

STATE OF DELAWARE,)
)
Plaintiff,)
)
V.) Cr. ID No. 1104016682
)
ALEX RYLE,)
Defendant.)
)

Decided: July 22, 2016

MAYER, Commissioner

This 22nd day of July, 2016, upon consideration of Defendant's Motion for Postconviction Relief and Motion for Appointment of Counsel, it appears to the Court that:

BACKGROUND, FACTS AND PROCEDURAL HISTORY

1. On June 6, 2011, a grand jury indicted Defendant Alex Ryle on the charges of two counts of aggravated menacing; two counts of possession of a firearm during the commission of a felony; and possession of a deadly weapon by a person prohibited. The indictment stems from an incident which occurred on April 20, 2011, whereby the Defendant verbally confronted two employees and a customer at the Home Depot, and subsequently returned with a semi-automatic handgun.
2. On September 9, 2011, Defendant, appearing *pro se*, filed a Petition for a Writ of Habeas Corpus. By order dated September 21, 2011, and docketed on September 23, 2011, the Court denied the Petition for a Writ of Habeas Corpus and held that the Defendant was legally detained and failed to state a claim upon which such a writ may be issued.
3. Trial was set for November 15, 2011, at which time Defendant pled guilty to two counts of aggravated menacing and the remaining three charges were dismissed. Also on November 15, 2011, Defendant was sentenced on the first

charge of aggravated menacing to five years at Level 5¹, suspended after one year, followed by two years at Level 3. For the second count, Defendant was sentenced to five years at Level 5, suspended after one year at Level 5, for two years at Level 3.

4. On February 10, 2012, the Defendant, appearing *pro se*, filed a Motion for Modification of his sentence. The motion indicates Defendant was aware of the sentence as set forth in paragraph 3 above. Defendant sought to reduce his sentence by asserting good behavior. Through this motion, Defendant also states that he was “most fortunate in receiving the gracious sentence that was imposed.” On May 31, 2012, the Court denied the Motion for Modification of sentencing. The Court held that the sentence imposed was fair and appropriate in light of the criminal conduct that occurred.

5. On May 31, 2012, Defendant again wrote to the Court, *pro se*, and complained that during the November 15, 2011 sentencing hearing, he was to have his Level 4 portion of the sentence removed and the Level 3 portion of the sentence was to be increased to twenty-four (24) months.

6. On June 28, 2012, the Court responded to the letter and denied the request for modification of the sentence on the grounds that the plea agreement requested unsuspended Level 4 time of six months and the sentencing worksheets of the clerk

¹ Defendant was to be held at supervision Level 5 until space was available at Level 4 work release.

also reflected Level 4 and Level 3 as set forth in the sentence order. As such, there was nothing to support the request in the Defendant's letter. The Court also invited Defendant's former counsel and the State of Delaware to review Defendant's letter and to supplement the record. The State responded on July 5, 2012, and indicated that there was nothing in the file to suggest that Defendant was not to be given Level 4 time and referred the Court to the Plea Agreement which states "Hold at L-5 pending L-4 placement."

7. On July 18, 2012, Defendant, *pro se*, filed a *Motion to Proceed In forma Pauperis to Obtain Transcripts*. The motion was granted on July 27, 2012 and a transcript of the November 14, 2011 hearing was forwarded to the Defendant at that time.

8. On March 5, 2013, Defendant, appearing *pro se*, wrote to the Court and complained of his sentencing conditions. On April 19, 2013, the Court responded to the letter from Defendant regarding conditions at the work release center and again indicated there was no basis to modify the sentence.

9. Defendant was released from prison and work release and began his Level 3 probationary term beginning June 20, 2013.

10. On July 7, 2014, Defendant was indicted on new gun and drug charges.²

² CR ID NO. 1404000692.

11. By order dated September 9, 2014 and docketed on September 9, 2014, the Court issued a Violation of Probation Sentence Order. Effective April 1, 2014, Defendant was sentenced to the Department of Corrections for 274 days at Level 5 with no probation to follow. Defendant was discharged as unimproved as to the other aggravated menacing charge.

12. On September 9, 2014, an “Advice Regarding Appeal from Violation of Probation” was provided to Defendant advising him that if he wished to appeal the Judge’s decision of violation of probation, or the new sentence, he must file a Notice of Appeal in the Delaware Supreme Court within 30 days from the date of the notice. There is no record of Defendant filing an appeal.

13. The Defendant’s sentence with respect to the postconviction relief sought herein ended on December 31, 2014. However, Defendant was later convicted for the charges stemming from the July 7, 2014 indictment and is presently incarcerated on this sentence for those charges.

14. On September 3, 2015, Defendant filed a second *pro se* Motion for Transcript and Application to Proceed *In Forma Pauperis to Obtain Transcripts*. It appeared from the papers that the Defendant sought the transcript for the purpose of filing a Rule 61 motion for ineffective assistance of counsel. The Court had previously granted the Defendant’s request for a transcript in July of 2012. On September 15, 2015, the Court denied the second request for a transcript on the

basis that the Defendant pled guilty and was sentenced on November 15, 2011 and the time limitation set forth in Rule 61 of one year had passed and therefore, the motion would be untimely under the rule.

DEFENDANT'S RULE 61 MOTION

15. On October 8, 2015, Defendant filed a *pro se* Motion for Postconviction Relief. In his motion, Defendant raises a number of claims. Defendant contends that his counsel provided ineffective assistance for a variety of reasons including the following allegations: that counsel waived Defendant's preliminary hearing without consent, he failed to appear at case reviews, failed to file requested motions, failed to prepare a proper defense strategy, and conspired to manipulate Defendant to acquiesce into a coerced plea bargain. As additional grounds, Defendant asserts that at a hearing on November 14, 2011, the Court abused its discretion by becoming involved in the plea negotiations in violation of Superior Court Criminal Rule 11(e) and instilled fear of movant losing his case and receiving a lengthy sentence. Defendant contends that there was a constitutional violation pursuant to Superior Court Criminal Rule 61(i)(5).

16. Before ruling on Defendant's motion, the record was enlarged and Defendant's trial counsel was directed to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter, the State filed a response to the motion and Defendant filed a reply thereto.

17. On January 28, 2016, Defendant's former counsel, Joseph Benson, submitted an Affidavit in accordance with the Scheduling Order. Mr. Benson denied waiving Defendant's right to a preliminary hearing without his consent. According to the Affidavit, Defendant may have given that waiver in exchange for favorable consideration from a detective and a prosecutor as to other charges. Mr. Benson is not able to admit or deny the allegation that Defendant was unrepresented at the case review hearings but does not think it was possible. Although the November 14, 2011 appearance before the Court was not docketed, the transcript from when the plea and sentencing were issued refers to a discussion the day prior. Mr. Benson admits that he did not file certain motions for Defendant and attests the proposed motions had no colorable basis. Finally, Mr. Benson affirms that he met with Defendant to ensure that he understood that he could be convicted of five charges that would involve substantial jail time and advised him of the benefits of the plea agreement. As to the second ground for relief, Mr. Benson asserts that the Court's involvement was entirely appropriate and the judge did not become involved in the plea negotiations.

18. On March 17, 2016, the State filed a response to the Motion. The response argues (a) Defendant is no longer in custody or subject to future custody and therefore cannot seek relief pursuant to Del.Super. Ct. Crim. R. 61(a)(1); (b) the motion is time barred by Del. Super. Ct. Crim. R. 61(i)(1); and (c) Defendant did

not assert new evidence with particularity to create a strong inference of actual innocence or a new rule of constitutional law pursuant to Super. Ct. Crim. R. 61(d)(2)(i)(ii).

19. On May 5, 2016, the Court granted Defendant's request for an extension of time and Defendant was provided until July 1, 2016 to submit his reply.

20. On May 26, 2016, Defendant filed a Reply and argued that (a) he did not give Mr. Benson consent to waive the Preliminary hearing; (b) Mr. Benson failed to meet with him on the dates of both case reviews; and (c) the November 14, 2011 hearing was not a Final Case review but a non-docketed proceeding to dissuade him from going to trial and that he was pressured by counsel and the court into taking the plea on this date.

21. Through his reply, Defendant does not oppose the State's argument that the Court lacks jurisdiction and the motion is time-barred. However, Defendant argues that constitutional violations occurred. Defendant claims he attempted to remove his counsel prior to trial but such efforts were denied and thus he had no choice but to proceed to trial and enter the plea.

DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL

22. On February 8, 2016, the Defendant filed a Motion for Appointment of Counsel seeking the appointment of counsel pursuant to Superior Court Criminal Rule 61(e)(2)(ii). Through the motion, Defendant asserts that he has filed an

untimely motion for postconviction relief and he seeks the appointment of counsel to assist him with the motion.

ANALYSIS OF DEFENDANT’S RULE 61 MOTION

23. Pursuant to Super. Ct. Crim. R. 61(d)(5) the motion may be summarily dismissed because it plainly appears from the record in the case that the movant is not entitled to relief. Defendant’s motion is procedurally barred for several reasons. As such, the Court should not consider the merits of the claim.³

24. Superior Court Criminal Rule 61(a)(1) provides that the postconviction remedy is available to “a person in custody under a sentence of this court seeking to set aside the judgment of conviction...” Defendant was discharged as unimproved on one aggravated menacing charge and as to the other, his sentence ended on December 31, 2014 – almost one year prior to the filing of the instant motion on October 3, 2015. Since Defendant was not in custody for the convictions at issue here at the time of the filing of the motion seeking to set aside the judgment of conviction, his motion is procedurally barred and no relief may be had under the rule.⁴

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990); *Paul v. State*, 2011 WL 3585623 (Del. Aug. 15, 2011), at *1 (“Delaware law provides that the Superior Court must first consider whether the defendant has satisfied the procedural requirements of Rule 61 before considering the merits of his postconviction motion.”)

⁴ *State v. Hinson*, 2006 WL 337031 (Del. Super. Ct., Feb. 10, 2006), at *2 (“All courts in Delaware that have considered whether postconviction relief under Rule 61 is potentially available to a person who is not “in custody or subject to future custody” for the challenged sentence have agreed that such relief under Rule 61 is not available.”)

