

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.)
) I.D. No. 9905019691
WARREN J. MCNEILL,)
)
)
 Defendant.)

Upon Consideration of Motion for Postconviction Relief
DENIED

Date Submitted: July 4, 2004
Date Decided: October 28, 2004

ORDER

Scott, J.

This 28th day of October 28, 2004, upon Consideration of Defendant's Motion for Post-conviction Relief pursuant to Superior Court Criminal Rule 61, it appears that:

1. On October 16, 1999, the Defendant was arrested and charged with Attempted Murder First Degree, Attempted Assault First Degree, eight counts of Possession of a Firearm During the Commission of a Felony (PFDCF), four counts of Reckless Endangering First Degree, two counts of Aggravated Menacing, two counts of Possession of a Deadly Weapon by

Person Prohibited, and two counts of Possession of a Deadly Weapon or Ammunition by a Person Prohibited.

2. On November 22, 2000, Defendant accepted a guilty plea to charges of Attempted Assault First degree,¹ Possession of a Firearm During the Commission of a Felony,² and Reckless Endangering First Degree.³ Subsequently, on February 8th, 2001, the Defendant moved to withdraw his guilty plea. Judge Goldstein denied the motion finding that the Court engaged in an extensive and thorough plea colloquy with the Defendant before accepting his knowing and voluntary plea.⁴ On appeal to the Delaware Supreme Court, the Court affirmed.⁵

3. Thereafter, on April 3rd, 2002, the Defendant was sentenced as follows: (1) ten years at Level five, suspended after four years for six years Level four for Attempted Assault First degree; three years Level five for PFDCF; and, five years Level five, suspended for five years at Level two for Reckless Endangering First degree.

4. Defendant contends that he should be afforded postconviction relief because of ineffective assistance of counsel, inability to speak at the

¹ 11 *Del. C.* § 631.

² 11 *Del. C.* § 1447A.

³ 11 *Del. C.* § 604.

⁴ *State v. McNeill*, Del. Super., ID No. 9905019691, Goldstein, J. (Apr. 5, 2001) (ORDER).

⁵ *State v. McNeill*, 2002 WL 31477132, Walsh, J. (Nov. 4, 2002) (ORDER).

sentencing stage, and denial of Due Process at the sentencing phase. The merit of each of these claims will be discussed below.

5. Defendant's claim that his defense counsel was ineffective must fail under *Strickland v. Washington*,⁶ and *Flamer v. State*.⁷ The test for ineffective assistance of counsel is (1) whether counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different.⁸ Additionally, there is a strong presumption that legal representation is professionally reasonable.⁹ Turning to the first prong, it is evident from the record that defense counsel acted reasonably. He explained to the Defendant the truth-in-sentencing guidelines for each of the charges, as well as the minimum and mandatory sentences.¹⁰ Furthermore, when the Defendant stated that he did not understand the sentencing "gibberish," defense counsel spent time explaining it to him.¹¹ Finally, the Defendant stated that he did understand all of the provisions of the plea agreement upon conferring with his

⁶ 466 U.S. 668 (1984).

⁷ 585 A.2d 736 (Del. Supr. 1990).

⁸ *Strickland*, 466 U.S. at 688, 694.

⁹ *Flamer*, 585 A.2d at 753-54.

¹⁰ Plea Hearing Transcript, 11/22/00, at 19.

¹¹ *Id.*

counsel.¹² With regard to the second prong, it is not probable that the outcome of the hearing would have been different but for counsel's lack of assistance because the Court found that Defendant knowingly and intelligently entered into his own plea agreement. Moreover, Defendant has presented no compelling facts to overcome the strong presumption of effective counsel.

6. Defendant's claim that he was denied the right to speak in allocution at the sentencing phase is without merit. Superior Court Criminal Rule 32(a)(1)(C) states, "[b]efore imposing sentence, the court shall also – [a]ddress the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence. However, in *Shelton v. State*,¹³ where it was the defendant's strategy not to speak to the jury, and no prejudice resulted due to the defendant's silence, there was no violation of Rule 32.¹⁴ As in *Shelton*, the Defendant here did not speak during the sentencing phase because of case strategy.¹⁵ Furthermore, no prejudice occurred as a result of the Defendant's

¹² *Id.* at 20. The Court asked, "Mr. McNeill, are you satisfied with your attorney's advice and representation in this case?" The Defendant responded, "yes."

¹³ 744 A.2d 465 (Del.Supr. 1999).

¹⁴ *Id.* at 488-89.

¹⁵ Sentencing Transcript, 4/3/2002, at 2. Defense counsel stated that he advised his client to remain silent because of the possibility of an appeal post sentencing of the motion before the court. *Id.*

silence because Judge Tolliver stated, “I take no negative inference from his lack of statement.”¹⁶

7. Finally, Defendant’s motion for postconviction relief must be denied as to his claim of due process violations at the sentencing phase. Defendant contends that he was not given the opportunity to question the procedure leading to the imposition of his sentencing. Rule 32(a)(1)(A) allows a Defendant to review the presentence report only if he is pro se; otherwise, the defense counsel has the right to review. As the record reflects, Defendant’s counsel reviewed the presentence investigation report and chose to defer to the Court’s recommendations.¹⁷

Therefore the Defendant’s Motion for Postconviction Relief is
DENIED.

IT IS SO ORDERED.

Calvin L. Scott, Jr.
Superior Court Judge

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 3.