IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES BARNETT,	§	
	§	No. 596, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0311017379
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: April 1, 2007
Decided: May 7, 2007

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

O R D E R

This 7th day of May 2007, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. James Barnett ("Barnett"), defendant-below appellant, appeals from the denial by the Superior Court of his motion to withdraw his guilty plea. Barnett contends that the trial court abused its discretion by finding that he failed to establish a "fair and just reason" to set aside his guilty plea. Specifically, Barnett contends that: (a) his plea was procedurally defective; (b) he had inadequate legal counsel; (c) he always asserted his innocence; and (d) granting his motion would not prejudice the State or unduly burden the Court. Because Barnett failed to

establish a "fair and just" reason to withdraw his guilty plea and the Superior Court correctly denied Barnett's motion to withdraw his guilty plea, we affirm.

2. On November 23, 2003, Barnett and his co-defendant, Sylvester Smith ("Smith"), drove to Barnett's ex-girlfriend's apartment, where Smith shot and killed the victim, Nicholas Whaley ("Whaley"). Barnett's former girlfriend, Jasmin Bridell ("Bridell"), later told police that on the evening of the incident, Barnett called her apartment several times because he was upset that Whaley was in her home. According to Bridell, Barnett threatened to come to her residence. Thereafter, Barnett and Smith drove together from Philadelphia to Bridell's apartment in Delaware, and then entered the apartment. At that point, Barnett picked up Jamier (Barnett's and Bridell's son) and moved him out of the way. Smith then shot Whaley three times.

3. Based upon a theory of accomplice liability, the State indicted Barnett on murder in the first degree and other related charges.[1] The State also indicated its intent to seek the death penalty. Rather than face a capital murder trial, Barnett pled guilty to the reduced charges of murder in the second degree and a weapons offense in exchange for testifying at his co-defendant's trial. Thirteen months later, Barnett filed a *pro se* motion to withdraw his guilty plea. Because Barnett

[1] Barnett was also charged with possession of a firearm during the commission of a felony, conspiracy in the first degree, burglary in the second degree and endangering the welfare of a child.

claimed inadequate representation by counsel who represented him from his indictment until his plea agreement, the Superior Court appointed another attorney to represent him in post-conviction proceedings. After an evidentiary hearing on Barnett's motion, the Superior Court found that Barnett had failed to establish a fair or just reason to withdraw his plea and denied his motion. Barnett has appealed from that order.

4. "A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court, and a denial of the motion is reviewable on appeal only for an abuse of discretion."[2] Where a defendant moves to withdraw his plea before sentencing, Superior Court Criminal Rule 32(d) permits that withdrawal for "any fair and just reason."[3] On such a motion, the defendant bears the burden of proof,[4] which burden is substantial.[5]

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[2] *Lane v. State*, 2006 WL 3703683, at *1 (Del. Dec. 18, 2006) *citing Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999).

[3] Superior Court Criminal Rule 32(d) provides:

> If a motion for withdrawal of a plea of guilty or nolo contendere is made before imposition or suspension of sentence or disposition without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 61.

[4] *Hall v. State*, 1995 WL 715630, at *2 (Del. Oct. 27, 1995) *citing State v. Insley*, 141 A.2d 619 (Del. 1958).

[5] *United States v. Jones*, 336 F.3d 245, 252 (3d Cir. 2003).

5. In determining whether a defendant has established a "fair and just reason" to withdraw his plea, the trial court must consider the following factors under *Patterson v. State*:[6] (i) whether there was a procedural defect in taking the plea; (ii) whether the defendant knowingly and voluntarily consented to the plea agreement; (iii) whether the defendant has an adequate basis to assert his legal innocence; (iv) whether the defendant had adequate legal representation throughout the proceedings; and (v) whether granting the motion will prejudice the State or unduly inconvenience the trial court.

6. Although Barnett argues that he maintained his innocence throughout the proceedings, he did not provide the trial court with a legal basis to support his claim. Instead, Barnett claims that he never actually pled guilty because when asked by the trial judge whether he was guilty of the offenses, Barnett replied, "no." But, immediately thereafter, the trial court carefully explained the theory of accomplice liability and how under that theory Barnett could be found guilty even if he did not actually "pull the trigger." When asked if he was thus guilty of the charges, Barnett responded, "yes." Barnett's initial response—that he was not guilty—does not, therefore, provide a legal basis to establish his innocence.[7]

[6] *Patterson v. State*, 684 A.2d 1234, 1238 (Del. 1996).

[7] *See generally, State v. Friend*, 1994 WL 234120 (Del. Super. May 12, 1994), *aff'd by, Friend v. State*, 1996 WL 526005 (Del. Aug. 16, 1996).

7. Barnett contends that he did not have effective legal counsel throughout his proceedings, because his attorneys did not sufficiently communicate with him or adequately prepare for his upcoming capital murder trial. Specifically, Barnett claims that as of two weeks before his trial, his attorneys: (a) had not hired a mitigation specialist despite having received Superior Court approval to do so, (b) did not have a psychologist or psychiatrist evaluate him, (c) did not correspond with him and, a week before trial, did not visit him to discuss his case. Moreover, Barnett contends that because he believed his attorneys were unprepared for his trial, he felt compelled to enter his guilty plea, and therefore, his plea was not knowing and voluntary.[8]

8. Our review of Barnett's claims is "subject to a strong presumption that counsel's conduct was professionally reasonable."[9] To establish that his attorneys were ineffective and, thereby, a "fair and just reason" to warrant withdrawal of a plea, Barnett must show that (a) counsels' actions fell below an objective standard

[8] However, during his plea colloquy Barnett stated, under oath, that he had no complaints as to how his attorneys represented him, and moreover, he stated that he was not forced to enter the plea. App. to Appellant's Opening Br. at A-31-39. Barnett has failed to present any clear and convincing evidence as to why he should not be bound by those answers.

