SUPERIOR COURT
OF THE
STATE OF DELAWARE

JEROME O. HERLIHY
JUDGE

NEW CASTLE COUNTY
COURT HOUSE
WILMINGTON, DE 19801-3733

May 3, 2005

Daniel C. Hamby
SBI #134464
Dorm # 2
H.R.Y.C.I.
P.O. Box 9561
Wilmington, DE 19809

RE: *State v. Daniel C. Hamby*
ID No. 0401018750 & 0402007273

Submitted: April 19, 2005
Decided: May 2, 2005

Upon Motion of the Defendant for Postconviction Relief - ***DENIED***

Dear Mr. Hamby:

You have filed a motion for postconviction relief raising three grounds for relief and one of ineffective assistance of counsel:

1. Your sentence for felony shoplifting should have been the same as your co-defendant, Charlotte Hardy.
2. The shoplifted merchandise was recovered.
3. The sentence was unfair because your sentence was in excess of the guidelines.
4. Defense counsel should have been aware of the co-defendant's probation sentence for the same offense. No greater sentence than that should have been imposed or the charge dismissed.

Background

You pled guilty on May 20, 2004, to felony shoplifting and to fourth offense driving under the influence. On that date you were sentenced to eighteen months at Level V on the shoplifting charge and six months at Level V, followed by probation, on the DUI charge.

The plea agreement to the felony shoplifting and the DUI, which you signed, states you agreed you were a habitual offender. The allegedly requisite prior felony convictions were listed on the agreement. The State, in that agreement, asked that you be declared a habitual offender and sentenced as one on the shoplifting charge. The State's recommended sentence was eighteen months in jail to be imposed under 11 *Del. C.* §4214(a).

When independently reviewing your criminal record, I discovered that two of the prior felonies listed, while carrying criminal action numbers three years apart, had in fact been sentenced on the same day. Therefore, you did not have the requisite three separate prior felony convictions to be declared a habitual offender. The shoplifting charge to which you pled made the third separate felony. As a consequence, and as I announced at sentencing, you were not eligible for habitual offender status and I did not sentence you as a habitual offender.

You did not appeal the sentence.

On August 11, 2004, Michael Modica, Esquire, filed, on your behalf, a motion to reduce your sentence. He made several claims for that reduction. One, he noted the

shoplifted property had been recovered. Two, he argued that your criminal record meant that you should have received a Level V (jail) sentence of up to six months.

I denied the motion on August 21, 2004. The denial notes you agreed you were a habitual offender and to be sentenced as such but that you were not. It also says you received your sentence based on your criminal record.

After this denial, you filed *pro se* three motions for modification of your sentence. In the first, you asked that you be allowed to enter Key and, upon completion, your Level V sentence be suspended. The Department of Correction did not make that request, so I denied it on October 6, 2004.

Your second motion raises the same guideline point Mr. Modica raised. It also repeats your request about Key. I denied that motion on January 14, 2005, as being filed past 90 days from sentencing, without extraordinary circumstances, and because the original sentence was appropriate.

You filed a third motion making similar claims to all the prior motions adding information about programs. I denied this third motion on February 9, 2005, as repetitive and indicated any program completion accomplishment must be made, if it wishes, through an application by the Department of Correction.

Now you have filed your motion for "postconviction relief."

Discussion

While you entitle your current motion as one for postconviction relief, it is a thinly disguised additional motion for a sentence reduction. Mr. Modica's motion, your second

motion, and this latest motion all raised an identical issue. That is, that your eighteen month Level V sentence was above guidelines. First, this is not an appropriate basis for postconviction relief. Second, it has been raised twice previously and rejected twice previously. Third, sentencing guidelines are just that, guidelines and are not binding.[1] Fourth, your serious criminal record dating back to 1978 in this Court alone, includes convictions for assault third degree, trafficking, burglary third degree, receiving stolen property, forgery, drug offenses, and various violations of probation.

Your felony record did not contain the requisite three separate prior felonies to be declared as a habitual offender on the shoplifting charge.[2] Even so, it warranted the eighteen months Level V sentence imposed.

Your current motion and Mr. Modica's motion also raised another identical point. It, too, is irrelevant as a basis for postconviction relief. Both motions note that the shoplifted property was recovered. This is a repetitive statement and since it relates to a reason for sentence reduction and not postconviction relief, it is denied, again.

The other two grounds for postconviction relief are interrelated. One is couched in the terms of a claim of ineffective assistance or counsel. These two claims relate to the sentence your co-defendant, Charlotte Hardy, received. She, too, pled to felony shoplifting. She was sentenced to one year in jail but suspended for one year of probation.

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[1] *McReynolds v. State*, Del.Supr. No. 91, 1993, Veasey, C.J. (June 23, 1993)(ORDER).

[2] *Buckingham v. State*, 482 A.2d 327, 330 (Del. 1984).

Your first claim related to her sentence is that your sentence should have been the same as hers. First, this claims is not a basis for postconviction relief. Second, it is arguably a basis for a sentence reduction. But you raise it more than 90 days after the sentence I imposed on you May 20, 2005. For that reason alone it is rejected. But to compare her sentence to your is bogus. Her plea was her first felony. Her criminal record is minimal. It includes only three misdemeanors. To compare her record to yours of many felonies and many misdemeanors and many violations of probation is a non-starter.

The interrelated claim for postconviction relief is that your counsel was ineffective because he should have been aware of her sentence and urged upon me a similar sentence.

To demonstrate ineffective assistance of counsel you must show (1) that counsel's conduct fell below some objective standard of reasonableness and (2) but for counsel's error you were prejudiced.[3]

It is unclear against whom your claim of ineffectiveness is made. If it were the attorney representing you in your case and at the plea and sentencing, this claim is baseless. You were sentenced on May 20, 2004. Hardy was sentenced on June 21, 2004. That attorney therefore, could not have known on May 20th of her sentence.

If your claim is against Mr. Modica who filed his motion for you on August 11, 2004, there is an arguable basis he should have been aware of and claimed that her sentence was a basis for getting your sentenced reduced.

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[3] *Grosvenor v. State*, 849 A.2d 33, 35 (Del. 2004).

That argument will get nowhere, however. Your sentence was based on your record and the new charges to which you pled. As noted, her record and yours are not comparable. Even if Mr. Modica had raised her sentence as a basis for reducing yours, I would not have accepted it as a valid reason. In short, you cannot meet the prejudice test and your claim of ineffective assistance fails.[4]

Conclusion

For the reasons stated herein, the defendant Daniel Hamby's motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

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J.

[4] *Stone v. State*, 690 A.2d 924, 926 (1996).