

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

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|------------------------|---|---------------------|
| STATE OF DELAWARE |) | |
| |) | |
| v. |) | I.D. No. 0711008865 |
| |) | |
| GEORGE L. STEWART, III |) | |
| |) | |
| Defendant |) | |

Submitted: July 13, 2011
Decided: August 16, 2011

Upon Defendant's Motion for Postconviction Relief.
SUMMARILY DISMISSED.

ORDER

Steven P. Wood, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

George L. Stewart, III, Wilmington, Delaware, *pro se*.

COOCH, R.J.

1. This 16th day of August 2011, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

2. On June 19, 2008, Defendant pled guilty to Possession of a Deadly Weapon by a Person Prohibited.¹ In return for his plea, the State entered a *nolle prosequi* on all remaining charges of the indictment.² Under the terms

¹ See Truth-In-Sentencing Guilty Plea Form of June 19, 2008

² *Id.* Defendant was also indicted for Reckless Endangering First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Possession of a Weapon with

of Defendant's plea agreement, he proceeded to immediate sentencing; the State's agreed sentence recommendation was eight years at Level V incarceration, suspended after six years, followed by 18 months Level III probation.³ Accordingly, on June 19, 2008, this Court imposed a sentence of eight years at Level V incarceration, to be suspended after six years at Level V incarceration for 18 months of Level III probation.⁴ Defendant did not file a direct appeal of his conviction or sentence.⁵

3. On May 12, 2011, Defendant filed a Petition for Writ of Habeas Corpus with this Court. In his petition, Defendant alleged that his sentence was "over the guidelines" for the offense of Possession of a Deadly Weapon by a Person Prohibited.⁶ According to Defendant, the sentencing guidelines indicate a sentence of "up to five (5) years" for his offense, and requested that, given that he had served three years and six months, the Court "consider time served."⁷

4. By order dated May 20, 2011, this Court denied Defendant's Petition for Habeas Corpus. This Court held that Defendant was legally detained and failed to state a claim upon which such a writ may be issued.⁸

5. Defendant now moves for postconviction relief. He raises three grounds for relief: his sentence violated the Constitutional prohibition on *ex post facto* laws, his sentence was "enhanced" by ineffective assistance of counsel, and there was a "constitutional miscarriage of justice" based on the unintelligible assertion that "the nonbinding nature of the sentences were outside the sentencing guidelines, the court abused its discretion."⁹ To support his contention, Defendant included a memorandum containing

Removed, Obliterated, or Altered Serial Number, and Resisting Arrest. *See* Indictment by the Grand Jury of Jan. 22, 2008.

³ *See* Plea Agreement of June 19, 2008.

⁴ Sentence Order of June 19, 2008.

⁵ *See* Superior Court Criminal Docket.

⁶ Petition for Writ of Habeas Corpus of May 12, 2011.

⁷ *Id.*

⁸ *In the Matter of George Stewart*, Del. Super., I.D. No. 0711008865/C.A. No. N11M-05-059, Cooch, R.J. (May 20, 2011) (ORDER).

⁹ Def.'s Mot. for Postconviction Relief of July 13, 2011.

conclusory allegations; this memorandum provided, *in toto*, as follows (errors in original):

Superior Court Criminal Rule 61(i)(5) petitioner should establish that the court lacked jurisdiction or a colorable claim that there was a miscarriage of justice because of a constitutional violation petitioner was sentenced based on incorrect information and his counsel was deficient pursuant to *Strickland v. Washington*, [].

The 6 year sentence was the result of a constitutional violation that undermined the fundamental legality, reliability, integrity and fairness of the proceedings. [] The applicable sentencing guidelines would have resulted in a lesser sentence. The Court should have applied the sentencing that should have governed the case at the time of conviction.¹⁰

6. Prior to considering the merits of Defendant’s motion, the Court must first determine if the motion satisfies the procedural requirements of Superior Court Criminal Rule 61.¹¹

7. It is manifest on the face of Defendant’s motion that his claims are time barred; pursuant to Superior Court Criminal Rule 61(i)(1):

A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

8. As stated, Defendant pled guilty and was immediately sentenced on June 19, 2008. Given that Defendant did not file a direct appeal, the date of finality of his conviction is controlled by Rule 61(m)(1), which states that, if

¹⁰ Memorandum in Support of Postconviction [Relief] (citations omitted).

