IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID 0810014644A & B
	)	
MICHAEL A. WALLACE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Upon Defendant's Pro Se Motion for Postconviction Relief.
Denied.

Submitted: February 2, 2011
Decided: February 16, 2011

Appearances:

Alexis S. Gatti, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware, attorney for the State.

Robert H. Robinson, Jr., Esquire, Office of the Public Defender, Georgetown, Delaware, attorney for Defendant.

Michael A. Wallace, Sussex Correctional Institution, Georgetown, Delaware, pro se Defendant.

STOKES, J.

Pending before the Court is Defendant Michael Wallace's first motion for postconviction relief, filed pursuant to Super.Ct.Crim.R. 61 ("Rule 61"). At the outset, the Court notes that the sole avenue to challenge a guilty plea is for the defendant to establish that his plea was made either involuntarily or under misapprehension or mistake as to his legal rights.[1] Defendant does not acknowledge this standard but instead focuses on the legality of his sentence. Defendant also fails to acknowledge that a properly entered guilty plea constitutes a waiver of all errors or defects occurring before the plea, except for lack of subject matter jurisdiction.[2]

However, the Court addresses the issues raised because this is Defendant's first postconviction motion. Having considered the motion, defense counsel's affidavit, the State's answer and Defendant's reply, the Court concludes that Defendant is not entitled to relief.

Facts

The record shows the following facts. In October 2008, the 16-year-old Victim told her mother that Defendant, her biological father, had been sexually assaulting her for nearly three years. She told police that from 2005 to 2008, her father had repeatedly touched her breasts and that he had twice digitally penetrated her vagina.

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[1] *Fullman v. State*, 1989 WL 27739 (Del.).

[2] *Id*. (citing *State v. Stoesser*, 183 A.2d 824, 825 (Del.1962)).

After Defendant was arrested, his estranged wife found suspicious entries on Defendant's computer and turned it over to police. A police forensic analysis showed 397 images and videos of child sexual exploitation, most of which were traced to hard-core child pornography web sites. Many of the images depicted sexual assaults on females aged six to eleven.

Posture

On September 11, 2009, Defendant pled guilty to one count of Continuous Sexual Abuse of a Child; two counts of Unlawful Sexual Contact Second Degree; and two counts of Dealing in Child Pornography.[3] As stated in the plea agreement, Defendant faced a period of incarceration ranging from six to sixty-nine years. A Pre-Sentence Investigation (PSI) was ordered at the request of the parties.

The sentencing hearing was held November 13, 2009. On the charge of Continuous Sexual Abuse of a Child, a Class B felony, Defendant was sentenced to 25 years at Level 5 with credit for 391 days served, suspended after 10 years and upon successful completion of Family Problems, for 1 year Level 4 work release followed by 4 years at Level 3 probation. On each of two charges of Dealing in Child Pornography,

[3]Defendant had also been charged with two counts of Rape Second Degree, forty-five counts of Unlawful Sexual Contact Second Degree, one count of Terroristic Threatening and twenty-five counts of Dealing in Child Pornography. Had Defendant been convicted as charged, he would have faced a sentence ranging from 60 to 891 years. Defendant rejected several plea offers that contained a set recommendation as to the sentence. The plea offer which he ultimately accepted made no sentence recommendation and requested a Pre-Sentence Investigation ("PSI").

Defendant was sentenced to 5 years at Level 5, suspended after 2 years for 3 years at Level 3. On each of two charges for Unlawful Sexual Contact 2nd degree, Defendant was sentenced to 2 years at Level 5 suspended for 2 years at Level 3. Probation was to be concurrent. He was also ordered to register as a Tier 3 sex offender. His judgment of conviction became final on December 12, 2009. *See* Rule 61(m)(1). This Court denied Defendant's Motion for Modification of Sentence on February 18, 2010. Defendant filed a timely Rule 61 motion.

Issues

Defendant raises five grounds for relief. First, he alleges that the State broke its promise not to ask for more than the minimum sentence of six years. Second, he alleges prosecutorial misconduct for statements made during sentencing. Third, he alleges ineffective assistance of counsel. Fourth, he offers observations about the sentencing philosophy of the General Assembly and the Sentencing Accountability Commission ("SENTAC"). Fifth, he offers a list of cases which he perceives to be comparable to his own sentencing situation.

