

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
)	
v.)	Cr. ID No. 9904015635
)	
)	
KENNETH JOHNSON,)	
)	
Defendant.)	
)	

Submitted: October 9, 2012
Decided: October 31, 2012

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
WHICH WAS RECOMMITTED TO CONSIDER A NEW CLAIM
SHOULD BE DENIED.**

Daniel G. Simmons, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Kenneth Johnson, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 31st day of October 2012, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. By Report and Recommendation dated January 9, 2012, Commissioner Lynne M. Parker recommended that Defendant's fourth motion for postconviction relief be summarily dismissed.¹

2. On January 18, 2012, Defendant filed an objection to the Commissioner's Order and Recommendation. Thereafter, on April 10, 2012, Defendant filed an "Amended Citation of Law". This document added an additional claim based on the recent United States Supreme Court decisions in *Missouri v. Frye*, 132 S.Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).²

3. By Order dated April 13, 2012, Defendant's fourth motion for postconviction relief was recommitted to Commissioner Parker for further consideration, after receiving the State's position with respect to the new claim advanced by Defendant.³

4. Before making a recommendation on Defendant's new claim raised, Defendant's trial counsel was directed to submit an Affidavit responding to Defendant's new claim of ineffective assistance of counsel.⁴ The State also was directed to file a response addressing Defendant's new claim.⁵ Defendant filed responses to both the State's and counsel's respective submissions.⁶

5. Before addressing the new claim raised by Defendant in his "Amended Citation of Law", it is first noted that Defendant's ongoing claim pertaining to the alleged

¹ Superior Court Docket No. 75.

² Superior Court Docket No. 77.

³ Superior Court Docket No. 78.

⁴ Superior Court Docket No. 86.

⁵ Superior Court Docket No. 82.

⁶ Superior Court Docket Nos. 85, 87.

violation(s) of the Interstate Agreement on Detainers has already been formerly adjudicated and will not be revisited, re-addressed or reconsidered herein. This issue was raised in several prior postconviction relief motions.⁷ This issue was already fully and thoroughly considered by the Superior Court and thereafter by the Delaware Supreme Court. The Superior Court has already held, and the Delaware Supreme Court has already affirmed, that Defendant's claim of a violation of the Interstate Agreement on Detainers is without merit.⁸

6. Turning now to the new claim raised by Defendant in his "Amended Citation of Law", Defendant now claims that his counsel was ineffective for providing "incomplete legal advice" during the plea bargain stage. Defendant relies on the recent United States Supreme Court decisions in *Missouri v. Frye*, 132 S.Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) as the basis for his new claim.

7. On the day of Defendant's trial, October 5, 2000, Defendant pled guilty to three counts of Robbery First Degree in connection with a jewelry store robbery that took place on June 3, 1997. The State entered a *nolle prosequi* on the remaining counts of the indictment which included three counts of possession of a deadly weapon during the commission of a felony, one count of conspiracy second degree, and one count of

⁷ See, Superior Court Docket No. 50; *State v. Johnson*, 2010 WL 3027069 (Del.); Commissioner's Report – *State v. Johnson*, 2011 WL 809544 (Del.Super.); Superior Court's Order adopting Commissioner's Report–*State v. Johnson*, 2011 WL 1416377 (Del.Super.); *Johnson v. State*, 2011 WL 4011367, at *1 (Del.)(Defendant has already raised his claim that the Interstate Agreement on Detainers was violated. This claim was already considered by the Superior Court and the denial of that claim was affirmed by the Delaware Supreme Court. As such, the claim is now procedurally barred under Rule 61(i)(4) as formerly adjudicated.)

⁸ See, Superior Court Docket No. 50; *State v. Johnson*, 2010 WL 3027069 (Del.); Commissioner's Report – *State v. Johnson*, 2011 WL 809544 (Del.Super.); Superior Court's Order adopting Commissioner's Report–*State v. Johnson*, 2011 WL 1416377 (Del.Super.); *Johnson v. State*, 2011 WL 4011367, at *1 (Del.)(Defendant has already raised his claim that the Interstate Agreement on Detainers was violated. This claim was already considered by the Superior Court and the denial of that claim was affirmed by the Delaware Supreme Court. As such, the claim is now procedurally barred under Rule 61(i)(4) as formerly adjudicated.)

criminal mischief. Defendant was sentenced to two years mandatory minimum on each of the robbery first degree charges, for a total of six years at Level V imprisonment, followed by three years of probation.

