

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ITIUS WYNN,	§	
	§	No. 334, 2012
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0910022262
Appellee.	§	

Submitted: March 8, 2013

Decided: May 28, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 28th day of May 2013, upon consideration of the parties' briefs and the Superior Court record, it appears to the Court that:

(1) The appellant, Itius Wynn ("Wynn"), filed this appeal from the Superior Court's May 23, 2012 denial of his first motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61"). We conclude there is no merit to the appeal and affirm the Superior Court's judgment.

(2) On December 21, 2009, Wynn was charged in a sixteen-count indictment with two counts of Assault in the Second Degree, five counts of Reckless Endangering in the First Degree, seven counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), and one count

each of Possession of a Deadly Weapon by a Person Prohibited and Criminal Impersonation. The charges against Wynn arose from an incident on October 31, 2009, when he allegedly fired three bullets into a group of people, striking one person in the chest and one person in the hand.

(3) On May 24, 2010, Wynn pled guilty to five counts in the indictment, *i.e.*, two counts of Assault in the Second Degree, two counts of PFDCF, and one count of Reckless Endangering in the First Degree. The transcript reflects that, during the course of the guilty plea hearing, and consistent with the parties' plea agreement, the prosecutor recommended eight years of incarceration, and the Superior Court ordered a presentence investigation ("PSI").

(4) On August 27, 2010, Wynn was sentenced to a total of thirty-one years of incarceration suspended after twenty-four years for decreasing levels of supervision. Wynn appealed the sentence to this Court, arguing in part that the Superior Court erred by imposing a sentence that was greater than the eight-year sentence recommended by the State. We concluded that Wynn's claim was without merit and affirmed the Superior Court's judgment.¹

¹ *Wynn v. State*, 23 A.3d 145 (Del. 2011).

(5) On February 13, 2012, Wynn filed a motion for postconviction relief under Rule 61. Wynn alleged that his guilty plea was coerced by his trial counsel, that the prosecutor made comments at sentencing that violated the parties' plea agreement, and that he was sentenced illegally because the Superior Court did not verify that he had reviewed the PSI report.

(6) Wynn's motion was referred to a Superior Court commissioner for a report and recommendation. At the direction of the commissioner, the State filed a response to the motion, and Wynn's trial counsel filed an affidavit in response to the claim that he had coerced Wynn into pleading guilty.

(7) By report dated March 7, 2012, the commissioner recommended that Wynn's postconviction should be denied. Wynn filed objections to the report. After *de novo* review, the Superior Court adopted the report and recommendation and denied Wynn's motion for postconviction relief. This appeal followed.

(8) In his opening brief on appeal, Wynn addresses the three claims that were raised in his motion and considered by the Superior Court, namely that his guilty plea was involuntary, that the State breached the plea agreement, and that he was sentenced illegally. Wynn also raises a new claim that was not considered by the Superior Court, *i.e.*, that his trial

counsel's failure to review the PSI report with him prior to sentencing constituted ineffective assistance of counsel. We decline to consider Wynn's new claim in the absence of a Superior Court ruling on that claim.²

(9) Having carefully considered the parties' briefs on appeal, we conclude that the Superior Court's denial of Wynn's postconviction motion should be affirmed. First, we agree that Wynn's related claims of ineffective assistance of counsel and involuntary guilty plea are without merit. On the ineffective counsel claim, there is no basis to overrule the Superior Court's finding that Wynn's claim of a coerced guilty plea was refuted by his trial counsel's sworn affidavit, which the court found credible. As for Wynn's involuntary guilty plea claim, the transcript of the guilty plea colloquy reflects that Wynn answered that no one had threatened him or coerced him in any way to plead guilty, and that he was entering the pleas of his own free will and because he believed it was in his best interest to do so. In the absence of clear and convincing evidence to the contrary, Wynn is bound by those representations.³

(10) Next, Wynn contends on appeal as he did in the Superior Court that the prosecutor breached the plea agreement when he made comments at

² See *Mercer v. State*, 2011 WL 2927774, at *2 (Del. July 20, 2011) (citing Del. Supr. Ct. R. 8.).

³ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

Wynn's sentencing suggesting that the State was in favor of a sentence greater than eight years. According to Wynn, he would not have accepted the State's plea offer and would have insisted on going to trial had he known the State could propose a sentence greater than eight years. The Superior Court denied Wynn's claim as without merit and as procedurally barred, and on appeal, we agree.

(11) The transcript of Wynn's sentencing reflects that, at the outset of the proceeding, the prosecutor responded to the judge's question about an incident mentioned in the PSI report concerning Wynn's ill-advised attempt to send an offer to the shooting victims. Later in the proceeding, the prosecutor commented on Wynn's explanation for the shooting that appeared in the PSI report, characterizing the explanation as "a lie" and "a completely ridiculous story."⁴ At no time during the sentencing proceeding, however, did the prosecutor argue that Wynn should receive a sentence greater than eight years, as Wynn would have us conclude. To the contrary, the transcript reflects that, as to the sentence Wynn should receive, the prosecutor stated, "[p]er the plea agreement . . . the State is recommending the eight years."⁵

⁴ Hr'g Tr. at 11, 12 (Aug. 27, 2010).

⁵ *Id.* at 10.

(12) Furthermore, Wynn's claim that the plea agreement was breached at sentencing is procedurally barred under Rule 61(i)(3) because the claim could have been raised at sentencing and/or on direct appeal and was not.⁶ On appeal, Wynn has not demonstrated that review of the claim under Rule 61(i)(5) is warranted.⁷

(13) Finally, Wynn's claim of an illegal sentence is also barred under Rule 61(i)(3). Wynn contends that, because he had no opportunity to review the PSI report before sentencing, he was unprepared to address the court's question, and to respond to the prosecutor's accusation, concerning matters raised in the report. Nonetheless, the Superior Court determined, and we agree, that the claim could have been raised at sentencing and/or on direct appeal and was not. On appeal, Wynn has not demonstrated that review of the claim under Rule 61(i)(5) is warranted.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

⁶ See Del. Super. Ct. Crim. R. 61(i)(3) (barring a claim not previously raised absent cause for relief from the procedural default and prejudice).

⁷ See Del. Super. Ct. Crim. R. 61(i)(5) (providing that the procedural bar of (i)(3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation).