IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM R. PANUSKI	)	No. 331,2011
	)	
v.	)	Superior Court
	)	
	)	New Castle County
STATE OF DELAWARE	)	
	)	Cr. ID No. 0903002643

Submitted: January 31, 2012
Decided: February 1, 2012

MEMORANDUM OPINION

cc: The Supreme Court of the State of Delaware
Mr. William R. Panuski
Alexis S. Gatti, Esquire

Parkins, J.

On April 13, 2009, Defendant, William R. Panuski, was indicted on 29 counts of Unlawfully Dealing in Child Pornography[1] (hereinafter "UDCP") after an investigation of the Delaware Child Predator Task Force. He pled guilty to two counts of UDPC on September 8, 2009. At the time Defendant faced 27 additional counts of the same charge and the State entered a nolle prosequi on those charges as part of the plea agreement. After sentencing Defendant filed a direct appeal with the Delaware Supreme Court. He argued the convictions violated the Double Jeopardy Clauses of the United States and Delaware Constitutions and he should have been sentenced for Possession of Child Pornography (hereinafter "PCP") instead of UDPC. The Supreme Court affirmed the convictions.[2]

Defendant filed a Motion for Post-Conviction Relief on May 2, 2011. He raised five claims. The court dismissed the motion on June 1, 2011. Defendant appealed that ruling to the Delaware Supreme Court. The Court determined that this court only ruled on Defendant's first two claims.[3] The Court remanded the case for this court "to consider and rule on Panuski's claims of "ineffective assistance of counsel, abuse of prosecutorial discretion, and 'contradictive and ambiguous' colloquy."[4] The Court also ordered this court to expand the record to include defense

[1] 11 *Del. C.* §1109.
[2] *Panuski v. State*, 3 A.3d 1098 (Del. 2010) (TABLE).
[3] *Panuski v. State*, No. 331, 2011, at ¶5 (Oct. 28, 2011 Del. 2011) (ORDER).
[4] *Id.* at ¶6.

counsel's affidavit responding to the allegations.[5] The court ordered defense counsel to respond to the allegations and the State to respond. Both having done so, the court now considers Defendant's motion on the newly expanded record. As explained below Defendant's motions are **DENIED.**

Procedural Bars

In considering a Rule 61 motion, the court must first look to procedural requirements of the rule.[6] Defendant's claim was timely filed within a year of the Delaware Supreme Court's ruling in the direct appeal and it is his first motion for post-conviction relief.[7] The court previously ruled that Defendant's claims were procedurally barred.[8] The Supreme Court determined the court's ruling only pertained to the first two claims—"violation of due process due to insufficient evidence and violation of double jeopardy."[9] Upon remand the court finds Defendant's final three claims are not procedurally barred. The court discusses each claim on the merits below.

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[5] *Id.*
[6] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[7] *See* Delaware Superior Court Rule of Criminal Procedure 61(i)(1),(2).
[8] *State v. Panuski*, I.D. 0903002643 (Del. Super June 1, 2011).
[9] *Panuski v. State*, No. 331, 2011, at ¶5 (Del. Oct. 28, 2011) (ORDER).

Ineffective Assistance of Counsel

Defendant raises several claims to support his argument that he received ineffective assistance of counsel. He argues counsel should have requested a Bill of Particulars and should have challenged the indictment on its face before, rather than after, Defendant entered his plea.[10] Defendant suggests if counsel had challenged the indictment before, rather than after the plea, the Motion to Merge/Downgrade Charges would have been granted.[11] Defendant further argues that his counsel's counseling was inadequate:

> "Defense Counsel informed Panuski that the State **only** needed to prove that if one **possessed** Child Pornography, then one can be charged and convicted with either 'Dealing in' or 'Possession of.' . . . Defense Counsel stated that going to trial was not viable, since each Class B Felony count carries a term of 2 to 25 years in prison, which if convicted would result in spending 58-725 years at Level V. Defense Counsel presumed that Panuski would have been found guilty at Trail [sic].[12]

Finally, Defendant states, he was denied the ability to offer evidence that he was abused as a child.[13]

Defense counsel submitted an affidavit to address Defendant's claims. This lengthy quote explains counsel's approach to the Bill of Particulars issue and his client counseling.

> As discussed with Mr. Panuski, the legal argument that the defense was trying to set up, was whether it was unconstitutional for the State to charge 29 identical counts

[10] Memorandum in Support of Post-Conviction Relief Motion, at 15.
[11] *Id.* at 20.
[12] *Id.* at 14 (emphasis in original).
[13] *Id.* at 15.

> that failed to distinguish "Dealing" from "Possession" or synonyms of "Possession" (e.g. "receive", "store", etc.), and therefore, we could argue at Sentencing that the Dealing charges merge with a lesser offense – Possession of Child Pornography (11 Del. C.§1111), which would then rescue Mr. Panuski from the minimum 2 year penalties associated with §1109 – a Class B felony. Again, the last thing counsel wanted to do, was to alert the State about this possible defect via a Bill of Particulars, so they could fix the defect through an amended indictment. Moreover, counsel fully understood the State's charging theory – each count being a separate video found on Mr. Panuski's computer.
>
> It was never seriously contemplated by either Panuski nor counsel that the Defense would take an "at bat" on this theory before a jury because (a) no jury would feel sympathetic to the argument after seeing the videos, and (b) no Court, at least in Delaware, had ever agreed with counsel's legal theory. Hence, with a plea offer of 4 years (two counts) on the table, counsel wasn't going to play Russian Roulette with a jury, exposing my client to 58 years of minimum level V time, with the fleeting hope that a jury and/or an appellate court would find/rule that Mr. Panuski is only guilty of 29 counts of Possession of Child Pornography.[14]

Defense counsel further explains that he used the evidence of abuse in Defendant's family during plea negotiations and that was part of the reason he was able to obtain a favorable plea offer.[15] Counsel also points out that he appealed the Motion to Downgrade/Merge the two counts at sentencing to the Delaware Supreme Court. The Court affirmed the trial court's decision to deny the motion.

The State also responded to the ineffective assistance of counsel claim. The State points to a wealth of evidence it had available to try Defendant and combat his argument that he did not intend to deal in

[14] Affidavit of Thomas A. Foley, ¶¶7-8.
[15] *Id.* at Ex. A 2-3 (noting the information was used in a letter to the State seeking leniency).

child pornography. The State proffered "the Trooper viewed a portion of Panuski's collection that was publically available and could have downloaded any of the video files therein."[16] Additionally, "Panuski himself admitted to police after his arrest that he permitted a portion of the child sexual abuse video to be available to the public for upload – otherwise the software would not allow him to download."[17] Based on the evidence the State had amassed, the State states, "had [Panuski] elected to proceed to a trial, the result would not have been an acquittal."

The court employs a two prong test in considering Defendant's claim of ineffective assistance of counsel. "To support a claim of ineffective assistance of counsel following 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."[18]

The first prong requires the court to "'be highly deferential.'"[19] The court must make every effort to evaluate counsel's conduct from the perspective of at the time, rather than in hindsight.[20] After considering Defendant's specific allegations the court must determine whether "the identified acts of omissions were outside the wide range of professionally

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[16] Answer to Motion for Post-Conviction Relief, at 6.
[17] *Id.*
[18] *Evans v. State*, 19 A.3d 301 (Del. 2011) (TABLE) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).
[19] *Taylor v. State*, 32 A.3d 374, 381 (Del. 2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1985)).
[20] *Taylor*, 32 A.3d at 381 (citing *Strickland*, 466 U.S. at 689).

competent assistance."[21] The court finds the opposite to be the case. Defense counsel offered Defendant professionally competent assistance. He considered the evidence against Defendant and counseled that a plea was in Defendant's best interest. He preserved a legal argument based on the statutory scheme and zealously appealed it to the Supreme Court. Ultimately the Court ruled against Defendant's argument. Based on the information at the time, evidence of overwhelming guilt including computer images and Defendant's own statements to police, counsel wisely counseled his client. In hindsight it becomes only more evident as the trial court and the Supreme Court rejected on the merits the legal arguments that Defendant claims would have prevailed if they had been raised earlier.[22] Counsel's decision to not seek a Bill of Particulars was reasonable legal strategy and will not be second guessed in hindsight by the court. Finally, counsel used the evidence of abuse in Defendant's family to help secure a favorable plea offer. The evidence would have been irrelevant during the guilt phase of the trial. Defendants claim fails the first prong of the ineffective counsel analysis.

In considering the second prong the court can look to the resolution of the case. A favorable plea agreement undermines "support for a contention that, but for [his] professional errors, [he] would have insisted on proceeding to trial."[23] The court finds that Defendant

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[21] *Taylor*, 32 A.3d at 381-82 (citing *Strickland*, 466 U.S. at 690).
[22] *Panuski v. State*, 3 A.3d 1098, ¶5 (Del. 2010) (TABLE) (finding double jeopardy did not apply).
[23] *Lacey v. State*, 19 A.3d 201, ¶5 (Del. 2011) (TABLE).

obtained a favorable plea agreement. Based on the indictment Defendant faced the prospect of serving most if not the entire rest of his life in prison on just the minimum mandatory time if convicted of all charges. The plea agreement brought down Defendant's minimum mandatory exposure to four years. The court finds that there is not a reasonable probability that but for Defense counsel's alleged errors Defendant would have rejected the plea offer and gone to trial. The court's analysis under each prong supports a denial of Defendant's motion for ineffective assistance of counsel and therefore, Defendant's motion is **DENIED** on that ground.

