**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| STATE OF DELAWARE | ) | |
| | ) | |
| v. | ) | ID No. 9901006050 |
| | ) | ID No. 9809006343 |
| THURMAN L. BOSTON, JR. | ) | |
| | ) | |
| Defendant. | ) | |

Submitted: June 14, 2003
Decided: September 30, 2003

**ORDER**

**On Defendant's *Pro Se* Motion for Postconviction Relief. Denied.**

Donald R. Roberts, Deputy Attorney General, Wilmington, Delaware.

Thurman L. Boston, Jr., *pro se* Defendant, Multi-Purpose Criminal Justice Facility, Wilmington, Delaware.

**CARPENTER, J.**

On this 30th day of September, 2003, upon consideration of Defendant's *pro se* Motion for Postconviction Relief it appears to the Court that:

1. Thurman L. Boston, Jr., ("Defendant"), has filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 and the State has filed its Response. At the request of the Court, Defendant's trial attorney, Raymond M. Radulski, Esquire ("Counsel") filed an affidavit refuting the allegations of ineffective assistance of counsel. For the reasons set forth below, Defendant's Motion for Postconviction Relief is **DENIED**.

2. On August 17, 1999, Defendant pled guilty to Unlawful Sexual Contact Second Degree, Assault Third Degree and Resisting Arrest. On October 15, 1999, this Court sentenced the Defendant to two years incarceration for the Unlawful Sexual Contact, one year incarceration for the Assault and one year of Level III probation for the Resisting Arrest charge.

The Defendant subsequently filed a Motion for Reduction of Sentence pursuant to Superior Court Criminal Rule 35(b), which was denied on January 11, 2000. On March 28, 2001, as a result of the commissioner's recommendation, Judge Gebelein reduced the sentence for the Assault to one year of Level III probation.[1]

[1]The Court notes that the docket appears to reflect that the Defendant's sentence has been modified seven times at various safe street and fast track proceedings.

3. Consequently, Defendant filed a Motion for Postconviction Relief and asserted the following three grounds for relief:

(1) A portion of his sentence was given while he was not present;
(2) The maximum possible consequences of registration were not spelled out by the sentencing judge or the trial judge;[2] and
(3) Ineffective assistance of counsel.

4. After receiving the State's response and the affidavit of Defendant's trial counsel, on May 16, 2003, this Court requested that the Defendant file a response by June 14, 2003. Since the Court has not received a response from the Defendant, the Court will now issue its decision.

5. Before addressing the merits of any claims raised in a motion seeking postconviction relief, this Court must first apply the rules governing the procedural requirements of Superior Court Criminal Rule 61(i).[3] Normally when, as in this case, a Defendant enters a guilty plea, Rule 61(i)(3)[4] bars relief when claims are later raised which were not raised at the plea, sentencing or on direct appeal.

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[2]This motion has been referred to this judge for decision as a result of the retirement of Judge Goldstein, who presided at the plea proceeding.

[3]*See Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (*citing Harris v. Reed*, 489 U.S. 255, 265 (1989)).

[4]Super. Ct. Crim. R. 61(I)(3), states that "[a]ny 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) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant's rights."

Here, the Defendant's claims relate to an alleged issue that supposedly occurred outside of the Defendant's presence and to ineffective assistance of counsel. As such, the Court is required to proceed to the substance of Defendant's motion to determine whether it presented a colorable claim of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings.[5]

6. Superior Court Criminal Rule 61(d)(4) provides that "[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified."[6] In the case at bar, Defendant's first ground for relief is that a portion of the sentence was given while Defendant was not present. The Defendant asserts that he was ordered to register as a sex offender after he was taken out of the courtroom. While the Court does not have a transcript of the sentencing proceeding, the record before it clearly demonstrates that the Defendant was aware of the registration requirement. The plea agreement, entered into by the Defendant, reflects that he would be required to register as a sex offender and that agreement was made a part of the record during the plea colloquy on August 17th, 1999. Furthermore, it should be noted that even if the

[5]*See* Super. Ct. Crim. R. 61(I)(5); *State v. Scott*, 2002 WL 485790, at *3 (Del. Super. Ct.).

[6]Super. Ct. Crim. R. 61(d)(4).

Defendant was not present, the Court is under no obligation to inform him at sentencing of every conceivable collateral consequence of a plea.[7] Further, there is no statutory duty to inform a defendant of sex offender registration and community notification requirements.[8] Here, the Defendant was aware of the obligation and the Court was under no additional duty. As such, the Defendant's claim is without merit.

