SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

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

October 12, 2006

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RE: State v. James Barnett
Defendant ID No. 0311017379

Dear Counsel:

On April 26, 2006, Mr. Barnett filed a *pro se* Motion to Withdraw his guilty plea to murder in the second degree and possession of a firearm during the commission of a felony. An evidentiary hearing took place on August 24, 2006. After considering Superior Court Criminal Rule 32(d), the relevant case law[1] and the evidence, I find that the Defendant has not established "any fair and just reason" to withdraw the plea. The Motion is denied and sentencing will take place on Friday, October 27, 2006 at 9:30 a.m.

1. On November 23, 2003, Nicholas Whaley was shot three times while he was at the apartment of his girlfriend in Laurel, Sussex County, Delaware. He died.

2. The investigation focused on James Barnett, who had a child with Mr. Whaley's girlfriend, Ms. Bridell.

3. The State's evidence as reported to the Court at the time of the guilty plea and the evidentiary hearing was as follows:

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[1] *State v. Friend*, 1994 Del. Super. LEXIS 229 (Del. Super.); *State v. Friend*, 1995 Del. Super. LEXIS 557 (Del. Super.); *State v. Friend*, 1998 Del. Super. LEXIS 332 (Del. Super.); *State v. Taylor,* WL 160596 (Del. Super.); *Roten v. State*, 884 A.2d 512, 2005 WL 2254202 (Del. Super.).

a. Mr. Barnett was upset that his former girlfriend and the mother of his child had taken up or resumed a relationship with Mr. Whaley.

b. The Defendant was from Philadelphia, PA.

c. Not too long before the shooting, during a telephone call, an argument took place between Mr. Barnett and his girlfriend. Threats were made. He reportedly told her he would show her how things are done Philadelphia style. When she asked what that meant, he said bringing a gun.

d. Seconds before the shooting, the girlfriend received a call from Mr. Barnett who sounded like he was running. Then he and his co-defendant, Mr. Smith, entered her apartment, and Whaley was shot.

e. Other witnesses saw Mr. Barnett and another person enter the apartment, and within 30 seconds heard gunshots. Immediately, the two men then fled the scene. They returned to Philadelphia.

f. There was evidence that as soon as Mr. Barnett entered the apartment, he moved his son who resided there, out of the way and Mr. Smith shot and killed Mr. Whaley.

g. Mr. Smith, the shooter, did not know Mr. Whaley and had not visited Sussex County before this incident. There was no evidence to support any conclusion that Mr. Smith "had a beef" with Mr. Whaley.

h. The evidence supported a strong inference that Mr. Barnett had a motive to do harm to Mr. Whaley and brought Mr. Smith to Sussex County to accomplish that purpose.

i. Mr. Smith is still awaiting extradition from Pennsylvania where he was recently convicted of a murder in that state.

4. Mr. Barnett was indicted for murder in the first degree and the State advised him of its intent to seek the death penalty.

5. Initially John Brady, Esquire and Edward Gill, Esquire were appointed to represent the Defendant. Due to their involvement in another first degree murder case, Mr. Gill kept his assignment as to the other case, and Thomas Pedersen, Esquire replaced him as to Mr. Barnett's representation.

6. Trial was scheduled to begin on March 21, 2005.

7. On March 11, 2005, the Defendant entered into a guilty plea to murder in the second degree and possession of a firearm during a felony. The plea agreement included "sentencing will be deferred until after co-defendant's case". Mr. Barnett gave a statement that day with his attorneys present.

8. On October 25, 2005, the Defendant wrote to the Court seeking to be sentenced because that would enable him to get into programs at the Department of Correction that were available only to sentenced inmates.

9. Following an office conference and communication with his client, Mr. Pedersen advised that as to sentencing, his client "would like to wait" until after [his] co-defendant's trial to be sentenced".

10. On April 24, 2006, the Defendant filed a *pro se* motion to withdraw his guilty plea.

11. Mr. Barnett made claims against Mr. Brady and Mr. Pedersen. Therefore, James D. Nutter, Esquire was appointed to represent the Defendant.

