IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	Cr.A.No.: VN9505056902R1
	)	VN95-05-0567R1
v.	)	
	)	ID No.: 9505000033
LEONARD OWENS	)	

Date Submitted: January 4, 2002
Date Decided: January 11, 2002

Upon Defendant's Motion for Postconviction Relief: ***DENIED***.

ORDER

Upon review of Movant Leonard Owens ("Defendant")'s Motion for Postconviction Relief and the record, it appears to the Court that:

1. Defendant filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 following a violation of probation hearing on September 27, 2001 that resulted in revocation of probation and a three year sentence at Level V.

2. In support of his motion, Defendant alleges (a) ineffective assistance of counsel, asserting that his counsel was "unprepared for case," (b) charges were dismissed upon which Defendant violated his probation and this entitles him to another V.O.P hearing, (c) charges of resisting arrest/disorderly conduct were dismissed on November 26, 2001.

3. The Delaware Supreme Court has held that in reviewing motions for postconviction relief, this Court must first determine whether a defendant's claims are procedurally barred prior

to considering them on their merits.[1] Rule 61(i)(4) provides for summary dismissal by the court "[i]f it plainly appears from the motion... and the record... that the movant is not entitled to relief, the judge may enter an order for its summary dismissal..."

This Court will not address Rule 61 claims that are conclusory and unsubstantiated.[2] Pursuant to Rule 61(a), a motion for postconviction relief must be based on "a sufficient factual and legal basis." In addition, pursuant to Rule 61(b)(2), "[t]he motion shall specify all the grounds for relief which are available to movant..., and shall be set forth in summary form the facts supporting each of the grounds thus specified."

4. This is Defendant's first motion for postconviction relief and the Court has determined that no procedural bars listed in Rule 61 are applicable. Therefore, the Court may consider the merits of Defendant's application.

5. In order to prevail on a claim of ineffective assistance of counsel, Defendant must satisfy the two-part test set forth in *Strickland v. Washington*.[3] Thus, Defendant must first show that his attorney's conduct fell below that of reasonable professional standards,[4] and second, that such conduct caused him actual prejudice.[5]

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[1] *Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Flamer v. State*, Del. Supr., 585 A.2d 736, 747 (1990).

[2] *See Younger v State*, Del. Supr., 580 A.2d 552, 555 (1990); *State v. Conlow*, Del. Super., Cr.A. No. IN78-09-0985R1, Herlihy, J. (Oct. 5, 1990) at 5; *State v. Gallo*, Del. Super., Cr.A.No. IN87-03-0589-0594, Gebelein, J. (Sept. 2, 1988) at 10.

[3] 466 U.S. 668, 687 (1984).

[4] *Strickland*, 466 U.S. at 687, 688.

[5] *Id.* at 687, 693.

In the context of an ineffective assistance of counsel claim, "a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal."[6] In the case of a guilty plea, the United States Supreme Court has held that the second prong of the *Strickland* test becomes whether the defendant has shown that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[7]

6. Defendant claims that counsel was ineffective because at his violation of probation hearing his attorney stated to the Court that "I took this case from Mr. Edinger minutes before the hearing began." And that "if Mr. Fountain were prepared properly, I believe I wouldn't have 3 years for misdemeanor charges which has been dismissed as of 11-26-01."

7. The court finds that Defendant's first ground of relief is clearly without merit. Defendant has the burden to show that his attorney's conduct did not meet reasonable professional standards and that such conduct was prejudicial to him.[8] A full contested hearing was held. Defendant has failed to establish the second prong of this standard even if the Court were to assume that his attorney's conduct was somehow unreasonable.

8. "It is settled Delaware law that allegations that are entirely conclusory are legally

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[6] *Walls v. State*, Del. Supr., No. 59, 1995, Holland, J. (Jan. 4, 1996)(ORDER) at 7; citing *Younger*, 580 A.2d at 556.

[7] *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *See Albury v. State*, Del. Supr., 551 A.2d 53, 58 (1988).

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

insufficient to prove ineffective assistance of counsel."[9] Because Defendant does not present the Court with any evidence that his counsel's conduct fell below that of reasonable professional standards or that he was prejudiced as a result of his attorney's conduct, his claim of ineffective assistance of counsel also must be denied as conclusory.[10]

9. The rest of Defendant's motion is based upon the claim that he is entitled to a new V.O.P hearing since the charges that led to violation of probation were dismissed on November 26, 2001.

10. Revocation of probation is an "exercise of broad discretionary power" in Delaware.[11] Proof sufficient to support criminal prosecution is not required to support a judge's discretionary order revoking probation.[12]

11. As for Defendant's assertion that "Attorney, nor prosecution didn't allow movant's wife to bring evidence into court room that was favorable in movant's behalf," he does not mention what evidence he is referring to, and how it would have affected the outcome of the hearing if it had been allowed in. Not does he indicate that counsel or the Court were ever informed of such evidence and what it would have been. Rules of evidence applicable in

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[9] *State v. Brittingham*, Del. Super., Cr. A. No. IN91-01-1009-R1, Barron, J., (Dec. 29, 1994) (ORDER) at 3 (citing *Younger v. State*, 580 A.2d at 556; *Jordon v. State*, Del. Supr., No. 270, 1994, Walsh, J. (Aug. 25, 1994)(ORDER)).

[10] *See State v. Mason*, Del. Super., Cr. A. No. IN98-02-0279R1, Barron, J. (Apr. 11, 1996)(Mem. Op.); *see also Walls*, No. 59, 1995, (ORDER) at 7.

[11] 11 *Del.C.* § 4335(c).

[12] *See Brown v. State*, Del.Super., 249 A.2d 269, 272 (1968).

criminal trial need not be followed in proceeding for revocation of probation.[13] In proceeding to revoke probation evidence need not establish guilt of criminal offenses beyond reasonable doubt; all that is required is that the evidence be such as to reasonably satisfy the judge that conduct of probationer has not been as good as required by conditions of probation.[14] The Court was reasonably satisfied with the evidence presented that petitioner had committed a criminal offense while on probation.

For the above stated reasons, Defendant's motion for post-conviction relief is **DENIED.**

IT IS SO ORDERED.

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The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: Leonard Owens - GH

[13] *Id.*

[14] *See Brown v. State*, Del.Super., 249 A.2d 269, 272 (1968) (citing *Manning v. United States* (5 Cir., 1947) 161 F.2d 827).