

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

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
FREDDIE CODY,	)	Cr. ID No. 1111002790
	)	
Defendant.	)	
	)	

Submitted: March 26, 2015  
Decided: June 4, 2015

Upon Defendant's Motion to Withdraw Guilty Plea  
**DENIED**

**MEMORANDUM OPINION**

Caterina Gatto, Esquire, Department of Justice, Wilmington, Delaware, Attorney  
for the State

Richard Zemble, Esquire, Attorney for Defendant

**JOHNSTON, J.**

## **FACTUAL AND PROCEDURAL CONTEXT**

Defendant was indicted on December 5, 2011, on charges of Robbery First Degree and two counts of Possession of a Deadly Weapon During the Commission of a Felony. At the time of the indictment, Defendant was in the custody of the Pennsylvania Department of Corrections for Attempted Robbery, which he committed in Philadelphia two days after the offenses at issue in this case. A Rule 9 Warrant and Authorization for Extradition were issued in Delaware. A Summons for Arraignment was mailed to Defendant on December 20, 2011. On January 9, 2014, the Pennsylvania Department of Corrections sent a letter to this Court enclosing executed detainer forms. On May 16, 2014, the State filed IAD forms for Defendant's transfer to Delaware.

Defendant was extradited to Delaware on May 22, 2014. Defendant was arraigned on June 10, 2014. At his First Case Review on June 23, 2014, Defendant pled guilty to Robbery First Degree and Possession of a Deadly Weapon During the Commission of a Felony. The State agreed not to proceed with sentencing as a habitual offender, pursuant to 11 *Del. C.* § 4214(b). A *nolle prosequi* was entered on the remaining count of Possession of a Deadly Weapon During the Commission of a Felony.

Sentencing was scheduled for September 19, 2014. On September 8, 2014, a continuance request was filed. Timothy Weiler, Esq., Defendant's counsel, had

been advised that Defendant planned to file a motion to withdraw his guilty plea. The continuance request was granted on September 9, 2014.

Richard Zemble, Esq. entered his appearance on behalf of Defendant on September 18, 2014. On November 26, 2014, Defense Counsel filed the instant Motion for Withdrawal of Guilty Plea.

## ANALYSIS

### *Withdraw of Guilty Plea*

A guilty plea must be voluntary and the Court must be satisfied that the plea is not the result of force, threats, or promises not included in the plea agreement.<sup>1</sup> Superior Court Criminal Rule 32(d) grants the Court discretion to permit withdrawal of a guilty plea if the defendant can demonstrate a fair and just reason for doing so.<sup>2</sup> A guilty plea may be withdrawn only if the Court finds that the plea was not entered into voluntarily or that the defendant entered the plea because of mistake or misapprehension of his legal rights.<sup>3</sup>

In the present case, Defendant claims that his guilty plea should be withdrawn because: (1) his Sixth Amendment right to effective assistance of counsel was violated; (2) his Sixth Amendment right to a speedy trial was violated;

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<sup>1</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

<sup>2</sup> Super. Ct. Crim. R. 32(d).

<sup>3</sup> *Smith v. State*, 451 A.2d 837, 839 (Del. 1982).

and (3) he has a basis to assert legal innocence because of a violation of Delaware Superior Court Criminal Rule 48(b).

The Court must consider five factors when deciding a motion to withdraw a guilty plea: (1) whether there was a procedural defect in taking the plea; (2) whether defendant knowingly and voluntarily consented to the plea agreement; (3) whether defendant presently has a basis to assert legal innocence; (4) whether defendant had adequate legal counsel throughout the proceedings; and (5) whether granting the motion will prejudice the State or unduly inconvenience the Court.<sup>4</sup> The Court is not required to balance the factors.<sup>5</sup> Facts supporting any one factor may justify relief on its own.<sup>6</sup>

Defendant does not allege that there was a procedural defect in taking the plea. Therefore, the first factor is not at issue.

The second factor that the Court will consider is whether defendant knowingly and voluntarily consented to the plea agreement. The record is clear that on June 23, 2014, before a Superior Court Judge, Defendant entered a knowing, voluntary, and intelligent guilty plea. The Court discussed in great detail with Defendant the Truth in Sentencing Guilty Plea Form, the nature of the charges, the trial rights he was waiving as a result of entering a guilty plea, the

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<sup>4</sup> *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007).

<sup>5</sup> *Id.*

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

consequences of entering a guilty plea, and his satisfaction with his lawyer's representation. Defendant stated that he understood the effect of entering a guilty plea. Therefore, the Court finds that Defendant knowingly and voluntarily consented to the plea agreement.

