SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

September 14, 2007

Jamie S. Dixon
SBI#
SCI
P.O. Box 500
Georgetown, DE 19947

RE: State v. Jamie S. Dixon, Def. ID# 0609002845

Date Submitted: September 10, 2007

Dear Mr. Dixon:

Pending before the Court is a motion for postconviction relief which defendant Jamie S. Dixon ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("R. 61"). This is my decision denying the motion.

On or about September 5, 2006, defendant was arrested for various crimes he committed when he raped the clerk of a convenience store he robbed on or about September 3, 2006. Thereafter, the Grand Jury indicted defendant on charges of rape in the first degree, robbery in the first degree, assault in the first degree, and kidnapping in the first degree.

On April 4, 2007, defendant pled guilty to the charges of rape in the first degree; robbery in the first degree; and assault in the second degree, causing physical injury to a person who is 62 years of age or older. The assault in the second degree was a lesser-included offense of the

original charge of assault in the first degree. The Judge taking the plea was The Honorable E. Scott Bradley. It was not The Honorable T. Henley Graves, as defendant alleges in his postconviction motion.

The plea agreement, which defendant signed, set forth the terms and conditions of the plea and the potential sentences on each charge. It specified as follows. The sentence for rape in the first degree was 15 years to life; that for robbery in the first degree was five to 25 years, and the first five years was a minimum mandatory; and that for assault in the second degree was eight years to life. It was noted as follows underneath the assault second information: "State agrees to file HO motion only as to assault offense. As a § 4201(c) violent felony 8 YR MAX = MIN". As was made clear from the plea colloquy, the abbreviation "HO" stands for habitual offender. The plea agreement also indicated that defendant would be sentenced after a presentence investigation took place and a report was prepared.

In the Truth-In-Sentencing Guilty Plea Form ("TIS Form"), which defendant signed, the following information appears:

OFFENSE	STATUTORY PENALTY	TIS GUIDELINE
Rape 1st	15 yrs. min. - Life	15 yrs. min.
Robbery 1st	5 yrs. min. - 25	5 yrs. min.
Assault 2d (lio) §612(a)(5)	[0-8 yrs.] If Habit. Off. 8 yrs. min. - Life	8 yrs. min (HO)

In the section asking if he understands there is a minimum mandatory penalty, he responded, "Yes", and the minimum mandatory set forth was : "15 (Rape) + 5(Robb.) + 8 if Habit. Off."

Defendant answered, "Yes", to the following:

> Do you understand that because you are pleading guilty you will not have a trial, and you therefore waive (give up) your constitutional right:
>
> (1) to be **presumed innocent** until the State can prove each and every part of the charge(s) against you beyond a reasonable doubt;
> (2) to a **speedy and public trial**;
> (3) to **trial by jury**;
> (4) to **hear and question the witnesses** against you;
> (5) to **present evidence** in your defense;
> (6) to **testify** or not testify yourself; and,
> (7) to **appeal** to a higher court?

Defendant affirmed in the TIS Form that he was satisfied with his lawyer's representation of him, that he was satisfied that his lawyer had fully advised him of his rights and his guilty plea, that he had read and understood all the information contained in the form, and that he freely and voluntarily had decided to enter the plea. He answered, "No" to the question of whether anyone had promised him what he sentence would be.

Pertinent portions of the plea colloquy are set forth below:

> MS. DUNN: ***
> He is pleading guilty to Count 1, rape in the first degree. He realizes that this is, at least, a 15-year minimum mandatory up to life on that. He is entering a guilty plea on robbery in the first degree and because of a prior, there is at least a five-year minimum on that, up to 25 years. He is entering a plea of guilty to the reduced charge of assault in the second degree. The State has indicated its intent to come forward before sentencing with a habitual offender motion under Subsection A and applying it to the assault second degree charge. So Mr. Dixon does realize that this Court could sentence him anywhere between the minimum of 28 years up to life and that we will go forward with a PSI then in this case.
>
> ***
>
> THE COURT: I understand you have decided to plead guilty to the charges of rape in the first degree, robbery in the first degree, and assault in the second degree; is that correct?
>
> THE DEFENDANT: Yes.

THE COURT: Do you understand the nature of each of those offenses?

THE DEFENDANT: Yes.

THE COURT: Do you understand the maximum penalties you face for each offense?

THE DEFENDANT: Yes.

THE COURT: Do you understand the minimum periods of incarceration you face on the rape first and robbery first?

THE DEFENDANT: Yes.

THE COURT: Do you understand the minimum periods of incarceration you face on the assault second if you are determined to be an habitual offender?

THE DEFENDANT: Yes.

THE COURT: Do you understand the maximum you face on that?

THE DEFENDANT: Yes.

THE COURT: That would take it up to life; do you understand that, Mr. Dixon?

THE DEFENDANT: Yes.

THE COURT: Did you discuss with Ms. Dunn the seven rights on this form, the seven rights in bold print?

THE DEFENDANT: Yes.

THE COURT: Do you understand those rights?

THE DEFENDANT: Yes.

THE COURT: Do you understand by pleading guilty you are waiving those rights?

THE DEFENDANT: Yes.

THE COURT: Do you understand there will not be a trial now?

THE DEFENDANT: Yes.

THE COURT: Did anybody force you to take this plea?

THE DEFENDANT: No.

THE COURT: Has anybody promised you anything in exchange for this plea?

THE DEFENDANT: No.

***

THE COURT: Are you satisfied with your attorney's representation of you?

THE DEFENDANT: Yes.

THE COURT: Are you certain this is how you want to resolve the charges against you?

THE DEFENDANT: Yes.