¹¹ See, e.g., *Watson v. State*, 602 A.2d 1082 (Del. 1991) (“[T]o preserve the integrity of Delaware’s procedural default rules, this Court will not ordinarily consider the merits of a postconviction relief claim before first determining whether the claim is procedurally barred.”) (citation omitted); *State v. Caldwell*, 2009 WL 3069680 (Del. Super. Ct. 2009) (“Prior to addressing the merits of a postconviction relief claim, the Court must first determine whether the Motion meets the procedural requirements of Rule 61(i).”) (citations omitted).

the defendant does not file a direct appeal, a judgment of conviction is final “30 days after the Superior Court imposes sentence.” Consequently, Defendant’s conviction was final on July 19, 2008. It follows that Rule 61(i)(1) required the instant motion to be filed by July 19, 2009, one year after his judgment of conviction was final.

9. Defendant has not asserted, much less substantiated, that a retroactively applicable right has been newly recognized by the Supreme Court of Delaware or the Supreme Court of the United States, thereby extending the time period in which he may file a motion for postconviction relief.¹² Instead, Defendant’s memorandum merely recited, in conclusory terms, the legal standard of Rule 61(i)(5). Rule 61(i)(5) is a narrowly construed “fundamental fairness” exception that exempts a defendant’s motion from the procedural bars of Rule 61(i)(1)-(3) if there is a “claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”¹³

10. Rule 61(i)(5) does not apply to Defendant’s motion. Defendant has not shown that the consideration of any of his claims is warranted in the interests of justice, as he has failed to articulate any factual basis to support the contention that “subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.”¹⁴ To trigger this exception, Defendant bears the burden of demonstrating that the Court lacked jurisdiction or a colorable constitutional claim;¹⁵ Defendant has shown neither condition. Likewise, Defendant has not established any

¹² Superior Court Criminal Rule 61(i)(1) (providing that if a motion for postconviction relief “asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.”).

¹³ *See, e.g., Younger v. State*, 580 A.2d 552, 555 (Del. 1990) (“The fundamental fairness exception (as set forth in Superior Court Criminal Rule 61(i)(5)) is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.”) (citations omitted).

¹⁴ *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990) (citations omitted).

¹⁵ *Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991) (citation omitted).

miscarriage of justice due to a constitutional violation; he simply made an unsupported assertion that his sentence is the result of a miscarriage of justice. This Court “will not address claims for postconviction relief that are conclusory and unsubstantiated.”¹⁶

11. As stated, this Court holds that Defendant’s claims are time-barred. Nonetheless, in addition to the fact that Defendant’s sentence was entirely proper and within both the relevant statutory range,¹⁷ this Court notes that Defendant’s alleged belief that his sentence was “outside the sentencing guidelines” is belied by his signature on the Truth-In-Sentencing Guilty Plea Form, wherein he acknowledged the statutory maximum penalty of eight years at Level V incarceration and the statutory mandatory minimum sentence of five years at Level V incarceration.¹⁸ On this point, Defendant received exactly what he bargained for in his plea agreement: a recommendation by the State for a sentence of eight years at Level V incarceration, to be suspended after six years at Level V incarceration, two years less than the statutory maximum, together with the entry of *nolle prosequi* on several other indicted charges.¹⁹ In the absence of clear and

¹⁶ *State v. Washington*, 2003 WL 21771210, at *2 (Del. Super. Ct. 2003) (citing *Younger*, 580 A.2d at 555).

