

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

December 4, 2008

Frederick B. Donohue
SBI#
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State of Delaware v. Frederick B. Donohue, Def. ID# 0703025024 (R-1)

DATE SUBMITTED: October 30, 2008

Dear Mr. Donohue:

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

On March 19, 2007, defendant was arrested on numerous charges arising from a domestic violence incident which took place on March 17, 2007. Specifically, he was arrested on charges of possession of a firearm during the commission of a felony; assault in the second degree; aggravated menacing (3 counts); reckless endangering in the first degree (3 counts); terroristic threatening (2 counts); and assault in the third degree (2 counts). Defendant's two daughters and his wife were the victims. After this arrest, his daughters disclosed that defendant had sexually abused them. On March 23, 2007, defendant was arrested on 136 counts of rape in the first degree and 3 counts of

continuous sexual abuse of a child. The State of Delaware (“the State”) consolidated these two cases. Defendant was indicted, on May 14, 2007, on all of the above-noted charges plus two added counts of possession of a firearm during the commission of a felony.

On October 2, 2007, defendant entered a plea of nolle contendere to the charges of rape in the second degree, a lesser-included offense of rape in the first degree (Count 15 of the indictment), and two counts of continuous sexual abuse of a child (Counts 151 and 152 of the indictment). He did not admit committing these offenses but acknowledged the State had sufficient evidence to convict him. He pled guilty to the charges of aggravated menacing (Count 2 of the indictment) and reckless endangering in the first degree (Count 9 of the indictment).

In the Truth-In-Sentencing Guilty Plea form (“TIS Guilty Plea form”), defendant stated that he was not under the influence of drugs or alcohol; neither his attorney, the State nor anyone had threatened or forced him to enter the plea; he was satisfied with his attorney’s representation of him; and his attorney fully advised him of his rights and his guilty plea.

Defendant was placed under oath before the plea colloquy commenced. During the plea colloquy, the following sworn testimony was elicited. Defendant was satisfied with his attorney’s representation of him; he had no complaints; everything his attorney had told the Court with regard to the plea was correct; he had been over everything in the TIS Guilty Plea form, the Plea Agreement and the Immediate Sentencing form with this attorney and everything in those forms was correct; his lawyer had gone over the nature of the crimes with him and had reviewed the evidence with him; he was freely and voluntarily entering the plea; he understood each of his trial rights he was giving up; no one was forcing him, pressuring him, or making him enter the pleas against his will; and his choice was freely and voluntarily made after consideration and discussion

with his attorney. Before taking the plea, the Court stated as follows with regard to the sentences to be imposed: “As to the penalties which have been recommended or have been outlined to you, it would be my intention to impose those penalties.” Transcript of October 2, 2007, Proceedings at 12-13. The Court then went over each and every recommended sentence for every count as set forth in the Plea Agreement, which defendant had signed and reviewed. Defendant, during this portion of the colloquy, stated that he understood each sentence to be imposed. Thereafter, as defendant entered his plea to each count, the Court made specific findings that the pleas to each crime were freely and voluntarily entered. It was established that defendant was taking Depakote and Seroquil; that the prison was giving him the prescribed dosage; and that the medicine was not making him confused, weak-willed, or unable to exercise independent judgment. The Court specifically found that defendant was fully competent and aware of the proceedings and confirmed that defendant was making a rational choice, a business decision for himself. The Court then sentenced him according to the plea agreement.

Defendant did not appeal.

On October 1, 2008, defendant filed his postconviction motion. Therein, he asserts relief based on three grounds. I review each ground below.

1) Ineffective Assistance of Counsel

The first ground is ineffective assistance of counsel. He asserts trial counsel was ineffective in four ways:

- A. Coercion of plea despite the record showing that movant was on Depakote [sic], a mood stabilizer and [sic] anti depressant, and Respitol [sic], a psychotropic medication, during his plea negotiations.
- B. Allowing movant to enter into this plea despite the fact that while on the street he was taking a prescription drug called Ativan, which causes impotence and

reduction of libido, and can interfere with the user's erection as well as their orgasms and ejaculation. Movant states that both the allegations in subsections A and B are clearly a violation of Delaware Rules of Professional Conduct *Rule 1.14*. C. Allowing client to enter into a plea despite the fact that he had always maintained his innocence, a fact she even stated on the record. This is a violation of Delaware Rules of Professional Conduct *Rules 1.1 and 1.2*. By allowing this plea into the official record then she was concurring with a belief that her client had never stated.