Defendant's assertion of legal innocence is based on an alleged violation of Delaware Superior Court Criminal Rule 48(b), as well as on the failure of the victim and a witness to identify Defendant in a photo lineup. Delaware Superior Court Criminal Rule 48(b) states in pertinent part: "[I]f there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."<sup>7</sup> While there was a two-and-a-half year interim between Defendant's indictment and the entry of his guilty plea, any delay is attributable to Defendant. Defendant was incarcerated in Pennsylvania during that period. Therefore, the Court will not exercise its discretion to dismiss Defendant's indictment.<sup>8</sup>

Defendant's guilty plea negates any claims that he is actually innocent. During Defendant's plea colloquy, the Court summarized the charges and asked Defendant how he pled to each. Defendant pled guilty to each charge. The Court then asked Defendant to explain his wrongdoing.

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<sup>7</sup> Super. Ct. Crim. R. 48(b).

<sup>8</sup> See *Boyer v. State*, 2003 WL 21810824, at \*3-4 (Del.).

THE DEFENDANT: What I did wrong, was, I was under the influence of drugs at the time and I needed more, so on the mentioned date I, umm, robbed an individual, not sure of her name, I think you mentioned it, and I took her purse, and I drove off.

THE COURT: All right. And you knew you did not have permission to do that right?

THE DEFENDANT: Right.

Having admitted to the Court that Defendant robbed the victim by stealing her purse, there is no basis for Defendant's claim of actual innocence.

Defendant next argues that he did not have adequate legal counsel throughout the proceedings. Defendant alleges that his lawyer, Timothy Weiler, Esq., advised Defendant to enter a guilty plea without first reviewing the discovery with him. However, Weiler has stated in an Affidavit that he received the discovery documents on June 16, 2014, and mailed the documents to Defendant on June 20, 2014. Weiler also stated that he reviewed the documents with Defendant on June 23, 2014, before Defendant's First Case Review.

Defendant's assertion that he did not receive adequate legal counsel is also contradicted by his statements made to the Court during Defendant's plea colloquy:

THE COURT: Are you satisfied with your lawyer's representation of you?

THE DEFENDANT: Yes.

THE COURT: Do you feel that Mr. Weiler has fully advised you of your rights?

THE DEFENDANT: Yes.

THE COURT: Do you feel that Mr. Weiler has represented you diligently?

THE DEFENDANT: He explained all of the facts to me, yes.

*Strickland v. Washinton* sets out a two-prong test for determining the adequacy of a defendant's legal representation during the criminal process.<sup>9</sup> "In the context of a guilty plea challenge, *Strickland* requires a defendant to show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) 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."<sup>10</sup> The United States Supreme Court has held that there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>11</sup>

In the present case, Weiler swore in his Affidavit that he reviewed the discovery with Defendant. Further, Defendant stated in his colloquy that he was satisfied with Weiler's representation. The Court finds that Defendant has failed to demonstrate that he received inadequate legal counsel throughout the proceedings.

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<sup>9</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>10</sup> *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citation and internal quotation marks omitted).

<sup>11</sup> *Strickland*, 466 U.S. at 689.

The last factor that the Court must address is whether granting the motion will prejudice the State or unduly inconvenience the Court. Because Defendant has failed to establish a fair and just reason for the withdrawal of his guilty plea based on any of the above-mentioned factors, it is unnecessary to discuss any prejudice that would be suffered by the State or inconvenience faced by the Court if the Motion were to be granted.<sup>12</sup> Nevertheless, permitting withdrawal of the guilty plea would prejudice the State and the elderly victim. The presentence investigation in this case noted that the victim has been traumatized. That trauma has resulted in her fear of leaving her home. A trial would result in the victim being required to testify, further prolonging any recovery from the victim's fear of engaging in the normal activities she enjoyed before the robbery.

A review of the record demonstrates that Defendant's guilty plea was made knowingly, voluntarily, and intelligently. Defendant received adequate legal counsel and does not presently have a basis to assert legal innocence. Therefore, the Court finds that Defendant has failed to articulate a fair and just reason to allow the withdrawal of his guilty plea.

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<sup>12</sup> *State v. DuCoin*, 2013 WL 5801735, at \*5 (Del. Super.) (“[B]ecause this Court finds that Defendant has not met the before-mentioned bases for withdrawing the plea, this Court does not address [the fifth] factor.”).



### *Speedy Trial*

Delaware courts have adopted a four-part test to assess whether a speedy trial violation has occurred. The factors the Court will consider are: “(1) the length of delay; (2) the reason for the delay; (3) the defendant’s assertion of the right to a speedy trial; and (4) prejudice to the defendant.”<sup>13</sup> None of the four factors is dispositive of the issue.<sup>14</sup> “Rather ‘they are related factors and must be considered together with such other circumstances as may be relevant.’”<sup>15</sup>

### Length of Delay

A defendant’s right to a speedy trial attaches at the moment of arrest or indictment, whichever occurs first.<sup>16</sup> The length of delay is the threshold factor “[because u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.”<sup>17</sup> There is no precise timing requirement for bringing a case to trial.<sup>18</sup> The more serious and complicated a case is, the more delay is tolerated.<sup>19</sup>

Defendant was indicted on December 5, 2011 but was not extradited from Pennsylvania to Delaware until May 16, 2014. Defendant was arraigned on June

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<sup>13</sup> *Page v. State*, 934 A.2d 891, 896 (Del. 2007) (citing *Barker v. Wingo*, 407 U.S. 514, 519 (1972)).