¹⁷ Defendant was previously convicted of three felony offenses, Robbery First Degree, Robbery Second Degree, and Conspiracy. *See* Immediate Sentencing Form. Consequently, Defendant’s prior criminal record placed him within the purview of 11 Del. C. § 1448(e)(1)(c), which provides that an individual who possesses a firearm or destructive weapon while prohibited shall receive a minimum sentence of “[f]ive years at Level V, if the person has been convicted on 2 or more separate occasions of any violent felony.” Further, Defendant, a prohibited person, possessed a firearm, a Class D Felony. 11 Del. C. § 1448(c) (“Possession of a deadly weapon by a person prohibited is a class F felony, unless said deadly weapon is a firearm or ammunition for a firearm, in which case it is a class D felony.”). Consequently, the statutory maximum sentence was in fact eight years. 11 Del. C. § 4205(b)(4) (“The term of incarceration which the court may impose for a felony is fixed as follows: [] For a class D felony up to 8 years to be served at Level V.”).

¹⁸ Truth-In-Sentencing Guilty Plea Form of June 19, 2008

¹⁹ The SENTAC Sentencing Guidelines indicate that the recommended penalty for an offender who is convicted of a Class D violent felony and has previously been convicted of two or more prior violent felonies is eight years. *See* Delaware Sentencing Accountability Benchbook 2011 at 110. Although not entirely clear, the instant Truth-In-Sentencing Form contains what appears to be a roman numeral designation of “VIII” under the “TIS Guideline” field. Thus, Defendant’s sentence of eight years at Level V incarceration, to be suspended after six years at Level V incarceration, is also within the

convincing evidence to the contrary, Defendant is bound by his acknowledgement of the potential sentence range and the State's agreed sentencing recommendation, as accurately set forth in his guilty plea forms.²⁰ In this case, Defendant has produced no evidence at all to suggest that he should not be held to his acknowledgement of the statutory maximum, mandatory minimum, and recommended sentence in this case.

12. Finally, although Defendant's untimely motion asserted that ineffective assistance of trial counsel "enhanced"²¹ his sentence, this Court finds that such a conclusory and unsubstantiated claim is properly subject to summary dismissal. While the Supreme Court of Delaware has observed that, in connection with a timely first motion for postconviction relief alleging ineffective assistance of counsel, it is the "preferable practice" for this Court to obtain an affidavit from trial counsel addressing the defendant's claims.²² At the same time, however, the Supreme Court of Delaware has confirmed that conclusory and unsupported claims of ineffective assistance of counsel are properly summarily dismissed by this Court.²³ In this case, Defendant simply made the unsubstantiated claim that ineffective assistance of counsel "enhanced" his sentence in some unspecified way; in addition to being wholly unsupported by Defendant, this claim is belied by the fact that Defendant's sentence was manifestly within the appropriate statutory range, and was indeed exactly the sentence that Defendant anticipated would be recommended by the State, in accord with his voluntarily entered plea

applicable sentencing commission guidelines, and it appears that Defendant was fully apprised of this at the time he signed the Truth-In-Sentencing Form.

²⁰ See *Somerville v. State*, 703 A.2d 629, 632 (1997) ("In the absence of clear and convincing evidence to the contrary, [the defendant] is bound by his answers on the Truth-in-Sentencing Guilty Plea Form and by his sworn testimony prior to the acceptance of the guilty plea.") (citations omitted).

²¹ Def.'s Mot. for Postconviction Relief of July 13, 2011.

²² *Horne v. State*, 887 A.2d 973, 975 (Del. 2005) ("Although Rule 61 does not require the Superior Court to obtain trial counsel's affidavit in response to the defendant's allegations of ineffective assistance of counsel, we find that to be the preferable practice in a case like this involving a first postconviction motion containing ineffectiveness claims.").

²³ *Boatswain v. State*, 962 A.2d 256, at *1 (Del. 2008) ("In the absence of any basis for [the defendant's] claim of ineffective assistance of counsel, we conclude that the Superior Court was correct in summarily dismissing it.").

agreement.²⁴ Moreover, even if Defendant's allegations of ineffective assistance of counsel were not patently lacking in merit, it remains that Defendant's motion is time-barred and not within any exception to the procedural bars of Rule 61. Thus, Defendant's claims of ineffective assistance of counsel may properly be summarily dismissed at this juncture.

13. Therefore, for the reasons stated above, Defendant's motion for postconviction relief is **SUMMARILY DISMISSED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services
Dade D. Werb, Esquire

²⁴ See *supra* note 3.