IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	ID # 1206002303
v.	)	
	)	
DYMERE BERRY,	)	
	)	
Defendant.	)	

Date Submitted: December 7, 2015
Date Revised: June 29, 2016

On Defendant Dymere Berry's Motion for Post Conviction Relief. **DENIED.**

On Counsel's Motion to Withdraw. **GRANTED.**

ORDER

James J. Kriner, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Dymere Berry, *pro se* Defendant.

Andrew J. Witherell, Esquire, 100 East 14th Street, Wilmington, Delaware, 19801 Attorney for Defendant.

Scott, J.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On May 27, 2012, Delaware State Police ("DSP") responded to the DWAR Studio Barbershop and Salon ("Barbershop"), located at 3125 New Castle Avenue, New Castle, Delaware, in response to a shooting inside the business. Upon arriving, DSP found the victim, a black male later identified as Airrion Yancey (the "Victim"), lying on the floor. DSP determined that the Victim had been shot twice, once in the head behind his left ear and once in the abdomen, and was pronounced dead at the scene. Upon investigation of the crime scene, DSP recovered twenty-nine 9mm shell casings, one from inside the Barbershop and the remainder from outside in the parking lot. Later ballistics testing revealed that two 9mm handguns had fired the shell casings. While at the scene, DSP interviewed one eyewitness who advised that he witnessed Dymere Berry ("Berry" or "Defendant") shoot the Victim behind his left ear while inside the Barbershop. Evidence further revealed that a second gunman shot the Victim in the abdomen while he lay on the floor, and that the Victim had been unarmed.

The next day, DSP interviewed Luis Cruz ("Cruz"), an eyewitness, who advised that the suspected shooter was a black male, known to him as "Mere" ("Suspect"), and that, on the night of May 27th, Cruz had opened the Barbershop to tattoo the Suspect as payment for some heroin supplied to him by the Suspect. Cruz stated that while he was working on the Suspect's tattoo, the victim and

Yusef Wiley ("Wiley") entered the Barbershop through the front door, whereupon the Victim asked Cruz to look at some tattoos on his arms. Cruz advised that he then stopped working on the Suspect's tattoo and went to the front of the Barbershop to talk to the Victim, who was standing with his back to the Suspect. It was at that point that Cruz witnessed the Suspect stand up, pull a handgun from his shorts, and shoot the Victim in the back of the head behind the left ear. Cruz further advised that the Suspect then exited the front door and began shooting at a vehicle in the parking lot, which proceeded to flee the scene.

During the Cruz interview, DSP presented a photo array consisting of six similar appearing individuals, one of which was the Defendant, to Cruz. Within ten seconds, Cruz positively identified the Defendant as the Suspect who had shot the Victim. Cruz also identified a Curtis Finney ("Finney") as being present in the Barbershop at the time of the shooting. Additionally, Cruz provided DSP with a cellular telephone number belonging to the Defendant, which DSP later confirmed as belonging to the Defendant.

DSP interviewed Tanya Marshall ("Marshall") who advised that she drove the Victim and Wiley to the Barbershop that night and that she drove off with Wiley once the gunfire erupted. Marshall further advised that the Defendant, and possibly Finney, shot at her vehicle and shattered her rear window. There was no evidence that Marshall or Wiley had been armed. DSP also interviewed Tanika

Malloy ("Malloy"), an eyewitness, who advised that she was at the Barbershop with Quianna Church that night, when she saw the Defendant stand up and shoot the Victim. Malloy subsequently identified the Defendant and Finney from a photo array. Lastly, DSP interviewed five other witnesses who were present in the Barbershop at the time of the shooting, including Quianna "Smack" Church, Elizabeth Ervin, Jalyn Boyd, and "Courtney," most of whom were uncooperative.

Additionally on May 28, 2012, DSP located Defendant's cellular phone signal in the area of the 100 block of Lower Oak Street in Wilmington, and DSP surveillance units converged on the area. At approximately 10:45 pm, DSP observed a subject matching Defendant's description exit a residence at 126 Lower Oak Street and return fifteen minutes later. The residence was later identified as that of Jalyn Boyd, the Defendant's girlfriend.

On May 29, 2012, DSP obtained an arrest warrant, and Defendant was taken into custody. During Defendant's arrest, DSP recovered a 9mm handgun with an obliterated serial number. Ballistics later identified this handgun as having fired 18 of the shell casings recovered at the crime scene on May 27, 2012 and, specifically, the one casing found inside the Barbershop. As a result, Defendant was charged with, and subsequently indicted on, Possession of a Deadly Weapon by a Person Prohibited, as he had previously pled guilty to the Possession of a Deadly Weapon by a Person Prohibited in Family Court on January 4, 2011, and Possession of a

Weapon with a Removed, Obliterated or Altered Serial Number (collectively, case number 1205024309). At the time of his arrest on May 29, 2012, Defendant had been out on bail for case number 1112020411, which included charges stemming from a New Castle County Police Department ("NCCPD") drug investigation.[1]

On June 4, 2012, Defendant was indicted by a New Castle County grand jury on one count of Murder First Degree, two counts of Attempted Murder First Degree, and three counts of Possession of a Firearm During Commission of a Felony (case number 1206002303). On June 5, 2012, a Rule 9 Warrant was issued and both cases were consolidated under lead case number 1206002303. On June 26, 2012, Defendant was arraigned and entered a plea of not guilty. On July 10, 2012, Gregory M. Johnson, Esquire (hereinafter "trial counsel") was appointed as conflict counsel. On September 25, 2012, a scheduling conference was held and trial was set for July 15, 2013.

On October 15, 2012, Defendant appeared before this Court in case number 1112020411 and entered a plea of guilty to four counts listed on the indictment,

[1] On December 30, 2011, NCCPD responded to 43 Thorn Lane in order to execute a search warrant. During their surveillance of the residence prior to executing the warrant, NCCPD observed Anthony Washington, Donald Wilson, Dymere Berry and two additional suspects, later identified as Joshua Brown and Finney, engaging in what appeared to be drug transactions. As NCCPD then executed the search warrant, all suspects fled and Berry ultimately entered a residence at 37 Thorn Lane through a rooftop window. NCCPD apprehended Berry in the residence and found 1.5 grams of crack cocaine in his possession. A subsequent search of Berry's residence located a loaded Colt 22 pistol, a loaded Benelli 12 gauge shotgun, and 4 grams of crack cocaine inside the home and a Smith and Wesson .40 cal handgun, a Dan Wesson Arms .357 revolver, a Mossberg 500A shotgun, and 14 baggies of heroin on the rooftop.

including one count of Burglary Second Degree, two counts of Possession of a Firearm by a Person Prohibited, and one count of Resisting Arrest. As part of the plea agreement, the State agreed to enter *nolle prosequi* on the remaining 38 counts on the indictment and agreed to cap its sentencing recommendation to two years of Level V incarceration on these charges. Additionally, the parties requested a presentence investigation and agreed to open sentencing. As requested by the parties, Judge Streett deferred sentencing until the resolution of case numbers 1206002303 and 1205024309.

On June 28, 2013, Defendant appeared before this Court in case number 1206002303, including cases previously consolidated therewith, and entered a plea of guilty to three charges, including one count of Attempted Murder First Degree, which was a lesser included offence of an original charge of Murder First Degree that was amended, one count of Possession of a Firearm During the Commission of a Felony, and one count of Reckless Endangering First Degree, which was a lesser included offense of an original and separate charge of Attempted Murder First Degree that was amended. As part of the plea agreement, the State agreed to enter *nolle prosequi* on the remaining five counts on the indictment but did not make any agreement to cap its sentencing recommendation. Additionally, the parties requested a presentence investigation and agreed to open sentencing.

