

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

<b>STATE OF DELAWARE</b>	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-06-12-0729 & IN-06-12-0731
	)	
<b>JAY CSEH</b>	)	
	)	ID No. 0612000749
Defendant	)	

*Submitted: June 4, 2009*

*Decided: July 22, 2009*

***MEMORANDUM OPINION***

*Upon Motion of the Defendant  
for Post-Conviction Relief - **DENIED***

HERLIHY, Judge

Before the court is Jay Cseh's ("Cseh") motion for Postconviction relief. The movant's *pro se* motion alleges an ineffective assistance of counsel claim. Specifically, Cseh claims that (1) his attorney advised him to reject the state's plea offer before trial, (2) counsel failed to raise obvious and significant issues such as not arguing for a lesser included offense in the jury instructions and (3) counsel failed to raise any arguable issues in the appellate brief. Cseh's attorney responded to Cseh's motion by affidavit and, in turn, Cseh submitted an affidavit in response.

Cseh was convicted of attempted robbery first degree. His conviction was upheld on appeal. <sup>1</sup> The mandate was issued May 8, 2008.

### ***Factual Background and Nature of Proceedings***

On December 1, 2006, around 11:30 p.m. Cseh entered an Eckerd drug store in New Castle County, Delaware. Robert Anderson, the front-end clerk of the store, was behind the register and on duty that day. According to Anderson, Cseh approached the counter with a sledgehammer and began waiving it over his head within 3-4 feet of Anderson. Cseh demanded that Anderson "open the cash register or I'll smash it." When Anderson informed Cseh that he did not have a key, Cseh again repeated his demand before hitting the register three times and then running out of the store. The event was recorded by surveillance camera and Cheryl Pitman, another employee of the store, called the police. The police were given a description of Cseh and his vehicle and he was arrested shortly after the incident.

---

<sup>1</sup> *Cseh v. State*, 947 A.2d 1112 (Del. 2008).

On March 5, 2007 at first case review, Cseh was offered a plea to attempted robbery first degree and possession of a deadly weapon during the commission of a felony (PDWDCF). There was no state sentencing recommendation. However, Cseh rejected this plea. He failed to appear for his final case review on June 4, 2007, thereby resulting in a capias. It was returned two days later. On June 12, 2007, Cseh was offered a plea for attempted robbery first degree and diversion on another pending case. The charge of PDWDCF was to be nolle prossed. Again there was no sentence recommendation. That plea was also rejected and the case proceeded to trial. Before trial began, the State dropped the PDWDCF charge because of an error in the indictment.

At the prayer conference, defense counsel requested an instruction on the lesser-included offenses of attempted robbery seconddegree, aggravated menacing and attempted theft, but this request was denied. On June 15, 2007, the jury found the defendant guilty of attempted robbery first degree and criminal mischief. Cseh appealed to the Delaware Supreme Court presenting one argument that the trial judge erred in denying his request for instructions on the lesser-included offenses. The Delaware Supreme Court affirmed the trial judge's decision.

### *Discussion*

Before the Court can reach the merits of Cesh's motion for postconviction relief, the movant must overcome the procedural bars contained in Superior Court Criminal Rule

61(i).<sup>2</sup> According to Rule 61(i)(1), the motion may not be filed more than one year after the judgment is final. Because the defendant appealed his conviction in the trial court, the judgment became final when the Supreme Court issued its mandate on May 8, 2008. Cseh filed this motion on February 17, 2009 and therefore, it is timely filed. One claim regarding the lesser-included offense is potentially procedurally barred as previously adjudicated. Reconsideration is not warranted in the interests of justice.<sup>3</sup> No other procedural bars apply and the Court can look to the merits of this motion.

In order to prevail on an ineffective assistance of counsel claim, the Cseh must demonstrate his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense.<sup>4</sup> Under the first prong of *Strickland*, Cseh must overcome a strong presumption that, “. . . counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>5</sup> In addition to showing the deficient performance, Cseh must show that but for counsel's errors, the outcome of the trial would have been

---

<sup>2</sup> *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

<sup>3</sup> See Discussion *Infra* p. 4.

<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>5</sup> *Strickland*, 466 U.S. at 689.

different.<sup>6</sup> Failure to prove either prong is sufficient to defeat a claim and the Court need not address the remaining prong.<sup>7</sup>

First, Cseh claims trial counsel advised him to reject the plea offered at first case review. That advice, he asserts, was based on trial counsel claiming he would convince the trial judge to instruct the jury on lesser-included offenses and he, Cseh, would get no more than one year in jail. Trial counsel rejects these contentions. The plea offer extended at first case review on March 5<sup>th</sup> was to two offenses conveying sentences of five years. Cseh and trial counsel have presented that written offer to this Court as part of their submissions on the current motion. That document rejects (1) Cseh's claim that there was no offer at first case review and (2) any reason this Court should give credibility to his report of what counsel said was a reason to reject it. In short, this court finds this claim of ineffective assistance as totally meritless.

Cseh's next ineffective assistance claim is that trial counsel did not argue at all or press this Court sufficiently for jury instructions in lesser-included offenses to attempted robbery first degree. This argument is utterly fallacious. Trial counsel did ask this Court for instructions on attempted robbery second degree, aggravated menacing, and attempted felony theft. The Court rejected that request. That denial was upheld on appeal.<sup>8</sup> In

---

<sup>6</sup> *Id.* at 687.

<sup>7</sup> *State v. Wright*, Del.Super., 653 A.2d 288, 294 (1994).

<sup>8</sup> *Cseh v. State*, *Supra*.

short, the issue of “lessers” was presented at this Trial Court and the Supreme Court. In addition, this claim has been previously adjudicated and is barred.<sup>9</sup> There is no known relief from this bar.

Another way to reject this claim of ineffectiveness is to repeat the principle that if counsel committed no error there can be no ineffectiveness.<sup>10</sup> Counsel asked for the instruction Cseh now says he should have and this Court’s denial of that request was affirmed. There can be no counsel error and thus no ineffectiveness.

Lastly, Cseh argues that his appellate counsel’s performance was ineffective because he failed to raise any arguable issues on appeal. Cseh’s claim is conclusory because he fails to identify or detail which issues counsel did not argue in the appellate brief to the Delaware Supreme Court. “This Court need not address Postconviction Relief claims that are conclusory and unsubstantiated.”<sup>11</sup> Furthermore, “[c]onclusory claims raised in a defendant’s motion for postconviction relief are insufficient to prove ineffective assistance of counsel and will not be addressed.”<sup>12</sup>

---

<sup>9</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>10</sup> *See Righter v. State*, 704 A. 2d 262 (Del. 1997); *cert denied* 523 U.S. 1126, 118 S. Ct. 1814, 140 L. Ed. 2d (1998).

<sup>11</sup> *State v. Jordan*, 1994 WL 637299, at \*3 (Del.Super.Ct. Jun.23, 1994), *aff’d*, 648 A.2d 424, 1994 WL 466142 (Aug. 25, 1994).

<sup>12</sup> *State v. Brown*, 1998 WL 735880, at \*3 (Del.Super.Ct. Aug.20, 1998), *aff’d*, 734 A.2d 640, 1999 WL 591450 (Del. May 21, 1999).

Even if Cseh proved that appellate counsel's conduct was deficient, he must still show how this deficient performance prejudiced his appeal. Again, Cseh has offered nothing to support the conclusion that his appeal would probably have resulted in a reversal had his attorney raised additional issues on appeal that were unstated and unknown in the motion. Therefore, Cseh cannot prevail on this ineffective assistance of counsel claim and is not entitled to the relief he requests.

*Conclusion*

For the following reasons, the Jay Cseh's Motion for Postconviction Relief is **DENIED.**

**IT IS SO ORDERED.**

---

J.