SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
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November 17, 2004

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RE: State of Delaware v. Catherine E. McCurley
Def. ID# 0212013780
Memorandum Opinion - Motion for Postconviction Relief

Dear Counsel:

This is my decision on defendant Catherine E. McCurley's ("McCurley") motion for postconviction relief. McCurley was charged with Vehicular Homicide in the First Degree, Vehicular Assault in the First Degree, and Driving a Motor Vehicle Under the Influence of Alcohol. The charges arose out of a serious car accident involving McCurley and two of her friends, Lacey Bevans and Nicholas Miller. McCurley drove her car into a car parked on the side of the road, causing her car to flip over several times. McCurley and her two friends were ejected from their car. Miller was seriously injured in the accident and later died. McCurley pled guilty on April 29, 2003 to Vehicular Homicide in the First Degree and Driving a Motor Vehicle under the Influence of

Alcohol. I sentenced McCurley on April 29, 2003 to five years at supervision level V, suspended after two years at supervision level V for three and one-half years of declining levels of supervision. McCurley did not file an appeal with the Supreme Court. McCurley filed this motion for postconviction relief on August 6, 2003. I held a hearing on this matter on January 8, 2004. This is McCurley's first motion for postconviction relief and it was filed in a timely manner. Therefore, there are no procedural bars for postconviction relief.[1]

In support of her claim of ineffective assistance of counsel, McCurley raises several alleged deficiencies in her counsel's representation of her that allegedly prejudiced her defense and caused her to plead guilty. McCurley was represented by Michael F. McGroerty, Esquire ("McGroerty"). McCurley contends that McGroerty failed to (1) conduct a thorough pre-trial investigation, file the appropriate pre-trial motions, and keep her informed of the facts of the case; (2) provide her with copies of any documents; (3) investigate a .019 discrepancy in the two blood alcohol tests; (4) request a *Daubert/Kumho* hearing regarding the conclusions in the FAIR team report; (5) request and listen to a tape statement taken of a witness which included exculpatory material; (6) inform her that her medical records were subpoenaed by the Attorney General's office, produce the records, discuss the confidentiality of the records, request an attenuation hearing, or move to dismiss the indictment; (7) file a motion to suppress the blood alcohol tests for lack of probable cause; and (8) discuss the fact that the elements required to prove the existence of the crime were absent and the State would not have been able to prove them at trial, rendering her innocent of the offense.

In order to prevail on her claim of ineffective assistance of counsel, McCurley must show (1) that McGroerty's actions fell below an objective standard of reasonableness; and (2) there exists a

[1]Younger v. State, 580 A.2d 552, 554 (Del. 1990).

reasonable probability that, but for McGroerty's errors, McCurley would not have plead guilty.[2] Mere allegations of ineffectiveness will not suffice. McCurley must make specific allegations of actual prejudice and substantiate them.[3] Moreover, any review of McGroerty's representation is subject to a strong presumption that his representation of McCurley was professionally reasonable.[4]

A. Pre-trial Investigation and Motions

First, McCurley alleges that McGroerty failed to properly conduct a thorough pre-trial investigation, file the appropriate pre-trial motions, and keep her informed of the facts of the case. As a result, McCurley alleges that she was unable to make an informed decision to enter a plea because she was unaware of the evidence against her. I have reviewed McGroerty's affidavit, the plea agreement, the truth-in-sentencing guilty plea form, the plea colloquy transcript, and the January 8, 2004 hearing transcript. I am satisfied that McGroerty conducted a thorough pre-trial investigation. McGroerty reviewed all of the discovery provided by the State. McGroerty discussed the facts of the case with McCurley and he also went to the scene of the crash and interviewed Lacey Bevans, who was in McCurley's car at the time of the accident. I am also satisfied that McGroerty kept McCurley informed of the facts of the case. McGroerty reviewed the elements of the charged offenses, including lesser-included offenses, the police reports, the FAIR team report, the two blood test results, McCurley's medical records, the speed calculations, and possible defenses with McCurley on several occasions. I am also satisfied that McGroerty properly explained the elements

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[2] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

[3] *Wright*, 671 A.2d at 1356; *Younger v. State*, 580 A.2d 552, 555-56 (Del. 1990).

[4] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

of the offenses to McCurley. McCurley argues that McGroerty made an error during the hearing when discussing the elements of the offenses and because of this she is entitled to relief. I am satisfied that this does not matter because McGroerty testified that when he went over the elements of the offenses with McCurley, long before she pled guilty, he was looking at the applicable code sections and not relying on his memory, as he was during the hearing. This makes any error on McGroerty's part unlikely. Further, McGroerty did discuss the possible pre-trial motions that could be filed with McCurley, but advised her that she would probably not succeed on a motion to suppress. I have not seen anything that would cause me to conclude that McGroerty's decision in this regard is not well grounded. Therefore, this claim is without merit.

