

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	I.D. No. 0805009136
)	
JAMAR WRIGHT)	
)	
Defendant)	

Submitted: August 16, 2010
Decided: October 28, 2010

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

John A. Barber, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Jamar Wright, Wilmington, Delaware, *pro se*.

COOCH, J.

This 28th day of October, 2010, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. Defendant Jamar Wright has filed this motion for postconviction relief based on grounds of ineffective assistance of counsel.¹ Defendant has

¹ Def.'s Feb. 19 Mot. for Postconviction Relief at 3.

alleged that his trial attorney, Jerome M. Capone, Esquire “persuaded [Wright] to take plea under duress-Would not properly prepare for [Wright’s] defense; talked to family and asked them to persuade [Wright] to plea [sic] guilty; failed to file a direct appeal after [Wright] requested him to do so.”² Also, Defendant has alleged that Mr. Capone “failed to file motion for the illegal stop-The evidence that the police confiscated all came from an illegal stop.”³

2. Defendant does not contest the background facts of the case, as set forth in the State’s Response to Defendant’s Motion for Postconviction

Relief:

On May 8, 2008 at approximately 8:28 p.m., New Jersey State Trooper Mike Ward stopped a white 1994 Chevy Lumina on the New Jersey Turnpike for exceeding the speed limit. The vehicle was driven by Dellis Hernandez, and his front seat passenger was Jamar Wright. Trooper Ward noticed there was a single key in the ignition. Trooper Ward asked who owned the car, and Hernandez said he did not know the name of the owner. Trooper Ward had Hernandez exit the vehicle and allowed him to make several phone calls to determine the name of the person who owned the car, which he eventually provided. In response to Trooper Ward’s questioning about their trip itinerary, Hernandez stated that he was not sure where they were headed only that he was meeting with some friends at a hotel off of Toll 3. Jamar Wright was also questioned about their itinerary, and provided a Delaware Identification card confirming his identity. Trooper Ward issued a warning for speeding and then released Hernandez and Wright.

After releasing the two men, Trooper Ward contacted Detective Chris Popp of the Delaware State Police Governor’s Task Force and advised him of the stop of the two men, including the description of the vehicle and tag number. Communication between Trooper Ward is not

² *Id.*

³ *Id.*

uncommon in these situations, as Trooper Ward and Detective Popp attended college together, and communicate with each other on a somewhat regular basis in regards to law enforcement situations. Detective Ward was aware of Popp's status as a Detective and his role in the Delaware Governor's Task Force and vice versa. Detective Popp advised Trooper Ward that Jamar Wright was a known narcotics dealer and active probationer who was not allowed to leave the State of Delaware as a condition of his Level 3 probation. Trooper Ward went to the Howard Johnson directly off of Toll 3 and saw the white Chevy Lumina in the parking lot. Trooper Ward left the area to continue his patrol. Trooper Ward returned within the hour, and the vehicle was gone. Trooper Ward then contacted Detective Popp again to advise him that the vehicle had left the Howard Johnson hotel.

Upon hearing that the vehicle had left the Howard Johnson hotel, Detective Popp suspected that the vehicle may be returning to Delaware. Detective Popp and other members of the Governor's task force set up surveillance at the Delaware Memorial Bridge and at approximately 10:30 p.m., saw the white Chevy Lumina with the same tag number occupied by Hernandez and Wright cross into Delaware. Based on the information received from Trooper Ward that Jamar Wright had been in New Jersey in the same vehicle earlier the same evening, Detective Huston stopped the Lumina. Detective Huston recognized Jamar Wright in the passenger seat and was advised by Delaware State Probation and Parole Officer James Kelly to take him into custody for violating the conditions of his probation, namely, for leaving the State of Delaware without permission and for being out after his 10:00 p.m. curfew. A search incident to Wright's arrest was conducted, during which officers found the following: A sandwich bag containing approximately 16.8 grams of crack cocaine in his right front pants pocket, 7 Percocet pills in a left front pants pocket, and a digital scale in his left front pants pocket. Hernandez was removed from the vehicle and a plastic bag was sticking out of his waistband which contained marijuana. A .38 caliber handgun loaded with 6 rounds was found under the driver's seat.