Discussion

Defendant argues first that the State breached its promise to recommend six-year minimum sentence. Defense counsel testified in his affidavit that the prosecutors stated that they would not ask for a set number of years and that there was no promise to recommend the minimum. Defense counsel also stated that Defendant chose a plea with a

PSI over a plea with a firm recommendation because he hoped to obtain a lighter sentence. The State argues that this claim is barred by Rule 61(i)(3) and that it made no promise regarding sentencing, either verbally or in writing.

Defendant offers no reason for his failure to raise this issue at sentencing, nor can he show that he suffered any prejudice from his sentence because neither the plea agreement nor the truth-in-sentencing form reflects any sentence recommendation whatsoever. This fact confirms the State's testimony that it made no firm sentencing recommendation and that Defendant was aware that the plea offer, which he signed, contained no reference to a six-year sentence.

In effect, Defendant contends that he disagrees with the terms of the plea bargain into which he entered. This is tantamount to asking to withdraw the guilty plea. A defendant is entitled to withdraw his plea after sentencing only if he shows that it was involuntary or that he was under misapprehension as to his legal rights.[4] The starting point of the inquiry is the plea colloquy. A judge taking a guilty plea must establish by direct interrogation of the defendant on the record that the plea is being entered knowingly, voluntarily and intelligently.[5]

In this case, the judge asked Defendant about the nature of each of the charges, and Defendant stated that he had discussed them with his attorney and that he understood

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[4]*Raison v. State*, 469 A.2d 424, 425 (Del. 1983).

[5]*Howard v. State*, 458 A.2d 1180 (Del. 1983).

them. Defendant stated that no one had promised any particular sentence or forced him into taking the plea. He understood that no one other than himself could make the decision to plead guilty. He stated that he was guilty of the charges stated on the guilty plea form. He said his attorney did a "super job" and that he had no complaints about counsel. He understood the numerous trial rights he was waiving, including the right to appeal. He knew that he would proceed to sentencing. He understood that the sentence could vary from 6 to 69 years. He also stated that he understood that he could not do it over if he did not like the sentence he received. After this interchange, the judge accepted his plea as being knowingly, voluntarily and intelligently entered.

Defendant has not shown that his plea was not made knowingly or made under a misapprehension of his rights. His argument that the State promised to recommend a six-year sentence is not supported by the written or the in-court record. Both trial counsel and the prosecutor testify that the State never promised, either verbally or in writing, that it would ask for a 6-year sentence.

In addition to his responses in the plea colloquy, Defendant signed the plea agreement. He is bound by his signature in the absence of clear and convincing evidence to the contrary.[6] He has not met this standard, despite the detailed chronology of the plea negotiations presented in his reply. When both the State and the defense testify that the State made no promises regarding a sentence, and the Defendant engaged in a thorough

[6]*State v. Jamison*, 2001 WL 258826 (Del.Super.)(citing *Fullman v. State*, 1989 WL 27739, at *2 (Del.)).

colloquy with the judge acknowledging the sentence range and stating that no one had promised him a particular sentence, he is bound by his own verbal and written representations. Defendant is not entitled to withdraw his guilty plea.

Defendant's claim that the State breached a promise as to the sentence is procedurally barred and has no substantive merit.

Second, Defendant alleges that the prosecutors made misleading statements and offered unfounded opinions at sentencing. He provides the page and line numbers in the transcript but fails to offer the basis for his contentions. The State argues that this claim is procedurally barred under Rule 61 (i)(3) because these objections could have been raised at the hearing. If the claim is not barred, the State argues that both prosecutors based their statements on investigative findings and statements made by the Victim and her mother. The State also argues that the Court has discretion to consider facts helpful in determining an appropriate sentence.

Defendant has not explained why he did not raise this claim at any point earlier in the proceedings, specifically at sentencing. Nor can he show that he was prejudiced by these remarks, partly because the sentencing judge explained the rationale for sentence on the record, as required by SENTAC. *See* discussion, *supra*. For these reasons, the claim is procedurally barred under Rule 61 (i)(3).

