

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE  
ONE THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947

April 15, 2010

John C. Zittinger  
Sussex Correctional Institution  
P. O. Box 500  
Georgetown, DE 19947

**RE: State v. John C. Zittinger  
Defendant ID No. 0904022604 (R-1)**

Dear Mr. Zittinger:

On March 1, 2010, you filed a timely Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The record was expanded pursuant to Rule 61(g). After reviewing your file, a transcript of your guilty plea, your attorney's report to the Court, the prosecutor's report, and your response received on April 8, 2010, I have determined your motion should be denied.

**THE PLEA**

On September 9, 2009, you entered a guilty plea to a fourth offense DUI and possession of marijuana. The felony DUI was your sixth or seventh offense. You say six, and the prosecutor alleges seven.

I accepted the negotiated, recommended sentence. On the DUI, you received a five (5) year sentence, suspended after one (1) year and the completion of the TEMPO program for eighteen (18) months Level 3 probation. On the marijuana charge you received probation.

**RULE 61 ALLEGATIONS**

In Ground one, you allege your attorney coerced you into pleading guilty. You state it took him an hour to talk you into accepting the plea.

In Ground two, you allege you told the officer about drinking beers after you lost your keys but he did not put it in his police report.

In Ground three, you allege the prosecutor withheld the “dashboard videotape” which would have contained exculpatory communications between you and the police officer.

### **DISCUSSION**

The prosecutor reports there was never a videotape made, and the police reports state the same, i.e., “no MVR”. The police officer noted in his report he did not activate the recording device because he had to exit his vehicle quickly.

Your attorney reports you chose to plead guilty after the two of you reviewed the evidence and he gave you his professional assessment of the case. One point he discussed with you at that time was that if the matter went to trial and if you were convicted, the sentence would probably be greater than the one year recommended pursuant to the plea negotiations.

Your attorney reviewed the evidence which he believed would put you behind the wheel of the vehicle while intoxicated. While you may have a different recollection, your attorney advised you he could not change the officer’s recollection.

Finally, your attorney advises that he inquired about a “dashboard video”, but the police report indicated no video was made. Specific inquiries with the prosecutor were made by your attorney to confirm whether or not a video existed. There was no video.

In your report you disagree with the State’s evidence and the police officer’s potential testimony as reflected in the police report.

You acknowledge you told me you were satisfied with your lawyer but now think you could have prevailed had the case gone to trial.

Finally, you ask that the Court consider modifying the sentence.

### **THE TRANSCRIPT**

On September 9, 2009, in response to my questions, you advised me of the following:

- You were satisfied with your attorney;  
You had enough time to consult with him.
- Neither your lawyer nor anyone else was forcing you to plead guilty.
- You discussed the State’s evidence and the charges and you were guilty of both offenses.
- You understood your trial rights and appeal rights.
- It was your personal decision to give up your rights and plead guilty.

The Court is entitled to rely on the answers you provided at your guilty plea, absent clear and convincing evidence to the contrary. *Somerville v. State*, 703 A.2d 629 (Del. 1997)

I am satisfied you took the best deal you could get at the Final Case Review which occurred one week before your trial date. Your attorney offered his professional opinion recommending the guilty plea, coupled with the plea recommendation.

I am satisfied that you were not coerced or forced into pleading guilty by your attorney. You are now just having guilty plea remorse.

Your complaints about what you think the evidence should have been versus the evidence the State was prepared to use at trial is nothing more than your opinion as to the unfairness of how you were treated. There is nothing to support evidence was withheld or “changed” to strengthen the State’s case.

A videotape that was never made cannot be produced. There is no evidence of any suppression of any tape.

**SUMMARY**

I am satisfied you entered an intelligent, knowing and voluntary plea. I am satisfied you were not forced or coerced into pleading guilty. The Rule 61 motion is denied.

To the extent you also argue for a modification of sentence, that is also denied. I am satisfied the sentence imposed was reasonable and appropriate.

**IT IS SO ORDERED.**

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

THG:baj

cc: Prothonotary  
Mark J. Cutrona, Esquire  
Eric G. Mooney, Esquire