On October 4, 2013, Defendant appeared before this Court for sentencing, in advance of which trial counsel submitted a Mitigation Report prepared by Tanya Batista, M.A. As stipulated in the plea agreement, a pretrial sentence report was also previously prepared and submitted. Defendant was sentenced as follows: Attempted Murder First Degree, 30 years at Level V, with credit for seven days; Possession of a Firearm During the Commission of a Felony, eight (8) years at Level V; Reckless Endangering First Degree, four (4) years at Level V, suspended after two (2) years for two (2) years at Level IV, suspended after six (6) months for 18 months at Level III; Burglary Second Degree, one (1) year at Level V; two (2) counts of Possession of a Firearm By a Person Prohibited, one (1) year each at Level V, suspended for one (1) year each at Level III; and Resisting Arrest, one (1) year at Level V, suspended for one (1) year at Level IV. In total, Defendant was sentenced to 41 years of incarceration, and the State entered *nolle prosequi* on 43 counts.

Defendant did not file a direct appeal to the Delaware Supreme Court.

On January 2, 2014, Defendant's trial counsel filed a Motion for Sentence Modification. On March 26, 2014, this Court denied the Motion for Sentence Modification. No appeal to the Delaware Supreme Court followed.

DEFENDANT'S RULE 61 MOTION AND RULE 61 COUNSEL'S MOTION TO WITHDRAW

On April 9, 2014, Defendant filed this *pro se* Motion for Postconviction Relief. In Defendant's *pro se* motion, he raises three claims: (1) "unfulfilled plea agreement;" (2) "coerced guilty plea;" and (3) "ineffective assistance of counsel."[2] In his first claim, Defendant contends that before he took the guilty plea trial counsel reassured him that his total sentence would be between 18 and 30 years and that the State had capped its sentence recommendation to 30 years. In his second claim, Defendant contends that trial counsel coerced Defendant into taking the guilty plea by misrepresenting the length of his sentence and through undue influence and improper use of power and/or trust that deprived Defendant of his free will and violated his Constitutional rights. In his third claim, Defendant contends that trial counsel was ineffective because he did not object to his sentence and the plea agreement, did not truly investigate his case, and did not respond to motions filed on his behalf.

On July 18, 2014, Defendant was assigned counsel, Andrew J. Witherell, Esquire ("Rule 61 counsel"), to represent Defendant on his Rule 61 Motion for Postconviction Relief. On July 16, 2015, Rule 61 counsel filed a Motion to Withdraw as Counsel pursuant to Superior Court Criminal Rule 61(e)(6).

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[2] Defendant's *Pro Se* Rule 61 Motion for Postconviction Relief, ¶ 12.

Superior Court Criminal Rule 61(e)(6) provides that:

> If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.[3]

In his Motion to Withdraw, Rule 61 counsel represented that, after undertaking a conscientious examination of the record and the law, counsel has determined that Defendant's claims fail to cite to appropriate authority, fail to include specific facts to support his claims, and fail to be supported by the record.[4]

On or about July 20, 2015, Rule 61 counsel provided Defendant a copy of his Motion to Withdraw and notified Defendant that he had 30 days in which to respond.[5] On December 1, 2015, Rule 61 counsel advised the Court that he met with Defendant on November 6, 2015, and Defendant confirmed that he had received Rule 61 counsel's submission and that he did not respond within the 30 day timeframe. Rule 61 counsel also advised Defendant that he did not withdraw Defendant's claims as originally submitted, and Defendant stated that he had not reviewed his case in a while and, thus, did not believe he had anything to add to his original *pro se* Rule 61 Motion.

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[3] Super. Ct. Crim. R. 61(e)(6).
[4] *See* Motion to Withdraw as Counsel (Dkt. 50).
[5] Rule 61 counsel's December 1, 2015, Letter (Dkt. 51).

