

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

1 THE CIRCLE, SUITE 2  
SUPERIOR COURTHOUSE  
GEORGETOWN, DE 19947

April 11, 2005

Joshua W. Fox  
Delaware Correctional Center  
1181 Paddock Road  
Smyrna, DE 19977

RE: State of Delaware v. Joshua W. Fox,  
Def. ID# 0204014615

DATE SUBMITTED: January 3, 2005

Dear Mr. Fox:

Pending before the Court is a motion for postconviction relief which defendant Joshua W. Fox ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). This is my decision denying the motion.

FACTS

On November 6, 2002, defendant pled guilty to a charge of burglary in the second degree in violation of 11 Del. C. § 825(1)<sup>1</sup> and the remaining two charges of theft misdemeanor and

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<sup>1</sup>In 11 Del. C. § 825, it is provided:

A person is guilty of burglary in the second degree when the person knowingly enters or remains unlawfully:

conspiracy in the second degree were nolle prossed. The plea agreement called for a sentence of four (4) years at Level 5, and upon successful completion of Level 5 Bootcamp, the balance was to be suspended for three and a half (3 1/2) years at Level 3 probation.

As a part of the plea colloquy, the Court went over with defendant the Plea Agreement form ("Plea Agreement"), the Truth in Sentencing Guilty Plea form ("TIS form"), and the immediate sentencing form. The Court questioned defendant closely regarding his understanding of, and voluntariness in entering, the plea. Pertinent to this motion are the following facts.

On his TIS form, defendant answered "Yes" to the following questions:

Have you freely and voluntarily decided to plead guilty to the charges listed in your written plea agreement?

Are you satisfied with your lawyer's representation of you and that your lawyer has **fully advised of your rights** and of your guilty plea?

He answered "No" to the following questions:

Have you been promised anything that is not stated in your written plea agreement?

Has your attorney, the State or anyone threatened or forced you to enter this plea?

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(1) In a dwelling with intent to commit a crime therein....

During the plea colloquy, defendant told the Court he was satisfied with his attorney's representation of him and had no complaints about such representation. Defendant also confirmed that trial counsel had explained to him "the legal elements of the burglary in the second degree" and had reviewed with him the evidence in the case.

The Court went over the sentence he was facing, also. The Court explained that if defendant failed to complete Bootcamp, then he would have to serve all four (4) years at Level 5. After satisfying itself that defendant knowingly, willingly, and voluntarily entered the plea, it imposed the sentence. Defendant did not appeal therefrom. Because defendant failed to complete Bootcamp, he now must serve all four (4) years at Level 5.

On December 29, 2004, defendant filed the pending motion for postconviction relief. He advances four grounds of relief. All of the grounds are based upon his unsupported assertion that the building he burglarized was a business and not a dwelling. This assertion that the burglary was a business rather than a dwelling is contrary to the information contained in the affidavit of probable cause and to the allegations of Count 1 of the indictment.

Defendant's first ground for postconviction relief is he unintelligently, involuntarily, and unknowingly entered a plea to

burglary in the second degree when the facts supported the crime of burglary in the third degree.<sup>2</sup>

The second ground is he was "Denied Due Process of Indictment Via State Employed Outrageous Law Enforcement Investigative Techniques." In support of that ground, he argues "outrageous law enforcement techniques" in pursuing a charge of burglary in the second degree when "it is pretty clear that the property burglarized was a business not a residence/dwelling."

The third ground is insufficient evidence to support a conviction of burglary in the second degree. He argues that a jury would not have found him guilty of burglary in the second degree when the facts support a conviction for burglary in the third degree.

The final ground is ineffective assistance of counsel. Defendant argues as follows. Trial counsel was ineffective because he failed to determine that the building burglarized was a business and not a dwelling. Because trial counsel did not know that the building was a business, he did not provide defendant with the ability to make a knowing decision regarding the guilty plea. Had he known the correct facts, defendant would not have

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<sup>2</sup>"A person is guilty of burglary in the third degree when the person knowingly enters or remains unlawfully in a building with intent to commit a crime therein." 11 Del. C. § 824.

pled guilty but would have gone to trial because the State of Delaware could not have proven he was guilty of burglary in the second degree.

Before considering these claims, I first must determine if Rule 61(i)<sup>3</sup> procedurally bars them.

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<sup>3</sup>In Superior Court Criminal Rule 61(i), it is provided as follows:

*Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

- (A) Cause for relief from the procedural default and
- (B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the

The claims are not time-barred pursuant to Rule 61(i)(1). However, Rule 61(i)(3) bars all the claims except ineffective assistance of counsel. Defendant makes no attempt to overcome the procedural bar of Rule 61(i)(3). Accordingly, I only consider the ineffective assistance of counsel claim.

As the Supreme Court explained in Barnes v. State, Del. Supr., No. 330, 1992, Walsh, J. (November 18, 1992):

In order to prevail on a claim of ineffective assistance of counsel, a defendant must claim and establish both prongs set forth in Strickland v. Washington, 466 U.S. 668 (1984): (a) counsel's conduct fell below "an objective standard of reasonableness;" and (b) counsel's action was prejudicial, i.e., "that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." Albury v. State, Del. Supr., 551 A.2d 53, 58 (1988); Hill v. Lockhart, 474 U.S. 52, 58 (1985). "Strickland's standard, although by no means insurmountable, is highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). There is also a "strong presumption that the representation was professionally reasonable." Flamer v. State, Del. Supr., 585 A.2d 736, 753 (1990). Moreover, the Constitution does not require counsel's performance to be free from error. McMann v. Richardson, 397 U.S. 759, 770-771 (1970).

\*\*\* It is settled Delaware law that in order to prevail on a claim of ineffective assistance of counsel a defendant must make concrete allegations of actual prejudice and substantiate them. Robinson v. State, Del. Supr., 562 A.2d 1184, 1185-1186 (1989); White v. State, Del. Supr., No. 81, 1991 Christie, C.J. (June 19, 1991) (ORDER)

In this case, defendant confirmed that trial counsel had

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judgment of conviction.

explained to him "the legal elements of the burglary in the second degree" and had reviewed with him the evidence in the case. Defendant now, in a conclusory manner and without substantiation, asserts the building he burglarized was a business and not a dwelling. Such a conclusory allegation fails.

For the foregoing reasons, I deny the pending motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office  
Adam D. Gelof, Esquire  
John F. Brady, Esquire