 6, 2008, basically went south and the 5-year recommendation was withdrawn and increased to an 8-year recommendation. You also allege that on August 6th, the State presented your attorney with a copy of the habitual offender motion the State would file in the event of a conviction.

You report you declined the second and third plea offer because you were concerned that, although a lesser recommendation was being made, you could face a maximum sentence of life imprisonment. You allege that your attorney was ineffective for failing to conduct an adequate investigation to determine that you were not actually habitual-offender qualified during the plea negotiation stage.

I note that if you declined the first offer of three (3) years because you were seeking a better offer, you then declined the subsequent offers as the plea offers kept getting worse.

I shall focus on whether or not trial counsel was ineffective.

An ineffective assistance of counsel claim must address two inquiries. You must show that (1) your attorney committed an error or omission; and (2) that error or omission actually prejudiced you. *Strickland v. Washington,* 466 U. S. 668 (1984).

Defense counsel has a duty to investigate but that duty must be assessed in light of the circumstances that existed at the time of the investigation decisions. In other words in looking backwards, we have to look at it from the perspective of what counsel knew at the time. *State v. Censurato*, 1995 WL 717618 (Del. Super. Dec. 1, 1995).

Following the trial and at sentencing, the State reported that it was not seeking to have you sentenced as an habitual offender. The State advised that it had determined that the conviction shown in the motion provided to defense counsel, but which was not filed with the Court, showed a conviction of trafficking in cocaine, but the conviction was actually for possession of cocaine.

Unfortunately, the DELJIS record shows an arrest and conviction against Calvin L. Allen for trafficking in cocaine. That record is in error but the DELJIS record is reasonably relied upon by those persons who use it in the criminal justice system.[2] Therefore, the initial mistake by the prosecutor in seeking to have you sentenced as an habitual offender should you have pled guilty or been found guilty of a delivery charge was not unreasonable in light of the DELJIS record. The prosecutor acted with due diligence between the time of your conviction and the date of sentencing and determined that you were not habitual-offender-eligible.

Based upon the state of the records in DELJIS and the aforementioned time line, I do not find that trial counsel committed a *Strickland* error by failing to adequately determine if you were habitual-offender-eligible for purposes of the plea negotiations.

As aforesaid, the DELJIS record system erroneously showed you to be habitual-offender-eligible.

I also must recognize the reality of the caseload of the Assistant Public Defender assigned to this Court. Considering the heavy caseload, I think it is unreasonable to expect trial counsel to go beyond that which the records ostensibly show in the plea negotiations. I also note that, in the Court's efforts to obtain the file concerning the alleged trafficking conviction which is now established as a possession of cocaine conviction, the Court discovered its file was sent to archives four years prior to the plea negotiations in question. Therefore, that file was not even available for review.

Finally, I note that your attorney literally has hundreds of clients to look after. I would think you would know your own record.

With regard to the second inquiry under the *Strickland* analysis, I do not find any prejudice in this case. As you noted, you turned down the first plea offer, not because of the potential of the habitual offender status, but because you thought you could get "a better offer at the next review". Unfortunately for you, that did not happen. Whether it was due to your capias or other reasons, the

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[2]Attached to this decision as Exhibit "A" is a copy of the DELJIS record as retrieved by the Court's staff.

State was entitled to withdraw and change plea offers. The simple fact is that although it is rare for plea offers to get worse as a case moves closer to trial, it does, in fact, happen and the State is permitted to withdraw its offers as it sees fit.

I also note that you are seeking unique relief. You had your trial and were convicted. That conviction was affirmed. You now wish to have that conviction vacated and to be returned to the point where you could accept the initial plea offer of 3 years. You demand that the State be required not to be vindictive but to give you the original offer.

It is easy to "Monday morning quarterback". You made the decision not to consummate a guilty plea. You now wish a do-over. In other words, from your present point of view, your decision to go to trial was the wrong decision. I do not find trial counsel committed error, nor do I find prejudice under the *Strickland* standard.

I do not find that you can make a decision to go to trial, lose, and then get to go back and accept an earlier plea offer. I also note that the State made the offer under the assumption you were an habitual offender. Had the State correctly known you were not habitual, there is no way to know what the offer might have been.

You also allege ineffective assistance of counsel for (1) failing to file a motion for pretrial discovery, and (2) for failing to review the photograph used in the out-of-court identification by the confidential informant and moving to suppress the identification of that photograph. This claim is procedurally barred. As noted in the Supreme Court appeal, this case was prosecuted based upon the willingness of the informant purchaser to testify against you. That informant purchaser knew you as "Hoss". The investigating detective knew you as "Hoss". As the Supreme Court noted, the use of the photograph to confirm that the informant and the police detective were talking about the same individual prior to their initiating the undercover operation created no error. The trial testimony of the informant was that he had purchased drugs from you a couple hundred times. There was no issue as to identification. I find that this claim has been previously adjudicated and is procedurally barred pursuant to Rule 61(i)(4).

Your Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

THG:baj
Enclosure
cc: Prothonotary
Department of Justice