B. Copies of Documents

Second, McCurley alleges that McGroerty's representation of her was ineffective because he did not provide her with copies of any documents, including the indictment, police reports, FAIR team report, and blood alcohol tests. McGroerty admits that he probably did not give McCurley copies of any documents. However, McGroerty did review and discuss all of the documents with McCurley. He also discussed the possible evidentiary objections that could be raised at trial to some of the evidence. While the better practice might have been for McGroerty to give McCurley copies of all documents, McCurley has simply failed to show any prejudice to her as a result of not receiving the actual documents herself. Therefore, this claim is without merit.

C. Discrepancy in Blood Test Results

Third, McCurley alleges that McGroerty failed to investigate a .019 discrepancy between the two blood alcohol tests that were preformed on her by the State Chemist and the Medical Examiner. Although McGroerty did not investigate the discrepancy, he was aware of it and did discuss the test

results with McCurley and he did explain to her that he believed the discrepancy would not result in either the exclusion of the test results or weaken the impact of the test results on the jury. Indeed, both of the test results (.150 State Chemist and .169 Medical Examiner) were well in excess of the legal limit. Further, McCurley has failed to show that she was prejudiced as a result of McGroerty's failure to investigate the discrepancy. Therefore, this claim is also without merit.

D. FAIR Team Report

Fourth, McCurley alleges that McGroerty's representation was ineffective because he failed to request a *Daubert/Kumho* hearing even though the FAIR team report was not allegedly supported by any appropriate expert evidence. McGroerty also allegedly failed to discuss the issue of a *Daubert/Kumho* hearing with McCurley. However, McGroerty did inform McCurley that any expert offered by the State would have to be qualified and that the State would probably try to present two experts, a reconstruction expert and an expert on blood alcohol tests. McGroerty also established that he discussed with McCurley the possibility of retaining an expert reconstructionist and even offered to refund the balance of his retainer if she decided to retain an expert. In her Affidavit, Deputy Attorney General Stephanie A. Tsantes ("Tsantes") stated that both the accident reconstructionist in this case and the State Chemist and Medical Examiner have been qualified as experts in many cases in Delaware. The principles underlying accident reconstruction and blood alcohol testing are certainly not novel. Once again, McCurley has simply failed to show that McGroerty's failure to request a *Daubert/Kumho* hearing falls below an objective standard of reasonableness or that McCurley would have been successful if such a hearing were held. Therefore, this claim is without merit.

E. Taped Statement

Fifth, McCurley alleges that McGroerty failed to obtain Lacey Bevans' taped statement that allegedly included exculpatory material. McCurley contends that the taped statement contained exculpatory material, including McCurley's lack of excessive speed, her ability to control the vehicle despite the State's allegation that she was under the influence of alcohol, and that she had not consumed alcohol for an extended period of time prior to the accident. I listened to the taped statement. It does not contain exculpatory evidence. The evidence it does contain indicates that McCurley was "drunk" and that she was exceeding the speed limit. Although McGroerty did not, prior to the entry of the guilty plea, listen to the taped statement, he did discuss the existence of it with McCurley and with Lacey Bevans, who are friends. McGroerty also reviewed the FAIR team report, which contained a summary of the taped statement, with McCurley. McGroerty also discussed the crash with Lacey Bevans prior to the entry of McCurley's guilty plea. Since McGroerty reviewed the summary statement of Lacey Bevans, discussed the statement with McCurley and actually talked with Lacey Bevans, it is unclear how McGroerty's failure to listen to the tape would have changed the outcome. Therefore, this claim is without merit.

F. Copies of Medical Reports

Sixth, McCurley alleges that McGroerty was careless by failing to inform her that her medical records were subpoenaed by the Attorney General's office, produce the records, discuss the confidentiality of the records, request an attenuation hearing, or move to dismiss the indictment. McGroerty admits that he did not give McCurley copies of her medical records and that he did not discuss the issue of confidentiality with her. However, McGroerty did review the records with McCurley. McGroerty believed that the State had sufficient evidence to proceed without the records.

Therefore, McGroerty did not file a motion to dismiss the indictment, nor did he file a motion for an attenuation hearing to determine if the State did in fact have sufficient evidence. McGroerty also discussed with McCurley the fact that the hospital record contained the entry "post MVA with acute alcohol intoxication" and a laboratory report of alcohol of .184. McGroerty also informed McCurley that they could object to admission of the records at trial if the State moved to admit them. Other than simply raising these issues, McCurley has not established in any persuasive way that the information in her medical records could have been excluded and, if excluded, that she would not have plead guilty. Quite simply, under even the best of circumstances, evidence of McCurley's alcohol consumption would have, in all likelihood, been before the jury. Therefore, the Court finds this claim to be without merit.