Abuse of Prosecutorial Discretion

Defendant argues that the State abused its discretion in charging him with UDCP instead of PCP. His argument largely rests on the claim that he did not "inten[d] to Deal in Child Pornography."[24] The State responds arguing it had evidence to support a guilty verdict on each charge in the indictment and appropriately charged Defendant.[25] The State has "broad discretion" in determining who to prosecute and with what charges.[26] "'[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the

[24] Memorandum in Support of Post-Conviction Relief Motion, at 17.
[25] Answer to Motion for Post-Conviction Relief, at 7.
[26] *Albury v. State*, 551 A.2d 53, 61 (Del. 1988) (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

decision of whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'"[27]

Defendant's arrest came after an undercover online investigation by the Delaware Child Predator Task Force. The State asserts that in his post *Miranda* statement, Defendant

> went on to say that he was aware that he was allowing a number of the child sexual abuse videos to be available to the public for distribution/upload. He knew that in order to be able to download video himself, he had to allow others in the public network to browse his collection and upload video from his collection.[28]

The court finds the State had probable cause to indict Defendant on charges of UDCP, therefore the State did not abuse its discretion and Defendant's motion is **DENIED.**

"Contradictive and Ambiguous" Colloquy

Defendant claims that the court misled him at sentencing. In essence Defendant now claims that he thought the court granted his motion to downgrade charges and that he pled to two counts of PCP, rather than two counts of UDCP. That State responds by arguing:

> The court was clear in its comments to counsel and [Defendant] that either the prior plea agreement stood as a valid representation of the defendant admitting that he possessed two separate images as opposed to only one image that was separately accessed and separately possessed (which was the heart of [Defendant's] argument prior to

[27] *Albury*, 551 A.2d at 61 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), *reh'g denied*, 435 U.S. 918 (1978)).
[28] Answer to Motion for Post-Conviction Relief, at 2.

> sentencing) or [Defendant] could vacate his plea and proceed to trial.[29]

Defendant's claim is unsupported by the record and without merit. The court heard oral argument on Defendant's motion to downgrade/merge the charges. Defendant's argument was two fold. First, the dealing and possessing statutes were so similar that they violated double jeopardy. Second, the indictment lacked specificity because it did not specific different images for each count. The court never granted the motion. Instead the court offered Defendant a choice. Defendant could admit to there being "two separate photographs" and be sentenced on the guilty plea or vacate the plea.[30] Defendant admitted he possessed two separate photographs which constituted child pornography.[31]

While Defendant may have hoped the use of the word "possess" meant the court was granting the motion, the record shows otherwise. Possession is sufficient under UDCP.[32] Defendant knew this because his "[c]ounsel advised Mr. Panuski of the draconian nature of this statute,--that despite its title of "Dealing" in Child Pornography, the statute also punishes persons who merely download and possesses images/video of

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[29] Answer to Motion for Post-Conviction Relief, at 7.
[30] Sentencing Transcript Feb. 12, 2010, at 12:1-8.
[31] *Id.* at 12:11-16.
[32] 11 *Del. C.* 1109(4) ("The person, intentionally compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes, prints, reproduces or *otherwise possesses* any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act.") (emphasis added).

child pornography."[33] No where in the record does the court grant the motion and in fact the court states, "I'm going to give you a chance to appeal that."[34] The plea to two counts of UDCP was never vacated. Defendant was sentenced on the plea agreement and Defendant signed the agreement as well as the Truth in Sentencing form. The court explicitly stated when pronouncing the sentence that Defendant was getting the minimum mandatory time.[35] Possession for child pornography is a Class F felony and as such does not carry minimum mandatory time.[36] Hence the court could not have been sentencing Defendant on PCP. The entire goal of Defendant's motion was to avoid the minimum mandatory time. At no point during the proceeding did Defendant or his counsel seek clarification or object to the fact that he was being sentenced to minimum mandatory time, which had to mean he was being sentenced under UDCP. The court did not mislead Defendant and he was sentenced under UDCP which were the only charges to which he signed a plea agreement and entered a guilty plea. Accordingly, Defendant's motion is **DENIED.**

Based on the foregoing, Defendant's motion for post-conviction relief is **DENIED.**

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[33] Affidavit of Thomas A. Foley, at ¶2.
[34] *Id.* at 13:7-8.
[35] *Id.* at 19:19-20. The court repeated the fact it was sentencing Defendant to the minimum mandatory. *Id.* at 21:22.
[36] 11 *Del. C.* §1111.

IT IS SO ORDERED.

/s/
John A. Parkins, Jr.

oc: Prothonotary