8. Defendant's new claim is based on his contention that he had previously been offered a better plea than the plea agreement he ultimately accepted and that his counsel was ineffective in his handling of the previous offer. Defendant's new claim is predicated on the following language which was contained in a letter from the State dated May 24, 1999.⁹ The letter was sent by the State to "Counsel of Record c/o Prothonotary". The letter was sent "pursuant to Superior Criminal Rule 16" and served as the State's automatic Rule 16 discovery responses.¹⁰ At the end of the letter, the State stated as follows:

Plea Offer:

The State has not discussed a plea with the victim(s) and therefore tentatively makes the following plea offer:

Robbery First Degree
PDWDCF
PSI.

If your client is inclined to accept an offer, please advise and the State will discuss the plea with the victim and make a firm offer.

If the defendant has other pending charges not specifically referred to herein, they should not be considered a part of this plea offer. In addition, if the defendant should be arrested for any additional charges prior to entry of this plea, or if a capias is issued in the case, the offer should be considered withdrawn.¹¹

⁹ See, Exhibit to Defendant's Reply to State's Response, Superior Court Docket No. 85.

¹⁰ Superior Court Docket No. 85, Exhibit- Letter of August 21, 2000.

¹¹ Superior Court Docket No. 85, Exhibit- Letter of May 24, 1999 at page 3.

9. It appears this May 24, 1999 letter was forwarded by defense counsel to Defendant by at least August 21, 2000, since there is a letter of August 21, 2000 from defense counsel to Defendant enclosing the State's Rule 16 Discovery Response.¹²

10. Both the State and defense counsel understood this "plea offer" to amount to no more than a tentative offer.¹³ They both understood this language to be an offer to make an offer. They both understood this language not to rise to the level of a firm offer which was capable of being accepted.¹⁴ Indeed, by its express language the State was "tentatively" making an offer and if the Defendant was inclined to accept "an offer" then the State would discuss the plea with the victim and make "a firm offer."

11. It is important to emphasize that the "tentative offer" failed to include a material term, a recommended sentence. In fact, the State expressly required a Presentence Investigation. It is clear from the express language of this "tentative offer" that the State was not yet in a position to make a firm offer and would need the results of the Presentence Investigation as well as a consultation with the victim in order to be in a position to do so.

12. The State further advises that before extending a formal plea offer in this case, a case that has civilian victims, the Victims Bill of Rights required that the State first confer with the victims in the case before making a formal offer.¹⁵

13. Both of the charges, Robbery First Degree and Possession of a Deadly Weapon During the Commission of a Felony, are Class B Felonies, with each carrying a

¹² Superior Court Docket No. 85, Exhibit- Letter of August 21, 2000.

¹³ Affidavit of Timothy J. Weiler, Esquire- Superior Court Docket No. 86; State's Response to Defendant's Amended "Citation of Law"- Superior Court Docket No. 82.

¹⁴ *Id.*

¹⁵ See, 11 *Del.C.* § 9405; State's Response to Defendant's Amended Citation of Law-Superior Court Docket No. 82.

maximum penalty of up to 20 years. A guilty plea to these two charges without any sentence recommendation, could have resulted in a sentence of up to 40 years at Level V. A 40 year sentence is, of course, far worse than the 6 year sentence that Defendant ultimately received.

14. Moreover, even if there was a sentence recommendation, the court would, of course, not be bound by it.

15. Defendants have no constitutional right or other legal entitlement to a plea bargain.¹⁶ Rather, plea agreements are undertaken for the mutual advantage of the parties and are governed by contract principles.¹⁷ One of the central tenets of contract law is that a contract must be reasonably definite in its terms to be enforceable. An agreement must be reasonably definite and certain in its terms before it is legally binding on the parties thereto.¹⁸ When it is clear from the language itself that the parties intended to sit down at a future time and decide on the essential terms of the agreement, it is the classic case of agreeing to agree in the future and is not an enforceable contract at the present stage of the negotiation.¹⁹

16. In the subject action, Defendant seeks to have his plea agreement vacated so that he can accept this “tentative plea offer” instead. However, by its express language, the tentative plea offer was never a firm offer, it was an offer to make an offer. The sentencing recommendation, a significant material term, was not provided. The “tentative plea offer” was a negotiation, it did not constitute a formal, firm offer. This

¹⁶ *Washington v. State*, 844 A.2d 293, 296 (Del. 2004).

