

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

May 18, 2006

Ben R. Roten
Sussex Correctional Institution
23207 duPont Highway
Georgetown, DE 19947

RE: State of Delaware v. Ben R. Roten, Def. ID# 0401005180

DATE SUBMITTED: February 28, 2006

Dear Mr. Roten:

Pending before the Court is a motion for postconviction relief which defendant Ben R. Roten (“defendant”) has filed pursuant to Superior Court Criminal Rule 61. This is my decision denying the pending motion.

FACTS

Defendant was arrested in January, 2004, on charges of kidnapping in the first degree; assault in the first degree; aggravated menacing; and refusing to authority to take photos and fingerprints. In March, 2004, the Grand Jury indicted him on charges of kidnapping in the first degree; attempted murder in the first degree; aggravated menacing; possession of a deadly weapon during the commission of a felony; resisting arrest; and refusing authority to take photos and fingerprints.

On August 6, 2004, defendant pled guilty to the charge of assault in the first degree,¹ a lesser included offense of the attempted murder in the first degree charge, and to the charge of aggravated menacing. In the Truth-in-Sentencing Guilty Plea Form (“TIS form”), defendant answered numerous questions. He responded “No” to the question of “Are you under the influence of alcohol or drugs at this time?” He also answered “No” to the questions of whether he had been promised anything not stated in his written plea agreement and whether his attorney, the State or anyone had threatened or forced him to enter this plea. He answered “Yes” to whether he was freely and voluntarily entering the plea; he was satisfied with his attorney’s representation of him; and he had read and understood all of the information on the TIS form.

During the plea colloquy, he confirmed the following information. He was satisfied with his attorney’s representation of him. He had read the TIS form, the immediate sentencing form and his plea agreement. He signed them. His attorney went over the information in these forms with him. He provided the answers to the questions in the TIS form. The information in all the forms was true. He understood the trial rights he was giving up by entering into the plea. No one was forcing him to enter the plea. He understood the penalties he was facing. He understood a presentence report would be prepared before he was sentenced.

Defendant pled guilty as noted above. The Court deemed his decision to be voluntary and

¹In 11 Del. C. § 613(a)(3), it is provided:

(a) A person is guilty of assault in the first degree when:

(3) The person recklessly engages in conduct which creates a substantial risk of death to another person, and thereby causes serious physical injury to another person....

a knowing and intelligent waiver of his rights.

After entering the plea and before sentencing, defendant filed a motion to withdraw the plea. The grounds were that he did not understand the plea offer; he was under the influence of medicines; and he had conflicts with his attorney. The Court, on September 24, 2004, ruled on the motion to withdraw the guilty plea. It deemed the first two grounds to be wholly unsupported and contrary to his sworn statements and the plea documents. The Court concluded that the plea was a voluntary choice and a knowing and intelligent waiver of his rights. The Court ruled there was no procedural defect in the taking of the plea; defendant knowingly and voluntarily consented to the plea; defendant had no basis to assert legal innocence; defendant adequately had counsel throughout the proceedings; and the granting of the motion would unduly inconvenience the Court due to its case load and would prejudice the State in trying to relocate and re-present evidence, which by the passage of time, may have been impacted. The Court found defendant to be an experienced criminal who changed his mind to try to manipulate the system.

The Court then sentenced defendant. On the assault conviction, it sentenced him to twenty-five (25) years at Level 5 with credit for time served. As to the aggravated menacing conviction, it sentenced him to five (5) years at Level 5, and upon successful completion of the Key Program, the balance is suspended for six (6) months at Level 4, Crest, followed by twelve (12) months of Level 3, Aftercare.

Defendant sought a reduction of the sentence on the assault conviction. The Court denied that motion. State v. Roten, Del. Super., Def. ID# 0401005180, Stokes, J. (May 18, 2005).

Defendant appealed the denial of his motion to withdraw his guilty plea. The Supreme Court affirmed the decision of this Court. In Roten v. State, Del Supr., No. 464, 2004, Berger, J.

(Sept. 15, 2005), the Supreme Court ruled:

3) Before sentencing, Roten filed a pro se motion to withdraw his plea. Roten alleged, among other things, that: i) he did not fully understand the plea offer; ii) he was under the influence of medications; and iii) he was pushed and rushed into signing the plea agreement. On appeal, Roten acknowledges that none of those allegations, which are inconsistent with his sworn testimony during the plea colloquy, forms a basis for withdrawing his guilty plea. Instead, he argues that he had a fair and just reason to withdraw his plea because the withdrawal would not have prejudiced the State. He contends that the trial court should have held an evidentiary hearing to determine whether the State would have suffered any prejudice.

4) Because Roten did not request an evidentiary hearing, we review this claim for plain error, which is error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." n1 We find no plain error. The trial court found that granting the motion would "unduly inconvenience this Court because this Court is overwhelmed with trials" and that it would prejudice the State because the State would have to "relocate and re-present evidence...." The trial court did not have to conduct an evidentiary hearing to determine that the withdrawal of the guilty plea would cause undue inconvenience to the court. Thus, even if the State would have suffered no significant prejudice, the trial court acted within its discretion in denying Roten's motion. n2

----- Footnotes -----

n1 Wainwright v. State, 504 A.2d 1096, 1100 (Del. 1986).

n2 Patterson v. State, 684 A.2d 1234, 1238 (Del. 1996).

----- End Footnotes-----

On February 27, 2006, defendant filed the pending motion for postconviction relief.

DISCUSSION

The first step this Court takes is to determine if the claims defendant advances in this Rule 61 motion may proceed or if they are procedurally barred. In the version of Rule 61(i) which applies to defendant's case, 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 judgment of conviction.

Defendant's motion is timely filed. Super. Ct. Crim. R. 61(i)(1).

Defendant's first allegation is that this Court abused its discretion by denying the motion to withdraw the guilty plea "and should have held an evidentiary hearing to see if the defendant had merit to withdraw his plea." To the extent defendant is arguing solely that the Court abused its discretion by denying the motion to withdraw the plea, the claim is procedurally barred because defendant had the opportunity to raise this issue on appeal and failed to do so. Super. Ct. Crim. R. 61(i)(3). Defendant has not attempted to show that any exceptions to the bar exist. This claim is denied as it is procedurally barred.

To the extent defendant is arguing that the Court abused its discretion by not holding a hearing before denying the motion, the claim fails as it is procedurally barred pursuant to Superior Court Criminal Rule 61(i)(4). The defendant raised this issue on appeal and the

Supreme Court denied it. Defendant has not attempted to show how the interest of justice requires a reconsideration of this claim. This claim is denied as it is procedurally barred.

Defendant argues trial counsel coerced him into entering the plea and consequently, was ineffective. Although defendant couches this argument within the context of an ineffective assistance of counsel claim, it is the same argument the Supreme Court deemed to have been appropriately conceded because it was inconsistent with defendant's sworn statements. This claim is procedurally barred. Super. Ct. Crim. R. 61(i)(4). Defendant has failed to show how the interest of justice requires a reconsideration of this claim. The Court denies it as procedurally barred.

Defendant argues that he was entitled to a jury trial before the sentence was imposed. He bases this legally meritless argument on the case of Blakely v. Washington, 124 S. Ct. 2531 (2004). Defendant had the opportunity to raise this issue on appeal and failed to do so. It is procedurally barred. Super. Ct. Crim. R. 61(i)(3). Defendant has not attempted to show why any exceptions to the procedural bar might exist. This claim fails on procedural grounds.

Defendant claims that his trial counsel was ineffective. Since this is the first time defendant could advance such a claim, there is no procedural bar.

As the Supreme Court recently explained in Dorsey v. State, Del. Supr., No. 406, 2005, Jacobs, J. (April 4, 2006) at 3-4:

To prevail on a claim of ineffective assistance of counsel in connection with a guilty plea, a defendant must show that, but for his counsel's unprofessional errors, he would not have pleaded guilty, but would have insisted on proceeding to trial. [Citation and footnote omitted.] There is no evidence in the record that any error on the part of Dorsey's counsel caused him to plead guilty. To the contrary, the record reflects that Dorsey's plea agreement provided him a significant benefit. Moreover, given the circumstances of his arrest, the evidence against him, and his criminal history, there is no reason to believe that Dorsey would have received a

lesser sentence had he not pleaded guilty and had proceeded to trial.