CONSIDERATION OF PROCEDURAL BARS

Superior Court Criminal Rule 61 governs Defendant's Rule 61 Motion. Postconviction relief is a "collateral remedy which provides an avenue for upsetting judgments that have otherwise become final.[6] To protect the finality of criminal convictions, the Court must consider the procedural requirements for relief set out under Rule 61(i) before addressing the merits of the motion.[7]

Rule 61(i)(1) bars a motion for postconviction relief if it is filed more than one year from the final judgment;[8] this bar is not applicable as Defendant's Rule 61 Motion was timely. Rule 61(i)(2) bars successive postconviction motions;[9] this bar is not applicable as this is Defendant's first motion. Rule 61(i)(3) bars relief if the motion includes claims not asserted in the proceedings leading to the final judgment;[10] this bar in not applicable as Defendant has claimed ineffective assistance of counsel, which could not have been raised in any direct appeal had one been filed.[11] Rule 61(i)(4) bars relief if the motion includes any grounds for relief formerly adjudicated;[12] this rule is similarly not applicable.

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[6] *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).
[7] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[8] Super. Ct. Crim. R. 61(i)(1).
[9] Super. Ct. Crim. R. 61(i)(2).
[10] Super. Ct. Crim. R. 61(i)(3).
[11] *See Watson v. State*, 80 A.3d 961 (Del. 2013) ("It is well-settled that this Court will not consider a claim of ineffective assistance of counsel that is raised for the first time in a direct appeal.).
[12] Super. Ct. Crim. R. 61(i)(4).

DISCUSSION

I. Defendant's Postconviction Challenge to a Non-Capital Sentence is Not Cognizable Under Rule 61.

Defendant's claim that his plea agreement went unfulfilled because his actual sentence exceeded 30 years, a condition he alleges was part of his plea agreement, effectively operates as a challenge to his sentence. Under the plain language of the rule, a postconviction challenge to a non-capital sentence is not cognizable under Rule 61.[13] Further, the Delaware Supreme Court has repeatedly held that defendants cannot use Rule 61 postconviction proceedings to challenge non-capital sentences.[14] In this case, it is clear from the plea agreement itself that it, in fact, neither contained any agreement as to the length of Defendant's sentence nor included the State's agreement to cap its recommendation to 30 years, and the two plea colloquies confirm Defendant's understanding that the Court would not be bound by any sentencing recommendation, let alone an agreement, in the plea agreements in any event.

Defendant indicated on his Truth-In-Sentencing Guilty Plea Forms that (i) he had not been promised anything that was not stated in his written plea

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[13] Del. Super. Ct. Crim. R. 61(a)(1) ("This rule governs the procedure on an application by a person in custody under a sentence of this court *seeking to set aside the judgment of conviction or a sentence of death*.") (emphasis added).

[14] *See Pearlman v. State*, 2009 WL 766522, at *1 (Del. March 25, 2009) (claim that implicated only the non-capital sentence received was no properly cognizable under Rule 61); *Wilson v. State*, 2006 WL 1291369, at *2 (Del. May 9, 2006) (claim that trial court improperly exceeded sentencing guidelines was not cognizable in postconviction proceeding).

agreement, (ii) no one promised him what his sentence would be, and (iii) all of the answers in his Truth-in-Sentencing Guilty Plea Forms were truthful and that he read and understood all the information on the forms.[15]

Defendant testified at the October 15, 2012 plea colloquy that he understood how his sentence would ultimately be decided:

> **Q.** Do you understand that the Court, although the State has agreed to cap its recommendation at two years Level V incarceration, the Court does not have to follow that recommendation, that you could be sentenced up to the maximum prison term. Do you understand that?
>
> **A.** Yes.[16]

And, trial counsel's remarks during the June 28, 2013 plea colloquy again confirm Defendant's same understanding, which Defendant later confirmed was correct[17]:

> **Trial Counsel.** [Defendant] understands, as well, that we, as the defense, are free to make our own recommendation to the Court. The State will make its recommendation and the presentence folks will also be making a report and a recommendation. Sentencing is ultimately in the discretion of the Court. [The Court is] not bound by the guidelines or any recommendation that otherwise would be given to Your Honor. I believe he understands all of this, and he is entering this plea knowingly, intelligently and voluntarily.[18]

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[15] Truth-in-Sentencing Guilty Plea Form dated June 26, 2013; Truth-in-Sentencing Guilty Plea Form dated October 15, 2012.
[16] October 15, 2012 Plea Colloquy Transcript at 13:9-14.
[17] June 28, 2013 Plea Colloquy Transcript at 6:9-11.
[18] *Id.* at 5:17-6:4.

