

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMION T. NEAL,	§
	§ No. 596, 2013
Defendant Below,	§
Appellant,	§ Court Below—Superior Court
	§ of the State of Delaware,
v.	§ in and for Kent County
	§
STATE OF DELAWARE,	§ Cr. ID 0811005782
	§
Plaintiff Below,	§
Appellee.	§

Submitted: April 4, 2014
Decided: June 11, 2014

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 11th day of June 2014, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The appellant, Damion Neal, appeals from the denial by the Superior Court of his first motion for postconviction relief. We find no merit to the issues Neal raises on appeal and, accordingly, affirm the Superior Court's judgment.

(2) Neal pled no contest¹ on May 10, 2010 to one count of Murder in the First Degree and one count of Murder in the Second Degree (as a lesser included offense). Neal had confessed to breaking into his former girlfriend's home and

¹ See *Robinson v. State*, 291 A.2d 279, 281 (Del. 1972) (holding that, under some circumstances, a defendant may be permitted to plead guilty without formally admitting guilt to the charges).

shooting her and her current boyfriend at close range as they lay in bed. In exchange for his plea, Neal avoided a capital murder trial, and the State dismissed six other companion charges. The Superior Court immediately sentenced Neal to life imprisonment plus a term of thirty-five years at Level V incarceration. Neal did not file a direct appeal.

(3) Instead, on March 1, 2011, Neal filed a motion for postconviction relief. He asserted three claims: (i) while housed in pretrial detention, he was denied access to a law library to conduct his own research to make sure his lawyers' advice was sound; (ii) his attorneys coerced him into pleading guilty by focusing on the strength of the State's evidence and in arranging for his family to visit him, even though he did not request a family visit; and (iii) his attorneys were ineffective for failing to provide him with copies of a mental health evaluation and for failing to inform him that the State was seeking a death sentence. Within his ineffectiveness claim, Neal also implied that his attorneys were at fault for Neal deciding to change his mind about pursuing an extreme emotional distress defense.

(4) Neal's motion was referred to a Superior Court Commissioner, who directed Neal's trial attorneys to file a response and affidavit. In their response, counsel stated that Neal never claimed that he was denied access to the prison law library. In fact, Neal was quite knowledgeable about cases and statutes relevant to the charges against him, which he cited in correspondence to the attorneys.

Counsel also denied having coerced Neal into accepting a guilty plea. Counsel did arrange for Neal's family to visit him in April to discuss a pre-trial plea offer made by the State, but Neal rejected that pre-trial plea offer. Ultimately, Neal indicated his desire to enter a plea after the death-qualified jury had been selected.

(5) Regarding Neal's third claim, counsel stated that at the outset of his case they had advised Neal that he was facing capital murder charges and that Neal understood the charges and the possible death sentence he was facing. Counsel also stated that they discussed at length with Neal both the defense expert's psychiatric evaluation (which concluded that at the time of the killings Neal was operating under extreme emotional distress) and the state expert's psychiatric evaluation (which concluded that Neal was not operating under extreme emotional distress). Although counsel did not furnish Neal copies of the reports, Neal was well-informed of the contents of both. Counsel also stated that Neal decided before trial that he did not want to argue extreme emotional distress as a mitigating factor and therefore did not want the defense expert to testify. Instead, Neal wanted to argue a "reckless endangering" defense to the jury, by testifying that he intended only to shoot into the bed *near* the victims in order to scare them and never intended to shoot *at* them.²

² The record reflects that five of Neal's six shots hit the victims.

(6) After receiving the State’s response,³ the Commissioner filed a report and recommendation, concluding that Neal had entered his guilty plea knowingly, intelligently, and voluntarily and that he had not demonstrated cause or prejudice sufficient to establish ineffective assistance of trial counsel. The Superior Court adopted the Commissioner’s recommendation and denied Neal’s motion for postconviction relief. This appeal followed.

(7) Although Neal enumerates five issues in his opening brief on appeal, he raises only three distinct claims.⁴ First, he claims that he was deprived of his constitutional right to file a direct appeal. Second, Neal contends that, because of his trial counsel’s ineffective assistance, his guilty plea was not entered knowingly, intelligently, and voluntarily. Specifically, Neal asserts that: (i) his plea was coerced by counsel; (ii) his “mental deficiencies” and extreme emotional distress, which his counsel failed to argue, rendered him legally unable to enter a knowing, intelligent, and voluntary plea; and (iii) counsel should have known that the

³ The Commissioner also allowed Neal to amend his motion after briefing was completed. Neal’s amendment included a further allegation of ineffective assistance of counsel based on counsel’s failure to adhere to “norms” in pretrial discovery procedure in a capital case. The Commissioner considered and rejected this allegation without requiring a supplemental response from either defense counsel or the State.

⁴ Neal does not raise any argument concerning his lack of access to the prison law library. By failing to raise this issue in his opening brief on appeal, that claim is waived. *See Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

evidence did not support a charge of first degree murder. Third, Neal argues that the Delaware statute defining “extreme emotional distress”⁵ is unconstitutional.

(8) To support a claim of ineffective assistance of counsel after the entry of a guilty plea, a defendant must demonstrate that: (a) counsel’s conduct fell below an objective standard of reasonableness; and (b) there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty but would have insisted on going to trial.⁶ A defendant must make concrete allegations of cause and actual prejudice to substantiate a claim of ineffective assistance of counsel.⁷ Neal essentially argues that his counsel was ineffective by coercing him into entering a plea, failing to give him copies of the psychological reports, and failing to adequately investigate and craft a defense.

(9) In their response to Neal’s allegations of ineffectiveness, his trial attorneys denied coercing him to take a plea. Neal had confessed to shooting both victims, and was facing a death sentence. Although Neal did not receive physical copies of the psychological reports, counsel had discussed the reports at length and Neal was well aware of their contents. Counsel stated that it was Neal’s decision to forego pursuing a theory of extreme emotional distress because he wanted to

⁵ 11 *Del. C.*, § 641.

⁶ *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985).

⁷ *See Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

present an argument that he was trying only to scare the victims by shooting into the bed. Once the death-qualified jury was selected, however, Neal changed his mind about wanting to defend against the charges and decided to take the plea.

(10) The record supports the Superior Court's conclusion that counsel's performance was well within the standards of reasonableness. Indeed, Neal stated under oath at his plea colloquy that he was satisfied with his counsel's representation. He indicated that he fully understood both the charges against him and the consequences of pleading guilty. Neal stated that he was pleading guilty because he was satisfied that the State had sufficient evidence to prove him guilty of the charged offenses. He further stated, among other things, that no one had threatened him or coerced him into pleading guilty. Absent clear and convincing evidence to the contrary, Neal is bound by those statements.⁸ We therefore reject Neal's claims that his guilty plea was involuntary due to his counsel's coercion and/or ineffective assistance.

(11) Neal's two remaining arguments—that he was denied his right to file a direct appeal and that the extreme emotional distress statute is unconstitutional—were not raised before the Superior Court in the first instance. Accordingly, we will not review these claims absent a showing of plain error.⁹ Plain error exists

⁸ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

⁹ *Knox v. State*, 29 A.3d 217, 222-23 (Del. 2011).

when the error constitutes a material defect that is apparent on the face of the record and is so clearly prejudicial to a defendant's substantial rights that it jeopardizes the fairness and integrity of the proceedings.¹⁰ We find no error, plain or otherwise, with respect to either claim.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹⁰ *Id.*