IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	In and For Kent County
	)	ID. Nos. 1108023648, 1109005261
v.	)	
	)	RK11-10-0177-01 Robbery 1st (F)
WILLIAM S. SELLS,	)	RK11-10-0178-01 PFDCF (F)
	)	RK11-10-0190-01 Consp. 2nd (F)
Defendant.	)	RK11-10-0210-01 Assault 2nd (F)

Susan G. Schmidhauser, Esq., Deputy Attorney General, Dover, Delaware. Attorney for the State.

William S. Sells, *Pro se.*

COMMISSIONER'S REPORT AND RECOMMENDATIONS

Upon Consideration of Defendant's Motion
For Postconviction Relief Pursuant to
Superior Court Criminal Rule 61

FREUD, Commissioner
October 11, 2017

On May 28, 2013, the Defendant William S. Sells ("Sells") was found guilty following a jury trial to one count of Robbery in the First Degree; one count Possession of a Firearm During by a person Prohibited; one count of Possession of a Firearm by a Person Prohibited; one count of Wearing a Disguise During the Commission of a Felony; six counts of Aggravated Menacing; and five counts of Reckless Endangering. He was acquitted of one count of Conspiracy in the First Degree and one count of Conspiracy in the Second Degree. He was declared an

habitual offender and sentenced to a total of ninety-eight years incarceration. A timely appeal was filed and the Delaware Supreme Court reviewed and remanded the matter back to this Court.

Subsequently Sells pled guilty on July 13, 2015 the morning his second trial was scheduled to begin to one count of Robbery in the First Degree, one count Possession of a Firearm during Commission of a Felony, one count of Conspiracy Second Degree and one count of Assault Second Degree. *Nolle prosequis* were entered on all remaining charges. The Court sentenced Sells in accordance with the Plea Agreement as follows: as to Robbery First Degree, twenty-five years at Level V incarceration, pursuant to 11 *Del. C.* § 4214 as an habitual offender;[1] as to Possession of a Firearm During the Commission of a Felony, five years at Level V incarceration, followed by two years at Level III, pursuant to 11 *Del C.* § 4214; Assault Second Degree, eight years at Level V incarceration, suspended after five years at Level V, followed by two years at Level III, pursuant to 11 *Del C.* § 4214; and Conspiracy Second Degree, two years at Level V incarceration, suspended for two years at Level III. Had he gone to trial and been found guilty of all offenses charged he would have faced life in prison. As noted in the plea transcript, the Plea Agreement was the result of lengthy negotiations between the parties. Sells did not appeal his conviction or sentence to the Delaware Supreme Court instead he filed the pending Motion for Postconviction Relief, pursuant to Superior Court Criminal Rule 61, alleging ineffective assistance of counsel.

---

[1] During the plea colloquy Sells admitted that he was an habitual offender and that the Court had earlier declared him as such.

FACTS

Following are the facts as set forth by the Delaware Supreme Court:

> On August 26, 2011, a masked man entered the First National Bank of Wyoming in Felton, Delaware (the "Bank"), displayed what appeared to be firearm, ordered the Bank manager to exit her office, and told the tellers to empty the cash drawers. During the robbery, the man jumped over a counter in the Bank and blood was later discovered on the ceiling above that counter.[FN4] The man placed the money from the cash drawers into a satchel and exited the Bank. These events were recorded on the Bank's security cameras. The money taken from the Bank contained dye packs, a security device designed to stain money taken from the Bank, and "bait bills," bills for which the bank had recorded and maintained serial numbers in case of theft. Over $54,000 was taken from the Bank.
>
> When the suspect exited the Bank, he entered a black SUV. An employee of the Bank who ran outside during the robbery testified that she saw the SUV driving away from the Bank and that the SUV was emitting "pink, red smoke" which indicated to her that the dye pack had gone off. Officer Keith Shyers of the Harrington Police Department ("Officer Shyers") also observed the SUV, and testified that he saw a black male "hanging out [of] the window" of the SUV and a "red poof" that "looked like some kind of paint."
>
> Because the vehicle was traveling at a high rate of speed and he thought something was suspicious, Officer Shyers turned around and began following the SUV. Officer Shyers then heard a call that went out over the radio

> dispatch for a robbery that had just occurred at the Bank. Officer Shyers was the first officer to begin pursuing the car and was the lead vehicle for much of the pursuit. A few minutes into the pursuit, the SUV stopped at an intersection and the passenger got out of the vehicle and began firing shots at the pursuing officers. Officer Shyers testified that he was approximately 20 to 30 feet from the passenger and theat the passenger was a black male wearing a grey hooded sweatshirt.
>
> The passenger then got back in the SUV and a high-speed pursuit ensued involving officers from the Delaware State Police, Harrington Police Department, and Felton Police Department. At various points during the pursuit, the passenger popped up through the sunroof and fired shots at the officers. The left rear tire of Officer Shyer's vehicle was shot and he abandoned his vehicle and jumped into another officer's car to continue the pursuit.
>
> Corporal Scott Torgerson, an assistant shift supervisor for the Delaware State Police ("Corporal Torgerson"), who was driving a fully-marked Crown Victoria, took over as the lead vehicle in the pursuit. The passenger continued to fire shots at the officers from the sunroof. The SUV drove around spike strips that had been set in its path and Corporal Torgerson continued to pursue it. Shortly thereafter, the driver lost control of the SUV and it came to rest in a ditch with its back tires stuck. The driver and the passenger both exited the SUV and began fleeing and Corporal Torgerson fired shots at them. The driver of the SUV was shot in the leg by Corporal Torgerson and was later identified as [Russell] Grimes. The passenger of the vehicle escaped on foot.