On June 9, 2008, Jamar Wright and Dellis Hernandez were indicted with several felony drug and weapon offenses in relation to this incident. On July 17, 2008, Wright filed a Motion to Suppress and counsel for Hernandez eventually joined in the motion. On August 21, 2008, Wright filed a Motion to Allow Rule 17 Subpoenas to Issue to obtain the telephone and email records of Trooper Ward and Trooper Popp and on September 16, 2008 that motion was granted. On October 3, 2008, a suppression hearing was held and the defense's motion was denied. On November 12, 2008, trial was scheduled for both defendants. Dellis Hernandez entered a guilty plea and agreed to testify truthfully in his codefendant's trial. Jamar Wright rejected the plea offered the morning of

trial and a jury was selected. Prior to opening statements, defense counsel requested that the plea offer be left open over the lunch break so he could again discuss it with his client. The State agreed and after reconvening after lunch, the defendant accepted the plea offer and his plea was entered. A pre-sentence investigation was ordered and sentencing was set for January 23, 2009. On December 16, 2008, the defendant filed a Motion to Withdraw Guilty Plea which was denied on March 30, 2009. Ultimately, on July 10, 2009, the defendant was sentenced to 2 years Level 5 as a Habitual Offender pursuant to 11 Del.C. §4214(a) for Trafficking Cocaine and 4 years Level 5 for Possession With Intent to Deliver, followed by probation.⁴

3. Jerome M. Capone, Esquire was appointed to represent Defendant on the instant charges.⁵ Mr. Capone stated that, contrary the allegations contained in Defendant's motion, he did in fact file a motion to suppress and represent Defendant at the suppression hearing.⁶ This is consistent with the Superior Court criminal docket for this case, which establishes that Mr. Capone filed a motion to suppress on July 21, 2008, and this motion was subsequently denied by this Court by bench ruling of October 3, 2008.

Mr. Capone met multiple times with Defendant at Gander Hill and "discussed the strengths and weaknesses of his case at length."⁷ Moreover, Mr. Capone noted that Defendant was present in court when the suppression hearing was held, thus would have heard most of the evidence that would be presented against him at trial.⁸ Mr. Capone denied Defendant's allegation

⁴ State's Resp.

⁵ Aff. of Jerome M. Capone, Esq. at ¶ 1.

⁶ *Id.*

⁷ *Id.* at ¶ 2.

⁸ *Id.*

that he “persuaded [Defendant] to take the plea, under duress,” and cited to the November 12, 2008 plea colloquy.⁹

This Court engaged in a thorough and comprehensive plea colloquy with Defendant:

The Court: Are you Jamar Wright?

Defendant: Yes, Your Honor.

The Court: Are you under the influence of any kind of drugs at this time?

Defendant: No, Your Honor.

The Court: Have you freely and voluntarily decided to plead guilty to the charges listed in your written plea agreement?

Defendant: Yes, Your Honor.

The Court: Did you sign this guilty plea form after reviewing it carefully with your attorney, Mr. Capone?

Defendant: Yes, Your Honor.

The Court: Have you been promised anything that is not stated in your plea agreement?

Defendant: No, Your Honor.

The Court: Has your lawyer, the State or anyone threatened or forced you to enter this plea?

Defendant: No, Your Honor.

The Court: Do you understand that because you are pleading guilty you will not have a trial, and that you, therefore, waive or give up certain constitutional rights?

Defendant: Yes, Your Honor.

The Court: Do you understand those constitutional rights include the following: One, to have a lawyer represent you at trial. Do you understand that?

Defendant: Yes, Your Honor.

The Court: Two, to be presumed innocent until the State can prove each and every part of the charges against you beyond a reasonable doubt.

Defendant: Yes, Your Honor.

The Court: Three, to a speedy and public trial by jury.

Defendant: Yes.

The Court: Four, to hear and question the witness against you.

Defendant: Yes, Your Honor.

⁹ *Id.* at ¶ 3.

The Court: Next, to present evidence in your defense.

Defendant: Yes, Your Honor.

The Court: To testify or not testify yourself.

Defendant: Yes, Your Honor.

The Court: And to appeal, if convicted, to the Delaware Supreme Court with the assistance of a lawyer.

Defendant: Yes, Your Honor.

The Court: Do you wish to waive or give up all those rights and enter pleas of guilty to Trafficking in Cocaine and Possession With Intent to Deliver Cocaine?

