

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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|--------------------------|---|------------------------|
| STATE OF DELAWARE |) | ID. No. 1406007424 |
| |) | In and for Kent County |
| v. |) | |
| |) | RK14-06-0363-01 |
| OLIVER HICKS, |) | Sex Solic. Child (F) |
| |) | |
| Defendant. |) | |

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Lindsay A. Taylor, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Oliver Hicks, *Pro se*

FREUD, Commissioner
August 29, 2017

The defendant, Oliver Hicks (“Hicks”), pled guilty on September 3, 2014 to one count of Sexual Solicitation of a Child, 11 *Del. C.* § 1112a. He also faced one count of Offensive Touching which was *nolle prossed* by the State in exchange for Hicks’ plea. A presentence office investigation was ordered and on October 31, 2014, the Court sentenced Hicks to fifteen years’ incarceration, suspended after four years for varying levels of probation. Next, Hicks filed a motion for modification of

sentence which was denied May 11, 2015. Hicks filed a second motion for modification of sentence which was denied October 12, 2015. That month Hicks filed the pending motion for postconviction relief pursuant to Superior Court Criminal Rule 61 in which he alleges Ineffective Assistance of counsel. Thereafter Hicks filed two motions for clarification of sentence. On April 22, 2016 Hicks filed a supporting memorandum for his motion for postconviction relief. Hicks' transmittal note for the memorandum included a request "...for a lawyer to help me with this case because I do not know about the law so it would help me. You could apoint (sic) me a lawyer in this matter." The request is not a properly filed motion and does not meet the criteria for appointment of counsel pursuant to Superior Court Criminal Rule 61(e).

FACTS

The charges stemmed from a "large fight" that Dover Police responded to in Dover, Delaware. On June 6, 2014, Hicks solicited a child, fourteen year-old Kyrisha Dunbar, to engage in a prohibited sexual act by offering to let the child drive his vehicle in exchange for sex. When the juvenile refused sex with Hicks, he asked the juvenile, "Do you give head?" The juvenile video recorded the encounter on her cell phone, then went home and told her family members about the incident. When the family members confronted Hicks, he grabbed the child by her neck, intentionally impeding breathing and circulation, which is when the fight broke out. Hicks was arrested and held for several hours due to his intoxicated state.

HICKS' CONTENTIONS

In his motion, Hicks raises the following grounds for relief:

- Ground one: Extraordinary circumstances.
I told my lawyer that I was extremely drunk when the event happen (sic). Intoxication should have been a defecense (sic).

- Ground two: Ineffective assistance of counsel.
Conflict of Interest - I directed the lawyer in how I wanted to handle my case: I was not informed by my lawyer what defenses would be to the criminal charges.

- Ground three: Reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2052, 2064, 80 L. Ed. 2d 674 (2984) bearing to mind that, "Because of the difficulties inherent in making the evaluation, (falls within to range of reasonable professional assistance Id 104 S. Ct. 2065-66[]).

DISCUSSION

Under Delaware law, this Court must first determine whether Hicks has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider

the merits of his postconviction relief claim.¹ This is Hicks' 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 Hicks' 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. To some extent each of Hicks' 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 Hicks' 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, Hicks must meet the two-prong test of *Strickland v. Washington*.² 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 going to trial and that the result of a trial would have been his acquittal.³ The failure

¹ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

² 466 U.S. 668 (1984).

³ *Id.* at 687.

to establish that a defendant would not have pled guilty and would have proceeded to trial is sufficient cause for denial of relief.⁴ 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.⁵ 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.⁶ This standard is highly demanding.⁷ *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to “eliminate the distorting effects of hindsight.”⁸

Following a complete review of the record in this matter, it is abundantly clear that Hicks has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find trial counsel’s affidavit, in conjunction with the record, more credible than Hicks’ self-serving claims that his counsel’s representation was ineffective. Hicks’ counsel clearly denies the allegations.

⁴ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988))(citations omitted).

⁵ See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

⁶ *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).

⁷ *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990)(quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)).

⁸ *Strickland*, 466 U.S. at 689.

Hicks was facing the possibility of sixteen years in prison had he been convicted, and the sentence and plea were reasonable under all the circumstances, especially in light of the evidence against him. Prior to the entry of the plea, Hicks and his attorney discussed the case. The plea bargain was clearly advantageous to Hicks. Counsel's representation was certainly well within the range required by *Strickland*. Additionally, when Hicks 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.⁹ Consequently, Hicks has failed to establish that his counsel's representation was ineffective under the *Strickland* test.

Even assuming, *arguendo*, that counsel's representation of Hicks was somehow deficient, Hicks 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.¹⁰ In an attempt to show prejudice, Hicks simply asserts that his counsel was ineffective. His statements are insufficient to establish prejudice, particularly in light of the evidence against him. Therefore, I find Hicks' grounds for relief are meritless.

To the extent that Hicks alleges his plea was involuntary, the record contradicts

⁹ *Mapp v. State*, 1994 WL 91264, at *2 (Del. Supr.) (citing *Sullivan v. State*, 636 A.2d 931, 937-938 (Del. 1994)).

¹⁰ *Larson v. State*, 1995 WL 389718, at *2 (Del. Supr.) (citing *Younger*, 580 A.2d 552, 556 (Del. 1990)).

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.¹¹ At the guilty-plea hearing, the Court asked Hicks whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Hicks 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 Hicks if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Hicks if he was entering into the plea as he was guilty of the charges. The Court also asked Hicks if he was satisfied with this counsel’s representation. Hicks answered each of these questions affirmatively.¹² I find counsel’s representations far more credible than Hicks’ self-serving, vague allegations.

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

¹¹ *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

¹² *State v. Hicks*, Del. Super., ID No. 1406007424 (Sept. 3, 2014) Tr. at 3-8.

Plea Agreement. Hicks is bound by the statements he made on the signed Guilty Plea Form unless he proves otherwise by clear and convincing evidence.¹³ I confidently find that Hicks entered his guilty plea knowingly and voluntarily and that Hicks' grounds for relief are completely meritless.

CONCLUSION

I find that Hicks' counsel represented him in a competent and effective manner and that Hicks has failed to demonstrate any prejudice stemming from the representation. I also find that Hicks' guilty plea was entered knowingly and voluntarily. I recommend that the Court *deny* Hicks' motion for postconviction relief as procedurally barred and completely meritless.

/s/ Andrea M. Freud

Commissioner

AMF/dsc

¹³ *Sommerville*, 703 A.2d at 632.