IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 0503008811
	)	
	)	
JOHN A. DIXON, JR.	)	
	)	
Defendant.	)	
	)	

Submitted: June 30, 2011
Decided: July 15, 2011

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED.

Renee L. Hrivnak, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

John A. Dixon, Jr., Howard R. Young Correctional Institute, Wilmington, Delaware, *pro se.*

PARKER, Commissioner

This 15th day of July, 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On March 2, 2010, Defendant John A. Dixon, Jr. pled guilty to one count of Possession of a Deadly Weapon by a Person Prohibited ("PDWPP"). All the remaining charges of the indictment were dismissed.[1] As part of the plea agreement, the parties agreed to immediate sentencing. The State agreed to recommend a 7 year sentence, to be suspended after a 5 year minimum mandatory term of incarceration, followed by deceasing levels of probation. This is exactly the sentence the Superior Court imposed.

2. The parties further agreed "that a minimum of 5 years of Level V must be imposed pursuant to 11 Del. C. § 1448(e)(1)(c) due to the defendant's prior violent felony convictions." The State agreed not to seek to sentence the defendant as a habitual offender pursuant to 11 Del. C. § 4214.[2]

3. Defendant Dixon did not file a direct appeal to the Delaware Supreme Court.

4. The facts giving rise to this action reveal that Defendant Dixon fled from the police- on motorcycle and then on foot. When caught, he had a loaded 9 mm Hi-Point semi-automatic handgun concealed in the front pocket of his hooded sweatshirt. He told police that he fled because he had a weapon on his person and knew that the tags on his motorcycle were fictitious.

5. Defendant was indicted on two felony charges (possession of a deadly weapon by a person prohibited and carrying a concealed deadly weapon); two misdemeanor charges (resisting arrest and possession of a non-narcotic schedule 1 controlled substance-marijuana); and seven motor vehicle violations.

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[1] Plea Agreement of March 2, 2010.
[2] *Id.*

6. Prior to the subject charges, in 1991, Defendant was convicted on the charge of robbery in the second degree. Prior to that sentencing, Defendant was declared to be a habitual offender under the provisions of 11 Del. C. § 4214(a).[3] He was sentenced in 1991 to a Level V term of ten years.

7. Defendant never disclosed on the Immediate Sentencing Form he completed in the subject action that he had already been declared a habitual offender for a previous conviction. Instead, Defendant misrepresented on the Immediate Sentencing Form that he had, in fact, never been previously declared a habitual offender.[4]

8. At the time of the subject indictment, Defendant had previously been convicted of Reckless First Degree in 1980, Robbery Second Degree in 1984, Attempted Robbery First Degree in 1986,[5] and Robbery Second Degree in 1991.[6]

9. Undoubtedly, Defendant Dixon received a significant benefit by pleading guilty. Having already been sentenced as a habitual offender under 11 Del. C. § 4214(a) for a previous conviction, Defendant was clearly eligible for habitual offender status on the subject felonies and could well have been facing up to a life sentence if he went to trial and was convicted on these charges. Under the terms of the Plea Agreement, the State agreed not to seek habitual offender status and agreed to seek only the five year mandatory sentence required by 11 Del. C. § 1448, for persons previously convicted of two or more violent felonies.

10. On May 13, 2010, Defendant filed a Motion to Correct Illegal Sentence and Compel Department of Corrections to Credit for Good Time. Both at the time of

[3] See, *Dixon v. Williams,* 2000 WL 1611104, at *1 (Del.Super. 2000).
[4] See, *State v. Dixon,* Immediate Sentencing Form dated March 2, 2010.
[5] See, *Dixon v. State,* 1987 WL 37298 (Del.Supr. 1987).
[6] *Dixon v. Williams,* 2000 WL 1611104 (Del.Super. 2000).

