IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	**ID NO. 1107016602**
_____v._____	:	
	:	
DANIEL L. PAOLINI,	:	
	:	
Defendant.	:	

Submitted: February 26, 2013
Decided: February 28, 2013

Upon Defendant's Motion to Withdraw Guilty Plea
DENIED

ORDER

Stephen R. Welch, Jr., Esq., Deputy Attorney General, Department of Justice, Dover, Delaware for the State of Delaware.

John R. Garey, Esq., Dover, Delaware for Defendant.

Young, J.

Defendant has filed a Motion to Withdraw his prior plea of Guilty, entered in this Court on October 12, 2012. As all parties agree, the determination of such request is within the sound discretion of the Court.[1] Nevertheless, the burden contemplated by Superior Court Criminal Rule 32(d) for a Motion filed prior to sentencing, the foundation of this motion, calls for a lower threshold of cause than a post-sentencing, or Rule 61, motion.[2]

More specifically, factors for consideration have been described in *State v. Friend*.[3] While each factor stated therein constitutes a proper item for consideration, each factor is not necessarily of the same significance relative to each other factor, particularly in a given case. In cases such as *Patterson v. State*,[4] the ultimate determination may turn on a fairly objective issue. In that case, for example, the Court demonstrated by examination of the record that the defendant's penalty calculation was altered at the last second, without proper advice.[5] In this case, the issue turns upon the credibility of the claim by Defendant of his intellectual impairment at the

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[1] *Patterson v. State*, 684 A.2d 1234, 1237 (Del. 1996).

[2] *Id*.

[3] *State v. Friend*, 1994 WL 234120, at *2 (Del. Super. May 12, 1994) (they are: (1) was there a procedural defect in taking the plea; (2) did the defendant knowingly and voluntarily consent to the plea agreement; (3) does the defendant presently have a basis to assert legal innocence; (4) did the defendant have adequate legal counsel throughout the proceedings; and (5) does granting the motion prejudice the State or unduly inconvenience the Court.), *aff'd*, 683 A.2d 59 (Del. 1996) (TABLE).

[4] 684 A.2d 1234 (Del. 1996).

[5] *Id*. at 1236-37.

moment of the plea. That is, Defendant here claims that he was under the influence of Ambien, inhibiting his free and voluntary entering of the plea. Thus, the credibility of Defendant's assertions, which dramatically contradict statements made by Defendant, while under oath, at the original sentencing, is very significant.

Defendant, in argument, suggested a *Friend* factor 1 procedural defect. To support that claim, he points out that the trial Court never asked specifically whether he knew all of the elements of the offense of assault second or the legal definition of "reckless." Defendant's original counsel testified that each of those items had been discussed with Defendant. That aside, the concerns for the Court to address with a defendant, in accepting a plea, as indicated in Superior Court Criminal Rule 11, do not require precise questioning on either specific item. The concept is to determine whether defendant fully grasps the nature of what the entering of a plea to the confronted charge is. The plea colloquy herein, to say nothing of the statements by the State and original defense counsel with which Defendant expressly agreed, fully informed Defendant. Hence, there was no procedural defect in the process. Defendant freely, voluntarily and intelligently pled guilty to assault second on October 12, 2012.

Relative to the second *Friend* factor, are we to believe that Defendant, who on October 12, 2012 stood before the Court under oath stating that he had answered the T.I.S. form truthfully, therein stating specifically that he was not under the influence of alcohol or drugs, was not then telling the truth; but now is, when he says that 4 months prior, at sentencing, he was impaired?

Concerning factor 3, are we to disbelieve Defendant's testimony during the

colloquy[6] and the admission made in the plea agreement that Defendant is, in fact, guilty of the charges; in favor of accepting Defendant's present claim that he has a legal innocence claim, even though he does not dispute that he pushed the victim down on an asphalt surface? Further, that does not even address the available testimony of other witnesses, who viewed the event as something decidedly more violent.

As to factor 4, are we to believe him now, when he says his lawyer never explained the requirements of the crime to which he was pleading; or are we to believe his statements at the time of the plea that his lawyer fully advised him (T.I.S. form); or his representation of satisfaction concerning satisfactory representation made to the Court under oath;[7] or the testimony of his counsel describing extensively the detail of their discussions?

As to the fifth factor, neither side has made any sort of issue of prejudice. That is appropriate. Since any prejudice would be minimal at best, that factor of the "*Friend*" test is of little consequence, unless its presence is meaningful (such as a deceased material witness).

In any event, we are told by Defendant – today – that his plea agreement was "sprung" on him on the morning he entered the plea, when he had just come to Court for what he thought was a case review. It does appear that the finalized paper work (T.I.S. form, Plea Agreement) was not presented to Defendant prior to the morning

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[6] Tr. of Plea Colloquy at 6:5-6.

[7] *Id*. at 6:18-20.

of the plea, though the offer was the one solicited by counsel for Defendant. Nevertheless, it arose after more than a year of negotiation, and was made orally by the State a week earlier. Defendant and his counsel met to discuss it the Monday before. Defendant and counsel considered it again on Wednesday, at the time of the final case review, two days before entering the plea – at which time a specific "plea by appointment" was arranged for Friday, October 12, 2012, not simply as part of the mix of 10 or 20 pleas taken on the final case review date. Finally, Defendant did enter the plea a couple of hours after he had arrived at Court for the purpose of entering the plea – the very plea Defendant and his counsel had been working to get for some time. Neither Defendant's description of the events nor his description of his anticipation is at all credible. While Defendant, not at this point facing the selection of a jury for a trial, may feel remorse, evidence indicates that he freely, voluntarily, intelligently and intentionally, entered his plea.

Interestingly, Defendant's claim that (1) he told the Pre-Sentence Investigator (whom he saw the day he entered his plea – when he testified to having been too sleepy to function) of his wish to withdraw his plea, and (2) did not tell the pre-sentence officer: "I pushed him. I guess it was hard enough so that he fell," both directly contradict the report and testimony of the Pre-Sentence Investigator. The Court finds the testimony and report to be credible, and the Defendant's contrary claims not to be.

Even under the most generous reading of the picture presented by Defendant, no legitimate postulation can be asserted that Defendant had any legal basis to dispute that he pushed the victim and caused him to fall on asphalt resulting at least in

scrapes and cuts. Both the State's position that the shove killed the victim, and the Defendant's that there was only slight or no injury to the victim may well have been hard cases to make. Hence, the compromise for the State to accept a plea to "serious injury," foregoing the cause of death, with the Defendant to accept "serious injury," foregoing mere physical injury, became the basis of the plea compromise agreement.

The claims of Defendant, a man who had previously entered pleas to at least 3 prior assaults, with at least 4 violations of probation, that he didn't realize what he was getting into, because he was "off his game," appear completely disingenuous.

Finally, following the testimony of Adam Windett, Defendant's original counsel, I find the implicit attack on the quality of his representation to be utterly meritless.

For all of the foregoing reasons, I find Defendant's Motion to Withdraw his Guilty Plea to be not well taken. The same is, therefore, **DENIED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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