

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
)	ID No.: 30701972DI
v.)	
)	Cr.A.No.: VN87-04-0489RI
)	VN87-04-0486R1
)	VN87-04-0483R1
KENNETH V. STEWART)	

Date Submitted: March 17, 2003

Date Decided: April 17, 2003

*Upon Defendant's Motion for Postconviction Relief: **DENIED.***

ORDER

Upon review of Movant Kenneth V. Stewart ("Defendant")'s Motion for Postconviction Relief and the record, it appears to the Court that:

1. Defendant filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 on March 17, 2003. Defendant was sentenced on July 25, 2001 for Violation of Probation ("VOP") pursuant to a contested fast track hearing. Defendant was sentenced on criminal action number VN87-04-0489-01 for VOP (Burglary 2nd) to five years at Level V. In addition, Defendant was sentenced on criminal action number VN87-04-0846-01 for VOP (Reckless Endangering 1st) to five years Level V suspended for five years Level IV work release, suspended after six months for four years and six months at Level III intensive probation. Defendant's sentence for criminal action number VN87-04-0483-01 for VOP (Robbery 2nd) was

reimposed to run consecutive for five years at Level II. Criminal action number VN84-09-1751-01 in connection with the Conspiracy 2nd charge was discharged unimproved. Defendant did not appeal the revocation of his probation and sentence to the Delaware Supreme Court.

2. Defendant's criminal history indicates that Defendant was initially paroled on March 31, 1995. He was subsequently arrested on four separate occasions between December 13, 1996 and April 15, 2000 for six motor vehicle related offenses.¹ On September 4, 2000, Defendant was arrested for Possession with Intent to Deliver, Possession within 1000' of a School, and Distribution, Delivery, or Possession of a Controlled Substance within 300' of a Park while on parole. Based upon his new arrest, Defendant was fast tracked in connection with violating his probation that would have commenced on approximately January 15, 2008. Defendant pled guilty on November 29, 2001 to Possession within 300' of a Park and was sentenced to two years Level V suspended after serving six months for eighteen months at Level III.

3. In addition to being sentenced for the above mentioned VOP, Defendant was also sentenced for violation of parole on March 26, 2002. The Board of Parole ordered Defendant to serve the balance of the sentence for which he was previously paroled at Level V.

4. On December 4, 2002, Defendant filed a motion for correction of an illegal sentence on the ground that he could not be sentenced for violation of probation because his probation was not due to begin until the expiration of his parole sentence in Fall of 2009. Defendant also indicated that he had already been sentenced for Violation of Parole for the same case as a result of a plea of guilt that he entered on November 29, 2001. Defendant's motion was denied on the basis that he may be violated for actions that occur prior to the commencement of probation that

¹Defendant was found guilty of four of the six motor vehicle offenses and assessed a fine for each charge.

indicate that he is a poor risk for community supervision.

5. In support of his instant motion, Defendant asserts two grounds for postconviction relief. First, Defendant claims that he was illegally sentenced for VOP presumably because his term of probation had not actually commenced. Second, Defendant claims that the Double Jeopardy Clause precludes the court from sentencing him for VOP for the same violation that resulted in the revocation of his term of parole. Defendant's claims are identical to the issues he raised in support of his prior motion for correction of an illegal sentence. In fact, Defendant attached a copy of his previous motion as an exhibit to support his instant motion.

6. The Delaware Supreme Court has held that in reviewing motions for postconviction relief, this Court must first determine whether a defendant's claims are procedurally barred prior to considering them on their merits.² Rule 61(d)(4) provides for summary dismissal by the court "[i]f it plainly appears from the motion... and the record... that the movant is not entitled to relief, the judge may enter an order for its summary dismissal..."³ This Court will not address Rule 61 claims that are conclusory and unsubstantiated.⁴ In addition, any ground for relief that was formerly adjudicated in a postconviction proceeding is thereafter barred unless reconsideration of the claim is warranted in the interest of justice.⁵ This is Defendant's first motion for postconviction relief. Because the court addressed Defendant's claims in his prior motion for

²*Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Flamer v. State*, 585 A.2d 736, 747 (Del. 1990).

³DEL. SUPER. CT. CRIM. R. 61(d)(4).

⁴ See *Younger v State*, 580 A.2d 552, 555 (Del. 1990); *State v. Conlow*, Del. Super., Cr.A. No. IN78-09-0985R 1, Herlihy, J. (Oct. 5, 1990) at 5; *State v. Gallo*, Del. Super., Cr.A.No. IN87-03-0589-0594, Gebelein, J. (Sept. 2, 1988) at 10.

⁵DEL. SUPER. CT. CRIM. R. 61 (i)(4).

correction of illegal sentence, Defendant's motion is procedurally barred pursuant to Rule 61(i)(4).⁶ However, the court will briefly address the merits of Defendant's claim for the limited purpose of substantiating how reconsideration of Defendant's claim is not warranted in the interest of justice.

7. Defendant's first claim is that he was illegally sentenced for VOP because his probationary period had not commenced at the time he was sentenced for the violation. In *United States v. Veatch*,⁷ the Court of Appeals held that district courts have the authority to revoke probation even before the term commences.⁸ Pursuant to title 11, section 4333 of the Delaware Code, probation "may be terminated by the court at any time."⁹ In *Williams v. State*,¹⁰ the Delaware Supreme Court supported the decision reached in *Veatch* and found that section 4333 granted the trial courts broad discretion regarding the grant and termination of probation, including revocation prior to its actual commencement.¹¹

8. Defendant's second claim is violation of the Double Jeopardy Clause because the same offense resulted in the revocation of both his term of probation and his term of parole. In *State v. Dorsey*,¹² this Court held that "the Double Jeopardy Clause is not implicated when one

⁶*See id.*

⁷*United States v. Veatch*, 792 F.2d 48 (3d Cir. 1986), *cert. denied*, 479 U.S. 933 (1986).

⁸*Id.*

⁹DEL. CODE ANN. tit. 11 § 4333 (2001).

¹⁰*Williams v. State*, 560 A.2d 1012 (Del. 1989).

¹¹*Id.* at 1013, 1015; *State v. Dorsey*, 1995 WL 862118 (Del. Super. Ct.).

¹²*Dorsey*, 1995 WL 862118, at *2.

violation triggers revocation of both parole and probation.”¹³ In addition, this Court held that the same conduct may constitute more than one offense and will not offend the Double Jeopardy Clause if more than one statutory provision is violated.¹⁴ In this case, Defendant’s conduct led to a violation under title 11, section 4334¹⁵ and under section 4352¹⁶ of the Delaware Code. Accordingly, Defendant’s Double Jeopardy claim is without merit.

Based upon the foregoing discussion, Defendant’s motion is procedurally barred and further reconsideration of Defendant’s claim is not warranted in the interest of justice.

Accordingly, Defendant’s Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: Kenneth V. Stewart, MPCJF

¹³*Id.*

¹⁴*Id.* at *3 (citing *State v. Burley*, Del. Super., Cr.A. No. IN90-02-0479R1, Toliver, J. (Nov. 14, 1991) (Letter Op.) at 2).

¹⁵DEL. CODE ANN. tit. 11 § 4334 (a) (2001) provides that “[t]he Court may issue a warrant for the arrest of a probationer for violation of any of the conditions of probation...”

¹⁶DEL. CODE ANN. tit. 11 §4352 (a) (2001) provides that “[a]t any time during release on parole or conditional release under parole the Board or any member thereof may issue a warrant for the arrest of a released person for violation of any of the conditions of release...”