SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

February 15, 2011

N440 STATE MAIL
Mr. DeAndre R. Pettiford
SBI: 003
Howard R. Young Correctional Institution
1301 East 12th Street
P.O. Box 9561
Wilmington, DE 19809

RE: ***State of Delaware v. DeAndre R. Pettiford***
ID No. 0812020458
Supreme Court No. 290, 2010

Dear Mr. Pettiford:

I have received your postconviction motion filed pursuant to Super.Ct.Crim.R. 61 ("Rule 61"). You seek to have your conviction and sentence in the above-referenced case vacated.

My summary dismissal of your initial motion was remanded by the Delaware Supreme Court for expansion of the record. On remand, I granted your motion to amend. I now have your amended motion, defense counsel's affidavits, the State's affidavit, and your reply. Your motion is considered to be timely filed, and the other procedural bars of Rule 61 do not apply. Based on the written submissions and the record of the

proceedings, your motion is denied.

Facts. The evidence at trial showed that an IRS tax refund check, payable to William and Janeen Pollard in the amount of $13,638, was stolen from a home in Sussex County. The house was owned by the Pollards and rented by Seven Abdullah and her sister. With a forged endorsement, the Pollards' check was deposited at the ATM machine at Delaware National Bank in Seaford, Delaware into the joint account of your co-defendant Michael Quailes and a woman not implicated in the crimes.

On April 2, 2008, Quailes withdrew $13,000 from the account and later in the day withdrew $635. The State charged Abdullah, Quailes and yourself with second degree forgery, misdemeanor theft, theft by false pretenses, and second degree conspiracy. Abdullah and Quailes entered guilty pleas, which included promises to testify against you at your trial.

Abdullah dated you for about three weeks in the Spring of 2008. She recalled seeing the Pollards' refund check arrive in the mail and put it on her kitchen table with the rest of the Pollards' mail. She later noticed that the check was missing and believed that you had taken it. Later, she saw it in Quailes' possession. She stated that Quailes forged the Pollards' names on the check. She stated that on April 1, 2008, you drove her and Quailes, in Quailes' vehicle, to various banks to cash the check.

After several unsuccessful attempts, you and Quailes decided to deposit the check in Quailes' account and withdraw the funds when the check cleared. A bank security

camera captured the transaction on videotape, although you do not appear in it. Abdullah testified that you remained in the car. Quailes testified that you stood just beyond range of the security camera.

The next day, after the check cleared, Quailes met you and Abdullah at your mother's house, where Quailes gave you $13,000 in cash. You gave Quailes a portion of the money and nothing to Abdullah. She testified about how you and she spent the money.

Quailes testified that you offered him money to drive him to a bank to cash a check. Quailes denied having endorsed the check or having seen it up close. Eventually he deposited it in his account and gave you the money later. He denied any involvement other than entering numbers at the ATM machine. He stated that you were standing just outside the view of the security camera. He gave you $13,000 of the proceeds the next day, whereupon you told him to keep the remaining $638. He withdrew $635 later in the day, and both withdrawals were reflected in bank records.

Because of brain surgery that affected his memory, Quailes spoke with a close friend to refresh his memory of these events. Based on Quailes' statement that his testimony derived from his own memory and personal knowledge, I denied your motion to dismiss on grounds that Quailes' testimony was not based on personal knowledge, as well as your motion for judgment of acquittal.

The jury convicted you of one count each of second degree forgery, misdemeanor theft, theft by false pretenses and second degree conspiracy, as charged. I granted the State's motion to declare you a habitual offender on each of the three felony convictions. You were sentenced to eleven years at Level 5, with credit for time served, suspended after ten years for one year of Level 4 work release. Your conviction and sentence were affirmed on appeal.

You timely filed a postconviction relief motion, which I summarily dismissed. The Supreme Court remanded for expansion of the record. This is my decision following remand.

Issues. You raise the following grounds for vacating your conviction and sentence:

(1) Misconduct by your trial attorney, the prosecutor and this Court based on defense counsel's alleged conflict of interest.

(2) Defense counsel's alleged failure to prepare a defense.

(3) Defense counsel's failure to call a hand-writing expert.

(4) The State's use of an allegedly coerced guilty plea to have you declared a habitual offender.

(5) Selective prosecution.

(6) The State's use of "forensic linguistics" to prove the identity of the forgerer.

(7) Judicial error in permitting Quailes to view the videotape of his interview

conducted by Detective Gray of the Delaware State Police.

(8) Defense counsel's failure to subpoena Tara Jones and Pamla Luke.[1]

(9) Defense counsel's failure to object to alleged hearsay statements made by witnesses who had spoken to Dell Burk, who did not testify at trial.

Discussion. Your primary allegation is that, in violation of your Sixth Amendment right to counsel, defense counsel had a conflict of interest in defending you because he represented Quailes in entering his guilty plea in the same case. You speculate that defense counsel may have gained incriminating evidence against you from Quailes. Based on these allegations, you assert that defense counsel, the State and this Court conspired together to hide the conflict in order to secure your conviction.

An actual conflict of interest on the part of defense counsel breaches counsel's duty of loyalty to his client.[2] If a conflict exists, prejudice is presumed only if the defendant shows that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected [defendant's] lawyer's performance."[3] To prevail on a Sixth Amendment claim for lack of ineffective representation, a criminal defendant must show by a preponderance of the evidence that defense counsel's conduct fell below a reasonable professional standard and that such conduct was prejudicial to the

---

[1]Ms. Luke spells her first name "Pamla."

[2]*Strickland v. Washington*, 466 U.S. 668, 692 (1984)(citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-350 (1980)).

[3]*Id.* at 350.

defendant.[4]

The record shows that no conflict of interest existed. Quailes was represented at his plea hearing by conflict counsel, James Nutter, Esquire. Your attorney, Mr. Daniello, testifies that conflict counsel was appointed for Quailes as soon as the conflict was found on February 25, 2009. The next day, February 26, 2009, conflict counsel for was appointed for Quailes.

Mr. Daniello further testifies that he never met or spoke with Quailes on any occasion. At sidebar during Quailes' questioning at trial, defense counsel said the same thing. You assert that the sidebar discussion is proof that there was a conflict and that a conspiracy existed among defense counsel, the prosecutor and myself to cover it up. However, given Quailes' early appointment of conflict counsel, a conflict did not develop. As separate representation was provided, there was no actual prejudice. With a heavy criminal docket, it is not uncommon to sort out assignments of counsel near the preliminary steps of a case.[5]

The sidebar pertained to defense counsel's request that the situation leading to the appointment of other counsel for Quailes not be revealed to the jury. This request was appropriate because that process was not relevant for trial purposes, and jurors are not

---

[4] *Younger v. State*, 580 A.2d 552, 556 (Del.1990)(citing *Strickland v. Washington*, 466 U.S. 668, 686, 694 (1984)).

[5] *See, Stokes v. State*, 524 A.2d 264 (Del. 1990)(no actual prejudice where co-defendants who were represented by same public defender at a preliminary hearing with later appointment of different trial counsel and separate trials).

informed about the use of public funds for defense lawyers to avoid prejudice. The request and the Court's regulation of the information protected your rights to a fair trial.

The basic requirement for a postconviction relief motion is that you present "a sufficient factual and legal basis for a collateral attack" on your conviction.[6] You have not done so, and this claim fails.

The lack of a conflict of interest moots your numerous assertions of conspiracy and misconduct on the part of the prosecutor and myself.

Second, you assert that defense counsel was ineffective for failing to prepare a defense. Failure to show either deficient attorney performance or sufficient prejudice defeats such a claim.[7]

Defense counsel states that his strategy was to highlight the lack of physical evidence tying you to the crime and to show that Quailes' reason for implicating you was to deflect guilt away from himself. Defense counsel points out that you were not shown on the surveillance tape, that no one other than your co-defendants testified that you were at the bank and that no fingerprints or other forensic evidence implicated you.

This was defense counsel's strategy to create a reasonable doubt in the jurors' minds as to your guilt. This approach was professionally reasonable in light of the facts

---

[6]Rule 61(a)(1).

[7]*Strickland v. Washington*, 466 U.S. at 700.

of record, and you have not shown actual prejudice resulting from this strategy.[8] Your claim fails.

Third, you assert that defense counsel should have obtained a hand-writing expert to rule out the possibility that you endorsed the stolen check. Defense counsel points out that Abdullah testified that Quailes signed the check, which Quailes denied. The State focused on Abdullah as the forgerer, not you.

At trial, the State showed the jury the forged signatures on the check, Abdullah's driver's license signature and Quailes's signature on his criminal processing paperwork. The prosecutor suggested to the jury that Abdullah's signature was more similar to the endorsements than was Quailes' signature. Evidence of your signature was not presented or discussed.

Defense counsel argues that on these facts it was unnecessary to call a hand-writing expert because the State argued that Abdullah forged the check. Further, on cross-examination a hand-writing expert might be led to admit that a particular individual could not definitively be ruled out as a suspect. Thus, defense counsel made a professionally reasonable decision not to hire a hand-writing expert, and you suffered no prejudice from his decision.[9] This claim has no merit.

---

[8] *Younger*, at 556.

[9] *Id.*

Fourth, you assert that the State falsified your criminal history by using a coerced guilty plea to support the motion to have you declared a habitual offender. The validity of a prior conviction does not arise in the proceedings leading to a finding of habitual status.

The State met the requirements to support its motion. Certified records of your prior felony convictions were submitted with the motion, and the Court found them to be accurate. Each record reflects your SBI number and uses your name, in addition to various aliases. A contested VOP hearing on your conviction for Burglary 3rd was cancelled because the victim could not be subpoenaed. This fact has no effect on your Burglary 3rd conviction, which stands. This ground fails as a matter of law and fact.

Fifth, you allege selective prosecution because the State offered you a plea agreement that differed from those offered to your co-defendants. The State responds that it offered you a less lenient plea because of your criminal history.

To prevail on a claim of selective prosecution, you must show first that you have been singled out for prosecution, unlike others who have not been proceeded against for similar conduct. You must also show that the State's decision to prosecute you was based on race, religion or the desire to prevent your exercise of constitutional rights.[10] In meeting this standard, you must show "intentional and purposeful discrimination."[11]

---

[10] *State v. Weber*, 2010 WL 5343153, at *2 (Del.Super.)(internal citations omitted).

[11] *Id.*

You fail to meet the first prong because the your plea offer was based on your criminal history compared to that your co-defendants, a reasonable decision on the State's part. You fail the second prong because you have not shown that the State's plea offer was based on race, religion or the intent to deprive you of your constitutional rights. Mere exercise of some selectivity is not in itself a federal constitutional violation,[12] and, in your case, the State had a reasonable basis for recommending a more lengthy sentence for you. This claim has no merit.

Sixth, you allege that the State used "forensic linguistics" in front of the jury to prove the identity of the forgerer of the check. As stated, *supra,* the State introduced Abdullah's Delaware driver's license and Quailes' guilty plea paperwork for signature comparison purposes. This Court allowed admission of these documents, stating that the jury's duty was to compare the samples and make appropriate determinations. On appeal, this procedure was noted with approval.[13]

In closing statements, the prosecutor argued that Abdullah's signature was more like the forgerer's than was Quailes' signature. The prosecutor asked the jury to make its own comparison, acknowledging that definitive proof could not be determined by the comparison. You cannot show that these events prejudiced your case because you were not the target of the handwriting comparison. You have not shown any legal error. This

---

[12]*State v. Wharton*, 1991 WL 138417, at *5 (Del.1991).

[13]*Pettiford v. State*, 2010 WL 891910, at *2 n. 3 (Del.).

claim has no merit.

Seventh, you allege that this Court erred in permitting Quailes to view the videotape of his pre-arrest interview conducted by Det. Gray. You do not explain why this was error or how it prejudiced you. At trial, I ruled that under 11 *Del.C.* § 3507, Quailes' presence in the courtroom was required because you had the right of cross-examination.[14] This is a statutory condition of admitting a § 3507 statement and is confirmed by our Supreme Court.[15]

Eighth, you argue that defense counsel was ineffective for failing to subpoena Tara Jones and Pamla Luke. Ms. Jones is the bank teller who assisted Quailes and Abdullah with the ATM deposit. You allege that her testimony could have proved that you were not at the bank with your co-defendants. Defense counsel testifies that you told him that Quailes had given you a ride to the Super Soda Center in Seaford in order to cash Quailes' social security check. In other words, you conceded that you were with Quailes on the day in question, that you shared a car, and that the purpose of the drive was to cash a check. Counsel reasoned that it was preferable not to call a witness who might have confirmed your presence in the car or in the bank.

---

[14]*Barnes v. State*, 858 A.2d 942, 944 (Del. 2004).

[15]Section 3507(a) states as follows:

> In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.

Even if Tara Jones had testified as you suggest, her testimony could not outweigh your concessions that you were with Quailes in the car and that you were trying to cash a check. Defense counsel's failure to subpoena Tara Jones did not fall below an objective standard of professional conduct. Nor have you shown a reasonable possibility that if she had testified, the result of the trial would have been different. You have not met either prong of *Strickland*, and this claim fails.

In your reply, you include an undated, unsworn affidavit signed by "Pamla Luke," who is your mother. The affidavit acknowledges that Ms. Luke saw you and Abdullah drive up to her house when Quailes was visiting her. The affidavit also asserts that your transactions with Quailes were related to a drug transaction. This unverified affidavit, presented for the first time in your reply, carries no weight.

Finally, you allege that defense counsel was ineffective for failing to make hearsay objections to statements made to witnesses by Dell Burk, head of risk management at the Sussex County Federal Credit Union in Seaford, Delaware. The record shows that Ms. Burk was unavailable to testify because she was out on the federal Family Medical Leave Act.

You have not identified the alleged hearsay, and the page numbers you cite do not correspond to the pages in the Court's copy of the transcript. Nevertheless, the pages have been located, and the statement of each witness is addressed individually.

In Burk's stead, the State called her supervisor, Sherry T. Shockley, chief financial officer at Sussex County Federal Credit Union. The prosecutor asked Shockley if she had looked at Burk's file pertaining to the IRS check. Ms. Shockley testified in detail as to the Credit Union's records of the deposit of the check and of Quailes' withdrawals.

Shockley was not asked what Burk said to her, nor did she refer to any statement made by Burk. Thus, Shockley's testimony was not hearsay. Instead, she testified as to her personal knowledge of the file on the check, as well as bank procedures. A hearsay objection would have been denied.

Dell Burk's name also came up in the testimony of the State's witness Kathryn Littleton, regional security officer for Fulton Financial Corporation, which owns Delaware National Bank. Littleton testified that she received a phone call from Burk informing her of a case being referred to the police for investigation. Littleton was then asked what she did after she got the call, signifying that her testimony was not offered for the truth of Burk's statement, but to reveal Littleton's own actions. Littleton explained her procedure in detail without reference to Burk. In other words, Littleton's testimony was not hearsay, and an objection on that basis would have been denied.

Detective Bernard Gray of the Delaware State Police also referred to Burk during his cross-examination. When defense counsel asked Gray if the Bank information consisted of receipts and photographs, Gray answered as follows:

> No, Sir. I had the receipt and the photographs, but I also, in speaking with Mrs. Burk, Dell Burk, financial investigator, she spoke with Mr. Quailes

regarding this incident prior to contacting me. At which time, I was given information that Quailes had given her regarding Mr. --

At this point, defense counsel interrupted Gray before he ventured into hearsay. Defense counsel testifies in his affidavit that his purpose with this line of questioning was to show that although Quailes implicated you in the crimes, the State offered no physical or documentary evidence to that effect. Further, Burk's statements would not have been offered for their truth but to show how Gray conducted his investigation. Gray's testimony is not hearsay, and any such objection would have been denied.

For all these reasons, your motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary
cc: Cathy L. Howard, Clerk, Supreme Court of Delaware
John P. Daniello, Esquire
Abby Adams, Esquire
Melanie C. Withers, Esquire