Finally, the Court's exchange with Defendant during the June plea colloquy confirms that Defendant was well aware that the maximum sentence would not be 30 years:

> **Q.** Do you understand that a maximum sentence will be life?
>
> **A.** Yes.[19]

Therefore, Defendant's contention that his plea agreement went unfulfilled at sentencing is without merit, and any attempt by Defendant to challenge his sentence in his Rule 61 Motion is not properly before the Court.

II. Defendant Waived His Claims Upon Entry of His Plea.

Defendant's claim that he was coerced into accepting the guilty plea, because trial counsel allegedly misrepresented the length of his sentence and deprived Defendant of his free will, effectively operates as a challenge to his guilty plea, which he waived when the guilty plea was accepted by the Court. A defendant is bound by his statements given during the plea colloquy, absent clear and convincing evidence that the defendant did not understand the plea agreement, that he was forced to accept the plea, or that the he was not satisfied with trial counsel's representation.[20] In this case, it is clear from the Truth-In-Sentencing Guilty Plea Forms, the Plea Agreements, and the plea colloquies that Defendant

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[19] *Id.* at 7:14-16.

[20] *State v. Harden*, 1998 WL 735879, at *5 (Del. Super. Jan. 13, 1998), *aff'd*, 719 A.2d 947 (1998).

knowingly, voluntarily and intelligently entered guilty pleas to the charges for which he was sentenced. Furthermore, Defendant claims lack evidentiary support.

In the Truth-in-Sentencing Guilty Plea Forms, Defendant represented that he had not received any promises by anyone as to what his sentence would be.[21] He further represented that his trial counsel had fully advised him of his rights, that he was satisfied with his trial counsel's representation, and that all of the answers in his Truth-in-Sentencing Guilty Plea Forms were truthful and that he read and understood all the information on the forms.[22]

Likewise, Defendant personally represented to the Court that he had read and understood the Truth-in-Sentencing Guilty Plea Forms and the Plea Agreements.[23] Defendant also signed each Plea Agreement.[24] Defendant further represented that he had reviewed these forms with his trial counsel, and that he had discussed the plea offers with trial counsel.[25] Defendant also testified that he was not being threatened or forced to enter his plea by his attorney, the State, or anyone else.[26] And, Defendant represented that no one promised him what his sentence would be.[27] At the conclusion of the plea colloquies, the Court accepted

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[21] Truth-in-Sentencing Guilty Plea Form dated June 26, 2013; Truth-in-Sentencing Guilty Plea Form dated October 15, 2012.
[22] *Id.*
[23] See June 28, 2013 Plea Colloquy Transcript; October 15, 2012 Plea Colloquy Transcript.
[24] *See* Plea Agreement dated June 28, 2013; Plea Agreement dated October 15, 2012.
[25] See June 28, 2013 Plea Colloquy Transcript; October 15, 2012 Plea Colloquy Transcript.
[26] *Id.*
[27] *Id.*

Defendant's guilty pleas after finding them to be knowing, intelligent, and voluntary.[28]

In his Rule 61 Motion, Defendant has not presented any clear, convincing, and contrary evidence to call into question his testimony at the plea colloquy, his understanding of the Plea Agreements, or his answers on the Truth-in-Sentencing Guilty Plea Forms. He only now claims that he was promised a maximum sentence of 30 years, a claim which belies his sworn testimony, and produces no evidence in support thereof. Therefore, he must be bound by his statements made at the plea colloquies, which confirm that he entered his plea knowingly, intelligently, and voluntarily, and any claims he now makes as to defects, errors, misconduct and deficiencies that occurred prior to the entry of the plea must fail.