12. The evidentiary hearing took place on August 24, 2006. Mr. Barnett, Mr. Pedersen and Mr. Brady testified. Prior to the hearing, the State advised that it was aware that Mr. Barnett would not be cooperating as to Mr. Smith's trial, but nevertheless the State did not intend to exercise its option to withdraw from the negotiated plea.

13. Mr. Barnett's testimony is summarized as follow:

a. He met with Mr. Brady twice and Mr. Pedersen about 10 times. He said Mr. Pedersen never stayed more than 10-15 minutes.

b. He claimed he felt compelled to enter a guilty plea because his attorneys were not doing anything for him. Specifically, he alleges they did not provide discovery to him, nobody was coming to see him. They were not corresponding with him. He testified he had not been seen by a psychiatrist, psychologist or a mitigation expert. He complained that a firearms expert was retained but this was not pursued.

c. He was upset his attorneys did not file a motion to suppress his girlfriend's statements because "she was lying".

d. Later, he acknowledged witness statements had been provided and that death penalty materials had been provided, but he did not read all of it.

e. He testified he was told by counsel that if convicted of murder in the first degree, he absolutely had to get the death penalty. On cross-examination, he acknowledged his lawyers had explained the process of the guilt phase, penalty phase and the final decision would be made by the judge.

f. He complained that he did not think his lawyers had a trial strategy.

g. The Defendant apparently believed that since Mr. Smith was the shooter, that he could not be convicted of murder. Liability for the conduct of another was explained to him by Mr. Pedersen. He acknowledged his attorneys discussed with him the State's theory of his culpability which included getting Mr. Smith involved, that Smith had no motive to harm Mr. Whaley, but Mr. Barnett had let his motive be known.

h. Finally, Mr. Barnett testified that although his family had not hired Mr. Progano, who was his Philadelphia criminal lawyer, there were numerous "family consultations" with Mr. Progano before and after the plea. The family then passed on the information from these consultations to the Defendant. He also consulted directly with a "jail house lawyer" who he told a "little" of the events, but not the "full story". Based on this advice, he wanted to withdraw his plea.

14. Mr. Pedersen's testimony was as follows:

a. He has fourteen years of experience as a criminal defense attorney. He has been involved in numerous murder and capital murder cases.

b. He became involved in this case in September, seven months prior to the trial. He believed he could reasonably come up to speed and be prepared for trial. When he first became involved, he felt there was much work to be done but stated that if he had felt he could not get prepared, then he would have requested a continuance.

c. He advised he corresponded frequently with the Defendant and attempted to address all of his questions. After the plea was entered, Mr. Pedersen submitted his time expended for purposes of his compensation. He visited Mr. Barnett nine (9) times at Sussex Correctional Institution.

d. He was familiar with two other recent murder cases in Sussex County where the defendants were each convicted of first degree murder as accomplices. He spent much time explaining accomplice liability to Mr. Barnett who accepted it in theory but was reluctant to apply it to himself in the present case. He was of the opinion that one of the other cases was much weaker as to accomplice liability than the State's theory against Mr. Barnett. Nevertheless, there was a conviction. All of this was discussed with the Defendant in explaining liability for the conduct of another.

e. He discussed the evidence as to why Mr. Barnett would want harm to come to Mr. Whaley as opposed to Mr. Smith who did not even know Mr. Whaley. This included a confrontation with Mr. Whaley in Philadelphia several weeks before the shooting.

f. He said his client initially had said he did not know Mr. Smith and that he just picked him up on his way down to Laurel. Mr. Pedersen reported that he told his client he didn't think a jury would find that credible. He told Mr. Barnett he thought the State's evidence was strong and if it went to trial, he would probably be convicted.

g. He testified he was "bluntly honest" with Mr. Barnett as to his circumstances because "sugar coating" the reality of Mr. Barnett's circumstances was not in his client's best interests, i.e., "a life is at stake".

h. Mr. Pedersen stated he primarily worked on the guilt phase but he also discussed the penalty phase and the aggravators with Mr. Barnett.

i. Mr. Barnett had difficulty with the concept that he committed a burglary because they just opened the door and walked in as opposed to breaking in or forcing their way in.

j. He believed Mr. Barnett to be an intelligent person who never hesitated to question what was going on.

k. Mr. Barnett told him that he might or might not fulfill the obligation to testify against Mr. Smith as contained in the plea agreement. Mr. Barnett was worried about being known as a "snitch". He knew he would have to be in jail for at least an 18-year sentence and it is not good to be in jail and be known as a "snitch".

l. Mr. Pedersen's time sheets evidence he visited Mr. Barnett many times for several hours at a time contrary to Mr. Barnett who testified that he never stayed more than 10-15 minutes.

m. He did not consider extreme emotional distress as a viable defense. It is an affirmative defense basically acknowledging the act and it did not fit Mr. Barnett's defense which was "I didn't know Smith was going to shoot him".

n. He acknowledged that Mr. Barnett did not like Mr. Brady and had trust issues with him.

o. He did not attempt to interview Mr. Smith in Pennsylvania. Mr. Smith was indicted in Delaware for capital murder. Mr. Pedersen "couldn't imagine in his wildest dreams" that Smith's attorney would allow an interview whereby Pedersen would be seeking to have him help Barnett , to Smith's detriment.

p. The plea was to murder in the second degree and the accompanying weapons offense. It removed capital punishment or a mandatory life sentence as potential sentences. It would result in a sentence of 18 years to life. As to the decision on the plea, it was Mr. Barnett's to make as he would have to live with it. He testified he believed Mr. Barnett's plan was knowing and voluntary and that he did so mindful of the potential negative consequences of trial.

15. Mr. Brady testified as follows:

a. He was responsible for hiring an investigator who worked with the defense.

b. He initially sought to obtain a firearms expert. Since no firearm was found, he acknowledged the Court questioned the need to expend State funds for a "firearms" report. The request was denied until such time as its relevance was proferred.

c. He obtained authority to hire a mitigation expert. He communicated with a local expert but then the decision was made to go with a mitigation expert in the Philadelphia area as that is where the Defendant lived. No expert was formally retained at the time the plea was entered.

d. Mr. Brady talked with Defendant's mother "extensively" by telephone and met with her in Delaware.

e. Communication with Mr. Barnett never gave rise to consideration of any mental health issues.

f. He concluded that an extreme emotional distress defense would not be appropriate based on Mr. Smith being the shooter, and his client's reported lack of knowledge.

g. He did not try to talk with Mr. Smith as he would need the Public Defender's permission.

16. The plea colloquy evidences the following:

a. The State and Defendant were involved in plea discussions for several months before trial, but as usually happens in these cases, negotiations accelerated as the trial date approached. Trial was scheduled for March 21, 2005. The written plea offer from the State was made on March 4th, and the plea was entered on March 11, 2005.

b. Under oath Mr. Barnett advised the Court that he understood the plea documents which he had gone through line-by-line with his lawyer. He reported he filled it out honestly and accurately.

c. He had no complaints about his lawyers and reported he was not being forced to enter the plea.

d. He acknowledged his guilt and he knew the consequences. The sentence had to begin at 18 years and could be life imprisonment.

e. A full *Brown v. State*[2] colloquy was conducted and the Defendant had no questions about the rights he was giving up.

f. The State proffered the evidence it would present at trial in support of the plea. The Defendant's culpability was based on accomplice liability. The State's theory was Mr. Barnett was upset with his girlfriend and Mr. Whaley and brought Mr. Smith to Sussex County, who immediately shot Mr. Whale.

g. During the plea colloquy, the Defendant initially stated he was pleading guilty but when asked if he was guilty, he said no. Then I asked the following:

> THE COURT: I am not asking if you pulled the gun trigger. I am asking, based upon the theory of liability, that you can be guilty even though you didn't

[2] *Brown v. State,* 250 A.2d 503 (Del. 1969)

> pull the trigger for actions of the people that are with you and the circumstances that you knew basically what was going down. So are you guilty of these two charges?
>
> THE DEFENDANT: Yes.

At the hearing on August 24, 2006, Mr. Pedersen testified that in his experience, it is always difficult for defendants to apply the "liability of conduct of another" to themselves. During the plea colloquy when Mr. Barnett initially said "no" to my "are you guilty" question, the transcript reflects that Mr. Barnett and Mr. Pedersen consulted. Mr. Pedersen testified that they reviewed the accomplice liability theory again with his client who then admitted he was guilty. At the hearing, Mr. Barnett did not rebut Mr. Pedersen's testimony as to this point, nor did he testify he was then forced to enter the plea.

h. Later I summarized what was the factual proffer presented to the Court:

> It is that you had a reason to want harm done to this person as opposed to Mr. Smith, and Mr. Smith was a friend of yours, and the two of you got together, came down, and the harm was done to Mr. Smith. That is how I understand the theory of what happened, if this case went to trial.
>
> Under the circumstances, that have just been outlined by your attorney, do you acknowledge, sir, that you are – again, I ask you under these facts, as I reviewed them also that you are pleading guilty of murder in the second degree and the weapons offense?
>
> The Defendant answered "Yes".

i. In an effort to communicate the finality of what was occurring as to the Defendant's trial being abandoned, the following exchange took place:

> THE COURT: Mr. Barnett, I use a phrase sometimes, and I don't mean to use it lightly. I use it because I think it brings to mind the importance of what we are doing here today. When people get married, a lot of times the preacher will say speak now or forever hold your peace. Have you heard that at weddings?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Well, I say that to you. If you know of any reason why I shouldn't accept this plea today and basically finish this matter as set for sentencing, which means there won't be a trial, okay, speak now or forever hold your peace.
>
> THE DEFENDANT: I have nothing to say.

18. Consideration of Mr. Barnett's application to withdraw his guilty plea is necessarily fact intensive. That is why the Court has attempted to review the past events. In considering the Friend[3] factors, I note the following:

> a. Procedural defect - A plea of guilty must be offered in compliance with Superior Court Criminal Rule 11 and *Brown v. State*, 250 A.2d 503 (Del. 1969). The record reflects a long and thorough discussion with the Defendant as to the nature and consequences of his decision to enter his guilty plea. The record reflects the Defendant made a knowing, voluntary and intelligent decision to plead guilty. There was no procedural defect in the plea colloquy or the Defendant's guilty plea.
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> b. Defendant's knowing and voluntary consent and adequate legal counsel - The plea colloquy contradicts the Defendant's present claim that he felt compelled to accept the guilty plea because he felt his attorneys were not satisfactorily prepared for trial. Unless there is clear and convincing evidence to the contrary,

[3] *State v. Friend*, 1994 Del. Super. LEXIS 229 (Del. Super. 1994).

the Defendant is bound by the representations he gave the Court at the time he entered the plea.[4]

At page 7 of the colloquy transcript, he stated under oath he had no complaints as to "how your lawyers have represented you". Also, at page 7, he stated he was not being forced to enter the plea. Later, I told him if there was any reason I shouldn't accept the guilty plea, he should "speak now or forever hold your peace". He had no reason(s) as to why the plea should not be entered (p.17). He knew there would be no trial.

At the August 24 hearing, Mr. Barnett made many complaints as to his attorneys' performance or lack of performance. He complained that they did not correspond with him, that a week prior to trial nobody was coming to see him; that the mitigation portion of the case was lacking in preparation; that he had not been evaluated by a psychologist; that his attorneys did not file to suppress his girlfriend's statements on the grounds "she was lying"; that his lawyers had not interviewed his co-defendant and that the ball had been dropped as to the ballistics expert.

The testimony of his attorneys stands in stark contrast to Mr. Barnett's allegations. For example, Mr. Barnett testified that Mr. Pedersen spent no more than 10-15 minutes with him when he visited him at Sussex Correctional Institution. Mr. Pedersen's time sheets reflect the average time of the SCI meetings was 2 hours.

