



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROGER BARLOW,)
) No. 240,2024
 Defendant Below-)
 Appellant,) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
 v.) STATE OF DELAWARE
) ID No. 2201006578 & 2109014511
 STATE OF DELAWARE,)
)
 Plaintiff Below-)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

REPLY BRIEF

**WOLOSHIN, LYNCH &
ASSOCIATES, P.A.**

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

ARGUMENT1

I. **THE SUPERIOR COURT ERRED IN DENYING MR. BARLOW'S
MOTION TO WITHDRAW GUILTY PLEA WHEN HE HAD
DEFICIENT LEGAL COUNSEL WITH A HISTORY OF
MISREPRESENTATION TO THE COURT AND HAD A BASIS TO
ASSERT HIS LEGAL INNOCENCE.**

CONCLUSION.....10

TABLE OF CITATIONS

State Cases

Cree v. Hatcher, 969 F.2d 34 (3d Cir. 1992).....8

Gregory v. State, 616 A. 2d 1198 (Del. 1992).....8

In the Matter of a Member of the Bar of the Supreme Court of Delaware,
291 A.3d 192 (Del. 2023).....2

Rules and Statues

11 *Del.C.* §4214(c).....5

D.R.E. 609(a)(2).....8

Superior Court Civil Rule 11(b).....6

ARGUMENT

II. THE SUPERIOR COURT ERRED IN DENYING MR. BARLOW'S MOTION TO WITHDRAW GUILTY PLEA WHEN HE HAD DEFICIENT LEGAL COUNSEL WITH A HISTORY OF MISREPRESENTATION TO THE COURT AND HAD A BASIS TO ASSERT HIS LEGAL INNOCENCE.

On November 5, 2020, the Office of Disciplinary Counsel (“ODC”) filed a petition for discipline against Andre Beauregard, Esquire.¹ Count III of the petition alleged a misrepresentation by Mr. Beauregard to the Superior Court.² On June 25, 2021, a panel of the Board on Professional Responsibility (“Board”) issued a unanimous report finding that ODC had shown by clear and convincing evidence Mr. Beauregard had made a negligent misrepresentation and knowing misrepresentations to the Superior Court.³ Mr. Beauregard objected to the Board’s report, and as such, the matter was submitted to this Court on November 16, 2022.⁴

This Court issued its decision regarding Mr. Beauregard’s disciplinary proceeding on January 23, 2023.⁵ This Court found that the Board’s conclusion that Mr. Beauregard made knowing misstatements to the Superior Court was supported by “substantial evidence.”⁶

¹ *Matter of Beauregard*, 291 A.3d 192, 199 (Del. 2023).

² *Id.*

³ *Id.* at 199-201

⁴ *Id.* at 192.

⁵ *Id.*

⁶ *Id.* at 204.

Mr. Beauregard's representations to the Superior Court in connection with Mr. Barlow's plea on October 3, 2022 were made while Mr. Beauregard's disciplinary matter was pending. In fact, Mr. Beauregard's representations to the Superior Court at issue in this appeal were made over a year after the Board's unanimous report finding Mr. Beauregard made negligent and knowing misrepresentations to the same court. Moreover, Mr. Beauregard's representations in this case were made only a few months before this Court's decision suspending Mr. Beauregard in part, for his misrepresentations to the Superior Court.

The basis of Mr. Barlow's Motion to Withdraw Guilty Plea is that he relied upon advice of his plea counsel, Mr. Beauregard, in deciding to enter a plea. Such advice, while erroneous, was that Mr. Barlow would not qualify as an habitual offender due to two prior drug convictions. That advice induced Mr. Barlow into accepting a plea.

In its Answering Brief, the State correctly pointed to representations that plea counsel made to the Superior Court during the plea colloquy to show that Mr. Barlow's plea was knowingly and voluntarily entered.⁷ Specifically, plea counsel told the Court: "Due to his record, [Mr. Barlow] is looking at 25 years to life. We know that there's a cap on that for 50 years that the State has given. He is being

⁷ Ans. Br. at 6, 13-14.

sentenced that way because he is habitual.”⁸ The Court relied upon plea counsel’s representations in deciding to accept Mr. Barlow’s plea. However, here, plea counsel told Mr. Barlow he was not an habitual offender, and then represented to the Court that he is an habitual offender. It is upon the backdrop of plea counsel’s prior knowing misrepresentations to the Superior Court, that this Court should consider plea counsel’s representations to the Court and Mr. Barlow regarding Mr. Barlow’s plea.

The crux of the State’s argument in his Answering Brief is that Mr. Barlow “absent clear and convincing evidence is bound by his prior admissions and representations in the plea documents as well as his statements under oath in open court during the plea colloquy.”⁹ As such, the State contends, “the Superior Court properly found as it did at the 2022 colloquy, that Barlow’s plea was knowing and voluntary.”¹⁰ Here, however, the Superior Court never provided Mr. Barlow an opportunity to present any evidence to rebut his admissions and representations during the plea colloquy and in the plea documents. Moreover, the evidence that Mr. Barlow did present to support his claims that his plea was not knowingly and voluntarily entered and ineffective assistance of counsel were given no weight by the Superior Court. For these reasons, the decision below should be reversed.

⁸ A045.

⁹ Ans. Br. at 16 (internal citations omitted).

¹⁰ *Id.*

The Superior Court held no evidentiary hearing on Mr. Barlow’s Motion to Withdraw Guilty Plea. In its Answering Brief the State twice noted that “[n]either Barlow nor his former counsel Beauregard testified at the January 8, 2024 hearing.”¹¹ Such emphasis seems to imply a failing on the part of Mr. Barlow to present witnesses in order to prove his claims in his Motion to Withdraw Guilty Plea. Not so.

After all of the submissions by the Defense and State regarding the Motion to Withdraw Guilty had been filed, on October 26, 2023, the Superior Court sent counsel a Scheduling Memorandum for the Oral Argument on December 11, 2023.¹² Thereafter, undersigned counsel sent an email to the Court about the possibility of scheduling a teleconference with the judge prior to oral argument.¹³ The State agreed with the request.¹⁴ The Court responded:

Good Morning Counsel:

I have conferred with her Honor regarding the below.

As you know, there is a pending Motion to Withdraw the Guilty Plea for which both parties have presented written submissions to the Court. The Court has reviewed those submissions, and has scheduled Oral Argument on December 11, 2023 at 1:00 p.m.

¹¹ *Id.* at 8, 11.

¹² A004. On December 5, 2023, the Court rescheduled Oral Argument to January 8, 2024. A004.

¹³ AR02

¹⁴ *Id.* AR01-02

At the December 11, 2023 hearing, the Court solely wishes to hear argument on the pending motion.

Is there a necessity for an additional status conference prior to December 11, 2023?¹⁵

The Superior Court foreclosed Mr. Barlow from presenting anything other than oral argument. The Court did not provide Mr. Barlow any opportunity to testify or to present any witnesses, including plea counsel. Instead, the Court only looked to the plea colloquy and documents to find that Mr. Barlow could not show “he entered into the plea without knowing he faced sentencing as a habitual offender.”¹⁶ The Court went further to find that the “record and plea documents are replete with references to Mr. Barlow’s habitual status.”¹⁷ As such, the State argued in its Answering Brief that the “Superior Court Judge’s references to the plea documents and Barlow’s oral responses in 2022 about the defendant’s status as a habitual offender are accurate and refute Barlow’s appellate argument as to the second plea withdrawal factor.”¹⁸

However, Mr. Barlow provided record support for his claim that his plea was not knowingly and voluntarily entered. Such support was plea counsel’s opposition

¹⁵ AR01

¹⁶ A294.

¹⁷ *Id.*

¹⁸ Ans. Brf. at 15.

to the State's application to declare Mr. Barlow an habitual offender filed December 21, 2022.¹⁹ In the opposition, plea counsel wrote:

Specifically, the State's assertion that the defendant has previously been declared a habitual offender is ambiguous with respect to what section and the predicate felonies used to justify the declaration. Trafficking and Possession w/Intent to Deliver statutes were repealed, and the State's reliance upon these convictions produces patent ambiguity respecting whether the conduct of the two convictions qualify as predicate felonies under 11 Del. C. § 4214(c).²⁰

In his filing, plea counsel did not simply allege technical defects in the State's motion to declare Mr. Barlow an habitual offender as the trial court held.²¹ Rather, in his opposition plea counsel directly challenged Mr. Barlow's eligibility as an habitual offender based upon convictions under statutes that were later repealed.

This filing buttresses Mr. Barlow's claim that plea counsel told him that he did not qualify as a habitual offender, and that advice, induced Mr. Barlow to take a plea. The basis for plea counsel's challenge to Mr. Barlow's eligibility as a habitual offender is identical to what plea counsel told Mr. Barlow before he agreed to enter the plea. Moreover, by filing the opposition with the Court which he signed,²² plea counsel represented to the Superior Court that the claims and contentions contained

¹⁹ A009.

²⁰ A125.

²¹ A293.

²² A126.

therein were warranted by existing law and had evidentiary support.²³ Yet, neither is true.

The State correctly contended in its Answering Brief that plea counsel's argument "that a change in status of prior predicate felony convictions for enhanced sentencing is meritless."²⁴ The State was also correct in writing that "[e]qually meritless are Beauregard's arguments in his opposition to the State's habitual motion are claims that the motion is untimely and that the paperwork establishing Barlow's predicate felonies is insufficient."²⁵ Undersigned counsel withdrew plea counsel's opposition to the State's habitual offender motion.²⁶

This filing, however, supports two of Mr. Barlow's claims to justify withdrawal of his plea. First, it shows that plea counsel was ineffective in providing erroneous advice to Mr. Barlow that induced him to take the plea and overcomes the presumption of reasonably effective assistance of counsel. Second, it shows that the misrepresentations to the Superior Court giving rise to plea counsel's suspension were not an isolated event, but rather, continued throughout plea counsel's representation of Mr. Barlow to Mr. Barlow's detriment.

²³ See Superior Court Civil Rule 11(b).

²⁴ Ans. Brf. At 15.

²⁵ *Id.* at 16.

²⁶ A308-09.

Mr. Barlow's claims of plea counsel's misrepresentations to him and to the Superior Court were also not far afield from a reason for plea counsel's suspension by this Court. Yet, the Superior Court gave no weight to plea counsel's misrepresentations to a judge of the same court finding that they had "no bearing on Mr. Barlow's case."²⁷ This Court, however, takes a broader view of the impact of a lawyer's misrepresentations to a court of law. In suspending Mr. Beauregard, this Court held, "false statements and lack of candor have a 'significant adverse effect on legal proceedings' given their impact on the administration of justice."²⁸ Such is the impact here on Mr. Barlow.

Moreover, the reasons why prior crimes of dishonesty or falsehood are automatically admissible are analogous to why the trial court erred in rejecting consideration of plea counsel's previous misrepresentations to the same court. Pursuant to D.R.E. 609(a)(2), evidence of a prior conviction for any crime may be admitted if it involved dishonesty or false statement.²⁹ This Court has defined the term "dishonesty" as "the act or practice of lying, deceiving, cheating, stealing or defrauding."³⁰ Crimes of dishonesty or false statement are automatically admissible

²⁷ A295.

²⁸ *In the Matter of a Member of the Bar of the Supreme Court of Delaware*, 291 A.3d. at 206 (citing *In re Vanderslice*, 2015 WL 3858865, at *15-16 (Del. June 19, 2015)).

²⁹ D.R.E. 609(a)(2).

³⁰ *Gregory v. State*, 616 A.2d 1198, 1204 (Del. 1992) (citing *Tinnen v. State*, 521 A.2d 247 (1986)).

and have no time limitation because such crimes “bear on a witness’s propensity to testify truthfully.”³¹ The test for admissibility of such crimes “focuses on the witness’s propensity for falsehood, deceit, or deception.”³² In other words, prior crimes of dishonesty and false statement can always be used to impeach a witness’s credibility by showing a propensity for falsehood, deceit, or deception.

Here, Mr. Barlow points directly to a substantiated prior act of falsehood and deception by plea counsel with the Superior Court to show plea counsel’s propensity for falsehood and deception the same Court regarding Mr. Barlow’s plea, and specifically, Mr. Barlow’s understanding of his eligibility as an habitual offender. Moreover, the substantiated prior act of falsehood and deception by plea counsel shows his propensity to deceive Mr. Barlow into believing he was not eligible to be sentenced as an habitual offender.

But for plea counsel’s propensity for falsehood and deception and ineffectiveness, Mr. Barlow would not have entered a plea, and instead, would have insisted upon a trial. Plea counsel’s ineffectiveness and misrepresentations to Mr. Barlow and the Superior Court qualify as fair and just reasons for Mr. Barlow to withdraw his guilty plea. Therefore, this Court should reverse the Superior Court’s denial of Mr. Barlow’s Motion to Withdraw Guilty Plea.

³¹ *Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992).

³² *Id.* at 28.

CONCLUSION

For the reasons stated herein and within Mr. Barlow's Opening Brief, Mr. Barlow respectfully requests that this Honorable Court reverse the Superior Court's decision denying Mr. Barlow's Motion to Withdraw Guilty Plea.

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