IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 0906006942
	)	
	)	
ELIGIO T. CINTRON,	)	
	)	
Defendant.	)	
	)	

Submitted: June 4, 2010
Decided: June 14, 2010

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.

Eligio T. Cintron, Howard R. Young Correctional Institution, Wilmington, DE, *pro se*.

PARKER, Commissioner

This 14th day of June, 2010, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Eligio Citron was indicted on 31 charges which included multiple counts of felony burglary third degree, multiple counts of criminal mischief, and thefts of various degrees.

2. At the time of indictment, case number 0906006942 was consolidated with case number 0907003392.[1]

3. On August 12, 2009, Defendant pled guilty to three counts of Burglary Third Degree and two counts of Violation of Probation.[2] Defendant was declared a habitual offender and, on November 6, 2009, was sentenced to six years of incarceration at Level V, one year at a halfway house, and two years of probation. Defendant did not file a direct appeal.

4. At the time of Defendant's sentencing, November 6, 2009, Defendant sought to withdraw his guilty plea. The Superior Court denied the motion to withdraw the guilty plea concluding that Defendant's decision to enter his guilty pleas to the charges listed in the plea agreement were made knowingly, intelligently and voluntarily.[3]

5. On November 12, 2009, Defendant filed a motion to withdraw his guilty plea. In that motion, Defendant alleged ineffective assistance of counsel claims in that he never received any discovery from his lawyer, that his lawyer lied to him about discovery, and that his lawyer talked badly about him when he attempted to fire his lawyer.

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[1] Superior Court Docket No. 5.
[2] Specifically, Defendant pled guilty to Count 1 in the indictment, Criminal Action No. 09070967; Count 27 in the indictment, Criminal Action No. 09062447; and Count 30 in the indictment, Criminal Action No. 09062449.
[3] November 6, 2009 Sentencing Transcript, pgs. 5-7.

6. The Superior Court considered Defendant's motion to withdraw his guilty plea as a Rule 61 motion.[4] On January 14, 2010, the Superior Court denied Defendant's motion. The Court determined that Defendant's motion was procedurally barred by Rule 61(i)(3), in that Defendant was required to, but did not, raise these contentions on direct appeal. The Superior Court determined that Defendant failed to demonstrate cause and prejudice amounting to manifest injustice in order to gain relief from the procedural bar. Consequently, the Superior Court denied Defendant's motion to withdraw his guilty plea.[5]

7. On November 24, 2009, Defendant filed a motion for sentence reduction/modification. Defendant again raised the failure of his counsel to provide discovery to him as well as additional ineffective assistance of counsel allegations. By Order dated December 7, 2009, the Superior Court denied Defendant's motion concluding that the sentence was appropriate for all the reasons stated at the time of sentencing, and that Defendant failed to state any grounds for modification of his sentence under Rule 35.[6]

8. On February 8, 2010, Defendant filed this motion for postconviction relief. Defendant appears to raise four grounds as the basis for the subject motion. Defendant raises the following: (1) he wanted to contest his VOP and his attorney refused; (2) he wanted to go to trial on case number 090703392; (3) his attorney did not discuss his appellate rights with him prior to sentencing; and (4) he felt he was bullied into taking the plea.

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[4] Superior Court Docket No. 22, January 14, 2010 Order denying Defendant's Motion to Withdraw Guilty Plea.
[5] Id.
[6] Superior Court Docket No. 21, December 7, 2009 Order denying Defendant's Motion for Reduction/Modification of Sentence.

9. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.[7] If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.[8]

10. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;[9] (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do 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.[10] Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."[11]

11. Rule 61(i)(4) precludes this Court's consideration of Defendant's claims presented herein since he has already filed a post conviction motion, decided pursuant to Rule 61, seeking to withdraw his guilty plea. After considering all the contentions that

[7] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[8] *Id.*
[9] If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).
[10] Super.Ct.Crim.R. 61(i)(5).
[11] Super.Ct.Crim.R. 61 (i)(4).

Defendant desired to raise in Defendant's prior post conviction motion, by Order dated January 14, 2010, the Court denied Defendant's motion to withdraw his guilty plea.

12. Defendant also previously adjudicated his present claims at the time of his sentencing on November 6, 2009, when he sought to withdraw his guilty plea based on the alleged inadequacies and ineffective assistance of counsel. In denying Defendant's motion, the Court already determined that Defendant's decision to enter his guilty plea was a knowing, intelligent and voluntary choice. Consequently, the contentions that Defendant raises in the subject motion are barred by Rule 61(i)(4).

13. Defendant also raised alleged inadequacies and ineffective assistance of counsel contentions in his prior motion for sentence reduction/modification. Here again, Rule 61(i)(4) precludes this Court's consideration of Defendant's claims since they were already previously adjudicated.