Defendant: Yes, Your Honor.

The Court: Do you understand that Trafficking in Cocaine has a minimum mandatory sentence of two years, and because you are habitual offender eligible, the maximum sentence is life imprisonment. Do you understand that?

Defendant: Yes, Your Honor.

The Court: And do you understand that there-is a fine of up to a \$50,000 on that charge?

Defendant: Yes, Your Honor.

The Court: With respect to the Possession with Intent to Deliver Cocaine, because of your prior record, do you understand that charge has a three-year minimum mandatory sentence, and because you are habitual offender eligible, a maximum sentence of life imprisonment?

Defendant: Yes, Your Honor.

The Court: Do you understand, then, that the minimum sentence you could receive would be five years, that's required by law, and cannot be suspended by a Judge, and the maximum sentence you could receive would be life imprisonment. Do you understand that?

Defendant: Yes, Your Honor.

The Court: And do you understand that there's a fine of up to \$15,000 for the Possession with Intent to Deliver Cocaine charge?

Defendant: Yes, Your Honor.

The Court: Do you understand that, because of your plea, your driver's license or driving privileges will be revoked for three years?

Defendant: Yes, Your Honor.

The Court: Has anyone promised you what your sentence will be?

Defendant: No, Your Honor.

The Court: Do you understand that even though the State has agreed to cap its recommendation of jail time to seven years, the sentencing judge will be free to impose anything from five years to life imprisonment?

Defendant: Yes, Your Honor.

The Court: Do you understand you were on probation or parole at the time of this offense?

Defendant: Yes, Your Honor.

The Court: Do you understand that a guilty plea may constitute a violation of that probation or parole?

Defendant: Yes, Your Honor.

The Court: Are you satisfied with Mr. Capone's representation of you and that he has fully advised you of your rights?

Defendant: Yes, Your Honor.

The Court: Have you read and understood all of the information in this form?

Defendant: Yes, Your Honor.

The Court: Are all of your answers truthful?

Defendant: Yes, Your Honor.

The Court: The plea agreement was read into the record by Mr. Barber, and then discussed by Mr. Capone. Did you sign that plea agreement document after reviewing it, also, carefully with Mr. Capone?

Defendant: Yes, Your Honor.

The Court: Does it summarize your understanding of how this case is to be resolved?

Defendant: Yes, Your Honor.

The Court: Do you understand that these are the parts of the plea agreement: One, that you plead guilty to Trafficking in Cocaine. Two, that you plead guilty to Possession with Intent to Deliver Cocaine. The State agrees to nolle pros or drop all of the remaining charges in this case. Both the State and Defendant request a presentence investigation. And, as it says-I just want to go through it with you-quote, "Open sentencing, the State and the defendant agree that the defendant is eligible to be sentenced as an habitual offender, pursuant to 11 *Del. C.* § 4214(a). The State will seek to have the Court sentence the defendant as an habitual offender under that statute in regards to Counts 1 and 2 of the indictment, The State and the defendant agree that a minimum sentence of three years incarceration for Count 2 must be imposed, pursuant to 16 *Del. C.* § 4763(a)(2)(a), due to your-due to the defendant's prior conviction of Possession with Intent to Deliver a Narcotic, on or about December 4, 2003." And that an additional two years of incarceration must be imposed for Count 1, that's the trafficking charge, pursuant to 16 *Del. C.* § 4753(a)(a)(2). And, as written in handwriting, "the State will not seek a jail sentence in excess of seven years at time

of sentencing.” Lastly, you agree to forfeit the firearm to the Delaware State Police. Is that your understanding of the plea agreement?

Defendant: Yes, Your Honor.

The Court: The charges against you read as follows: Count one, Trafficking in Cocaine. It reads that you on or about May 7, 2008, in this county and State, you did knowingly and unlawfully possess more than 10 grams but less than 50 grams of a mixture containing cocaine, a narcotic Schedule II controlled substance, as classified under 16 *Del. C.* § 4716(b)(4). Did you commit that offense?

Defendant: Yes, Your Honor.

The Court: Count 2 is Possession with Intent to Deliver a Narcotic Schedule II controlled substance. And it reads that you on or about that same date and place did knowingly and unlawfully possess cocaine, a narcotic Schedule II controlled substance, as classified under 16 *Del. C.* § 4716(b). Did you commit that offense?

Defendant: Yes, Your Honor.

The Court: Do you understand that by pleading guilty all defenses that you might have had at trial, including a later appeal of the suppression hearing, which was ruled against you, are forever waived or given up? Do you understand that?

Defendant: Yes, Your Honor.

The Court: Is one of the reasons that you decided to accept the State’s plea offer to avoid the risk of being convicted and being sentenced, or the State seeking a longer sentence against you than the seven years that it's willing to recommend?

Defendant: Yes, Your Honor.

The Court: Do you understand that what's being done today is final, you will not be able to come back at any later time to seek to withdraw this guilty plea?

Defendant: Yes, Your Honor.

The Court: Do you believe you have had significant time to discuss this with Mr. Capone?

Defendant: Yes, Your Honor.

The Court: Do you believe you're knowingly, voluntarily, and intelligently entering a plea of guilty to the two charges?

Defendant: Yes, Your Honor.

The Court: I find the guilty pleas to be knowingly, voluntarily, and intelligently offered.¹⁰

¹⁰ Tr. of Nov. 12, 2008 Plea at 5:18-14:8 [hereinafter Tr. at __.]

4. In his affidavit, Mr. Capone agreed with Defendant's assertion that he did not file a direct appeal, but explained: "[a]t the time of his sentence, I met with Mr. Wright in cell block after the sentence was imposed and he thanked me for my work in his defense and told me he was satisfied with the result. There was no indication that he wanted me to file an appeal."¹¹

5. Mr. Capone subsequently represented Defendant on a motion to withdraw his guilty plea, filed prior to his sentencing. Defendant sought to withdraw his guilty plea on the grounds that "he is not guilty and. . .so that he may retain his appeal rights."¹² After a thorough review of the plea colloquy and Defendant's arguments, this Court found no evidence that Defendant did not understand the terms of the plea, was forced to accept the plea, or was not satisfied with trial counsel's representation.¹³ Thus, this Court denied the motion by Order dated March 30, 2009, stating:

Defendant alleges that he is not guilty, but has failed to submit any support for his contention. Defendant's unsubstantiated representation of innocence after his explicit admission of guilt during the plea colloquy does not warrant withdrawal of his guilty plea.¹⁴

6. After the denial of Defendant's motion to withdraw guilty plea, Defendant was sentenced on July 10, 2009 to six years of imprisonment,

¹¹ Aff. of Jerome M. Capone, Esq. at ¶ 3.

¹² *State v. Wright*, 2009 WL 866185 at *2 (Del. Super. 2009).

¹³ *Id.* at *5.

¹⁴ *Id.*

followed by probation. He then filed the instant motion for postconviction relief on April 30, 2010. In this motion for postconviction relief, Defendant alleges that Mr. Capone provided ineffective assistance of counsel by “persuad[ing] me to take plea under duress-Would not properly prepare for my defense; talked to family and asked them to persuade me to plea [sic] guilty; failed to file a direct appeal after I requested him to do so.”¹⁵ In the initial motion, Defendant also asserted that Mr. Capone “failed to file a motion for the illegal stop-The evidence that the police confiscated all came from an illegal stop.”¹⁶

Mr. Capone filed an affidavit on June 24, 2010, responding to Defendant’s allegations of ineffective assistance of counsel. Mr. Capone’s affidavit states in its entirety:

1. I was court appointed to represent the Defendant in the above captioned case. The Defendant has alleged in his Rule 61 motion that I “failed to file a motion for the illegal stop.” I did file a motion to suppress and did, in fact, represent the Defendant at the suppression hearing convened by the Court to consider the Motion to Suppress. The motion to suppress was denied after a full hearing.

2. To the extent that the Defendant asserts that I did not properly prepare the Defendant for his defense, I deny this allegation. I visited with him on several occasions at Gander Hill and discussed the strengths and weaknesses of his case at length. The Defendant was present in Court when his suppression motion was heard, and therefore heard most of the evidence which would have been presented against him at trial.

¹⁵ Def.’s April 30 Mot. for Postconviction Relief at 3.

¹⁶ *Id.*

3. To the extent that the Defendant asserts that I “persuaded [him] to take the plea under duress, this is denied. (Please see the plea colloquy dated November 12, 2008). Defendant entered the plea with the belief and understanding that it was in his best interest.

3. [sic] To the extent that the Defendant alleges that I “did not file a direct appeal” I can state that I agree with that assertion. At the time of his sentence, I met with Mr. Wright in cell block after the sentence was imposed and he thanked me for my work in his defense and told me he was satisfied with the result. There was no indication he wanted me to file an appeal.¹⁷

Notably, Defendant’s response contradicts his initial assertion that Mr.

Capone “failed to file a motion for the illegal stop,” as this response states:

[Mr. Capone] delt [sic] with my case like it, and I was [sic] a waste of time. Just like I told him to put me on the stand at my suppression [sic] hearing because the officers was lying, along with the state trooper from New Jersey because I gave him a fake name, and he told me that, that wasn’t my name like he already new [sic] who I was, and when I told Mr. Capone this he still never asked this question at my suppression hearing when he had trooper Ward on the stand.¹⁸

In his Reply, filed August 16, 2010, Defendant also elaborated on his assertion of ineffective assistance of counsel as follows:

I didn’t agree with Mr. Capone from day one, I tryed [sic] so many times to change lawyers, because Mr. Capone didn’t want to do his job the way he should, and I told he [sic] I didn’t want him, so by me not wanting him, it caused more problems, like when I wanted to go to trail [sic], he told my family my situation, and had my mother write me a letter whey we were in court telling me to take the plea because she needs me, and my daughter, and my daughter mom [sic] need me, and if I didn’t my Daughter mom would go crazy in check in to a hospitle [sic]. That’s another thing I don’t understand, I though [sic] what ever is

¹⁷ Aff. of Jerome M. Capone, Esq.

¹⁸ *Id.* at 2.

said between me and my lawyer stay [sic] between us, just like the letter I agressed [sic] to him, he takes it upon himself, and send [sic] a copie [sic] to the courts and the proscuter [sic], that letter was between us not anybody else it feels like he did that to hurt me not to help me those were my feelings on that paper, not a (motion). That's just like the New Jersey State Trooper stop report, he didn't write the stop report intill [sic] we sent for the paper work the date on it was 9-22-08 the computer that it was writting [sic] on doesn't lie, and I showed it to Mr. Capone, and all he did was brush me off, Just like he did when I told him I wanted to appeal [sic] my sentence, the other time he brush me off was the day of trail [sic] when he showed me that my co-defendant was going to take the stand on me, showing me this at the last second made me go crazy, So I asked he could he rescule [sic] it, and he told me that the Judge wouldn't do it, I told him why not this could change everything because he's going to change his story, and lie on me, but he didn't care because he didn't even try to ask, witch [sic] would have been the right thing to do since he works for me.

* * *

Just like when the task force pull us over I was sleep [sic] when they went through my pockets and pulled me out the car, and onto the ground, Mr. Capone never brough [sic] any of these things up he said it didn't matter, and I know that's not right because everything matters, I may not know the law, but I do know when somethings not feel write [sic], and what he was doing wasn't right. Just like when I told him the stuff they found in my lower pockets wasn't mine, the only thing that belong to me was the pills nothing else don't remember them pulling anything out of my pocket because I was sleep [sic] that's what they said they found in. . . [end of Reply]¹⁹

7. Defendant's claims of ineffective assistance of counsel are governed by the United States Supreme Court's decision in *Strickland v.*

Washington.²⁰ Under *Strickland*, Defendant bears the burden of proof in meeting a two prong test: that counsel's efforts "fell below an objective

¹⁹ Def.'s Resp. at 1-2.

²⁰ 466 U.S. 668 (1984).

standard of reasonableness” and that, but for counsel’s alleged error there was a reasonable probability that the outcome would have been different.²¹ In the context of a guilty plea challenge, the second prong requires that a defendant show that “counsel’s actions were so prejudicial ‘that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial.’”²²

When evaluating counsel’s performance, “[a] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”²³ A Court “cannot require defense counsel to choose one particular defense strategy over any other strategy that falls within the ‘wide range of competent assistance[.]’”²⁴ “Choices of trial strategies and tactics are insufficient to establish ineffective representation even though others may have made different choices and such choices may be subject to criticism.”²⁵

8. Defendant has alleged that defense counsel was ineffective because he “persuaded [Wright] to take plea under duress-Would not properly prepare for [Wright’s] defense; talked to family and asked them to persuade [Wright]

²¹ *Id.* at 668-691.

²² *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citations omitted).

²³ *Strickland*, 466 U.S. at 689.

²⁴ *Oliver v. Wainwright*, 795 F.2d 1524, 1531 (11th Cir. 1987) quoting *Strickland*, 466 U.S. at 688-89.

²⁵ *Tyra v. State*, 574 N.E.2d 918, 924 (Ind. Ct. App. 1991) (quoting *Cochran v. State*, 445 N.E.2d 974 (Ind. 1983)).

to plea [sic] guilty.”²⁶ Upon review of the facts and history of this case, Defendant’s contentions fail to meet the test established in *Strickland*. Although Defendant has made the vague and unsubstantiated allegation that Mr. Capone treated his case like it was a “waste of time,” Mr. Capone stated that he visited Defendant on several occasions to discuss the strengths and weaknesses of his case, and that Defendant entered a guilty plea “with the belief and understanding that it was in his best interest.”²⁷ This is entirely consistent with the plea colloquy, wherein Defendant stated as follows:

The Court: Did you sign this guilty plea form after reviewing it carefully with your attorney, Mr. Capone?

Defendant: Yes, Your Honor.

The Court: Have you been promised anything that is not stated in your plea agreement?

Defendant: No, Your Honor.

The Court: Has your lawyer, the State, or anyone threatened or forced you to enter this plea?

Defendant: No, Your Honor.

* * *

The Court: Are you satisfied with Mr. Capone’s representation of you and that he has fully advised you of your rights?

Defendant: Yes, Your Honor.

The Court: Are all your answers truthful?

Defendant: Yes, Your Honor.

The Court: The plea agreement was read into the record by Mr. Barber, and then discussed by Mr. Capone, did you sign that plea agreement document after reviewing it also carefully with Mr. Capone?

Defendant: Yes, Your Honor.

* * *

The Court: Is one of the reasons that you decided to accept the State’s plea offer to avoid the risk of being convicted

²⁶ Def.’s Feb. 19 Mot. for Postconviction Relief at 3.

²⁷ Aff. of Jerome M. Capone, Esq. at ¶ 2.

and being sentenced, or the State seeking a longer sentence against you than the 7 years that it's willing to recommend?

Defendant: Yes, Your Honor.

The Court: Do you understand that what's being done today is final, you will not be able to come back at any later time to seek to withdraw this guilty plea?

Defendant: Yes, Your Honor.

The Court: Do you believe you have had significant time to discuss this with Mr. Capone?

Defendant: Yes, Your Honor.

The Court: Do you believe your knowingly, voluntarily and intelligently entering a plea of guilty to the two charges?

Defendant: Yes, Your Honor.

The Court: I find the guilty pleas to be knowingly, intelligently, and voluntarily offered.²⁸

Mr. Capone's representation of Defendant herein did not violate an objective standard of reasonableness, as defined by *Strickland*. To the contrary, the foregoing colloquy and the facts of this case evidenced that Defendant was confronted with the possibility of a life sentence secondary to being classified as a habitual offender, and that after discussing the risks of proceeding through trial with Mr. Capone, Defendant knowingly, intelligently, and voluntarily entered a guilty plea to secure a seven (7) year sentence recommendation from the State. The guilty plea colloquy confirms Defendant's awareness that he was eligible for a life sentence, given his habitual offender status, and the colloquy further confirms that he entered a knowing, voluntary, and intelligent plea of guilty to avoid the risk of being

²⁸ Tr. at 5:18-14:8.

convicted at trial and a longer sentence being sought by the State.²⁹

Defendant has adduced no facts to support an allegation that Mr. Capone's "actions were so prejudicial 'that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.'"30

With respect to Defendant's allegation that Mr. Capone forced him to enter this plea under duress, Defendant was specifically asked if this plea was being entered under threat or force from the State, defense counsel, or anyone else, and he stated that it was not.³¹ Defendant has introduced no evidence to refute his testimony during the colloquy. As explained by the Supreme Court of Delaware, "[i]n the absence of clear and convincing evidence to the contrary, [the defendant] is bound by his answers on the Truth-in-Sentencing Guilty Plea Form and by his sworn testimony prior to the acceptance of the guilty plea."³²

To the extent that Defendant claims that defense counsel was ineffective because Mr. Capone improperly communicated with Defendant's family in an effort to coerce Defendant into pleading guilty, this contention is not credible, given the plea colloquy. Thus, Defendant has not shown that

²⁹ *Id.* at 8:13-19.