25. Defendant's motion is also procedurally barred as untimely. Superior Court Criminal Rule 61(i)(1) imposes the condition that 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.⁵ Defendant has not asserted an entitlement to relief based on a newly recognized right. Defendant pled guilty on November 15, 2011 and was sentenced that day. Defendant did not file a direct appeal and therefore his judgment of conviction became final on December 15, 2011.⁶ The Defendant's motion was filed on October 3, 2015, almost three (3) years later, which is past (1) year after the Defendant's judgment became final. Therefore, the motion was filed outside the applicable time limit. Indeed, Defendant was aware of the issues he raises at the time of his plea and sentencing and Defendant's claims, at this late date, are time-barred.

26. Defendant has not established any prejudice to his rights and/or cause for relief. Defendant had time and opportunity to raise any issue on direct appeal and was afforded an opportunity for reconsideration of his sentencing through no less

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (affirming dismissal of motion for postconviction relief as untimely).

⁶ Pursuant to Superior Court Criminal Rule 61(m)(1), a judgment of conviction is final for the purpose of this rule within 30 days after the Superior Court imposes sentence if the defendant has not filed a direct appeal. The Defendant herein did not file a direct appeal.

than three (3) prior motions and orders. Defendant was fully advised of his right to file an appeal but elected not to do so.

27. Defendant asserts that the procedural bars do not apply and seeks relief pursuant to Superior Court Criminal Rule 61(i)(5). The bars to relief will not apply to a claim that the court lacked jurisdiction or a claim that satisfies the pleading requirements of subparagraphs 2(i) or 2(ii) of subdivision (d) of Rule 61.

Defendant does not assert that the Court lacked jurisdiction and therefore that exception does not apply.

28. Defendant has failed to meet the pleading requirements for proceeding with the subject motion and therefore, the motion should be summarily dismissed for these reasons as well. Superior Court Criminal Rule 61(d)(2)(i)-(ii) provides that a motion under this rule shall be summarily dismissed unless the movant was convicted after a trial and the motion either (i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or (ii) pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and render the conviction or death sentence invalid. Defendant pled guilty to the charges and has not pled any new evidence or facts demonstrating any inference that the movant is innocent of the

acts giving rise to the conviction. Further, Defendant has not asserted that a new rule of constitutional law affects his conviction. As such, Defendant has failed to meet the pleading requirements of Rule 61(d)(2)(i)-(ii).

29. Defendant's secondary grounds for relief must fail for the reasons set forth above. Defendant argues that the Court violated Superior Court Criminal Rule 11(e) by involving the Court in plea negotiations. Due to the fact that the motion should be summarily dismissed as procedurally barred, the Court should not address the substantive grounds asserted.⁷ To the extent Defendant attempts to raise claims that were known to him at the time he accepted the plea, the claims, with the exception of ineffective assistance of counsel, are also barred as untimely for Defendant's failure to raise them on direct appeal.⁸

DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL

30. Finally, Defendant's request for appointment of counsel should be denied. Defendant seeks the appointment of counsel pursuant to Superior Court Criminal Rule 61(e)(2)(ii) which provides that the judge may appoint counsel for an indigent movant's first timely postconviction motion and request for appointment of counsel, if the motion seeks to set aside a judgment of conviction that resulted from a plea of guilty, only if the judge determines that (i) the conviction has been

⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ Superior Court Criminal Rule 61(i)(3); *Malin v. State*, 2009 WL 537060, at *5 (Del. Super. 2009).

affirmed by final order upon direct appellate review or direct appellate review is unavailable; (ii) the motion sets forth a substantial claim that the movant received ineffective assistance of counsel in relation to the plea of guilty; (iii) granting the motion would result in vacatur of the judgment of conviction for which the movant is in custody; and (iv) specific exceptional circumstances warrant the appointment of counsel.

31. Defendant's motion does not meet the procedural requirements of Super Ct. Crim. R. 61(e)(2)(ii) because the request for appointment of counsel does not accompany a "timely" filed motion for postconviction relief. In fact, in the Defendant's motion, he admits that the postconviction motion is untimely. Furthermore, Defendant's request for appointment of counsel fails to meet the pleading requirements of Super. Ct. Crim. R. 61(a)(2) because (i) Defendant's conviction has not been affirmed by final order upon direct appellate review as no appeal was filed; (ii) the motion fails to set forth a substantial claim that the movant received ineffective assistance of counsel; (iii) granting the motion will not result in a vacatur of the judgment of conviction for which the Defendant is in custody since the Defendant is no longer in custody for the challenged conviction; and (iv) no additional specific exceptional circumstances warranting appointment of counsel have been articulated.

For all the foregoing reasons, Defendant's Motion for Postconviction Relief may be summarily dismissed and the motion should be summarily denied. Further, for the reasons set forth above, the Motion for Appointment of Counsel should be denied.

IT IS SO RECOMMENDED.



Commissioner Katharine L. Mayer

oc: Prothonotary
cc: Robert J. O'Neill, Esquire
Alex Ryle