G. Motion to Suppress

Seventh, McCurley contends that she was prejudiced by McGroerty's failure to file a motion to suppress blood evidence. McGroerty's recollection is that he did discuss a motion to suppress for lack of probable cause with McCurley. However, given the facts of the case, McGroerty advised McCurley that it was unlikely that she would prevail on such a motion. The other evidence against McCurley included a bottle of bourbon in her car and a witness who was interviewed by the police at the hospital after the crash who indicated that all three occupants of McCurley's vehicle were all drinking from the same bottle. There is nothing to suggest that McGroerty's advice as to the likelihood of prevailing on the motion to suppress was not based upon a reasonable analysis of the evidence and the law. Therefore, this claim is without merit.

H. McCurley's Innocence

Finally, McCurley contends that she is innocent of the offenses and did not know that she had a complete defense to the charges. McCurley's position is that she was not under the influence of alcohol, that she was driving within the speed limit, and that she could not have reasonably expected the car in front of her to stop suddenly and the shoulder of the road to be blocked by a parked car with its lights off. This is simply an argument based on McCurley's view of the evidence. It is in no way under all circumstances a complete defense to the charges. McGroerty acknowledges that he discussed this complete defense with McCurley, and that he advised her that it was extremely risky and she was likely to be convicted. McGroerty's judgment about the riskiness of McCurley's defense is supported by other evidence indicating that McCurley was drunk, was drinking while she was driving, was speeding, and was passing cars on the right hand side of the road. I find no error at all in McGroerty's analysis of McCurley's defense.

McCurley decided to enter a plea of guilty in this case. McCurley swore under oath before me that she committed the offenses and that she was freely, voluntarily and knowingly entering a plea of guilty. McCurley is bound by those representations and she cannot now claim that she is innocent. During the January 8, 2004 hearing, McCurley's recollection of the facts was vague at best. She lacked a recollection of the facts on many of the questions that were asked on cross-examination, while she was able to state which specificity what documents McGroerty did not provide her with on direct examination. McGroerty's recollection of the meetings and what was discussed at these meetings is much clearer and less troublesome to the Court. I find that McCurley's testimony lacks an indicia of reliability. I found McGroerty to be much more credible than McCurley.

Moreover, McCurley voluntarily signed the plea agreement on April 29, 2003. McCurley also signed the truth-in-sentencing guilty plea form where she indicated that she was satisfied with McGroerty's representation of her case, that McGroerty fully advised her of her rights, and that she was aware of the outcome of her guilty plea. During the plea colloquy, the following exchange took place:

> THE COURT: Did you review, fill out and sign this [Truth-in-Sentencing Guilty Plea] form?
> THE DEFENDANT: Yes.
> THE COURT: Did you see the seven rights in bold print on that form?
> THE DEFENDANT: Yes.
> THE COURT: Did you discuss those rights with your attorney?
> THE DEFENDANT: Yes.
> THE COURT: Do you understand those rights?
> THE DEFENDANT: Yes.
> THE COURT: Do you understand you are waiving those rights by pleading guilty?
> THE DEFENDANT: Yes....
> ....
> THE COURT: Did anybody force you to take this plea?
> THE DEFENDANT: No.
> THE COURT: Did anybody coerce you into taking this plea?
> THE DEFENDANT: No.
> THE COURT: Did anybody promise you anything in exchange for this plea?
> THE DEFENDANT: No.
> THE COURT: Did you commit the two offenses you are pleading guilty to?
> THE DEFENDANT: Yes.
> THE COURT: Are you satisfied with your attorney's representation of you in this case?
> THE DEFENDANT: Yes....

It is well established that a "defendant's statements to the Court during the guilty plea colloquy are presumed to be truthful."[5] Further, "[t]hose contemporaneous representations by a defendant pose

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[5] *State v. Denston*, 2003 WL 22293651 at *5 (Del. Super. Ct.), *citing Bramlett v. A.L. Lockhart*, 876 F.2d 644, 648 (8th Cir. 1989); *Davis v. State*, Del. Supr., No. 157, 1992, Walsh, J. (Dec. 7, 1992)(Order).

a 'formidable barrier in any subsequent collateral proceeding.'"[6] Consequently, in the absence of clear and convincing evidence to the contrary, McCurley is bound by her statements on the truth-in-sentencing guilty plea form and by her sworn testimony prior to my acceptance of the guilty plea.[7] McCurley has failed to present clear and convincing evidence to rebut her sworn statements that she committed the offenses and that she was satisfied with McGroerty's representation. McGroerty's representation of McCurley was reasonable and McCurley has not shown that but for any errors made by McGroerty she would not have pled guilty.

CONCLUSION

The defendant's Motion for Postconviction Relief is denied for the reasons stated herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB:tll

cc: Prothonotary's Office

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[6]*Denston*, 2003 WL at *5, *quoting Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985)(quoting *Blackledge v. Allison*, 431 U.S. 63, 73 (1977)).

[7]*Denston*, 2003 WL at *5, *citing Fullman v. State*, Del. Supr., No. 268, 1988, Christie, C.J. (Feb. 2, 1988)(Order). *See Little v. Allsbrook*, 731 F.2d 238, 239-40, n.2 (4th Cir. 1984); *cf. Patterson v. State*, 684 A.2d 1234, 1238 (Del. 1996).