Defendant's indictment on the subject charges in 2005 as well as at the time of his sentencing in March 2010,[7] 11 Del. C. § 1448 established a five year mandatory sentence for a person convicted of PDWPP, if that person had previously been convicted of two or more violent felonies.[8] However, this statute was amended in July 2007 to prohibit defendants sentenced pursuant thereto from receiving good time credit.[9] Since Defendant was charged with a violation of 11 Del. C. § 1448 in 2005, prior to the 2007 amendment prohibiting good time credit, Defendant filed the motion to enable him to receive good time credit.

11. By Order dated June 8, 2010, the Superior Court denied Defendant's motion for correction of sentence.[10] In the June 8, 2010 Order, the Superior Court clarified that its Sentencing Order of March 2, 2010 never prohibited Defendant from receiving good-time credit. The Superior Court stated that Defendant failed to present documentation to support his contention that the Department of Correction was not correctly calculating his sentence.[11]

12. On August 6, 2010, Defendant renewed his motion for correction of sentence. This time he provided documentation to support his contention that the Department of Correction was not allowing him to receive good time credit. By Order dated August 26, 2010, the Superior Court granted Defendant's motion. On August 26, 2010, the Superior

[7] The long delay in the resolution of the case appears to stem from the fact that Defendant failed to appear for his arraignment in 2005 and the capias against him was not returned until November 2009.
[8] Prior to 2007, 11 Del. C. § 1448 (e)(3) required the imposition of 5 years at Level V, if the person had been convicted on two or more separate occasions of any violent felony. In July 2007, the statute was amended. The same language that appeared at 11 Del. C. § 1448 (e)(3) prior to July 2007 was now set forth at 11 Del. C. § 1448 (e)(1)(c). Both prior to 2007 and after the statutory amendment in 2007, 11 Del. C. § 1448, established a five year mandatory sentence for a person convicted of PDWPP, if that person had previously been convicted of two or more violent felonies.
[9] See, 11 Del. C. § 1448 (e)(4)
[10] See, Superior Court Docket No. 22.
[11] *Id.*

Court modified the Sentencing Order of March 2, 2010 to clarify that Defendant was permitted to receive good time credit.

13. Specifically, the Sentencing Order was modified on August 26, 2010 as follows:

> The Sentence Order dated March 2, 2010 is hereby modified to clarify that level 5 time is not mandatory. Defendant was charged in 2005 with PDWBPP. 11 Del. C. Sec. 1448 was amended in 2007 to impose mandatory time. Therefore, defendant is eligible to receive good time credit.[12]

14. On March 2, 2011, Defendant filed this motion for postconviction relief. Defendant raises four grounds as the basis for the subject motion. Defendant raises the following: (1) "Violation of Rule 61, 749 Fundamental Fairness"; (2) "Illegal Sentence"; and (3) two grounds of ineffective assistance of counsel, prosecutorial misconduct.

15. Before turning to the specific contentions raised by Defendant in his Rule 61 motion, it is important to emphasis that at the time of Defendant's sentencing, the Superior Court was unaware that Defendant had already been sentenced as a habitual offender for a previous conviction in 1991. Defendant had not disclosed this fact on the Immediate Sentencing Form and had instead misrepresented that he was never previously declared a habitual offender. It is also important to emphasis that Defendant had at least four prior violent felony convictions prior to the subject conviction.

16. The Superior Court sentenced Defendant to the five year mandatory Level V term of incarceration required by 11 Del. C. §1448 and permitted Defendant to receive good time credits. He was not sentenced as a habitual offender. Defendant, through his Rule 61 motion, seeks to withdraw his plea and vacate his sentence. Defendant is strongly urged to carefully consider his pursuit of this goal. If Defendant was successful in accomplishing this result, and he thereafter was convicted of the felony charges in the

[12] August 26, 2010 Modified Sentence Order

indictment, the Superior Court would be sentencing Defendant on his actual record with full knowledge that he was already sentenced as a habitual offender in a prior conviction. Following a conviction, Defendant could not possibly receive a lesser sentence, since he already received the minimum sentence possible, and could very well fare far worse.

17. As it is, Defendant's contentions raised in his Rule 61 motion are not meritorious and do not result in the granting of the relief requested.