On the merits, the Court decides first whether there was any misconduct on the part of the prosecutor. Striking the balance between permissible and impermissible

comment by a prosecutor calls for judicial discretion.[7] If there was no misconduct, the inquiry ends. If there was misconduct, the Court must consider related factors.[8]

Defendant challenges the following comments by both the lead prosecutor and the prosecutor from the Child Predator Unit.

> Ms. Cohee: [The victim and her mother] have moved to Virginia. They wanted to distance themselves from this as much as possible. The victim is struggling with this greatly. Sentencing Tr. at 6.

These are statements of fact based on Ms. Cohee's communications with the Victim and her family, supported by the record. *Id*. at 6. Thus, the statements do not constitute prosecutorial misconduct, and judicial inquiry ends.

> Ms. Cohee: I think [Defendant] is doing the same thing here in minimizing his actions against his own daughter. *Id*. at 7.

Just prior to this statement, Ms. Cohee had referred to an earlier incident where Defendant had engaged in inappropriate relationships with players on a team he coached. Defendant minimized his conduct and claimed that the accusations were inaccurate. The prosecutor saw Defendant taking a similar stance on the charges regarding his daughter.

Although Defendant had previously pled guilty to the charges, at the sentencing hearing he said that the massages were given to alleviate his daughter's back pain. He

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[7] *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

[8] *Erskine v. State*, 4 A.3d 391, 396 (Del. 2010).

then stated, "Massages were never meant to be offensive or sexual in nature, but [at] some point I crossed a line and purely accidentally and unintentionally touched her breast inappropriately." *Id*. at 5. Thus, he identified the touching as an accidental, one-time occurrence. He plainly stated that he had no intention to do so.

Also at sentencing, he did not acknowledge that he had digitally penetrated his daughter's vagina. The prosecutor's assertion that Defendant minimized his crimes is confirmed by Defendant's own statements and thus does not constitute prosecutorial misconduct.

> Ms. Cohee: Then after his Level 5 time there should be extensive Level 3 probation because the [Child Predator Unit's] concern, even by his own evaluation that there is at least a low if not moderate risk for re-offending. . . . There were a total of 397 images and videos of child pornography discovered on the Defendant's computer. *Id*. at 8.

The record shows that defense counsel arranged for Ron Wolskee, L.C.S.W., of Counseling Services, Inc., to evaluate Defendant's test results. Mr. Wolskee's report showed that Defendant scored low to moderate risk for re-offending and that he had difficulty understanding and maintaining boundaries. *Id.* at 4. Thus, the prosecutor's statement about re-offending is based on the forensic evaluation and the precise number of images and videos of child pornography found on Defendant's computer. This information would have been admissible at trial. This claim of prosecutorial misconduct

has no merit.

> Ms. Slutsky (from the Child Predator Unit): There were also images of infants raped by adult men. Your Honor, he has a predatory sexual interest in children. We know this specifically. *Id.* at 9.
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> The Court: Was part of this [computer] activity during the time that he abused his daughter?
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> Ms. Slutsky: When [the Victim] refused him, he then turned to the computer, and, Your Honor, who knows what would have happened after. *Id.* at 10.

Ms. Slutsky is a Deputy Attorney General in the Child Predator Unit. Her work focuses on offenders who are charged with sexual crimes against children, such as Defendant. Speaking from her experience and her familiarity with the evidence against Defendant, including forensic evaluations, Ms. Slutsky voiced an informed opinion that Defendant has predatory sexual interest in children. She said nothing that was not supported by the record.

Based on her familiarity with the dates of the alleged abuse and the dates the computer registered Defendant's pornographic searching, Ms. Slutsky was also able to infer that Defendant resorted to Internet child pornography when his daughter no longer permitted his advances. Her statements did not constitute prosecutorial misconduct.

Finally, SENTAC advises that aggravating or mitigating factors used to go outside the presumptive sentence are to be set forth on the record. SENTAC presents a non-exclusive list of factors that a judge may rely on to reach an appropriate sentence. When an exceptional sentence is imposed, the factors leading to that sentence must be stated on the record and identified on the sentencing order.

The list of aggravators includes "Vulnerability of Victim." When imposing the sentence for Continuous Sexual Abuse of a Child, the Court cited to this factor:

> I am satisfied that in this particular case, that there is an aggravating factor of the defendant taking advantage of his daughter's vulnerability, a person who really could not defend herself, and was placed in a position where she had to submit to his wrongful sexual appetite. (Sentencing Tr. at 11.)

The statutory penalty range for this offense is 2 to 25 years. The presumptive sentence is 2 to 5 years. The Court stated the reason for going beyond the presumptive range. Regardless of comments from the prosecutor, or defense counsel for that matter, the record shows that the correct procedure was followed in imposing an enhanced sentence and also provides ample basis for the enhancement.

Defendant's claims of prosecutorial misconduct fail both procedurally and substantively.

Third, Defendant asserts that defense counsel was constitutionally ineffective for refusing to allow him to read the PSI report and for failing to present mitigating factors, including on his mental health history and his own experience of being sexually abused as a child. Defense counsel testifies by way of affidavit that neither counsel or defendants

receive copies of PSI reports but that he took notes while reading the report and shared those notes with Defendant. Defense counsel also states that he provided the following paperwork to the PSI officer: a copy of a report written by Ron Wolskee, L.C.S.W, which included his diagnosis of bipolar and PTSD; a report prepared by John Dowling of the Office of the Public Defender; and excerpts from a treatise on PTSD. These materials were made part of the PSI report.

Defense counsel chose not to raise the mental health issues at sentencing because many defendants have similar diagnoses. Defendant's own history of being sexually abused as a child was also contained in Mr. Wolskee's report. Defense counsel made this history known to the State, but chose not to raise it at sentencing because prosecutors often parry by saying that the defendant suffered abuse and knows how bad it is, yet did it to someone else. The State argues that defense counsel made a tactical decision based on his experience to let the PSI report stand on its own as to Defendant's mental health history and childhood abuse.

To prevail on a claim of ineffective assistance of counsel in the context of a guilty plea, Defendant must show that defense counsel's representation fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable possibility that he would not have accepted the plea but would have insisted on going to trial.[9] A defendant must make concrete allegations of actual prejudice and substantiate

[9]*Hill v. Lockhart*, 474 U.S. 52, 57-60 (1985); *Somerville v. State*, 703 A.2d 629, 631 (Del.1997).

them or risk summary dismissal.[10]

The record shows that defense counsel made a conscious, tactical decision to include the mental health issues and childhood abuse history in the PSI report but not to raise them at sentencing. Defense counsel gives reasonable explanations for his decisions, and his choices do not constitute attorney error. Nor can Defendant show prejudice because his attorney successfully negotiated a plea that resulted in a 14-year period of incarceration compared to the maximum of 69 years that Defendant could have received if he accepted the State's first offer. Defendant has not substantiated his assertions, which are conclusory and unfounded. Defense counsel was not ineffective.

Defendant also states in conclusory fashion that he has had a spinal injury since he was 20 years old, which requires lifetime treatment. However, he has not shown that his attorney was aware of the alleged injury, provided any medical documentation or alleged any prejudice he suffers related to the injury. In sum, Defendant has failed to show either attorney error or actual prejudice.

Fourth, Defendant asserts that the sentencing philosophy of the General Assembly and SENTAC is to impose the least restrictive and cost effective sentences possible. He offers further commentary on sentencing philosophy and goals. However, Defendant did not raise these issues at the sentencing hearing. Nor has he indicated how his 14-year sentence ran afoul of legislative goals. His bare assertions do not rise to the level of a

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[10] *Younger v. State*, 580 A.2d 552, 556 (Del.1990).

cognizable claim for relief.[11]

Any inferred argument that Defendant should have received a lighter sentence in light of legislative goals is procedurally barred under Rule 61 (i)(3). Defendant has not explained why he did not raise this issue earlier in the proceedings and he has articulated no way in which his sentence violates legislative or SENTAC intent. This claim has no merit.

Fifth, Defendant offers a list of cases which he asserts are comparable to his own. However, he never referred to these cases earlier in the proceedings and makes no attempt to show how they could serve to achieve a lighter sentence. Like his commentary on sentencing goals, Defendant's compilation of case law does not state a claim for relief from his sentence or provide any viable reason for him to withdraw his guilty plea. He has made a list, not a claim.

For all these reasons, Defendant's motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

Richard F. Stokes, Judge

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[11] *State v. Wright*, 2008 WL 2943386 (Del.Super.); *State v. Deputy*, 1989 WL 158454 (Del.Super.).