D. Movant also states that his attorney should have known by reading the victim's medical records that her hymen was intact and that there was no tissue scarring. This contradicts the prima facie [sic] allegation. Again; [sic] Delaware Rules of Professional Conduct, *Rule 1.3* states that [trial counsel] should have acted with diligence in his behalf and if she had then she would have been aware of the extent of the entire medical files regarding the alleged victim.

Before examining the claim itself, the Court first reviews whether any procedural bars apply.¹

¹In Rule 61(i), 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 is 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.

The first time a defendant can assert a claim for ineffective assistance of counsel is in a postconviction relief motion. *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994). The motion asserting the ineffective assistance of counsel claim was timely filed. Thus, no procedural bars apply.

As 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 his counsel's unprofessional errors, he would not have pleaded guilty, but would have insisted on proceeding to trial. The defendant must make concrete allegations of actual prejudice, and substantiate them, or risk summary dismissal. [Footnotes and citations omitted.]

Defendant has made conclusory allegations and has not attempted to show how any errors or omissions on trial counsel's part caused him to plead guilty. During his plea colloquy, defendant acknowledged the State had evidence to convict him on the sex crimes and he pled guilty to the crimes of aggravated menacing and reckless endangering. He clarified that his pleas constituted a business decision on his part. He acknowledged he was satisfied with his attorney's representation of him. He swore he was not being coerced into entering the plea. Defendant clarified that the medicines he was taking, as prescribed, had no impact on his competency to enter the pleas. The Court specifically found the medicines he was taking had no impact on his competency or the voluntariness of his plea. Absent clear and convincing evidence to the contrary, defendant is bound by all representations made during his plea colloquy. He freely and voluntarily waived his right to a trial and entered into the pleas.

Defendant has failed to show that but for errors or omissions on trial counsel's part, he

would not have pleaded guilty and would have gone to trial. In this case, the pleas provided defendant a clear benefit. It was reasonable to plead guilty to 5 charges rather than risk being tried on 153 charges. *See Edwards v. State*, Del. Supr., No. 445, 2007, Steele, C.J. (Dec. 17, 2007) at 4.

In conclusion, the ineffective assistance of counsel claim is without merit.

2) Prosecutorial Misconduct

Defendant asserts the prosecutor intimidated defendant into entering the guilty plea. Although defendant wraps this claim within the heading “prosecutorial misconduct”, the claim actually is one alleging coercion. Because such a claim should have been brought on direct appeal, defendant is barred from asserting it in a postconviction proceeding. Super. Ct. Crim. R. 61(i)(3); *Palmateer v. State*, Del. Supr., No. 559, 2006, Jacobs, J. (Jan. 5, 2007) at 2. Defendant has failed to assert any grounds for relief from the procedural bar. Thus, the procedural bars prevent the Court from considering the claim.

Even if the Court considered the claim, it would deny it on its merits. The plea colloquy underscores the voluntariness of the plea. There was no coercion.

This claim fails.

3) Excessive Sentencing

Defendant’s third claim is that the sentences imposed were excessive. In support of that contention, he argues as follows. The Court went out of its way to sentence him excessively. The victims have relatives who are police officers, they have close friends who are police officers, and some of their relatives are friends with a sitting Superior Court Judge. “[T]hese factors played a major part in influencing the Court’s decisions regarding his sentencing.”

Rule 61 is not the appropriate vehicle for pursuing this ground. Instead, defendant should

have filed, pursuant to Superior Court Criminal Rule 35(b),² a motion for reduction of the sentences on the ground they were imposed in an illegal manner. *Colon v. State*, Del. Supr., No. 572, 2005, Steele, C.J. (May 12, 2006). Such a motion should have been filed within 90 days of the sentence being imposed. *Id.* Absent the failure to timely file the motion, defendant should have set forth extraordinary circumstances giving him cause for seeking a reduction of his sentence beyond the 90 day period. *Id.* He has failed to assert any extraordinary circumstances. It is doubtful he could present any such facts given that the sentences imposed were the exact same sentences defendant negotiated and were the exact same sentences the Court told defendant it was inclined to impose *before* he entered the plea.

This claim fails.

For the foregoing reasons, 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
Carole J. Dunn, Esquire

²In Superior Court Criminal Rule 35(b), it is provided in pertinent part as follows:

Reduction of sentence. The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. ... The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances....