SUPERIOR COURT
OF THE
STATE OF DELAWARE

JEROME O. HERLIHY
JUDGE

DANIEL L. HERRMANN
COURT HOUSE
WILMINGTON, DE 19801-3353

Submitted: October 5, 2001
Decided: October 31, 2001

Mr. Charles E. Smith
Gander Hill
1301 East Twelfth Street
Wilmington, DE 19802

RE: *State v. Edward Smith a/k/a Charles E. Smith*
Cr.A. No. IN-00-10-0257-R1
ID No. 0008010453
Motion for Postconviction Relief - ***DENIED***

Dear Mr. Smith:

You have filed a Rule 61 motion making the following claims:

1. On the date of the offenses to which you pled guilty, May 6, 2000, you were not arrested, fingerprinted or photographed. This resulted in a denial of your rights to due process.

2. The arresting officers abused their authority by coercing you into making drug buys and indicating that there would be no charges against you if you cooperated.

3. The indictment was defective because no evidence was presented to the grand jury to support an intent to deliver. Also, you contend there was an unnecessary delay from the time of the date of the offense to the indictment.

4. The prosecutor erred by (a) not being present at your sentencing and (b) incorrectly noting on the plea agreement that you were a habitual offender.

5. Your assigned public defender was not present at your sentencing and had not been present during one of your case reviews. You also claim he failed to follow up on Rule 16 discovery and do some investigating.

6. The sentencing judge remarked about your drug dealings which you contend is incorrect. Your assigned counsel's absence meant this went unchallenged.

7. The presentence officer was not thorough in her investigation, especially about your drug history and criminal record. You also complain about being interviewed thirteen days prior to your sentencing. You say that you were never able to discuss the presentence reports' contents with your lawyer.

The background of these claims is that you pled guilty on February 20, 2001 to possession with intent to deliver heroin, assault second degree and carrying concealed a deadly weapon. In exchange for these guilty pleas, the State dropped a number of other charges against you. The plea agreement you entered into contained a State-recommended sentencing cap of seven years. This was not a Rule 11(e)(1)(c) sentence agreement. That agreement also stated the State would not seek to have this Court declare you to be a habitual offender.

On May 25, 2001, you were sentenced to seven years in jail and additional incarceration which was suspended, however, for several years of probation. On July 29th you wrote the sentencing judge seeking a sentence reduction, basically asking to get into a level 5 drug treatment program. The sentencing judge denied your application on August 22, 2001. Shortly thereafter, you filed this motion for postconviction relief.

DISCUSSION

Your guilty pleas operate as a waiver to several of your claims for relief.[1] The claims waived by your pleas are (1) failure of the police to arrest and fingerprint you, (2) police misconduct in handling your charges and (3) insufficient evidence presented to the Grand Jury to support the indictment and undue delay from offense date to indictment (five months).[2] By so ruling, of course, the Court is not passing on the merit or lack thereof on these claims.

Your next claim of error is that the prosecutor was not present at your sentencing and incorrectly noted on the plea agreement that you were a habitual offender.

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[1]*Murphy v. State*, Del.Supr., No. 377, 1998, Berger, J. (October 26, 1998) (ORDER).

[2]*Woods v. State*, No. 507, 1997, Hartnett, J. (June 12, 1998) (ORDER).

There is no requirement that the prosecutor of your case be present at your sentencing. This claim is without merit. In this Court, prior to the felonies for which you were sentenced in May 2001, you had one prior felony conviction. You have several felony convictions in Pennsylvania. You pled to three felonies here. The totality of your record makes you eligible to be classified and sentenced as a habitual offender.

When I took your guilty pleas on February 20th, that eligibility was reviewed with you. When you were sentenced, you did not question your felony record. That record makes you eligible to be treated as a habitual offender and be sentenced up to life imprisonment. In short, the prosecutor made no mistake. Or, to put it another way, seven years is a lot better than a life sentence. The claim of prosecutorial misconduct is groundless.

Your next basis for seeking postconviction relief is that the sentencing judge made inaccurate remarks about your drug history. I have read the transcript of the sentencing proceeding before Judge Ableman. You and she had an exchange about the remark in the 1990 presentence report that you sold drugs to support yourself. You told Judge Ableman you did not do that and denied saying it in 1990.

You further complain about Judge Ableman's remarks concerning her experience as a Family Court judge with persons using drugs. Your complaint is nonsensical. In your April 24, 2001 letter to the sentencing judge (you did not know then who it would be) you speak of your drug addiction. You write about how it made you a different person. You ask for treatment as part of your sentence.

The bottom line is that your complaints about what Judge Ableman said is nothing more than a repackaged request to have your seven-year sentence reduced. In that April 24th letter, you write about the State's seven-year sentencing cap and say, "I realize that these charges are very serious and am ready to take responsibility for braking [sic] the law."

You use the comments of Judge Ableman to complain that you were prejudiced by the absence at sentencing of your assigned attorney and that his absence meant Judge Ableman's remarks went unchallenged. You were represented at sentencing by counsel. Judge Ableman's remarks about which you complain you disputed at sentencing. Your denial at sentencing was more direct than counsel disputing them and contradicts your current claim that they went unchallenged. Based on your record, counsel, whether your assigned one or another, may have deemed it in your best interest not to deny what was in the record.

You complained to Judge Ableman about never being on probation and never having drug treatment. That is clearly wrong. When you were originally sentenced in this Court in 1990, you were (1) given four years of probation and (2) ordered to undergo evaluation and treatment for substance abuse. You violated that probation and did not even appear for your original violation proceeding. The violation report indicated that you had not undergone the court-ordered substance abuse evaluation. Subsequent to these violations, you were placed on probation for three years on several convictions in Pennsylvania. Your statements to Judge Ableman about not having been on probation, therefore, were contrary to the record. Any self-respecting attorney would have known that and not said what you did.

This, coupled with your denial of telling the presentence officer in 1990 that you sold drugs, and your record are things that could easily and properly have caused Judge Ableman to sentence you to more than seven years. Your assigned counsel and the experienced counsel representing you at sentencing are aware of those kind of considerations and would have rather you not say them.

Since you received a sentence no greater than you knew the State was going to ask for, but far less than what you could have received, there was no prejudice to you by the absence of your assigned counsel. In addition, since you complain that counsel's absence meant the judge's remarks went unchallenged, but the transcript shows you did, this aspect of your complaint is also groundless. Other than that meritless claim of prejudice, you make no other claim and I cannot find any. The contention that Judge Ableman erred and that you were prejudiced by assigned counsel's absence is without merit.

This is not the only complaint that you make about the sentencing procedure. Next, you contend the presentence officer did not perform a thorough investigation. You further complain you were interviewed only thirteen days prior to your sentencing. Your generalized argument about this particular contention is that there was inaccurate information in the report and that there was insufficient attention to your treatment needs. You fail to mention what was inaccurate or where the investigation was not thorough.

The presentence officer repeated what you told her about the offenses; basically your effort to evade or minimize your culpability. Much of the other information in the report is factual, your criminal record, for instance, or came from you. My own examination of the report shows that it is thorough. Further, there is no relationship between your sentence and the interview thirteen days before. In sum, this ground for postconviction relief is meritless.

Some of your grounds for postconviction relief infer, and one ground expressly states, there was ineffective assistance of counsel. To succeed on such a claim, you must show (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.[3] In addition, you must make specific allegations of prejudice and substantiate them.[4]

Your complaints of ineffective assistance are assigned counsel's (1) absence from one of the case reviews, (2) absence from sentencing, (3) failure to follow up on discovery, (4) failure to investigate and obtain favorable information and (5) informing you that you faced a 157-year sentence, if you went to trial and were found guilty of all the indicted charges. In a broad brush, you say some of these professional errors affected the plea process.

In three separate indictments, you were charged with:

1. Possession of heroin with the intent to deliver it (maximum penalty 10 years)
2. Possession of heroin within 1000 feet of a school (30 years)
3. Criminal impersonation (1 year)
4. Carrying a concealed deadly weapon (2 years)
5. Possession of drug paraphernalia (1 year)
6. Trafficking in heroin, 5-15 grams (20 years)
7. Assault second degree (8 years)
8. Possession with the intent to deliver heroin (10 years)
9. Possession of heroin within 1000 feet of a school (30 years)
10. Possession of heroin within 300 feet of a park (15 years)
11. Possession of drug paraphernalia (1 year)
12. Resisting arrest (1 year)

These maximums total 129 years, 28 less than you claim your lawyer said you could get if convicted on all these charges. That error in math changes nothing. You were facing a lot of jail time. And, with your felony record, just one more conviction would have subjected you to a possible life sentence. A lawyer exercising his best

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[3] *Bialach v. State*, Del.Supr., 773 A.2d. 383, 387 (2001).

[4] *Shelton v. State*, Del.Supr., 744 A.2d 465, 475 (2000).

professional responsibility is required to advise you of the consequences, so telling you of the maximum risk you faced fulfilled that responsibility. Even the charges you pled to had a potential maximum of 20 years, substantially less than 129 years. In the end, you were sentenced to only seven years.

You make several generalized non-specific allegations about failure to follow up on discovery and obtain favorable information, appear at sentencing and at one of your case reviews. You do not, however, say what prejudice any of this caused you other than a similarly broad contention that you may not have pled guilty. That contention is rather hollow considering the record.

First of all, you told me during your plea colloquy and you checked off on the TIS guilty plea form that you were satisfied with your lawyer's advice. In the absence of clear and convincing evidence to the contrary, you are bound by these statements.[5] You have provided no such evidence. Nor have you shown or claimed what further discovery would have revealed or what exculpatory evidence exists.

You had several case reviews on these charges. Two were set you did not show up for. You do not say what harm you suffered, if it is true your assigned counsel was not present for the case reviews where you appeared. In all three of the charges to which you pled guilty, the events were witnessed by the Wilmington Police. At sentencing, you had a lawyer present. He had read the presentence report. He urged that you get minimal jail time and that the focus of Judge Ableman's sentence be instead on treatment. That was consistent with your April 24th letter to her. And, you received no more time than the State's recommendation. There is no showing, and probably never could be, that had assigned counsel been there, you would have received less jail time. To put it another way, you cannot show, and have not shown, that the sentence you received was in any way the result of assigned counsel's absence from sentencing.

In sum, you have shown neither professional error occurred nor that, assuming error did occur, how you were prejudiced. For these reasons, your claims of ineffective assistance of counsel fail.[6]

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[5]*Somerville v. State*, Del.Supr., 703 A.2d 629, 631 (1997).

[6]*Dawson v. State*, Del.Supr., 673 A.2d 1186 (1996).

Your motion is a transparent gloss. You use a lot of the right words such as ineffective assistance of counsel, prejudice and so forth. But, you fail to make credible, specific claims. You cite to provisions in the *United States Code* which are inapplicable to your arguments and claims. It is probably not coincidental that your motion for postconviction relief followed the denial of your *pro se* motion for reduction of sentence. You appear to be back-tracking in what you wrote on April 24, 2001, that you were willing to accept the consequences for serious crimes. Judge Ableman ordered you to get treatment while in jail. Since you failed to do it before, while on probation, you must follow through now.

CONCLUSION

For the reasons stated herein, the motion for postconviction relief of Edward Smith a/k/a Charles E. Smith is **DENIED**.

IT IS SO ORDERED.

Sincerely,

JOH/bsb
Original to Prothonotary
cc Kathleen W. Edwards, Esq.
Dade D. Werb, Esq.
David J. Facciolo, Esq.