IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	IK00-07-0581-R1
	)	IK00-07-0582-R1
CORNELL L. RIVERA	)	IK00-07-0583-R1
	)	IK00-07-0587-R1
Defendant.	)	
ID No. 0007016173	)	

O R D E R

On this 13th day of March, 2002, upon consideration of the defendant's Motion for Postconviction Relief, the Commissioner's Report and Recommendation, and the record in this case, it appears that:

(1) The defendant, Cornell L. Rivera ("Rivera") pled guilty on January 2, 2001 to four counts of Unlawful Sexual Intercourse in the Third Degree ("USI 3rd"), 11 *Del. C.* § 773, as a lesser included offense of Unlawful Sexual Intercourse in the First Degree ("USI 1st"). Rivera was facing trial on seven counts of USI 1st, one count of Attempted Unlawful Sexual Intercourse in the First Degree, one count of Continuous Sexual Abuse of a Child and eleven counts of Unlawful Sexual Contact in the Second Degree. Had Rivera gone to trial and been convicted of the eight most serious charges, he would have faced the possibility of 120 years minimum mandatory incarceration and up to life, if found guilty of

each of these charges. Pursuant to the plea agreement, the State entered a *nolle prosequi* on the remaining charges. A presentence investigation was ordered. Rivera was sentenced on February 27, 2001 to a total of twenty years incarceration suspended after three years for varying levels of probation. Rivera did not appeal his conviction or sentence to the Delaware Supreme Court. Instead, Rivera chose to file a motion for postconviction relief pursuant to Superior Court Criminal Rule 61. In his motion, Rivera alleges three grounds for relief: 1) that his confession was coerced, 2) that his counsel was ineffective, and 3) that the charges should have proceeded in Family Court.

(2) The Court referred this motion to Superior Court Commissioner Andrea Maybee Freud pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of facts and conclusions of law. The Commissioner has filed a Report and Recommendation that the motion for postconviction relief should be denied. No objections to the Report have been filed.

NOW THEREFORE, after careful and *de novo* review of the record in this action, and for the reasons stated in the Commissioner's Report and Recommendation dated January 30, 2002,

IT IS ORDERED that:

(A) The Commissioner's Report and Recommendation is adopted by the Court;

(B) The defendant's Motion for Postconviction Relief is ***DENIED***.

/s/ Henry duPont Ridgely
President Judge

cmh
oc: Prothonotary
xc: Hon. Andrea Maybee Freud
John R. Garey, Esq.
Christopher Tease, Esq.
Mr. Cornell L. Rivera
Order Distribution (w/Report & Recommendation)

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John R. Garey, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Mr. Cornell L. Rivera, *pro se*.

COMMISSIONER'S REPORT AND RECOMMENDATION

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

FREUD, Commissioner
January 30, 2002 - **REVISED March 13, 2002**

The Defendant, Cornell L. Rivera ("Rivera") pled guilty on the day his trial was to begin, January 2, 2001, to four counts of Unlawful Sexual Intercourse in the Third Degree ("USI 3rd"), 11 *Del. C.* § **773** as a lesser included offense of Unlawful Sexual Intercourse in the First Degree ("USI 1st"). Rivera was facing trial on a total of **seven** counts of USI 1st **and one count of Attempted Unlawful Sexual Intercourse in the First Degree** with the possibility of 120 years minimum

mandatory incarceration and up to life, if found guilty of each of these charges. He also faced one count of Continuous Sexual Abuse of a Child, and **eleven** counts of Unlawful Sexual **Contact** in the Second Degree. Pursuant to the plea agreement, the State *nolle prossed* the **three** counts of USI 1st and the remaining charges. A presentence investigation was ordered. Rivera was sentenced on February 27, 2001 to a total of twenty years incarceration suspended after three years for varying levels of probation. Rivera did not appeal his conviction or sentence to the State Supreme Court, instead he filed the instant motion for postconviction relief pursuant to Superior Court Criminal Rule 61. In his motion, Rivera alleges several grounds for relief including that his trial counsel was ineffective.