[9] *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997), *quoting Albury v. State*, 551 A.2d 53, 59 (Del. 1988).

of reasonableness and (b) there exists a reasonable probability that, but for counsels' unprofessional errors, Barnett would have chosen to proceed to trial.[10]

9. Although Barnett's argument correctly states the law, it lacks merit for two reasons. First, most of Barnett's claims are moot because he entered his guilty pleas two weeks before his trial, and as noted by the Superior Court, trial preparation is an ongoing process. Second, the trial judge did not find Barnett to be credible regarding the question of what work was being done by his attorneys.[11] Where a trial judge sits as a trier of fact, he or she is the "sole judge of credibility" and therefore, "this Court will not disturb conclusions of fact made by the Trial Judge when supported by competent evidence."[12]

10. Barnett argues that his plea was procedurally defective because he did not completely understand the consequences of his plea as Superior Court Criminal Rule 11 requires. Compliance with Rule 11 means that "the plea is voluntarily offered by the defendant, himself, with a complete understanding by him of the nature of the charge and the consequences of his plea, and that the trial judge has so determined."[13]

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[10] *MacDonald v. State*, 778 A.2d 1064, 1075 (Del. 2001) *quoting Hill v. Lockhart*, 474 U.S. 52 (1985).

[11] *State v. Barnett*, 2006 WL 3308211, at *4 (Del. Super. Oct. 12, 2006).

[12] *Sanchez v. State*, 1993 WL 61707, at *3 (Del. Feb. 25, 1993).

[13] *Brown v. State*, 250 A.2d 503, 504 (Del. 1969).

11. Barnett contends that his plea was procedurally defective because he believed (incorrectly) that he could void the agreement by not fulfilling its terms; *i.e.*, by not testifying against his co-defendant, Smith.[14] To support his claim, Barnett points to paragraph four of the March 4, 2005 letter from the State to his counsel. That letter, which was incorporated into his plea agreement, reads, "If the Defendant breaches any part of the agreement, as set forth above and/or in the Superior Court Plea Agreement form, the plea agreement will be null and void, with the State reserving the right to prosecute the Defendant on the original charges."

12. The problem with Barnett's argument is that it ignores the fact that the trial court addressed this precise issue in the plea colloquy:

> There is only one thing that I am going to comment on, and that is I am accepting this plea as knowingly, voluntarily, and intelligently offered. What that now means is that on Paragraph 4, if the State feels that there is a breach of the agreement, okay, then the State comes to the Court, and the Court makes a determination if there is a breach, and if that occurs, then this could be wiped out and start anew with prosecution. It is not now the State's sole decision. They would have to plead it, prove it. It is now my decision.[15]

[14] During the evidentiary hearing on Barnett's motion to withdraw his guilty plea, Barnett testified that he never intended to testify against Smith. *See* App. to Appellant's Opening Br. at A-66. The State argues that Barnett's actions amount to a fraud on the State and the Court. Because Barnett's plea was not otherwise procedurally defective, we need not consider whether Barnett acted fraudulently when entering into his plea agreement. Inexplicably, the record does not disclose whether Barnett did (or did not) testify against Smith.

[15] App. to Appellant's Opening Br. at A-39.

Moreover, immediately thereafter, the trial court asked Barnett if he had any questions, to which Barnett responded, "no." Earlier in the proceeding the trial court went to great lengths to make sure Barnett understood the finality of his plea agreement and Barnett answered that he understood.[16] The trial judge's colloquy was careful and detailed. Absent clear and convincing evidence to the contrary, Barnett is bound by the answers he provided under oath during that plea colloquy.[17] Having provided no such evidence,[18] Barnett has failed to establish any procedural defect in the taking of his guilty plea.

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[16] 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.

[17] *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

[18] Barnett also claims that his incorrect belief that he could unilaterally void the agreement was reinforced by his trial attorney. To support that claim, Barnett cites the following testimony from his evidentiary hearing:

> A: (Barnett's Trial Attorney): He went back and forth on whether or not he ever intended to fulfill his obligation.
> Q: Sorry. When I say "fulfill his obligation," I mean testify against Sylvester Smith?"
> A: That is what I assumed you meant.
> Q: Thank you.
> A: He would tell me, "Well, I am," and he did. "So I am going to take the plea, but I am not going to testify." I said, "Well, you understand that it's not – you don't get to pick and choose. You either take the plea and you fulfill it, or you don't take the plea." "Okay, I understand." And then we would go ahead, and we took the plea.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

> Afterwards, "Well, I am not going to fulfill my obligation to testify so." "Well, you understand that if you do that, then the State is going to withdraw your plea offer. You are going to be back at square one and look at the possibilities the same as they were before I advised you to accept the plea, and that is not a good position to be in." "Well, then I will go ahead and do what I have to do."

In our view, that ambiguous testimony does little to establish precisely what it was exactly that Barnett did not understand or how any alleged misunderstanding made his plea procedurally defective. Moreover, Barnett's answers during his plea colloquy indicate that any confusion on his part was resolved by the trial court's explanations.