<sup>14</sup> See *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002).

<sup>15</sup> *Id.* (quoting *Barker*, 407 U.S. at 530).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (quoting *Barker*, 407 U.S. at 530).

<sup>18</sup> *Skinner v. State*, 575 A.2d 1108, 1116 (Del. 1990).

<sup>19</sup> *Id.*

10, 2014. The two-and-a-half year delay is sufficient to provoke inquiry into the other three factors.

### Reason for Delay

The reason for delay is often referred to as the “‘flag all litigants seek to capture’ because it is here that the speedy trial argument usually stands or falls.”<sup>20</sup> When evaluating the reason for delay, some explanations for delay are weighted more heavily than others.<sup>21</sup> Deliberate attempts to delay the trial to prejudice the defense are weighted heavily against the State.<sup>22</sup> More neutral reasons, such as negligence or over-crowded courts, are weighted less heavily.<sup>23</sup> A delay may be justified if there is a valid reason, such as a missing witness.<sup>24</sup> In such an instance, the delay will not weigh against the State.<sup>25</sup>

The reason for the two-and-a-half year delay in this case is Defendant’s incarceration in Pennsylvania for a robbery he committed two days after the offense that he committed in Delaware. In *Boyer v. State*, a nine-year delay separated the entry of Boyer’s guilty plea and his sentencing.<sup>26</sup> The reason for

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<sup>20</sup> *Bailey v. State*, 521 A.2d 1069, 1081 (Del. 1987) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)).

<sup>21</sup> *Middlebrook*, 802 A.2d at 274.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 2003 WL 21810824, at \*3 (Del. 2003).

delay was incarceration in Pennsylvania for violating his Pennsylvania parole.<sup>27</sup> The Court held that the nine-year delay between Boyer's guilty plea and sentencing was not attributable to the State because the Pennsylvania incarceration constituted a valid reason for delay.<sup>28</sup> Similarly in the present case, the two-and-a-half year delay because of Defendant's incarceration in Pennsylvania is not attributable to the State. Therefore, this factor weighs against Defendant.

#### Defendant's Assertion of the Right to a Speedy Trial

"If and when a defendant asserts his [speedy trial] rights are factors of considerable significance in determining whether there has been a speedy trial violation."<sup>29</sup> Defendant asserted his speedy trial right on November 26, 2014, when he filed the instant Motion for Withdrawal of Guilty Plea. While Defendant did not raise the issue at the first possible opportunity – at his First Case Review on June 23, 2014 – he did raise it within a reasonable time. Therefore, Defendant's assertion of his right to a speedy trial on November 26, 2014, will not weigh against him.

#### Prejudice to Defendant

The right to a speedy trial was designed to protect three important defendant interests: (1) preventing oppressive pretrial incarceration; (2) minimizing the

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<sup>27</sup> *Id.* at \*4.

<sup>28</sup> *Id.*

<sup>29</sup> *Bailey*, 521 A.2d at 1082.

anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.<sup>30</sup> Defendant was not incarcerated in Delaware for an unreasonable amount of time prior to the entry of his guilty plea. He was extradited to Delaware on May 22, 2014, and entered his guilty plea at his First Case Review on June 23, 2014. The two-and-a-half years that Defendant was incarcerated in Pennsylvania was for a robbery that he committed there and therefore Defendant was not prejudiced by such incarceration. Additionally, there is no evidence to suggest that Defendant suffered any extraordinary anxiety as a result of the delay. “Whether the defense itself was impaired is the most serious interest which must be protected to insure fairness.”<sup>31</sup> Defendant has asserted that there is a “real possibility” that the defense will be impaired because memories may fade, witnesses may become inaccessible, and evidence may be lost. However, Defendant has not demonstrated that any of these situations have actually occurred, resulting in prejudice to Defendant.

Balancing all of the factors, the scale weighs against Defendant. Although the two and a half years between indictment and the entry of the guilty plea constituted a substantial delay, the reason for the delay (Defendant’s incarceration in Pennsylvania) is attributable to Defendant. Further, Defendant has failed to

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<sup>30</sup> *Barker*, 407 U.S. at 532.

<sup>31</sup> *Skinner*, 575 A.2d at 1117.

articulate any claims of actual prejudice suffered because of the delay. Therefore, this Court finds that Defendant's right to a speedy trial was not violated.

**THEREFORE**, Defendant's Motion to Withdraw Guilty Plea is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ Mary M. Johnston

The Honorable Mary M. Johnston