³⁰ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citations omitted).

³¹ Tr. at 6:11-13.

³² *Somerville*, 703 A.2d at 681 (citations omitted).

Mr. Capone's representation fell below an objective standard of reasonableness nor established that he would not have pleaded guilty and insisted upon going to trial but for any alleged improper preparation or duress by Mr. Capone.

9. Second, Defendant has alleged that Counsel was ineffective because Counsel "failed to file a direct appeal after [Wright] requested him to do so." Once again, Defendant has failed to meet the *Strickland* test. Mr. Capone met with Defendant in cell block after the sentence was imposed; Mr. Capone's affidavit stated that Defendant "thanked me for my work in his defense and told me he was satisfied with the result. There was no indication that he wanted me to file an appeal."³³ Moreover, Defendant confirmed his understanding that by pleading guilty he would "waive or give up certain constitutional rights," including the right to appeal; Defendant answered the Court as follows:

The Court: [Do you understand that the waived constitutional rights include the right] to appeal, if convicted, to the Delaware supreme Court, with the assistance of a lawyer?

Defendant: Yes, Your Honor.

The Court: Do you wish to waive or give up all those rights and enter pleas of guilty to Trafficking in Cocaine and to Possession With Intent to Deliver Cocaine?

Defendant: Yes, Your Honor.³⁴

³³ Aff. of Jerome M. Capone, Esq. at ¶ 2.

³⁴ Tr. at 7:17-8:2.

Accordingly, Defendant's motion has failed to establish that, under the foregoing circumstances, any failure to file a direct appeal fell below an objective standard of reasonableness or that the result would have been different if Mr. Capone had filed a direct appeal. Indeed, the record fails to establish even that Defendant ever discussed the filing of a direct appeal with Mr. Capone secondary to the entry of Defendant's guilty plea. Therefore, Defendant has failed to meet the *Strickland* test.

10. Finally, Defendant asserts that defense counsel was ineffective because Mr. Capone "failed to file motion for the illegal stop-The evidence that the police confiscated all came from an illegal stop."³⁵ This allegation was expanded upon in Defendant's Reply, wherein Defendant acknowledges that a motion to suppress was filed, but nonetheless faults Mr. Capone for failing to call Defendant to the stand and to question Trooper Ward, because Defendant seems to believe that this would have enhanced his prospects of prevailing on his motion to suppress by discrediting Trooper Ward with respect to Ward's knowledge of Defendant's identity at the time of the traffic stop.³⁶

Again, Defendant has failed to satisfy the *Strickland* test. Defendant has failed to establish any reasonable probability that Mr. Capone's

³⁵ Def.'s Feb. 19 Mot. for Postconviction Relief at 3.

³⁶ Def.'s Resp. at 2.

presentation strategy during the suppression hearing changed the outcome of his case. As stated in *Strickland*, “[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.”³⁷ There was a full hearing on this issue, and Mr. Capone’s conduct and strategy during that hearing must be given a strong presumption that it was “within the wide range of reasonable professional assistance.”³⁸ Moreover, Defendant knowingly waived his right to contest the outcome of the suppression hearing:

The Court: Do you understand that by pleading guilty all defenses that you might have had at trial, including a later appeal of the suppression hearing, which was ruled against you, are forever waived or given up. Do you understand that?

Defendant: Yes, Your Honor.³⁹

The Court will not speculate as to what effect, if any, Mr. Capone’s presentation strategy during the suppression hearing might have had because Defendant has failed to rebut the strong presumption that Mr. Capone’s conduct was reasonable, and Defendant knowingly, voluntarily, and intelligently waived his right to appeal the decision on the motion to suppress.

³⁷ 466 U.S. 668, 689 (1984).

³⁸ *Id.*

³⁹ Tr. at 13:5-11.

11. For the reasons stated above, Defendant's claims for ineffective assistance of counsel are deficient when analyzed under the *Strickland* test. Therefore, Defendant's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Jerome M. Capone, Esquire