7. Defendant's second ground for relief is that the maximum possible consequences of registration were not spelled out by the sentencing judge or the trial judge. Defendant asserts that at no time during the plea colloquy or at sentencing was the Defendant advised that the registration would be every year for ten years and that the failure to do so would result in a new offense. The Court accepts the Defendant's representation that this detail as to the registration and consequences of sex offender registration was not articulated by the Court at either proceeding. However, for the reasons set forth above, this claim also must fail.

8. Defendant's final ground for relief is that he had ineffective assistance of counsel because counsel was twice instructed by the trial judge to "protect Defendant's interest" at sentencing and because counsel did not explain the full range of possible consequences of the plea agreement. An ineffective assistance of counsel claim requires a showing that counsel's errors were so serious as to deprive the

[7] *See Drake v. State*, 682 A.2d 626, 1996 WL 343822, at **3 (Del. Supr.).

[8] *See id.*

defendant of a fair trial and resulted in a trial that is unreliable.[9] In order for a movant to prevail on a claim of ineffective assistance of counsel he must satisfy the two-prong test of *Strickland v. Washington*.[10] *Strickland* requires that a defendant show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's unprofessional error, the result of a trial would have been different.[11] Under the first prong of the *Strickland* test, there is a strong presumption that counsel's representation was professionally reasonable.[12] Although this is not insurmountable, *Strickland* mandates that this Court must "eliminate the distorting effects of hindsight" when reviewing counsel's representation.[13] Delaware has additionally held that a defendant must make "concrete allegations of actual prejudice and substantiate them or risk summary dismissal" in claims of ineffective assistance of counsel.[14] The Defendant's allegations fail to meet this test.

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[9]*See State v. Talmo*, 2002 WL 1788111, at *1 (Del. Super. Ct.) (*citing Strickland v. Washington*, 466 U.S. 668 (1984).

[10]*See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[11]*See Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (*quoting Strickland*, 466 U.S. at 688, 694).

[12]*See Albury*, 551 A.2d at 59 (*citing Strickland*, 466 U.S. at 689); *see also Larson v. State*, 1995 WL 389718, at *4 (Del. Supr.); *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

[13]*See Strickland*, 466 U.S. at 689.

[14]*See State v. Wilson*, 2001 WL 392357, at *2 (*citing Younger*, 580 A.2d at 556; *Skinner v. State*, 1994 WL 91138 (Del. Supr.)).

9. Defendant's only basis for ineffective assistance of counsel is that his counsel was twice instructed by the trial judge to protect Defendant's interest at sentencing and that counsel did not explain the full range of possible consequences. The Court finds this contention legally insufficient to prove ineffective assistance of counsel and it is not supported by the record.[15] Mr. Radulski's affidavit reflects that it is his policy and practice to review each and every term of plea agreements with clients prior to signing.[16] Here, the plea agreement, entered into by the Defendant, reflects that he would be required to register as a sex offender. In addition, Mr. Radulski noted that "the transcript of the plea colloquy, which occurred in open court in defendant's presence, makes clear that the plea agreement involved 'sexual offender notification'."[17] In addition, the record reflects that the Court's instructions regarding the protection of the "Defendant's interest" was contained in two letters by Judge Goldstein to defense counsel that were simply forwarded correspondence the Court had received from the Defendant prior to sentencing. The concerns expressed by the Defendant related to the day of trial decision by the Defendant to plead guilty and the Court's refusal to accept the Rule 11 plea and whether the state would be filing a habitual offender petition. Those matters were addressed by his counsel and

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[15]*See Jordan v. State*, 1994 WL 466142 (Del. Supr.); *Anderson v. State*, 2002 WL 187509 (Del. Super. Ct.) (*citing State v. Brittingham,* 1994 WL 750341 (Del. Super. Ct.)).

[16]*See* Affidavit of Raymond M. Radulski at ¶ 4.

[17]*Id*. (*citing* Tr. 8/17/99, p. 2, 3). *See also* Tr. 10/15/99, p. 5, 10.

the Defendant was sentenced in accordance with the plea agreement as executed. It is also evident that Mr. Radulski did act in the Defendant's best interest by resolving the charges in a manner that prevent the Defendant from receiving a life sentence. Since neither *Strickland* prong has been established, the Defendant's claim is denied.

10. Therefore, based upon the above reasoning, the Defendant is not entitled to postconviction relief and the Motion is hereby **DENIED**.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.