14. To the extent that Defendant has restated or refined his claims, the Superior Court is not required to re-examine any claim that has received "substantive resolution" at an earlier time simply because the claim is now refined or restated.[12]

15. Moreover, Rules 61(i) (2) and (3) would prevent this Court from considering any additional arguments or claims not previously raised. Defendant was required to, and either did, or should have, raised any issue regarding his plea in a prior proceeding to be procedurally preserved.[13] Defendant was required to present the claims that he raises in the subject motion at the time of his plea, the time of sentencing or on direct appeal. Defendant either raised his claims, and they were considered, or he failed to do so, and they are now barred pursuant to Rule 61(i)(2) and Rule 61(i)(3).

[12] *Johnson v. State*, 1992 WL 183069, *1 (Del.Supr.).
[13] *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); Super.Ct.Crim.R. 61(i)(2) & (3).

16. Even if Defendant's claims are not procedurally barred, they are without merit.

17. Defendant signed a Truth-In Sentencing Guilty Plea Form prior to entering his guilty plea in which he stated that he had been notified of the mandatory sentence, that he had not been promised what his sentence will be, that he had not been threatened or forced to enter the plea, that he was satisfied with his lawyer's representation, that his lawyer fully advised him of his rights, and that he freely and voluntarily decided to plead guilty.[14]

18. Moreover, by signing the Truth-In Sentencing Guilty Plea Form, Defendant further acknowledged that by pleading guilty he would not have a trial and therefore waived his constitutional rights to confront witnesses, present evidence, present a defense, testify or not testify, and appeal any decisions.[15]

19. Before accepting Defendant's plea, the Court engaged Defendant Cintron in a plea colloquy to ascertain that his plea was entered knowingly, intelligently, and voluntarily. At the guilty plea hearing, Defendant stated that he had not been promised anything in exchange for the plea, that he had not been threatened or forced to enter the plea, and that he had read and understood the rights that he gave up as stated on the Truth-In Sentencing Guilty Plea Form.[16]

20. During the plea colloquy, Defendant admitted to the offenses to which he pled guilty.[17]

21. During the plea colloquy, the Court gave Defendant an opportunity to withdraw his guilty plea when the Court advised Defendant that it intended to order a pre-sentence

[14] Truth-In Sentencing Guilty Plea Form dated August 12, 2009.
[15] Truth-In Sentencing Guilty Plea Form dated August 12, 2009.
[16] August 12, 2009 Plea Colloquy Transcript
[17] August 12, 2009 Plea Colloquy Transcript, at pgs. 7-8.

investigation and Defendant requested immediate sentencing. Defendant chose to proceed with the guilty plea.[18]

22. 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.[19] The record before the Court, including Defendant Cintron's own statements, undermines his claims in the subject post conviction motion.

23. The Truth-in-Sentencing Form and plea colloquy reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the charges on which he was sentenced and that he understood he was waiving his constitutional rights, including his right to appeal. Therefore, Defendant has not met his burden of showing that he should not be bound by his prior representations under oath. The record reveals no basis to permit the withdrawal of Defendant's guilty plea.

24. Turning now to Defendant's specific claims, Defendant first contends that he wanted to contest his VOP and that his counsel refused to look into whether he had time left on one of his then pending VOPs. At the time of his plea colloquy, the Court addressed the violations of probation:

> The Court: You also understand that by pleading guilty, you're going to admit you violated two probations and you could get extra jail time over and above two life terms? Does that make a difference to you?
>
> The Defendant: No, it doesn't make any difference.[20]

Both VOPs were discharged as unimproved at the time of sentencing.[21]

[18] August 12, 2009 Plea Colloquy Transcript, at pgs. 6-7.
[19] *State v. Harden*, 1998 WL 735879, *5 (Del. Super.); *State v. Stuart*, 2008 WL 4868658, *3 (Del. Super. 2008).
[20] August 12, 2009 Plea Colloquy, at pgs. 5-6.

25. It is not clear whether Defendant is raising an ineffective assistance of counsel claim. To the extent that he is, to prevail on an ineffective assistance of counsel claim, the defendant must show that his counsel's efforts "fell below an objective standard of reasonableness" and that, but for his counsel's alleged errors, there was a reasonable probability that the outcome would have been different.[22] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[23] There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[24]

26. The issue as to whether Defendant had time left on his VOP was rendered moot when the pending VOPs were discharged as unimproved. Because both VOPs were discharged as unimproved at the time of sentencing, even if Defendant was able to establish that his counsel's conduct was somehow deficient, Defendant has not satisfied the second prong of an ineffective assistance of counsel claim.

27. According to defense counsel's Affidavit in Response to Defendant's Rule 61 Motion, defense counsel: 1) asked Defendant if he wanted to contest his VOP, 2) told the Court that he was unable to ascertain the amount of Level V time remaining on the VOP, 3) told the Court that Defendant disputed the amount of Level V time remaining on the VOP, and 4) that the State agreed to discharge any Level V time remaining on the VOP.[25]

28. It does not appear that defense counsel's actions were deficient in any regard, but even if they were, because the pending VOPs were discharged, Defendant cannot satisfy

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[21] November 6, 2009 Sentencing Transcript, pgs. 17, 23.
[22] *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).
[23] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[24] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).
[25] Affidavit of Trial Counsel, at pg. 1.

the second prong of an ineffective assistance of counsel claim and demonstrate that he has suffered actual prejudice as a result of his counsel's actions.

29. Turning next to Defendant's second claim, he contends that he wanted to go to trial on case number 090703392. This case was consolidated into case number 0906006942 at the time of the indictment. It appears that the one indicted charge on case number 0907003392 is Count I on the consolidated indictment, Indictment No. 09-07-0967.

30. Defendant expressly agreed to plead guilty to Count I on the consolidated indictment, Indictment No. 09-07-0967, in the Plea Agreement which he executed.[26] Moreover, during the plea colloquy, the Defendant represented as follows:

> The Court: Here are the charges: Count 1, Burglary in the Third Degree. On or about April 29th, 2009 in New Castle County, Delaware you did knowingly enter or remain unlawfully in a vehicle located at 130 Executive Drive in Newark with intent to commit theft. Do you understand that charge?
>
> The Defendant: Yes.
>
> The Court: Did you commit that offense?
>
> The Defendant: Yes.[27]

31. Absent clear and convincing evidence to the contrary, which has not been established in this case, Defendant is bound by these representations that he intended to plead guilty to Count I of the Indictment, that he did plead guilty to Count I of the Indictment and that he committed the offense set forth in Count I of the indictment.

[26] Defendant's Plea Agreement dated August 12, 2009.
[27] August 12, 2009 Plea Colloquy, at pg. 7.

32. Defendant had already been declared a habitual offender on three prior occasions.[28] Defendant had only been out of jail for 40 days when he began to break into cars again. Defendant appears to be a serial car burglar. On his last crime spree, Defendant pled guilty to 10 car burglaries. In the instant grouping of offenses, the police developed him as a suspect, followed him, and observed him shatter the window of a Porsche and steal a bag. As they were following him, they lost him. A couple of days later, they followed him again. They watched him shatter the window of another vehicle, and they arrested him before he could steal anything from the car.[29]

33. Defendant was not sentenced as a habitual offender on Count I, and his sentence on that charge was three years at Level V, suspended for three years at Level IV halfway house to allow work release, suspended after one year for the balance to be served at Level III.[30]

34. If Defendant was convicted of the entire 31 count indictment, he was facing up to 12 life sentences plus 19 years. Considering the police observed Defendant either attempt to or break into vehicles on two occasions and considering the penalty that Defendant was facing if he was convicted at trial, the outcome defense counsel was able to obtain for Defendant was reasonable under the circumstances. Indeed, even the Court at the time of sentencing noted that the plea recommendation was favorable to Defendant in light of Defendant's criminal history and the penalties he was facing if convicted at trial.[31] Despite Defendant's present contention to the contrary, the record reflects that

[28] November 6, 2009 Sentencing Transcript, pgs. 8-10.
[29] November 6, 2009 Sentencing Transcript, pgs. 13-16.
[30] November 6, 2009 Sentencing Transcript, pgs. 22.
[31] November 6, 2009 Sentencing Transcript. pgs. 20-21.

Defendant freely, knowingly and voluntarily chose to plead guilty to Count I of the consolidated indictment.

35. Defendant's third claim, that his counsel never discussed his appellate rights before sentencing, is belied by the record. Defendant completed the Truth-In-Sentencing Guilty Plea Form prior to the entry of the plea, in which he acknowledged that by entering into a plea he understood he was waiving his right to appeal his conviction. Moreover, trial counsel, in his Affidavit in response to Defendant's Rule 61 motion, represents that he did, in fact, inform Defendant he would be waiving any appellate rights by entering the plea agreement.[32] During the plea colloquy, the Court confirmed that Defendant understood he was waiving his constitutional rights that were stated on his guilty plea form by entering his guilty plea.[33]

36. Defendant's fourth claim, that he felt he was bullied into taking the plea, is also unsupported by the record. 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. He further represented that his plea was entered into freely, knowingly and voluntarily.[34]

37. Defendant Cintron received a significant benefit by pleading guilty and his guilty plea represented a rational choice given the charges and possible sentences he was facing.

38. In this case, 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

[32] Affidavit of Trial Counsel in response to Defendant's Rule 61 motion, at pg. 2.
[33] August 12, 2009 Truth-In Sentencing Guilty Plea Form; August 12, 2009 Plea Colloquy, at pg. 5.
[34] August 12, 2009 Truth-In Sentencing Guilty Plea Form; August 12, 2009 Plea Colloquy, at pgs. 4-5.

justice" exception is a "narrow one and has been applied only in limited circumstances.[35] The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."[36] 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.[37]

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
Raymond D. Armstrong, Assistant Public Defender

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