18. A defendant is bound by his answers on the guilty plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.[13] In this case, the Truth-in-Sentencing Form and plea colloquy reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the charge on which he was sentenced. Defendant represented that he had reviewed the plea agreement, immediate sentencing form and truth-in sentencing guilty plea form with his counsel.[14] Defendant represented that he was satisfied with his counsel's representation of him. Defendant also acknowledged his guilt.[15] Only after finding that Defendant's plea was entered into knowingly, intelligently and voluntarily did the court accept the plea.[16]

19. The record in this case reflects that Defendant Dixon understood the nature of the plea and its consequences, was satisfied with the representation provided by counsel, and knowingly, intelligently and voluntarily entered the plea. Consequently, Defendant has not met his burden of showing that he should not be bound by his prior representations under oath.

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[13] *State v. Harden,* 1998 WL 735879, *5 (Del. Super.); *State v. Stuart,* 2008 WL 4868658, *3 (Del. Super. 2008).
[14] March 2, 2010 Plea and Sentencing Transcript, at pg. 3.
[15] *Id.,* at 3-5,
[16] *Id.*

20. In Defendant's Rule 61 motion, he first contends a "violation of Rule 61, 749 Fundamental Fairness" in that his criminal record was purposely enhanced, and false criminal charges were added to his record, to obtain a stiffer sentence from the judge.

21. It is first noted that this claim is procedurally barred since it was required to be raised in prior proceedings to be procedurally preserved.[17] Defendant should have raised this claim on direct appeal to be procedurally preserved.

22. Even if this claim was not procedurally barred, it is without merit. Defendant received the five year mandatory sentence required to be imposed for a person convicted of PDWPP, if that person was previously convicted of two or more violent felonies. Defendant not only received the minimum jail sentence required by that statute but was also permitted to receive good time credits as well.

23. The "false criminal charges" to which Defendant is referring is that the State indicated on the Immediate Sentencing Form that Defendant's conviction in 1991 was to the charge of Robbery First Degree. It appears it was actually a conviction for Robbery Second Degree, also a violent felony. The State further indicated that Defendant Dixon was convicted of two counts of Reckless First Degree in 1980.[18] Defendant Dixon contends that he was convicted of only one count of Reckless First Degree in 1980.

24. At the time of the indictment, it is not contested that Defendant had previously been convicted of at least one count of Reckless First Degree in 1980, Robbery Second Degree in 1984, Attempted Robbery First Degree in 1986,[19] and Robbery Second Degree

[17] *Malin v. State,* 2009 WL 537060, at *5 (Del.Super.); Super.Ct.Crim.R. 61(i)(2)& (3).
[18] Immediate Sentencing Form dated March 2, 2010.
[19] See, *Dixon v. State,* 1987 WL 37298 (Del.Supr. 1987).

in 1991.[20] Consequently, Defendant had been convicted of at least 4 prior violent felony convictions prior to his conviction of the subject PDWPP charge.

25. It cannot go without mention that Defendant noted his disagreement with the State's recitation of his criminal history on the Immediate Sentencing Form.[21] On that form he represented: "No Reckless First Degree 1980 only one; no first degree robbery 1991".[22] Defendant never disclosed on the Immediate Sentencing Form that he had, in fact, been convicted of a violent felony in 1991 but that the felony conviction was Second Degree Robbery rather than First Degree Robbery.[23] Moreover, on the Immediate Sentencing Form, Defendant misrepresented that he had never previously been sentenced as a habitual offender, when, in fact, he had. Defendant should not be pointing fingers at others given his own deceptions.

26. Defendant's first claim that his sentence was somehow enhanced is procedurally barred and without merit. He received the minimum sentence required to be imposed by statute. Defendant has failed to establish any prejudice or a constitution violation.

27. Turning next to Defendant's second claim, illegal sentence, Defendant contends that "movant was original sentenced under Del. C. 11(e)(1)(c) in the bench book law 2007. Movant was charged in March of 2005, there is no (e)(1)(c) in the bench book law 2005 edition. Therefore making the entire plea and sentencing process illegal in it self."

28. Since Defendant's plea was entered into voluntarily, intelligently and knowingly, Defendant waived his right to challenge any alleged errors or defects occurring prior to

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[20] *Dixon v. Williams,* 2000 WL 1611104 (Del.Super. 2000).
[21] Immediate Sentencing Form dated March 2, 2010.
[22] *Id.*
[23] On the Immediate Sentencing Form, Defendant denies that he was convicted of first degree robbery in 1991. He never discloses his robbery second degree conviction in 1991. He was required to make this disclosure in response to the question: "Do you have any felony convictions, since 1988, in addition to those listed above?" Defendant answered this question in the negative.

the entry of his plea, even those of constitutional proportions.[24] This claim was waived when Defendant knowingly, freely and intelligently entered his plea.

29. In addition to having waived this claim, this claim is also procedurally barred pursuant to Superior Court Criminal Rule 61(i)(4), since this claim has already been formally adjudicated. Defendant raised this claim in his motion for correction of sentence.

30. Even if not waived or procedurally barred, this claim is without merit. Defendant was sentenced to the five year mandatory jail sentence with the ability to earn good time credits. Accordingly, Defendant was sentenced in accordance with the pre-2007 amendments. He has not been prejudiced in any way.

31. For the sake of completeness, it is noted that the Superior Court was not necessarily required to give Defendant the benefit of the statute as it existed in 2005, even though it did. In a plea agreement, the parties have leeway to negotiate and agree on sentencing recommendations. The United States Supreme Court recently reiterated that plea bargains are the result of complex negotiations suffused with uncertainty.[25] Defendants may waive their constitutional rights when entering into plea agreements.[26]

32. If Defendant was sentenced pursuant to 11 Del. C. §1448, after a conviction at trial, the Superior Court may very well be required to give Defendant the benefit of the pre-2007 amendments. However, a plea agreement is different. The parties agreement that Defendant be sentenced pursuant to 11 Del. C. §1448 (as it now exists) rather than as a habitual offender pursuant to 11 Del. C. §4214(a), should be upheld and enforceable,

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[24] *Somerville v. State,* 703 A.2d 629, 632 (Del. 1997); *Modjica v. State,* 2009 WL 2426675 (Del. 2009); *Miller v. State,* 840 A.2d 1229, 1232 (Del. 2004).
[25] *Premo v. Moore,* 131 S.Ct. 733, 741 (2011)
[26] *Brown v. State,* 2009 WL 3588006 (Del. 2009).

and not subject to attack at a later time by Defendant. Defendant's second claim has been waived by his guilty plea, is procedurally barred, and is without merit.

33. In Defendant's third claim, he restates his first two claims and recouches them as ineffective assistance of counsel and prosecutorial misconduct contentions. Specifically, in Defendant's third claim, Defendant contends that "counselor did not research law and allowed movant to be sentenced under an illegal sentence, prosecutor did same knowingly and presented false and enhanced criminal record to said judge which may have affected judge decision at sentencing."

34. Defendant's third claim, like his first two claims, has been waived by his guilty plea, is procedurally barred, and is without merit, for the reasons discussed in connection with Defendant's first two claims.

35. Turning to Defendant's fourth and final claim, Defendant alleges that his counsel was ineffective for "refusing to investigate movant's case in any form, only telling movant to take plea bargain, telling movant that police needed no particular evidence to convict movant in said case, cause movant to plea guilty out of pure fear."

36. First, Defendant waived this claim when he voluntarily, intelligently and knowingly entered his guilty plea. Defendant, by the entry of his guilty plea, waived the right to challenge any alleged errors or defects occurring prior to the entry of his plea, even those of constitutional proportions.[27] This claim that Defendant seeks to raise involves allegations of defects, errors, misconduct and deficiencies which occurred prior to the entry of the plea, and were waived when Defendant knowingly, freely and intelligently entered his plea.

