

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

September 29, 2011

Rodger L. Rust, Sr.
SBI #00125
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Rodger L. Rust, Sr.
Defendant ID No. 0912005406

Dear Mr. Rust:

The defendant has filed a Motion for Post Conviction Relief, pursuant to Superior Court Criminal Rule 61 ("Rule 61"). In reality, it is another motion to modify his sentence. Defendant seeks that the Court vacate the June 25, 2010, sentence imposed pursuant to a guilty plea and presentence investigation and "then to be resentenced as follows:," wherein he seeks a shorter period of incarceration. He argues this should be granted because his lawyer was ineffective, the Court abused its sentencing authority, and there was prosecutorial misconduct.

I find that the present motion is subject to summary dismissal pursuant to Rule 61(d)(4) for the following reasons:

(1) The defendant does not seek "to set aside a judgment of conviction" pursuant to Rule 61(a)(1). He seeks a better sentence for the conviction arising from his guilty plea. He has twice filed motions to reduce or modify the imposed sentence, both of which have been denied by Superior Court, with the second denial being affirmed by the Supreme Court. *Rust v. Delaware*, 2011 WL

3896859 (Del.).¹ Therefore, he seeks to circumvent the earlier rulings and the time restrictions of Superior Court Criminal Rule 35 ("Rule 35") by packaging new complaints under Rule 61, but asking for Rule 35 relief.

(2) The ineffective assistance of counsel claim arises from the collateral matter of the forfeiture of vehicles and money seized at the time of the arrest. Basically, Mr. Rust claims his wife's attorney did a better job as to interrogatories in the civil forfeiture proceedings. He claims it was unnecessary to forfeit the vehicles by signing a stipulation as to the civil action. This is a collateral matter.

On May 10, 2010, the defendant pled guilty before Judge Richard F. Stokes. The plea colloquy reflects that the defendant was satisfied with his attorney and had no complaints. The plea colloquy was lengthy and exhaustive as to the defendant's decision to plead guilty. The Court is entitled to rely upon the defendant's answers to the questions Judge Stokes asked of him. In fact, the defendant informed Judge Stokes that he would not be filing a Rule 61 ineffective assistance of counsel complaint.

The colloquy reflects that the defendant was facing severe consequences if found guilty by a jury and his lawyer negotiated a plea that the defendant decided to take, perhaps reluctantly, as nobody volunteers to go to jail; but nevertheless, this was ultimately the defendant's decision.

The plea agreement included the dismissal of the civil forfeiture petition. That separate order was signed by Judge Stokes on May 10, 2010. *Rust v. Delaware*, C.A. No. S10M-01-023 (Del. Super. May 10, 2010). The stipulation as to the property was also included in the criminal docket of the present case at docket number 14.

¹Mr. Rust originally filed the present motion on June 21, 2011, but this Court lacked jurisdiction because the denial of the second motion for modification was on appeal. On September 20, 2011, the mandate from the Supreme Court was received in Superior Court.

Afer considering the plea colloquy and the defendant's complaints, I find that he has not established the second prong of *Strickland v. Washington*, 466 U. S. 668 (1984). He has not established any ineffectiveness of counsel as to the civil forfeiture that prejudiced him in making his decision to plead guilty. He may not have liked the deal, but he took it at final case review rather than go to trial days later.

(3) The claim of judicial abuse of sentencing discretionary authority has been previously adjudicated in this court and in the Supreme Court by way of the defendant's motions to modify his sentence. This claim is barred by Rule 61(i)(4).

(4) Finally, defendant claims prosecutorial misconduct because he claims the signature of Judge Stokes on the stipulation of dismissal in the civil forfeiture action must be a forgery. This claim is frivolous.

Defendant's present motion is summarily dismissed.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

THG/jfg

cc: Prothonotary
John Donahue, Esquire, Department of Justice