The SUV was registered to Sophia Jones ("Jones"). Jones was Sells' girlfriend. Jones and Sells shared an apartment and had a child together. Jones testified that she did not know who was driving the SUV at the time of the bank robbery because she had not seen the SUV in over a week, but that the last time she had seen the SUV, Sells had been driving it. She testified that Sells had the SUV because he was trying to sell it.

After the robbery, police officers searched the apartment that Jones and Sells shared and asked her questions. Jones gave the officers Sells' cell phone number and told them that Sells' best friend was named "Russell." On August 28, Jones contacted the police and inquired about getting her SUV back. The officers then asked Jones if Sells had contacted her, and she replied that he had called her, inquired about his son, and asked whether the police had been to the apartment because he had heard about the SUV being in an incident with Grimes.

On September 6, 2011, Sells was found barricaded in a room at the Shamrock Motel. The SWAT team deployed tear gas grenades, smoke grenades, stringball grenades, [FN5] and stun grenades into the room through a small bathroom window that opened to the outside in order to get Sells to exit the room, but those efforts were unsuccessful. The officers used so many of the various types of grenades that Sergeant Ennis testified that he had "no idea how [Sells] stayed" in the room. [FN 6]

When the standoff ended and Sells was taken into custody, United State currency was collected from three separate locations of the motel room: in the living room, in the bathroom, and outside the motel underneath the

bathroom window. Many of the bills that were collected as evidence at the motel were torn and burned. Some of the money that was collected in the living room area of the motel room also appeared to be stained with a red dye. Sells' defense counsel elicited testimony on cross examination that the red stains on the currency could have been caused by some of the explosives, which discharge red dye. A large red stain also appeared on one of the walls of the motel room. Around 50 bills were collected from the motel room ranging in denominations from $1 to $50. The total value of the money collected was at most $769.[FN7]

Witnesses testified that Sells had used $475 of money with a red dye stain to purchase cigarettes, and that 34 of those bills matched bait bills that were taken from the Bank. One of Sells' female companions also testified that Sells used $3,500 in cash to purchase a car and that some of that money had red on it. That money was never recovered.[2]

FN 4 The testimony of a Senior Forensic DNA Analyst revealed that the samples taken from inside the Bank were not consistent with either Grimes or Sells.

FN 5 Stringball grenades were described by Sergeant Ennis as "a rubber softball [that] has small little tiny rubber balls that are inside of it; when it explodes, the rubber balls fly around."

FN 6 The officers completely exhausted their supply of grenades and a helicopter had to deliver additional

---

[2] *Sells v. State*, 109 A.3d 568, 571-572 (Del. 2015).

grenades.

FN7 Detective Daddio testified that $31 was found outside the motel room, the living area had $44 and one-half of a $50 bill. In the bathroom there was $418 recovered and an additional $226 in partial bills.

In his motion Sells raises two grounds for relief which essentially are one claim. Sells claims that his counsel was ineffective for allowing him to plead guilty to the Conspiracy in the Second Degree charge because he had been found not guilty of that charge at his original trial and thus the plea to that charge violated his constitutional right against double jeopardy. The State has conceded this fact and agrees with Sells that his conviction for Conspiracy in the Second Degree should be vacated because the charge was added by the State to the plea by mistake and it should now be stricken. However the State argues that because he was not sentenced to any jail time on the charge and consequently suffered no prejudice that the appropriate remedy would be to drop the motion due to Sells failure to demonstrate prejudice and to strike his conviction and sentence for the Conspiracy in the Second Degree charge but leave the remaining charges.

To modify the sentence as the State has requested would simply allow the original intent of the Plea Agreement to be carried out.[3] In this case, it is clear that it was the intent of all parties that Sells not receive jail time on the Conspiracy in

[3] *See United States v. Bello*, 767 F.2d 1605, 1070 (4th Cir. 1985), (holding that "...the Double Jeopardy Clause does not preclude increasing the sentence on the remaining offense to effectuate the sentencing judge's original intent,...")

the Second Degree charge but only on the other charges.

DISCUSSION

Under Delaware law, this Court must first determine whether Sells has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.[4] This is Sells' first motion for postconviction relief, and it was filed within one year of his conviction becoming final. Therefore, the requirements of Rule 61(i)(1) - requiring filing within one year and (2) - requiring that all grounds for relief be presented in initial Rule 61 motion, are met. None of Sells' claims were raised at the plea, sentencing, or on direct appeal. Therefore, they are barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice. Each of Sells' claims are based on ineffective assistance of counsel; therefore, he has alleged cause for his failure to have raised them earlier.