Defendant first argues trial counsel was not effective because he failed to investigate the effects of the drugs defendant was taking and determine if they might impact on defendant's ability to enter the plea voluntarily. Both this Court and the Supreme Court have ruled that defendant's sworn testimony contradicts any current self-serving assertion that defendant was under the influence of drugs at the time he entered the plea. Neither this Court nor the Supreme Court would allow for defendant to use this ground as a basis for obtaining a withdrawal of the plea. Defendant cannot end-run such a decision by attempting to claim trial counsel was ineffective because he did not determine that defendant was under the influence of drugs at the time of the plea. The record stands as established at the time of the plea agreement; defendant was not under the influence of any drugs at the time he entered the plea. This claim fails.

Defendant's second assertion is that trial counsel failed to investigate the facts of the case. He argues that had trial counsel investigated these facts, then he would have learned that the victim's injuries were "mostly superficial" and "there is a chance that he would have considered negotiation for a plea to Assault Second² as opposed to Assault First.³"

Defendant's argument fails for several reasons.

First, the standard for showing ineffective assistance of counsel is not that defendant

²In 11 Del. C. § 612(a)(1), it is provided:

(a) A person is guilty of assault in the second degree when:

(1)The person recklessly or intentionally causes serious physical injury to another person....

³See footnote 1, supra, for text of statute.

could have gotten a better plea offer. Instead, what defendant must show is that but for his counsel's unprofessional errors, he would not have pleaded guilty, but would have insisted on proceeding to trial. Dorsey v. State, supra. Defendant has not attempted to make any such showing, and his claim fails for that reason.

His argument also fails because it is not logical. His argument that he was entitled to a plea to assault in the second degree is based upon his contention the victim's injuries were "mostly superficial"; that argument attacks the degree of the injury to the victim. However, the crime of assault in the second degree also requires serious physical injury as an element. 11 Del. C. § 612(a)(1). Thus, defendant's argument does not make any sense.

What defendant probably means to argue is that he could have had a plea to assault in the third degree in violation of 11 Del. C. § 611(1).⁴ However, defendant does not present anything which supports his contention that the victim's injuries were "mostly superficial". In fact, the medical documents to which defendant cites for support completely contradict this assertion and establish the victim suffered serious physical injury. His beating of the victim multiple times over a period of hours resulted in her losing consciousness and suffering a closed head injury; a brain contusion; multiple complex facial fractures, including a left maxillary sinus fracture, orbital fracture, zygomatic fracture, and nasal bone fractures. Defendant fails to reference the pictures of the victim which are in the record. These pictures show a person horrifically injured. Trial counsel could not have performed any investigation which would have resulted in a finding that

⁴In 11 Del. C. § 611(1), it is provided:

A person is guilty of assault in the third degree when:

(1) The person intentionally or recklessly causes physical injury to another person....

the injuries were “mostly superficial” and thereby, entitled defendant to a plea of assault in the third degree.

There is no evidence in the record that any error on the part of defendant’s trial counsel caused him to plead guilty. In fact, this plea agreement provided defendant a significant benefit. Defendant cannot show that in light of the evidence against him and his criminal history, he would have received a lesser sentence had he not pleaded guilty and had he gone to trial.

Defendant’s claims of ineffective assistance of trial counsel in connection with entering the plea fail for the foregoing reasons.

Defendant’s final argument concerning his attorney is that his attorney failed to raise issues on appeal which he wanted raised. These issues were the issues raised before the Superior Court. On appeal, trial counsel conceded these arguments. He conceded them because he could not have won them, as the Supreme Court noted in its decision. Since defendant cannot show that the outcome of the appeal would have been different had trial counsel pursued these grounds on appeal, he cannot establish ineffective assistance of counsel. This argument fails.

For the foregoing reasons, the Court denies defendant’s motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary’s Office
Melanie C. Withers, DAG
James D. Nutter, Esquire