IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	ID# 1406005949
v.	)	
DEREK CAPERS,	)	
Defendant	)	

Submitted: January 22, 2018
Decided: April 4, 2018

On Defendant's Motion for Postconviction Relief. **DENIED as MOOT.**

ORDER

Katherine C. Butler, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Cathy A. Johnson, Esquire, Assistant Public Defender, Office of Defense Services, Wilmington, Delaware, Attorney for Defendant.

COOCH, R.J.

This 4th day of April 2018, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Defendant was indicted on July 21, 2014 on one count each of Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Ammunition by a Person Prohibited, Carrying a Concealed Deadly Weapon ("CCDW"), and Possession of Marijuana. He pled guilty to PFBPP and CCDW. He subsequently moved to withdraw his guilty plea as to the PFBPP charge, which this Court granted on November 17, 2015.[1] A jury subsequently found Defendant guilty of all counts on January 26, 2016. This Court sentenced

[1] *State v. Capers*, 2015 WL 7301890 (Del. Super. Ct. Nov. 17, 2015).

Defendant on October 7, 2016 to the minimum mandatory sentence of ten years at Level V incarceration with decreasing levels to follow. Defendant did not file an appeal with the Delaware Supreme Court within the 30-day window pursuant to 10 *Del. C.* § 147.

2. Defendant filed this *pro se* Motion for Postconviction Relief pursuant to Delaware Superior Court Criminal Rule 61 on October 12, 2017—more than a year following his sentencing.

3. On November 15, 2017, this Court requested from prior counsel for Defendant an affidavit addressing the issue of Defendant's assertion in his Rule 61 motion that his trial counsel failed to file a Notice of Appeal.

4. Defendant's trial counsel, Cathy A. Johnson, Esquire, filed her affidavit ("Defense Counsel Affidavit") on December 12, 2017, which is set forth below *in toto*:

> As to Ground One: "Trial counsel failed to file a timely Notice of Appeal after defendant was convicted at trial. Counsel of record was under obligation pursuant to Supreme Court Rule 26(a) to file a Notice of Appeal. Counsel failed to do so violating Defendant's United States and Delaware Constitutions." Denied.
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> Counsel met with [Defendant] on October 6, 2016 regarding his sentencing. During that meeting, counsel advised [Defendant] of his right to appeal and that he had thirty days from the date of his sentencing to appeal. Counsel again advised [Defendant] of his right to appeal on the day of sentencing. On November 22, 2016, counsel visited [Defendant] after receiving a call from [Defendant's] friend. On that date, [Defendant] advised counsel that he wanted to appeal his sentence. Counsel advised that he was beyond the allowable time to appeal. I inquired why [Defendant] had not advised me earlier that he wanted an appeal because I previously explained his appeal rights on at least two occasion. [Defendant] advised that he tried to reach me by phone. I advised [Defendant] that I had no phone messages from him and did not receive a letter from him requesting the appeal. [Defendant] advised that there was something wrong with the prison phones however, I advised that I had received calls from other clients. In addition, I advised [Defendant] that he could have written me a letter. [Defendant] had no additional response.
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> As to Ground Three: "Counsel was ineffective for failure to file a motion to suppress the reasonable suspicion, consent and involuntary statement, it is submitted that had [Defendant's] former

attorney filed a motion to suppress evidence that challenged the reasonable suspicion, the invalid consent, and the statements that derived from the fruits of this poisonous tree, it is highly likely that the outcome of the instant case would have been different." Denied.

Counsel of record at the time motions would have been filed was Andrew Rosen. However upon review of the contacts that Mr. Rosen had with [Defendant] it indicates that on July 7, 2015 Mr. Rosen discussed the evidence and facts of the case with [Defendant]. Mr. Rosen indicated that the fact pattern presented a pretty solid case for the prosecution for constructive possession. At some point, [Defendant] chose to plead guilty and entered a plea of guilty on March 31, 2015 thereby negating any need for a motion to suppress. [Defendant] subsequently withdrew his plea of guilty due to the classification of his prior drug offense as a violent felony which subjected him to a higher penalty. In November 2015, undersigned counsel took over this case from Mr. Rosen. Counsel reviewed the case with [Defendant] in preparation for trial. [Defendant] indicated that his family was getting private counsel for him. After several contacts with the family, they informed me that they were not retaining a private attorney for [Defendant]. On January 22, 2015 I met with [Defendant] to prepare for trial. Trial occurred on January 26, 2016.

As to Ground Four: "The State was going to move for enhancement of sentence pursuant to 11 Del. C. Section 1448 Section (1) (b) for 1 prior violent felony conviction within 5 years. Counsel for the defense brought to the attention of the State that there was an additional possible violent felony in the State of New Jersey. This was not reasonable strategy in the guilty plea negotiation stage. The prejudice is the additional 5 years level 5 Defendant received as the result of ineffective assistance of counsel."