At this point, Rule 61(i)(3) does not bar relief as to Sells' grounds for relief, provided he demonstrates that his counsel was ineffective and that he was prejudiced by counsel's actions. To prevail on his claim of ineffective assistance of counsel, Sells must meet the two-prong test of *Strickland v. Washington*.[5] In the context of a guilty plea challenge, *Strickland* requires a defendant show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on

---

[4] *Bailey v. State,* 588 A.2d 1121, 1127 (Del. 1991).

[5] 466 U.S. 668 (1984).

going to trial and that the result of a trial would have been his acquittal.[6] The failure to establish that a defendant would not have pled guilty and would have proceeded to trial is sufficient cause for denial of relief.[7] In addition, Delaware courts have consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.[8] When examining the representation of counsel pursuant to the first prong of the *Strickland* test, there is a strong presumption that counsel's conduct was professionally reasonable.[9] This standard is highly demanding.[10] *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to "eliminate the distorting effects of hindsight."[11]

Following a complete review of the record in this matter, it is abundantly clear that Sells has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. As noted, the Plea Agreement was a result of lengthy

---

[6] *Id.* at 687.

[7] *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988))(citations omitted).

[8] *See e.g.*, *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

[9] *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).

[10] *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990)(quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)).

[11] *Strickland*, 466 U.S. at 689.

negotiations as Trial Counsel states in his affidavit Sells was fully engaged in the plea bargaining. Sells' counsel clearly denies the allegations.

As noted, Sells was facing life in prison had he been convicted, and the sentence and plea were reasonable under all the circumstances, especially in light of the strong evidence against him. Prior to the entry of the plea, Sells and his attorney discussed the case. The plea bargain was clearly advantageous to Sells. Counsel's representation was certainly well within the range required by *Strickland*. Additionally, when Sells entered his guilty plea, he stated he was satisfied with defense counsel's performance. He is bound by his statement unless he presents clear and convincing evidence to the contrary.[12] Consequently, Sells has failed to establish that his counsel's representation was ineffective under the *Strickland* test.

Even assuming, *arguendo*, that counsel's representation of Sells was somehow deficient, Sells must satisfy the second prong of the *Strickland* test, prejudice. In setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk dismissal.[13] In an attempt to show prejudice, Sells simply asserts that his counsel was ineffective. His statements are insufficient to establish prejudice, particularly in light of the evidence against him and the fact that he did not receive any jail time on the Conspiracy charge. Additionally Sells does not allege he was innocent of the other

---

[12] *Mapp v. State*, 1994 WL 91264, at *2 (Del.Supr.)(citing *Sullivan v. State*, 636 A.2d 931, 937-938 (Del. 1994)).

[13] *Larson v. State*, 1995 WL 389718, at *2 (Del. Supr.)(citing *Younger*, 580 A.2d 552, 556 (Del. 1990)).

charges for which he pled guilty. Therefore, I find Sells' grounds for relief are meritless.

To the extent that Sells alleges his plea to the charges besides the Conspiracy count was involuntary, the record contradicts such an allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary, the Court looks to a plea colloquy to determine if the waiver of constitutional rights was knowing and voluntary.[14] At the guilty-plea hearing, the Court asked Sells whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Sells if he understood he would waive his constitutional rights if he pled guilty; if he understood each of the constitutional rights listed on the Truth-in-Sentencing Guilty Plea Form ("Guilty Plea Form"); and whether he gave truthful answers to all the questions on the form. The Court asked Sells if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Sells if he was entering into the plea as he was guilty of the charges. The Court also asked Sells if he was satisfied with this counsel's representation. Sells answered each of these questions affirmatively.[15] I find counsel's representations far more credible than Sells self-serving, vague allegations.

Furthermore, prior to entering his guilty plea, Sells signed a Guilty Plea Form and Plea Agreement in his own handwriting. Sells signatures on the forms indicate

---

[14] *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

[15] *State v. Sells*, Del. Super., ID Nos. 1108023648, 1109005261 (July 13, 2015), Tr. at 9 - 15.

that he understood the constitutional rights he was relinquishing by pleading guilty and that he freely and voluntarily decided to plead guilty to the charges listed in the Plea Agreement. Sells is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.[16] I confidently find that Sells entered his guilty plea knowingly and voluntarily and that Sells grounds for relief are completely meritless.

CONCLUSION

I find that Sells' counsel represented him in a competent and effective manner and that he has failed to demonstrate any prejudice stemming from the representation. I also find that Sells' guilty plea was entered knowingly and voluntarily. I recommend that the Court ***deny*** Sells' motion for postconviction relief as procedurally barred and completely meritless. However, I also recommend that the Court vacate Sells' conviction and sentence for Conspiracy in the Second Degree as it was clearly put in the Plea Agreement by mistake and it should be vacated.

/s/Andrea M. Freud
Commissioner

AMF/dsc

[16] *Sommerville* 703 A.2d at 632.