¹⁷ *Washington v. State*, 844 A.2d 293, 296 (Del. 2004).

¹⁸ *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Delaware, Inc. v. Hiram Grand Lodge Masonic Temple, Inc.*, 80 A.2d 294, 295 (Del.Ch. 1951); *Ayres v. Jacobs & Crumplar, P.A.*, 1997 WL 819121, at *4 (Del.Super. 1997).

¹⁹ *Hindes v. Wilmington Poetry Society*, 138 A.2d 501, 503-504 (Del.Ch. 1958).

case presents a classic example of an agreement to agree in future. The “tentative plea offer” did not rise to an enforceable contract at that stage of the negotiation. There was no firm offer, no legally enforceable contract, for Defendant to accept at the time and therefore no firm offer for Defendant to be able to roll back the clock and accept today.²⁰

17. To complete the analysis of the plea negotiations, it appears that at the first case review on July 17, 2000, the State offered a plea to all the pending charges.²¹ Since Defendant would be subjected to a substantial amount of minimum mandatory jail time, defense counsel rejected the plea offer.²² Of course, Defendant accepted a more favorable plea deal on the day of trial and is not now complaining that this less desirable plea deal made at the first case review should have been accepted.

18. Defense counsel, in his Affidavit, represented that Defendant had a First Case Review (July 17, 2000) and a Final Case Review (August 14, 2000) and did not enter any plea on those dates.²³ A suppression motion was also filed. Defense counsel had no recollection of Defendant desiring to enter into any plea until the day of trial. On the contrary, it appeared that Defendant elected to reject any plea offered at the First and Final Case Review. Defendant chose to resolve the matter, and accept the plea offer, on the day of trial.²⁴

19. The plea colloquy on October 5, 2000 likewise reveals that Defendant chose to resolve the matter, and accept a plea offer, for the first time on the day of trial and then only after the jury had already been selected and the trial was about to commence.²⁵ At

²⁰ See, *Hindes v. Wilmington Poetry Society*, 138 A.2d 501, 503-504 (Del.Ch. 1958).

²¹ See, July 24, 2000 letter from defense counsel attached as Exhibit “B” to Superior Court Docket No. 85.

²² *Id.*

²³ Superior Court Docket No. 12, 16, 86.

²⁴ Superior Court Docket No. 86.

²⁵ October 5, 2000 Guilty Plea and Sentencing Transcript, pg.5.

the time Defendant made the decision to accept the plea offer, Defendant had a motion to dismiss the case under the interstate agreement on detainers pending as well as a motion to suppress evidence.²⁶

20. Defendant's reliance on *Frye* and *Lafler* is misplaced under the circumstances of this case. There must first be a firm offer which was made but not accepted before the holdings of *Frye* and *Lafler* come into play.²⁷ This threshold requirement was not met in this case. There was never any firm offer in this case that was capable of being accepted prior to the plea deal that Defendant ultimately accepted. Without a firm offer at issue, the discussion is at an end and this case does not fall within the holdings of *Frye* and *Lafler*.

21. Both *Frye* and *Lafler* involved circumstances in which firm offers were made and not accepted by the defendant.²⁸ In both of those cases, the offers were definite as to all the terms. In *Frye*, defense counsel never conveyed the firm offer to the defendant which had a fixed expiration date.²⁹ In *Lafler*, the firm offer was rejected by the defendant based on the faulty advice of counsel which all parties conceded was ineffective.³⁰

22. In *Lafler*, a defendant rejected a firm plea offer based on the advice of counsel and was thereafter convicted on all charges and received a sentence 3 ½ times greater than the plea offer. On two occasions, the prosecutor offered to dismiss two of the charges pending against the defendant and to recommend a sentence of 51 to 85 months

²⁶ October 5, 2000 Guilty Plea and Sentencing Transcript, pgs. 5, 10-12.

²⁷ *Missouri v. Frye*, 132 S.Ct. 1399, 1401-1402 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1383-1391 (2012).

²⁸ See, *Missouri v. Frye*, 132 S.Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

²⁹ *Frye*, 132 S.Ct. at 1401-1402.