On April 4, 2007, the State of Delaware ("the State") filed a motion to declare defendant an habitual offender. A presentence investigation report was undertaken and a report was prepared. On May 25, 2007, The Honorable Richard F. Stokes sentenced defendant.

At the time of sentencing, defendant's trial attorney represented that defendant understood the sentencing range, which included that for an habitual offender determination on the assault second conviction. It was clarified that defendant acknowledged the three prior felony convictions set forth in the motion to declare him an habitual offender and he understood the absolute minimum sentence he was facing was 28 years but he understood he was facing a life sentence. The Court declared him to be an habitual offender. The Court found aggravating circumstances existed and for those reasons departed from the presumptive sentence. The Court sentenced him as follows. As to the rape in the first degree, he was sentenced to Level 5 for the

balance of his natural life, with the first 15 years being mandatory. As to the robbery in the first degree, he was sentenced to five years at Level 5, with the five years being mandatory. As to the assault in the second degree, he was sentenced to eight years at Level 5, followed by six months of Level 4 Work Release, which was imposed pursuant to 11 Del. C. § 4204(l).

Defendant did not appeal therefrom. On July 23, 2007, he filed a motion for postconviction relief. In that motion, he asserts the following grounds as providing him relief.

First, he erroneously maintains that Judge Graves took his plea. It was Judge Bradley who took his plea. He questions how Judge Stokes could have sentenced him when another Judge took his plea. Even though he acknowledges the plea agreement indicated the sentencing range was 28 years to life, he then argues he would not have taken the plea if he had realized he would have received life, rather than the minimum15 years, on the rape first conviction.

His second argument is not particularly clear.[1] It appears he is arguing he should not have been declared an habitual offender because he was not previously warned that commission of further offenses could result in such a declaration and because he was not provided a chance for rehabilitation.

Finally, he argues trial counsel was ineffective because she did not inform him of any rights of due process and that the Judge "would not go with the accepted plea".

DISCUSSION

The first step this Court takes is to determine if the claims defendant advances in this Rule 61 motion may proceed or if they are procedurally barred. In the version of Rule 61(i) which

[1]He states: "This is my first time every begin told about the habitual so how can you be decleared and sentenced as an Habitual with no prior treatment."

applies to defendant's case, it is provided as follows:

> *Bars to relief.* (1) Time limitation. 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.
> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim in warranted in the interest of justice.
> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
> (A) Cause for relief from the procedural default and
> (B) Prejudice from violation of the movant's rights.
> (4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.
> (5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to 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.

Defendant's motion is timely filed. Super. Ct. Crim. R. 61(i)(1).

Defendant's argument that the habitual offender statute should not have applied to him because he did not have prior notice it might apply and was not given treatment is procedurally barred pursuant to R. 61(i)(3). Defendant should have raised this issue on appeal and did not. He has not shown that an exception to the procedural bar exists. However, even if he did overcome the procedural bar, he would not have been successful on this ground. The law does not require that defendants have prior notice that any subsequent conviction will result in being deemed an habitual offender down the road. Eaddy v. State, Del. Supr., No. 440, 1995, Walsh, J. (May 30,

1996) at 3-4. However, there is a requirement that a defendant be given some chance for rehabilitation after each sentencing on the three separate convictions. Shockley v. State, Del. Supr., No. 600, 2003, Berger, J. (April 21, 2004) at 12. As the Supreme Court further explained at Eaddy v. State, supra at 4:

> Although a defendant must have been given "some chance for rehabilitation" before he may be sentenced as an habitual offender, ... [the Supreme] Court has held that "some chance for rehabilitation" means only that some period of time must have elapsed between sentencing on an earlier conviction and the commission for the offense resulting in the later felony conviction. [Citation omitted].

The habitual offender motion and a review of defendant's criminal history contained in his Presentence Investigation Report shows periods of time elapsed between sentencings on defendant's earlier convictions and the commission of subsequent offenses. Thus, he was given the required chances for rehabilitation.

For the foregoing reasons, this ground fails.

In ground one, defendant maintains the same Judge who took his plea should have sentenced him. He, however, names the incorrect Judge who took his plea. Without examining the procedural bars, I dismiss this claim as meritless.

Defendant also argues in ground one that he would not have taken the plea if he had realized he would have been given a life term on the rape in the first degree conviction. This claim is procedurally barred pursuant to R. 61(i)(3) and defendant has not made any attempt to overcome the procedural bar. Defendant, however, takes a second opportunity to advance this ground by asserting it within the context of the ineffective assistance of counsel claim contained in ground three. He argues that trial counsel was ineffective because she did not tell him that the

sentencing judge would not go with the "accepted plea".

As the Supreme Court recently explained in Cannon v. State, Del. Supr., No. 20, 2007, Steele, J. (Aug. 2, 2007) at 2: "In order to prevail on a claim of ineffective assistance of counsel in connection with a guilty plea, a defendant must demonstrate that, but for counsel's unprofessional errors, he would not have pleaded guilty, but would have insisted on proceeding to trial."

In this case, defendant is arguing that there was an agreement limiting the time to be imposed on the rape in the first degree conviction to 15 years and that trial counsel did not tell him he was facing a life term on that conviction. The transcript of defendant's guilty plea, the TIS Form, and the plea agreement undermine this contention. Defendant clarified that he understood the maximum sentence he was facing for each conviction and that he had not been promised a definite sentence. "In the absence of clear and convincing evidence to the contrary, ... [defendant] is bound by the representations he made during his guilty plea colloquy. [Footnote and citation omitted]." Id. at 3. Thus, this claim is meritless.

CONCLUSION

For the reasons stated above, defendant's motion for postconviction relief is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Adam D. Gelof, Esquire
Carol J. Dunn, Esquire