

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE) ID No. 1410020161
) In and for Kent County
 v.)
) RK15-02-0038-01 Rape 4th (F)
ROBERT PURYEAR) RK15-02-0039-01 Cont Sex Abuse (F)

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Kathleen A. Dickerson, Deputy Attorney General, Department of Justice, for the State of Delaware.

Robert Puryear, *Pro se.*

FREUD, Commissioner
September 20, 2017

The defendant, Robert Puryear (“Puryear”), pled guilty the day his trial was scheduled to begin on October 5, 2015 to one count of Continuous Sexual Abuse of a Child, 11 *Del. C.* § 776, and one count of Rape Fourth Degree, 11 *Del. C.* § 770. He was also facing one count of Rape in the Second Degree without Consent, five counts of Unlawful Sexual Contact Victim under 13 years old, and Unlawful Sexual Contact in the Second Degree. In exchange for the plea, *nolle prosequis* were entered by the State on the additional charges. A presentence investigation report was ordered. On December 16, 2015 Puryear was sentenced to a total of forty years incarceration suspended after serving four years and six months at Level V, two of

which were minimum mandatory for varying levels of probation. Puryear did not appeal his conviction or sentence to the Delaware Supreme Court. Instead on April 27, 2016 he filed a nonconforming motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The motion was rejected. Subsequently Puryear filed a conforming Rule 61 motion for postconviction relief on November 21, 2016.

FACTS

On October 4, 2014, the Delaware State Police began an investigation into alleged sexual molestation by Puryear. The report of the investigation is attached to the State's response (Exhibit A). The report recounts that the initial investigating officer was told by the victim that Puryear, who had recently moved into her home, had physically and sexually abused her. Three days later, on October 7, 2014, Detective Surowiec of Delaware State Police's Major Crimes Division began his investigation. At this point, the victim's mother had been notified of the allegations against Puryear and had agreed to remove him from her home. When Det. Surowiec spoke with the victim's mother on October 8, the mother reported that the victim "told her counselor that she fabricated the sexual assault allegations." Two days later the victim was interviewed at the Children's Advocacy Center by forensic interviewer Cynthia Vollmer. During this interview, the victim disclosed that the sexual abuse by Puryear began when she was 10 or 11 years old and living in Whispering Pines, a manufactured homes community in Dover, Delaware. The detective confirmed that the victim, her mother and Puryear lived in this community at the same time. The victim recounted that other instances of sexual assault occurred while she lived at that location. Furthermore, the victim reported that Puryear assaulted her at her new

address on South Governor's Avenue in Dover starting when she was 13 years old. She described the defendant digitally penetrating her vagina and engaging in penile-vaginal sexual intercourse. The victim also described Puryear groping her whenever he felt like it. The victim could not state when the abuse ended but told the interviewer that she had not seen Puryear for a year until he returned in October 2014.

Det. Surowiec interviewed Puryear on October 15, 2014. Puryear denied any illegal behavior but consented to a polygraph examination. After the polygraph examination on October 29, 2014, Det. Surowiec again interviewed Puryear. During this interview, Puryear stated: "I did touch Nicole." He admitted that the abuse started at the victim's previous home in 2007 when she was 8 years-old. He also admitted to touching the victim's vagina at her new residence. Eventually, Puryear admitted that he put his penis into the victim's vagina.¹

Puryear was arrested after his interview. He was indicted on February 2, 2015 and charged as noted above. The State provided initial discovery to defense counsel on January 26, 2015, including police reports and recordings of Puryear's statements to the police (Exhibit A). On March 12, 2015, the State provided the defense with redacted copies of the victim's Department of Family Services file (Exhibit B).² On October 2, 2015 the defense was provided the transcripts of the victim's and

¹ *State v. Puryear*, Del. Super., ID No. 1410020161 (April 28, 2017), DI 39. See Police Report attached as Exhibit A of State's Response.

² *Id.* DI 39.

Puryear's statements (Exhibit C).³

PURYEAR'S CONTENTIONS

In his motion, Puryear raises the following grounds for relief:

Ground one: Puryear claims that "newly discovered" evidence concerning the victim's alleged "recantation" found in the police report and his counsel's failure to notice this is grounds for relief.

Ground two: Puryear argues the Court "sabotaged" his initial Rule 61 filing by not accepting his nonconforming motion.

DISCUSSION

Under Delaware law, this Court must first determine whether Puryear has met the procedural requirements of Superior Court Criminal Rule 61(I) before it may consider the merits of his postconviction relief claim.⁴ This is Puryear's first motion for postconviction relief, and it was filed within one year of his conviction becoming final. Therefore, the requirements of Rule 61(i)(1) - requiring filing within one year and (2) - requiring that all grounds for relief be presented in initial Rule 61 motion, are met. None of Puryear's claims were raised at the plea, sentencing, or on direct appeal. Therefore, they are barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice. Only Puryear's first claim is based to some degree on

³ *Id.* D.I. 39.

⁴ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

ineffective assistance of counsel; therefore, he has alleged cause for his failure to have raised it earlier. Puryear's second ground for relief concerning the court's alleged "sabotaging" of his rights is utterly devoid of merit. The court rules require postconviction motion to be filed in accordance with set standards and procedures. Puryear's April 2016 filing was non-conforming with court rules and was returned to him. He subsequently filed a conforming motion within the required time frame. Puryear has demonstrably suffered no prejudice by having to conform to court rules and this ground is utterly frivolous and should be denied.

At this point, Rule 61(i)(3) does not bar relief as to Puryear's grounds for relief, provided he demonstrates that his counsel was ineffective and that he was prejudiced by counsel's actions. To prevail on his claim of ineffective assistance of counsel, Puryear must meet the two-prong test of *Strickland v. Washington*.⁵ In the context of a guilty plea challenge, *Strickland* requires a defendant show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial and that the result of a trial would have been his acquittal.⁶ The failure to establish that a defendant would not have pled guilty and would have

⁵ 466 U.S. 668 (1984).

⁶ *Id.* at 687.

proceeded to trial is sufficient cause for denial of relief.⁷ In addition, Delaware courts have consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.⁸ When examining the representation of counsel pursuant to the first prong of the *Strickland* test, there is a strong presumption that counsel's conduct was professionally reasonable.⁹ This standard is highly demanding.¹⁰ *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to "eliminate the distorting effects of hindsight."¹¹

Following a complete review of the record in this matter, it is abundantly clear that Puryear has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find trial counsel's affidavit, in conjunction with the record, more credible than Puryear's self-serving claims that his counsel's representation was ineffective. Puryear's counsel clearly denies the allegations.

Puryear was facing substantial incarceration time had he been convicted, and the sentence and plea were reasonable under all the circumstances, especially in light

⁷ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988))(citations omitted).

⁸ See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

⁹ *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).

¹⁰ *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990)(quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)).

¹¹ *Strickland*, 466 U.S. at 689.

of the evidence against him including his recorded confession. Prior to the entry of the plea, Puryear and his attorney discussed the case. The plea bargain was clearly advantageous to Puryear. Counsel's representation was certainly well within the range required by *Strickland*. Additionally, when Puryear entered his guilty plea, he stated he was satisfied with defense counsel's performance. He is bound by his statement unless he presents clear and convincing evidence to the contrary.¹² At sentencing, Puryear also expressed some limited remorse for his actions. Consequently, Puryear has failed to establish that his counsel's representation was ineffective under the *Strickland* test. As noted by the State and defense counsel Puryear's argument that there is "newly discovered" evidence is simply factually incorrect. The police report was provided to the defense well before his guilty plea and counsel fully discussed with Puryear the "alleged" recantation of the victim and Puryear chose to plead guilty.

Even assuming, *arguendo*, that counsel's representation of Puryear was somehow deficient, Puryear must satisfy the second prong of the *Strickland* test, prejudice. In setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk dismissal.¹³ In an attempt to show prejudice, Puryear simply asserts that his counsel was ineffective. His statements are insufficient to establish prejudice, particularly in

¹² *Mapp v. State*, 1994 WL 91264, at *2 (Del.Supr.)(citing *Sullivan v. State*, 636 A.2d 931, 937-938 (Del. 1994)).

¹³ *Larson v. State*, 1995 WL 389718, at *2 (Del. Supr.)(citing *Younger*, 580 A.2d 552, 556 (Del. 1990)).

light of the evidence against him. Therefore, I find Puryear's grounds for relief are meritless.

To the extent that Puryear alleges his plea was involuntary, the record contradicts such an allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary, the Court looks to a plea colloquy to determine if the waiver of constitutional rights was knowing and voluntary.¹⁴ At the guilty-plea hearing, the Court asked Puryear whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The Court asked Puryear if he understood he would waive his constitutional rights if he pled guilty; if he understood each of the constitutional rights listed on the Truth-in-Sentencing Guilty Plea Form ("Guilty Plea Form"); and whether he gave truthful answers to all the questions on the form. The Court asked Puryear if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Puryear if he was entering into the plea as he was guilty of the charges. The Court also asked Puryear if he was satisfied with this counsel's representation. Puryear answered each of these questions affirmatively.¹⁵ I find counsel's representations far more credible than Puryear's self-serving, vague allegations.

Furthermore, prior to entering his guilty plea, Puryear signed a Guilty Plea Form and Plea Agreement in his own handwriting. Puryear's signatures on the forms

¹⁴ *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

¹⁵ *State v. Puryear*, Del. Super., ID No. 1410020161, Tr. at 4-7.

State v. Puryear
ID No. 1410020161
September 20, 2017

indicate that he understood the constitutional rights he was relinquishing by pleading guilty and that he freely and voluntarily decided to plead guilty to the charges listed in the Plea Agreement. Puryear is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.¹⁶ I confidently find that Puryear entered his guilty plea knowingly and voluntarily and that Puryear's grounds for relief are completely meritless.

CONCLUSION

I find that Puryear's counsel represented him in a competent and effective manner and that Puryear has failed to demonstrate any prejudice stemming from the representation. I also find that Puryear's guilty plea was entered knowingly and voluntarily. I recommend that the Court *deny* Puryear's motion for postconviction relief as procedurally barred, frivolous, and completely meritless.

/s/ Andrea M. Freud

Commissioner

AMF/dsc

¹⁶ *Sommerville* 703 A.2d at 632.