³⁰ *Lafler*, 132 S.Ct. at 1383-1391.

for the other two, in exchange for a guilty plea.³¹ The *Lafler* defendant rejected the plea offer on both occasions based on his counsel's advice that the prosecution would be unable to meet its proofs at trial. After trial, the defendant was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months imprisonment.³²

23. In *Lafler*, defense counsel conceded, and all the parties agreed, that defense counsel provided ineffective assistance in his faulty advice to defendant.³³

24. In *Lafler*, the United States Supreme Court reiterated that defendants have no constitutional right to be offered a plea nor any federal right that the judge accept it.³⁴ However, the United States Supreme Court recognized that a defendant has stated a claim of ineffective assistance of counsel in those circumstances in which a defendant is able to show that but for counsel's error there was a reasonable probability that a firm plea offer would have been presented to the court (ie. that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.³⁵

25. In the subject action, Defendant falls far short of establishing a claim of ineffective assistance of counsel. First, there was no firm offer in which to accept. Second, without sentencing even being addressed, there can not be a showing that the offer's terms would have been less severe than under the sentence that was imposed. There is no showing that the prosecution would have recommended a sentence for the

³¹ *Lafler*, 132 S.Ct. at 1383.

³² *Lafler*, 132 S.Ct. at 1383.

³³ *Lafler*, 132 S.Ct. at 1390-91.

³⁴ *Lafler*, 132 S.Ct. at 1387.

³⁵ *Lafler*, 132 S.Ct. at 1384-1385.

“tentative plea offer” that would have been more favorable than the sentence that was imposed. There is no showing that the court would have accepted any more favorable terms. Defendant falls far short of the necessary showing needed to establish an ineffective assistance of counsel claim based on the “tentative plea offer.”

26. In *Frye*, defense counsel failed to convey a formal plea offer to his client. The defendant was facing a maximum 4 year prison term.³⁶ The prosecutor offered two possible plea bargains, including an offer to reduce the charge from a felony to a misdemeanor and to recommend with a guilty plea, a 90 day sentence. Defense counsel failed to convey the plea offers to the defendant and they expired. Defendant subsequently pleaded guilty and was sentenced to three years in prison.³⁷

27. The United States Supreme Court ruled in *Frye*, that as a general rule, defense counsel has a duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. The *Frye* court noted that any exceptions to this general rule did not need to be addressed because the offer at issue was a formal one with a fixed expiration date.³⁸

28. In the subject action, unlike *Frye* and *Lafler*, the language at issue contained in the State’s May 1999 letter was not a firm offer. It was, by its express terms, a “tentative offer”, with no sentencing recommendation and nothing fixed and formal for the defendant to accept. Consequently, the holdings of *Frye* and *Lafler* are inapplicable to the subject action.

³⁶ *Frye*, 132 S.Ct. at 1401-1402.

³⁷ *Frye*, 132 S.Ct. at 1401-1402.

³⁸ *Frye*, 132 S.Ct. at 1402.

29. As to any outstanding request for the appointment of counsel, Rule 61(e) permits the court to appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown. The Delaware Supreme Court has consistently held that there is no constitutional right to counsel in a postconviction proceeding.³⁹ The United States Supreme Court's decision in *Martinez v. Ryan*,⁴⁰ did not change Delaware's longstanding rule that defendants have no constitutional right to counsel in a postconviction proceeding.⁴¹ Indeed, the United States Supreme Court in *Martinez* made it clear that when, like the subject motion, a Rule 61 motion is insubstantial, wholly lacking in merit, and wholly without any factual support, a request for the appointment of counsel is properly denied.⁴²

30. Defendant's request for an evidentiary hearing is also denied. Having carefully considered the Defendant's motion and the evidentiary record, Defendant's allegations were either reasonably discounted as not supported by the record, persuasively rebutted by counsel's Affidavit, or not material to a determination of Defendant's claims. To the extent there is any other outstanding motion related to this Rule 61 motion, it is hereby denied. There is no just reason to delay the issuance of this decision in order to further expand the record or to otherwise hold any type of hearing.

³⁹ *Garnett v. State*, 1998 WL 184489 (Del.); *Cropper v. State*, 2001 WL 1636542 (Del.).

⁴⁰ *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

⁴¹ See, *Martinez*, 132 S.Ct. at 1315-1320.

⁴² See, *Martinez v. Ryan*, 132 S.Ct. 1309, 1319 (2012); Superior Court Criminal Rule 61(e).

31. Defendant's "new claim" is without merit and his fourth motion for postconviction relief should be denied for the reasons set forth in the Commissioner's Report and Recommendation dated January 9, 2012⁴³, and for the reasons set forth herein.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

cc: Prothonotary
Timothy J. Weiler, Esquire

⁴³ Superior Court Docket No. 75.