Under Delaware Law this Court must first determine whether Rivera has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.[1] This is Rivera's first motion for postconviction and it was filed within three years of his conviction becoming final, so the requirements of Rule 61(i)(1) - requiring filing within three years - and (2) - requiring that all grounds for relief be presented in initial Rule 61 motion - are met. None of Rivera'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. Several of Rivera's contentions are based on ineffective assistance of counsel, therefore, he has alleged cause for his

[1] *Bailey v. State,* Del. Supr., 588 A.2d 1121, 1127 (1991); *Younger v. State,* Del. Supr., 580 A.2d 552, 554 (1990).

failure to have raised these issues earlier. Rule 61(i)(3) does not bar relief as to those claims at this point should Rivera demonstrate that his counsel was ineffective and that he was prejudiced by counsel's actions.

In his first ground for relief, Rivera claims that his confession was coerced. In his third ground for relief, Rivera appears to allege that the charges should have proceeded in the Family Court. These claims are meritless as Rivera's guilty plea waived any claim based on alleged errors prior to the plea.[2] In *Haskins* the Delaware Supreme Court stated that "[a] 'voluntary and intelligent' plea agreement waives all defects allegedly occurring before the defendant enters the plea with the exception of subject matter jurisdiction."[3] Clearly these grounds for relief are meritless. Additionally the claims are procedurally barred by Rule 61(i)(3) since they were not raised during Rivera's plea, at his sentencing or on direct appeal. Rivera has made no attempt to demonstrate cause for his failure to have raised these issues earlier. Nor has he attempted to demonstrate any prejudice.

Rivera's remaining ground for relief is that his counsel was ineffective by failing to "follow through with time, date, age of incident which was favorable to

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[2] *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Simon v. State*, Del. Supr., No. 224, 1992, Veasey, C.J. (August 10, 1992) (ORDER); *Haskins v. State*, Del. Supr., No. 188, 1991, Moore, J. (August 19, 1991) (ORDER); *Downer v. State*, Del Supr., 543 A.2d 309, 312-313 (1988).

[3] *Haskins, supra,* at 2-3.

my defense."[4] Rivera also alleges in a supporting memorandum that his counsel promised him he would only receive a sentence for time served and as such the guilty plea was involuntary. These contentions superficially raise the issue of ineffective assistance of counsel. To prevail on his claims of ineffective assistance of counsel, Rivera must meet the two prong test of *Strickland v. Washington*.[5] In the context of a guilty plea challenge, *Strickland* requires that 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] 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.[7] When examining the representation of counsel pursuant to the first prong of the *Strickland* test, there is a strong presumption that counsel's

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[4] Docket Item No. 16 at p. 3.

[5] 466 U.S. 668 (1984) ("*Strickland*"); *Larson v. State*, Del. Supr., No. 200, 1994, Hartnett, J. (June 23, 1995) (ORDER); *Albury v. State*, Del. Supr., 551 A.2d 53 (1988), *Skinner v. State*, Del. Supr., 607 A.2d 1170, 1172 (1992).

[6] *Hill v. Lockhart*, 474 U.S. 52, 57, 59 (1985); *Strickland*, 466 U.S. at 688, 694; *Accord Larson v. State*, *supra,* at 3-4; *Blanchfield v. State*, Del. Supr., No. 97, 1994, Veasey, C.J. (October 18, 1994) (ORDER); *Skinner v. State*, 607 A.2d at 1172; *Albury v. State*, 551 A.2d at 58.

[7] *Younger v. State*, 580 A.2d at 556; *Skinner v. State*, Del. Supr., No. 318, 1993, Holland, J. (March 31, 1994)(ORDER).

conduct was professionally reasonable.[8] This standard is highly demanding.[9] *Strickland* mandates that when viewing counsel's representation, this Court must endeavor to "eliminate the distorting effects of hindsight."[10]

Following a complete review of the record in this matter, it is abundantly clear that Rivera has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find counsel's affidavit,[11] in conjunction with the record, more credible than Rivera's contention that he did not knowingly enter his plea or that his counsel "manipulated" him into entering the clearly beneficial plea agreement. Rivera was facing trial on **seven** charges of USI 1st **and one charge of Attempted USI 1st** with two ten year old boys and risked being sentenced to one hundred and twenty years minimum mandatory incarceration or life imprisonment. Rivera's counsel was able to negotiate a plea bargain with the State which left open the possibility of a probationary sentence and which ultimately resulted in only three years incarceration as **o**pposed to life in prison. Rivera and his attorney discussed the case prior to the entry of the plea. The plea bargain was clearly advantageous to Rivera. Counsel's representation was

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[8] *Albury v. State*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. 689); *see also Larson v. State*, *supra,* at 4; *Flamer v. State*, 585 A.2d 736 at 753 (1990).