III. Defendant's Claim of Ineffective Assistance of Counsel is Without Merit.

Defendant's claim that his trial counsel ineffectively represented him, because counsel allegedly did not object to his sentence, did not truly investigate his case, and did not respond to motions filed on his behalf, fails to satisfy the rule set forth in *Strickland v. Washington*[29] and is, therefore, without merit. In *Strickland*, the United States Supreme Court ruled that in order to prove ineffective assistance of counsel, the defendant must show (1) deficient

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[28] *Id.*

[29] *Strickland v. Washington,* 466 U.S. 668, 687–88 (1984).

performance and (2) that the deficient performance prejudiced the defense.[30] Counsel's performance is deficient when "counsel's representation fell below an objective standard of reasonableness," but there is a strong presumption that trial counsel's representation of his or her client was professionally reasonable.[31] "Where the alleged error of counsel is a failure to investigate, a determination of 'prejudice' to the defendant by causing him to plead guilty depends upon the likelihood that the additional effort by counsel would have led to a change in counsel's recommendation as to that plea."[32]

In this case, Defendant has not demonstrated how counsel was ineffective with respect to sentencing. In advance of the sentencing hearing, trial counsel submitted a mitigation report, as well as several letters from family and friends. And, at the sentencing hearing, trial counsel made a moving argument for the Court to impose only 20 to 25 years of incarceration.[33] It has already been discussed, *supra*, that Defendant understood that the Court was not bound by any sentencing recommendations or agreements made among the parties. Therefore, this Court finds that trial counsel reasonably represented Defendant at the sentencing hearing.

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[30] *Id.* at 687.
[31] *Id.*
[32] *Alston v. State*, 2015 WL 5297709, at *3-4 (Del. Sept. 4, 2015) (quoting *Albury v. State,* 551 A.2d 53, 59 (Del. 1988)).
[33] *See* October 4, 2013 Sentencing Transcript.

As to Defendant's claim that trial counsel allegedly failed to investigate his case, Defendant provided no facts to support his allegation and, upon review of the record, this Court finds that trial counsel worked diligently to discover the facts of Defendant's case from the State, which is further evidenced by the plea agreements that counsel was able to obtain in the face of 50 charges for which Defendant had been indicted. As to Defendant's claim that trial counsel allegedly failed to respond to motions, this Court finds that the records offers no support for such an allegation. In fact, the record evidences that trial counsel made several extra filings on Defendant's behalf to provide the Court with all mitigating factors prior to sentencing and to modify Defendant's sentence after the fact.

Therefore, this Court is satisfied that trial counsel's representation of Defendant does not appear to have been deficient in any regard. Further, Defendant has failed to establish, let alone even contend, that there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial. The record shows that Defendant knowingly, intelligently, and voluntarily entered into the guilty pleas, and this Court will not now indulge Defendant and allow him to claim that the plea agreements were not as he understood them to be at the time they were entered into. Therefore, this

Court also finds that Defendant has failed to show any actual prejudice.[34] Based on these considerations, Defendant's allegations regarding his trial counsel's conduct fail under both prongs of the *Strickland* test.

CONCLUSION

The Court has reviewed the record carefully and has concluded that Defendant's Rule 61 Motion is without merit and devoid of any other substantial claims for relief. The Court is also satisfied that Rule 61 counsel made a conscientious effort to examine the record and the law and has properly determined that Defendant does not have a meritorious claim to be raised in his Rule 61 Motion.

Accordingly, Defendant's Motion for Postconviction Relief is **DENIED** and Defendant's Rule 61 Counsel's Motion to Withdraw is **GRANTED**.

IT IS SO ORDERED.

/s/ Calvin L. Scott Jr.
The Honorable Calvin L. Scott Jr.

[34] In *Stevenson v. State*, the Delaware Supreme Court affirmed the trial court's determination that a defendant failed to prove his claim of ineffective assistance of counsel based solely on the defendant's failure to demonstrate prejudice. 469 A.2d 797 (Del. 1983).