IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	Cr.A.No.: n97-12-1567
	)	
v.	)	
	)	ID No.: 9711000429
CURTIS L. EVANS	)	
	)	

Date Submitted: December 10, 2001
Date Decided: December 19 , 2001

*Upon Defendant's Motion for Postconviction Relief: **DENIED**.*

ORDER

Upon review of Movant Curtis L. Evans ("Defendant")'s Motion for Postconviction Relief and the record, it appears to the Court that:

1. Defendant filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 following a guilty plea on March 17, 1999, to one count of Attempted Murder First, one count of Reckless Endangering First, one count of P.F.D.C.F., one count of Robbery First, and one count of Conspiracy Second.

2. In support of his motion, Defendant alleges ineffective assistance of counsel, contending that his counsel disregarded information provided to him by Defendant, inaccurately advised him to plead guilty, did not pursue leads that could have proven Defendant's innocence, did not challenge the validity of charges such as robbery and carjacking, failed to investigate matters he should have, and failed to consult Defendant on important decisions. The Defendant also alleges that counsel failed to pursue newly discovered evidence, and that Defendant was denied counsel guaranteed by the sixth amendment. Defendant breaks up the allegations into 11 grounds.

3. The Delaware Supreme Court has held that in reviewing motions for postconviction relief, this Court must first determine whether a defendant's claims are procedurally barred prior to considering them on their merits.[1]

This Court will not address Rule 61 claims that are conclusory and unsubstantiated.[2] Pursuant to Rule 61(a), a motion for postconviction relief must be based on "a sufficient factual and legal basis." In addition, pursuant to Rule 61(b)(2), "[t]he motion shall specify all the grounds for relief which are available to movant..., and shall be set forth in summary form the facts supporting each of the grounds thus specified."

4. In order to prevail on a claim of ineffective assistance of counsel, Defendant must satisfy the two-part test set forth in *Strickland v. Washington*.[3] Thus, Defendant must first show that his attorney's conduct fell below that of reasonable professional standards,[4] and second, that such conduct caused him actual prejudice.[5]

In the context of an ineffective assistance of counsel claim, "a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal."[6] In the case of a guilty plea, the United States Supreme Court has held that the second prong of the *Strickland* test

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[1] *Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Flamer v. State*, Del. Supr., 585 A.2d 736, 747 (1990).

[2] *See Younger v State*, Del. Supr., 580 A.2d 552, 555 (1990); *State v. Conlow*, Del. Super., Cr.A. No. IN78-09-0985R1, Herlihy, J. (Oct. 5, 1990) at 5; *State v. Gallo*, Del. Super., Cr.A.No. IN87-03-0589-0594, Gebelein, J. (Sept. 2, 1988) at 10.

[3] 466 U.S. 668, 687 (1984).

[4] *Strickland*, 466 U.S. at 687, 688.

[5] *Id.* at 687, 693.

[6] *Walls v. State*, Del. Supr., No. 59, 1995, Holland, J. (Jan. 4, 1996)(ORDER) at 7; citing *Younger*, 580 A.2d at 556.

becomes whether the defendant has shown that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[7]

5. This is Defendant's first Motion for Postcinviction Relief and the Court has determined that no procedural bars listed in Rule 61 are applicable. Therefore, the Court may consider the merits of Defendant's application.

6. Defendant's allegations that counsel failed to pursue newly discovered evidence (grounds one, five, seven, and ten of his motion) refer to the affidavit of the codefendant in which he says that he rather than the Defendant was responsible for the shooting of Mr. Cortes. Defendant states that he was "advised by counsel to enter a plea of guilty even after counsel was made aware that the State's witness, Jerome L. Johnson, would actually benefit defendant's case and prove defendant's innocence by testifying that he (state's witness) was the actual shooter, and blamed Defendant to avoid prosecution."

According to Mr. McDonald's letter to Judge Herlihy, dated May 30, 2000, Defendant's understanding of the impact on his case of the affidavit of Mr. Johnson recanting his prior statements to police is unrealistic and unwarranted. On the facts of the case developed in the discovery phase, and the applicable law, it does not matter whether it was Mr. Evans or Johnson who fired the shot that wounded Mr. Cortes, the Defendant still faced conviction for Attempted Murder of Mr. Cortes.

7. The facts tend to show that Mr. Evans, and Mr. Johnson acted together, and include: (1) the statements made by Mr. Cortes' friend and fellow victim, which corroborated (2) the information the police had developed, independent of Johnson, that on Oct. 26, 1997, Defendant was probably one of the four black males at the Darley Road Shopping Center at about 1:25 a.m., when a store

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[7] *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *See Albury v. State*, Del. Supr., 551 A.2d 53, 58 (1988).

patron was jumped and robbed of $120. Later at about 1:49 a.m. the same four black males approached the car in which Rigby and Cortes were seated, pulled Rigby from the drier's seat and shot Cortes. Witnesses were able to give a general description of him, and a police dog followed a track to within a short distance of the Defendant's residence, (3) fingerprints of both Evans and Johnson were lifted from the carjacked Mercedes-Benz, (4) the result of the search, conducted pursuant to the October 31, 1997 search warrant that yielded clothing that had been earlier described as worn by suspects by witnesses on October 26, (5) the statements made by Johnson when he was arrested by police and with parental consent was interviewed and gave a statement admitting his involvement with Evans in several robberies, including the carjacking and the shooting on October 26, 1997, (6) Defendant's mother was present with defendant during most, if not all, the discussions between counsel and client.

Since the foregoing tends to show that Evans and Johnson were acting together on October 26, 1997, either as accomplices within the meaning of 11 *Del.C.* §§ 501-503 or coconspirators within the meaning of 11 *Del.C.* §§ 511-521, under either theory of criminal liability, Evans faced conviction of the attempted murder of Cortes whether it was Evans or Johnson who was the shooter.[8]

8. Defendant asserts that Johnson's affidavit is newly discovered evidence, that would permit him to withdraw his guilty plea even after sentencing.[9] This Court has ruled that a new trial can be ordered on those grounds only if the following three prong test is satisfied.[10] (1) the evidence will probably change the result of the first trial, (2) the evidence was discovered after the first trial and

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[8]Letter from John McDonald, Esq. to Judge Jerome O. Herlihy of 5/30/00, at 2.

[9]Letter from John McDonald, Esq. to Judge Jerome O. Herlihy of 5/30/00, at 3.

[10]*State v. Hamilton*, Del. Super., 406 A.2d 879 (1974).

could not have been discovered before by due diligence, and (3) that the new evidence is not merely cumulative or impeaching.[11] The chances of Johnson's affidavit satisfying even one of the three prongs seems remote.[12]

9. According to Mr. McDonald's letter to Judge Herlihy, even if for the sake of argument we assume that Evans goes to trial, chances of an outcome favorable to Evans are remote because both statements, the taped statement to police on October 31, 1997, in which he implicates Evans and himself in the shooting, as well as his 8-line affidavit saying that Evans had nothing to do with the shooting, would be admissible at trial to corroborate or impeach Johnson's testimony.[13]

10. The above information brought out by the discovery phase of the case, and referred to in Mr. McDonald's May 30th letter to Judge Herlihy, points to the fact that Defendant was not arrested without probable cause, as he alleges in grounds four, and nine of his motion. Information in the following paragraph does the same.

11. In ground two of his motion Defendant asserts that: "two witnesses and the victim, Jason Caroll, stated that the defendant was not involved in the robbery or displayed any handgun." The Defendant fails to state who these witnesses are, and how the failure to interview these witnesses was prejudicial to his case.

Contrary to the Defendant's statement, according to affiant Darla L Hoff, New Castle county PD, in the Statement of Probable Cause, issued on October 31, 1997, not only did the victim Jason Carroll identify the accused in a photo lineup, but identified the beige pair of Nautica boots that the

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[11] *Id.*

[12] Letter from John McDonald, Esq. to Judge Jerome O. Herlihy of 5/30/00, at 2.

[13] 11 *Del.C.* s 3507.

accused was wearing, as being the ones that had been taken from the victim.

12. In ground three, Defendant asserts that counsel failed to challenge "the validity of the robbery, carjacking and other related charges when the actual crime never happened." According to Mr. McDonald,[14] "On October 28, 1997, a carjacking of a Mercedes-Benz automobile occurred at the Darley Road Shopping Center. The finger prints of Evans (Defendant) and Johnson were lifted from the car, which was recovered approximately one block from Johnson's residence in Wilmington." Also, when he was arrested by police, and with parental consent, was interviewed, Johnson gave a statement admitting his involvement with Evans in several robberies, including the carjacking and the shooting on October 26, 1997.[15]

13. In support of his motion, Defendant alleges involuntariness and unwilling plea acceptance (ground eight). Defendant claims that his attorney induced him to sign the plea agreement by not advising Defendant regarding his rights, and failing to pursue various options on Defendant's behalf. And that "he was 'trapped' into entering the plea and would have liked to have gone to trial."

14. According to the sentencing transcript, Defendant told the Court: "I would have gotten a private attorney if I could have afforded one. But since I couldn't, I had to be trapped to the point where I had to take 20 years as a minimum. I would like to take my case to trial, but I was afraid of what I might be falsely convicted of. I might have been given more time instead of a fair sentence."[16] Even though Defendant said that he would have liked to go to trial, never once did he say that he

[14]Letter from John McDonald, Esq. to Judge Jerome O. Herlihy of 5/30/00, at 2.

[15]Letter from John McDonald, Esq. to Judge Jerome O. Herlihy of 5/30/00, at 2.

[16]Hr'g Tr. of June 4, 1999.

actually wanted to do so. And the evidence, based upon the transcript of the guilty plea hearing, contradicts the assertion that Defendant wanted to go to trial but was trapped into the plea agreement.

15. At the beginning of the guilty plea hearing the prosecutor stated to the judge the exact sentence as it reads on the plea agreement.[17] After which, Mr. McDonald, Defendant's attorney stated that "The state has correctly recited the agreement between the State and Mr. Evans. I believe there is a basis in fact for his entry of his plea of guilty to the five enumerated charges."[18] Mr. McDonald further informed the Court that Defendant had "completed the Guilty Plea form in his own hand and manifested a full and complete understanding of the trial rights he is giving up and the penalties to which he is exposed."[19]

16. During the guilty plea hearing the Court reiterated the factual bases for charging and indicting Defendant and in response to the Court's questions, Defendant stated to the Court that he was guilty of the described crimes.[20] Defendant acknowledged that he was aware of the maximum time of imprisonment for the charges. He indicated that he understood the time of imprisonment he would receive, that the plea was knowing and voluntary, that he was not being forced to plea and that he did not receive a promise in exchange for his plea.[21]

17. Defendant indicated that he understood that his guilty plea was made pursuant to Rule

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[17] Hr'g Tr. of March 17, 1999.

[18] Hr'g Tr. of March 17, 1999.

[19] Hr'g Tr. of March 17, 1999.

[20] Hr'g Tr. of March 17, 1999.

[21] Hr'g Tr. of March 17, 1999.

11(e)(1)(c) and that if the Court did not follow the recommended sentence, that he could withdraw his plea and proceed.[22] He further acknowledged that he entered into the guilty plea freely and voluntarily, that by pleading guilty he was giving up his right to a trial by jury, his right to have his guilt proved by a reasonable doubt, and his right to present and cross-examine witnesses.[23]

18. Defendant alleges in ground eight of his motion that in the plea agreement which the Court accepted, "Defendant has stated 'no' as to whether he was satisfied with his counsel's representation and that counsel has not advised Defendant of his rights." A review of the plea colloquy shows that this fact was brought to the attention of the Judge, and explained to the satisfaction of everyone present, including the Defendant.[24]

Judge Gebelein asked Defendant, "Have you discussed your case and your rights with your lawyer?" Defendant said, "Yes." The Judge further asked, "Are you satisfied with his advice?" Defendant again answered, "Yes."[25] At which time Defendant's attorney said, "Your Honor, in that connection, the Court should note in response to the last question on the Guilty Plea form, which asked whether he is satisfied with my representation and that I have fully informed him of his rights under the guilty plea, he checked a "no" block, but I, I understand by his response and also in a subsequent conversation that he has indicated that he is comfortable with me."[26]

The Judge asked the Defendant, "Is that right?" Defendant answered, "Yes."[27]

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[22]Hr'g Tr. of March 17, 1999.

[23]Hr'g Tr. of March 17, 1999.

[24]Hr'g Tr. of March 17, 1999.

[25]Hr'g Tr. of March 17, 1999.

[26]Hr'g Tr. of March 17, 1999.

[27]Hr'g Tr. of March 17, 1999.

19. Defendant alleges in ground six of his motion that his attorney failed to consult him on important decisions. Also, in ground 11 of his motion, Defendant alleges that he had been a juvenile unaware of his rights, and his attorney had exploited that situation. The Court finds these two claims of the Defendant to be unsubstantiated. A review of the guilty plea hearing transcript shows that Mr. McDonald took into account the fact that Defendant had been a juvenile at the time of commission of crimes, and involved Defendant's mother in the discussions before the guilty plea hearing so that they both could be part of the important decisions that needed to be made.[28]

Mr. McDonald noted at the hearing that even though the Defendant was now 19 years old, "he was 17 at the time these offenses occurred, and for that reason throughout our discussions this afternoon, Curtis' mother has been present. She is present in the courtroom now. And so she is aware of and supportive of his rather difficult decision to accept the state's offer in the hopes that he will receive a sentence of no greater than twenty years."[29]

20. In addition to the clarity of the plea agreement, the Court finds that Defendant participated fully in his plea proceeding and at his sentencing hearing. Defendant signed and filled out, where required, the Truth in Sentencing Guilt Plea Form and the Plea Agreement. The plea entered was an 11(e)(1)(c) plea by which the Court abided at sentencing.

21. After reviewing the transcript of the guilty plea hearing, the Court finds that Defendant had a full and fair opportunity to be heard on the issue of his plea agreement. He was adequately advised in a timely and appropriate manner of the conditions of his plea, and he is bound by his written plea agreement and by his statements that he understood the plea to which he agreed.

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[28]Hr'g Tr. of March 17, 1999.

[29]Hr'g Tr. of March 17, 1999.

22. Defendant's motion makes numerous allegations regarding his attorney's conduct; however, not one of these allegations can be substantiated. Defendant does not present the Court with any evidence that his counsel's conduct fell below that of reasonable professional standards or that he was prejudiced as a result of his attorney's conduct, his claim must be denied as conclusory.[30] Furthermore, Defendant has not shown that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[31] Therefore, Defendant has failed to demonstrate to this Court that his counsel was ineffective under *Strickland*.

23. For the foregoing reasons, the Court finds that the grounds upon which Defendant bases his Motion are without merit. Therefore, Defendant's motion for post-conviction relief is **DENIED.**

IT IS SO ORDERED.

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The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: Curtis L. Evans - DCC
John McDonald, Esq.
Robert Surles, Esq., DAG

[30] *See State v. Mason*, Del. Super., Cr. A. No. IN98-02-0279R1, Barron, J. (Apr. 11, 1996)(Mem. Op.); *see also Walls*, No. 59, 1995, (ORDER) at 7.

[31] *Hill*, 474 U.S. at 59.