

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE :
 : I.D. No. 0401018495
 v. :
 :
 KELLY L. GUSTIN, :
 :
 Defendant. :

Submitted: September 29, 2004
Decided: December 13, 2004

ORDER

Upon Defendant' s Motion to
Withdraw Guilty Plea. Denied.

Stephen R. Welch, Jr., Esquire, Deputy Attorney General, Dover, Delaware;
attorneys for the State of Delaware.

Sheryl Rush-Milstead, Esquire, Assistant Public Defender, Dover, Delaware;
attorneys for the Defendant.

WITHAM, J.

Upon consideration of Defendant' s Motion to Withdraw Guilty Plea, it appears to the Court:

1. Kelly Gustin (" Defendant") has been charged with three counts of Assault in the first degree in violation of 11 *Del. C.* §613 as a result of several incidents that occurred between December, 2003 and January, 2004. The investigation commenced on January 23, 2004 when Defendant' s children, Kiara and Shawn, were admitted to the hospital, examined and found to have severe retinal hemorrhaging. In addition, Shawn suffered cranial bleeding.¹ The attending physician believed the children' s conditions were the result of being shaken or struck. Although the Defendant originally claimed that Kiara fell off the bed, he later admitted that she bounced off the bed after he forcefully threw her onto the bed because she would not stop crying. The Defendant also admitted to shaking both of the children out of frustration earlier because they would not stop crying.² Due to the severity of the injuries, the Defendant was charged with three counts of Assault in the First Degree.

2. On July 28, 2004, the Defendant, represented by an attorney from the Public Defender' s Office, entered into a plea agreement. Instead of going to trial on three counts of Assault in the First Degree, the Defendant decided to plead guilty

¹ On December 7, 2003, Kiara was admitted to the hospital and was also found to have cranial bleeding.

² According to the report, Defendant provided these statements to the police on January 24, 2004 after being read his Miranda rights.

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to one count of Assault in the First Degree and two counts of Assault in the Second Degree. Rather than face a potential sentence of up to sixty years of incarceration with a minimum mandatory penalty of six years, the Defendant entered into a plea agreement where the maximum potential penalty was forty-one years of incarceration with a minimum mandatory sentence of only two years. A few weeks prior to the sentencing date, which was scheduled for September 29, 2004, the Defendant filed a motion to withdrawal his guilty plea. Defendant claims that he did not understand the plea agreement and was pressured by Defense Counsel into entering the plea agreement. Defendant further claims that although he has completed the eleventh grade, he only has a comprehension level of a fourth or fifth grader and also suffers from attention deficit hyperactivity disorder (“ADHD”) thereby making it difficult for him to fully understand the nature of the plea agreement. The Defendant claims that he was never explained the nature of the plea agreement and did not fully comprehend the implications of the plea agreement until he was in solitary confinement after he had already entered into the agreement. Defendant also contends that the plea agreement is procedurally defective because his counsel filled out the Truth-In-Sentencing Guilty Plea Form for him. Accordingly, Defendant requests that this Court permit him to withdraw his guilty plea.

3. The determination of whether to permit the defendant to withdraw his

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guilty plea is reserved to the sound discretion of the trial court.³ Superior Court Criminal Rule 32(d) empowers this Court to grant Defendant’ s motion to withdraw his guilty plea “ upon a showing by the defendant of any fair and just reason.”⁴ Essentially, in order for this Court to allow the Defendant to withdraw his guilty plea, the Defendant must establish that the plea agreement was not voluntarily entered or that the Defendant entered the agreement because he misapprehended or misunderstood his legal rights.⁵ In determining whether the Defendant has provided a fair and just reason for withdrawing his guilty plea, the Court should make the following inquiries:

- a. was there a procedural defect in taking the plea;
- b. did the defendant knowingly and voluntarily consent to the plea agreement;
- c. does the defendant have a basis to assert legal innocence;
- d. did the defendant have adequate legal counsel throughout the proceedings; and
- e. does granting the motion prejudice the state or unduly inconvenience the Court?⁶

³ *Brown v. State*, 250 A.2d 503, 504 (Del. 1969).

⁴ Super. Ct. Crim. R. 32.

⁵ *State v. Insley*, 141 A.2d 619, 622 (Del. 1958).

⁶ *State v. Friend*, 1994 Del. Super. LEXIS 229, *4.

4. This Court must first consider whether there was a procedural defect in taking the plea. Defendant asserts that the plea agreement was procedurally defective because the Truth-In-Sentencing Form requires that the Defendant answer the questions in his or her handwriting but the checkmarks on his form were written by his counsel. While this Court acknowledges that the form states that the questions are to be answered by the defendant in his own handwriting, it has been the practice of this Court to allow defense counsel to prepare the form so long as the defendant approves each checkmark and signs the form. Defense Counsel has also informed the Court that the normal procedure is to ask the questions and record the answers for the client because the clients are usually chained to the wall. Accordingly, this Court finds that such a method is adequate and does not render the plea agreement procedurally defective. After reviewing the record, this Court finds that the procedure employed when the Defendant entered into his plea agreement and pled guilty was procedurally sound.

This Court must next consider whether the Defendant knowingly and voluntarily entered into the plea agreement. Defendant contends that he did not understand the nature of the plea agreement because he suffers from ADHD and only has the comprehension level of a fifth grader. Further, Defendant claims that he was pressured into accepting the plea agreement by Defense Counsel. Defense Counsel disagrees entirely with the Defendant's assertion and claims that the Defendant was aware and understood the consequences of the plea agreement. Defense Counsel acknowledged that the Defendant has ADHD and was placed into

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special classes but insisted that it did not affect the Defendant's ability to comprehend or understand the nature of the plea agreement. In fact, Defense Counsel remembers talking to the Defendant about the plea agreement. Defense Counsel recalls a conversation with the Defendant where the Defendant stated he was told by his family that the injuries to the children were not as bad as the reports suggested. After explaining to the Defendant the extent of his children's injuries and the long-term implications of shunts, Defense Counsel recalls that the Defendant agreed with her that the information provided by her was probably more reliable and knowingly and voluntarily consented to the plea agreement. Defense Counsel also referenced a letter from the Defendant dated March 5, 2004 where the Defendant stated that he wanted to take a plea agreement and did not want to go to trial. Although Defense Counsel might have informed the Defendant that his chance of success at trial was not very good, this Court finds that such a statement is not undue "pressure" but rather well-reasoned advice based upon Defense Counsel's knowledge and experience. Based upon Defense Counsel's comments, the plea colloquy, and the Truth-In-Sentencing Form which was signed by the Defendant, this Court finds that the Defendant knowingly and voluntarily consented to the plea agreement.

This Court also finds that the Defendant has not asserted any basis for his legal innocence. In fact, the Defendant admitted to forcefully shaking and throwing the children out of frustration because they would not stop crying. While the Defendant claims that a more thorough investigation would have led to a finding of

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his innocence, this conclusory statement does not provide the Defendant with an adequate legal basis to assert his innocence.

This Court must next determine whether the Defendant was provided with adequate legal counsel throughout the proceedings. Generally, in order to succeed based upon a claim for ineffective assistance of counsel, the defendant must show that defense counsel's performance fell below "an objective standard of reasonableness" and that there is a reasonable probability that the defendant would not have entered a plea agreement but for counsel's deficient performance.⁷ Defendant argues that Defense Counsel's performance was substandard because she did not adequately investigate the incident. Defendant relies upon the decisions in *MacDonald v. State*⁸ and *Patterson v. State*⁹ to support his contention. This Court finds these decisions factually incompatible and thus unpersuasive. In *MacDonald*, the defendant, without any investigation of the charges, agreed to accept a plea bargain within six days after being informed of the charges and essentially received nothing in return for his pleading guilty. Here, there was an investigation which led to the Defendant's self-incriminating statements and Defendant's potential maximum sentence as well as his minimum mandatory sentence was substantially lessened as a result of the plea agreement. In *Patterson*, the defense counsel

⁷ *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

⁸ 778 A.2d 1064 (Del. 2001).

⁹ 684 A.2d 1234 (Del. 1996).

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provided the defendant with erroneous information. Defense counsel erroneously informed the defendant that he would only need to serve six more years when in fact the sentence was a minimum mandatory of ten years which means that he could not earn any good time credits. Also, because the defendant was intoxicated and could not remember the alleged incident, the defendant in that case entered into a Robinson Plea, a plea which he entered knowingly and voluntarily but without admitting commission of the offense. Those facts are not present here. Defendant has not entered into a Robinson Plea nor has he asserted that Defense Counsel has provided him with any erroneous information. In short, the Defendant has failed to show that his counsel' s performance was inadequate based upon an objective standard of reasonableness. The mere conclusory assertion that Defense Counsel has not thoroughly investigated the incident is insufficient to sustain the Defendant' s burden. Accordingly, this Court finds that the Defendant has failed to establish that his legal counsel performed inadequately.

The final factor this Court must consider is whether granting Defendant' s motion to withdraw his guilty plea would prejudice the State or inconvenience the Court. Even if this Court were to conclude that granting Defendant' s motion would not inconvenience the Court or unduly prejudice the State, the Defendant has still failed to produce a fair and just reason to withdraw his guilty plea. Accordingly, any discussion concerning the potential prejudice to the State or inconvenience to the Court would be trivial.

Based upon the comments of Defense Counsel, the plea agreement, the plea

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colloquy, and the Truth-In-Sentencing Form which was signed by the Defendant, this Court finds that the Defendant has failed to meet his burden of providing a fair and just reason to withdraw his guilty plea. Accordingly, Defendant' s motion to withdraw his guilty plea is hereby denied.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File