The determination that [Defendant] had two prior violent felonies was made in 2015. The Court, State, defense counsel and [Defendant] were aware of this determination. [Defendant] was well aware that he would be facing a minimum of 10 years incarceration if found guilty of the Possession of a Firearm by a Person Prohibited.[2]

5. On January 22, 2018, the State filed a Response to Defendant's Motion for Postconviction Relief. The State argued that Defendant has asserted no meritorious grounds for relief and argued that the motion should be denied. The State's essential argument was that Defendant has not brought an

[2] Aff. of Defense Counsel, December 12, 2017, D.I. 46.

adequate ineffective assistance of counsel claim against his trial counsel for failing to have filed an appeal within the thirty-day window because any failure to file a timely appeal was no fault of trial counsel. The State cites to the Defense Counsel Affidavit for support that Defendant's trial counsel properly informed Defendant of his right to an appeal and the applicable time frame thereof. The State contends that "it is reasonable to conclude that Defendant knew of his obligation to file a Notice of Appeal, and consciously elected not to do so . . . ."[3]

6. Additionally, the State points to the fact that Defendant claims it was the fault of his trial counsel that a timely appeal was never filed, yet Defendant did not file this *pro se* Motion for Postconviction Relief for another eleven months. The State argued that

> [i]n a closer case, re-issuing the operative scheduling order as a means of affording a criminal defendant a second opportunity to seek appellate review might serve both the interests of justice and of judicial economy. On this record, however, it is reasonable to conclude that Defendant simply slumbered on his rights, which he now seeks to resuscitate by laying blame at the feet of Trial Counsel.[4]

7. This Court also received an affidavit from Tamara Brooks, in which she supported Defendant's contentions that he desired to take an appeal. In her affidavit, Ms. Brooks' states:

> I, Tamara Brooks would like to present this affidavit on behalf of my fiancé [Defendant] #00769726.
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> On January 26, 2016 [Defendant] went to trial. In which Kathy Johnson, his public defender, represented him. He was later sentenced on October 7, 2016. A few days later after sentencing, [Defendant] advised me to contact Kathy Johnson to ask for his transcripts. Kathy Johnson told me why does he need his transcripts? I told her, [Defendant] wants her to put in a motion for an appeal. She, Kathy Johnson, says to me, that he had taken a plea deal, and hadn't went to trial, so there was really no need to put in a motion for an appeal. And to my knowledge [Defendant] clearly told me he had a trial. So I was confused.

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[3] State's Resp., D.I. 50, at 8.
[4] *Id.*

> So when I talked to [Defendant] and told him what Kathy Johnson said. We both agreed that she seemed confused about his case. And that she possibly had his case mixed up with someone else's case.
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> So, at that point, [Defendant] asked that I call her back and tell her to come visit him and talk to him in person, to rectify the mistake.
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> I proceeded to call Kathy Johnson, leaving numerous messages, on many occasions, but to no avail. She never returned my calls, and [Defendant] says she never visited him, in person. So there hasn't been any contact from Kathy Johnson since I talked to her a few days later after [Defendant] had been sentenced, when I called her about the transcripts.[5]

8. The issue now before the Court is whether, in the exercise of this Court's discretion, Defendant's sentence should now be vacated with Defendant immediately resentenced to the original sentence, in order to avail Defendant of a new thirty-day window in which to file an appeal. Delaware Courts have previously vacated defendants' sentences and subsequently reimposed them in appropriate circumstances in order to give the defendants an opportunity to file a timely appeal.[6]

9. The State in its Response has stated that "[i]n a closer case, re-issuing the operative scheduling order as a means of affording a criminal defendant a second opportunity to seek appellate review might serve both the interests of justice and of judicial economy."[7] Without opining on the "close[ness]" of this case, or lack thereof, and even given the problematic eleven-month period that elapsed before Defendant filed his Rule 61 Motion complaining of no timely appeal having been filed, the Court in its discretion will vacate Defendant's sentence and will reimpose the original sentence.

10. Accordingly, the Court has vacated his sentence imposed October 7, 2016 and has reimposed the original sentence, effective today. The Motion for Postconviction Relief is **DENIED as MOOT.**

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[5] Aff. of Tamara Brooks, January 12, 2018, D.I. 48.

[6] *Potts v. State*, 925 A.2d 504 (Del. 2007) (remanding to this Court "for the reimposition of sentence. Re-sentencing Potts will renew the time to file an appeal"); *Floyd v. State*, 907 A.2d 145 (Del. 2006) (remanding to this Court "with directions to vacate and reimpose the . . . sentence in order to give Floyd the opportunity to file a timely appeal.").

[7] State's Resp., D.I. 50, at 8.

IT IS SO ORDERED.

Richard R. Cooch, J.

cc: Prothonotary
Investigative Services
Derek Capers`