[9] *Id.* at 754.

[10] *Strickland*, 466 U.S. at 639.

[11] In the affidavit Counsel specifically denies Rivera's allegations. Counsel clearly states that he never promised Rivera what his sentence would be although he candidly states that he told Rivera "that it was my opinion he may get that sentence given the mitigating circumstances" (Emphasis added). Docket Item No. 21 at 4.

certainly well within the range required by *Strickland.* Additionally, when Rivera 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] Consequently, Rivera has failed to establish that his counsel's representation was ineffective under the *Strickland* test.

Even assuming, *arguendo* that counsel's representation of Rivera was somehow deficient, Rivera 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] Rivera simply asserts that his counsel didn't do enough in an attempt to show prejudice. Rivera does not clearly suggest what more counsel could have done. These statements are insufficient to establish prejudice. Interestingly, Rivera does not claim innocence. In fact, Rivera confessed to the police that he had intercourse with the victims multiple times. The confession was handwritten by Rivera. The case against Rivera was very strong indeed. Rivera has failed to demonstrate any prejudice stemming from counsel's representation.

To the extent Rivera alleges his plea was involuntary, the record clearly contradicts Rivera's allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary, the court looks to the plea colloquy

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[12] *Blanchfield v. State*, Del. Supr., No. 97, 1994, Veasey, C.J. (October 18, 1994) (ORDER); *Mapps v. State*, Del. Supr., No. 3, 1994, Holland, J. (March 17, 1994) (ORDER) (citing *Sullivan v. State*, Del. Supr., 636 A.2d 931, 937-938 (1994)).

[13] *Larson v. State*, *supra,* at 5; *Younger v. State*, 580 A.2d at 556.

to determine if the waiver of constitutional rights was knowing and voluntary.[14] At the guilty plea hearing, the Court asked Rivera whether he understood the nature of the charges, the consequences of his pleading guilty and whether he was voluntarily pleading guilty. The Court asked Rivera if he understood he would waive his constitutional rights if he pled guilty, if he understood each of the constitutional rights listed on the guilty plea form and whether he gave truthful answers to all the questions on the form. The Court asked Rivera if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Rivera if he was giving the plea of his own free will because he was in fact guilty. The Court asked Rivera if he understood the maximum sentence he could receive by pleading guilty was life incarceration. The Court also asked Rivera if he was satisfied with his counsel's representation. Finally, the Court asked Rivera if he was in fact, guilty of the charge. Rivera answered each of these questions clearly and affirmatively.[15]

Furthermore, prior to entering his guilty plea, Rivera filled out a Guilty Plea Form and signed it. Rivera wrote that he understood the constitutional rights he was relinquishing by pleading guilty and that he freely and voluntarily decided to plead guilty to the charge listed in the plea agreement. Rivera is bound by the statements he made on the signed Guilty Plea Form unless he proves otherwise by

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[14] *Godinez v. Moran*, 113 S.C-1 2680, 2687 (1993).

[15] Transcript of guilty plea at 17-23.

clear and convincing evidence.[16] Consequently, I confidently find that Rivera entered his guilty plea knowingly and voluntarily and that these grounds for relief are completely meritless.

I find that Rivera's counsel represented him in a competent and effective manner and that Rivera has failed to demonstrate any prejudice stemming from the representation. I also find that Rivera's guilty plea was entered knowingly and voluntarily. As to Rivera's remaining claims, they are all barred by Rule 61(i)(3). I recommend that the Court ***deny*** Rivera's motion for postconviction relief.

/s/ Andrea Maybee Freud
Commissioner Andrea Maybee Freud

oc: Prothonotary
cc: Hon. Henry duPont Ridgely
John R. Garey, Esq.
Christopher Tease, Esq.
Cornell L. Rivera
Notebook

[16] *Hickman v. State*, Del. Supr., No. 298, 1994, Veasey, C.J. (October 11, 1994) (ORDER); *Smith v. State*, Del. Supr., No. 465, 1989, Walsh, J. (January 4, 1990) (ORDER). *See also Sullivan v. State*, Del. Supr., 636 A.2d 931, 938 (1994) (ruling the fact that defendant filled out Truth In Sentencing Guilty Plea Form in defendant's own handwriting supported the Superior Court's conclusion that defendant's decision to plead guilty was knowing and voluntary).