[27] *Somerville v. State,* 703 A.2d 629, 632 (Del. 1997); *Modjica v. State,* 2009 WL 2426675 (Del. 2009); *Miller v. State,* 840 A.2d 1229, 1232 (Del. 2004).

37. Even if Defendant had not waived his claim, it is without merit. The record before the Court, including Defendant Dixon's own statements, undermines his claim that he was forced to accept the plea as a result of ineffective counsel. Indeed, Defendant during the plea colloquy and in his signed Truth-In Sentencing Guilty Plea Form expressly represented that nobody, not his attorney, the State, nor anyone else, threatened or forced him to enter his guilty plea. Defendant further represented that he was satisfied with his counsel's representation of him. As previously discussed, Defendant is bound by his prior representations under oath.

38. Moreover, Defendant fails to identify any specific issue that he contends that his counsel should have investigated but did not. In fact, Defendant's counsel represented that he did investigate Defendant Dixon's case.[28] Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim under Rule 61.[29] The Court will not address Rule 61 claims that are conclusory and unsubstantiated.[30]

39. In order to prevail on an ineffective assistance of counsel claim in the context of a guilty plea challenge, the defendant must show that his counsel's efforts "fell below an objective standard of reasonableness" and that, counsel's actions were so prejudicial that "there was a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial."[31] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[32]

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[28] See, Affidavit of John S. Edinger, Jr. in response to Defendant's Rule 61 motion, at pg. 2.
[29] *State v. Chambers,* 2008 WL 4137988, at *1 (Del.Super.).
[30] *State v. Mobley,* 2007 WL 3287999, at *3 (Del.Super.); *State v. Donohue,* 2008 WL 5206779 (Del.Super.)
[31] *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Somerville v. State,* 703 A.2d 629, 631 (Del. 1997).
[32] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

40. There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[33] The purpose of this presumption is to eliminate the distorting effects of hindsight in examining a strategic course of conduct that may have been within a range of professional reasonableness at the time.[34]

41. The United States Supreme Court recently reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.[35] The United States Supreme Court cautioned that in reviewing ineffective assistance of counsel claims in the context of a plea bargain, the court must be mindful of the fact that "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks."[36]

42. Here, Defendant's ineffective assistance claims are undermined by the record and fails to satisfy *Strickland.* Defendant fails to state a legitimate ground for relief against his counsel. In this case, Defendant fled from the police- on motorcycle and then on foot. When caught he had a loaded 9 mm Hi-Point semi-automatic handgun concealed in the front pocket of his hooded sweatshirt. Defendant told the police that he fled because he had a weapon on his person and knew that the tags on the motorcycle were fictitious. The case against Defendant was formidable and if convicted Defendant was facing sentencing as a habitual offender and could have been sentenced to up to life in prison.

43. Defendant received a significant benefit by pleading guilty and his guilty plea represented a rational choice given the pending charges and possible sentences he was facing. Defense counsel's representation of Defendant was reasonable. Defendant has

[33] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).
[34] *Id.*
[35] *Premo v Moore,* 131 S.Ct. 733, 739-744 (2011)
[36] *Id.* at * pg. 741.

failed to satisfy either prong of the *Strickland* test, and therefore, his claims of ineffective assistance of counsel fail.

44. The fact that Defendant may have accepted the plea agreement "out of pure fear" does not mean that the plea should not have been accepted or that his fear was not justified. Defendant, if convicted, was facing up to life in prison. Defendant's fear of a conviction was justified and his counsel provided sound advice in urging Defendant to accept the plea.

45. In this case, Defendant's claims are waived, procedurally barred, and without merit. As to those claims that are procedurally barred, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances.[37] The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."[38] The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the "interests of justice" require it to consider the otherwise procedurally barred claims for relief.[39]

[37] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[38] *Id.*
[39] *Id.*

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

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Commissioner Lynne M. Parker

oc: Prothonotary
cc: John S. Edinger, Jr., Esquire