After considering the testimony of Mr. Pedersen, Mr. Brady, and the plea colloquy, I find that Mr. Barnett's present allegations are not accurate. His recollection of the work being done by his attorneys is not credible based upon the testimony of his attorneys and the timesheets which reflect not only preparation and work, but regular and lengthy meetings.

I believe Mr. Barnett's present application is driven to a substantial degree by his concern to not be known as a "snitch" within

[4] *Sommerville v. State*, 703 A.2d 629 (Del. 1997).

the prison system. Perhaps he is remorseful that he got Mr. Smith involved in the shooting, and then turned on him.

Considering the answers he gave to the Court under oath and in reconciling the conflicts between the testimony of Mr. Barnett and his attorneys, I do not find that Mr. Barnett felt compelled to enter the guilty plea because of his attorneys' alleged failure to prepare for his case. I also note that the preparation was an ongoing process and the plea was entered approximately two weeks prior to the trial. The Defendant has not objectively established that his attorneys were ineffective, that their performance fell below an objective standard of reasonableness.[5] Nor has he established any specific prejudice arising from his specific complaints.

I am satisfied that the Defendant knowingly, voluntarily and intelligently decided to enter the guilty plea.

c. Legal innocence - The State has never alleged the Defendant shot the victim. The State has alleged that the facts and reasonable inferences establish Mr. Barnett's intent to have harm come to the victim. The evidence supporting this theory is strong and has been reviewed in this decision. The State's case is not just Mr. Barnett's mere presence at the scene. It is his presence, together with his motive, his communication of threats and his transporting the shooter to the scene and his immediate flight.

The Defendant has not provided any basis to now assert his innocence. He has not contradicted his admissions made at the time of the guilty plea.[6]

d. A *Strickland*[7] analysis was encompassed in the above determination as to whether the plea was knowing and voluntary. There is no need to repeat same. In summary, the Defendant has not established his

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[5] *Strickland v. Washington*, 466 U. S. 668 (1984).

[6] *Russell v. State*, Del. Supr. No. 509, 1998, Veasey, Jr. (June 2, 1999) (ORDER); *State v. McNeill*, 2001 WL 392465 (Del. Super.).

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

attorneys were deficient based upon an objective standard, nor has he established that any specific deficiency caused him prejudice.

e. Does the motion prejudice the State or unduly inconvenience the Court? This application was made on April 26, 2006 as to a plea that was entered a year and a month earlier. While Mr. Barnett gets the benefit of a Superior Court Criminal Rule 32(d) analysis, as opposed to a Rule 61 analysis, it is noteworthy that he was aware his trial for capital murder had been scheduled for a long time. In preparation for his trial, much work was necessary. All of the attorneys, for both the defense and the State, had done and were still doing their homework. The Court had issued summonses for a capital jury panel. Everyone was prepared and/or preparing to try this case in March of 2005. The Defendant's knowing, voluntary and intelligent guilty plea is what removed the case from the calendar, nothing more. The Defendant had the opportunity to be sentenced long ago, but he chose to delay it further.

f. Based upon these facts, I feel that the State is prejudiced to have to now prepare a capital case anew as to Mr. Barnett.

I also find that this Court is unduly inconvenienced. While these cases are serious, the Court still has to be able to manage its docket and schedule such cases with a long lead time so everyone can "gear up". To allow Mr. Barnett, under these facts, to go back to square one does unduly inconvenience the Court.[8]

In conclusion, the Defendant has not established that his plea was entered involuntarily or under a misapprehension or mistake as to his legal rights. He has not established a fair and just reason to set aside his guilty plea.

The Defendant's Motion to Withdraw his Guilty Plea is denied.

IT IS SO ORDERED.

Yours very truly,

T. Henley Graves

THG:baj
cc: Prothonotary

[8] *Roten v. State*, 884 A.2d 512, 2005 WL 2254202 (Del. Super.).