IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
	:	
v.	:	**Crim. I.D. No. 9812010576**
	:	
ANTHONY L. CHEEKS,	:	
	:	
Defendant.	:	

***Upon Defendant's Motion for Postconviction Relief* -- DENIED**

Submitted: January 9, 2001
Decided: April 9, 2001

ORDER

DEL PESCO, Judge.

This 9th day of April, 2001, upon consideration of defendant's Motion for Postconviction Relief, it appears to this Court that:

1) On January 4, 1999, the Grand Jury returned a seven count indictment against defendant, Anthony L. Cheeks ("Cheeks"), charging him with six felony counts of Assault Second Degree[1] and one felony count of Endangering the Welfare of a Minor.[2]

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[1] **11 *Del. C.* § 612.**
[2] **11 *Del. C.* § 1102(b)(2).**

2) On April 5, 1999, Cheeks, represented by counsel, accepted a plea offer made by the State. The plea agreement required that Cheeks plead guilty to two felony counts of Assault Second Degree involving the following acts: rupturing his son's intestinal tract and fracturing four of his son's ribs. The remaining five counts of the indictment were to be *nolle prossed*. The agreement also indicated that it was *not* drawn pursuant to Super. Ct. Crim. R. 11(e)(1)(C), and that the State would recommend Cheeks serve no more than three years at Level V incarceration. Cheeks signed the agreement after indicating that he had not been threatened or forced to enter the plea, and that he had not been promised anything that was not stated in the written plea agreement.

3) At the April 5, 1999 plea colloquy proceedings, Cheeks was given an opportunity to review the plea agreement. As a result of the serious nature of the crimes to which defendant was about to plead, the Court exercised particular caution during the plea colloquy and extensively reviewed with the defendant the consequences of this entry of a guilty plea. During this colloquy, Cheeks indicated that he had read the guilty

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[3] **This rule provides: (1) In general. The attorney general and the attorney for the defendant . . . may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty . . . to a charged offense . . ., the attorney general will . . .: (C) Agree that a specific sentence is the appropriate disposition of the case. The prosecuting attorney shall comply with 11 *Del. C.* § 5106."**

plea form and the plea agreement, had discussed them with his attorney, understood what the papers stated, and signed them. The Court confirmed that the defendant understood that the State was going to recommend he serve no more than three years incarceration, and explained that the final decision regarding his sentence belonged to the judge. After Cheeks entered his plea, the Court once again advised him that although the State was going to recommend he serve no more than three years, the judge could sentence him to as many as sixteen years under the statute. When asked if he understood, Cheeks responded affirmatively. In closing, the Court asked Cheeks if he was satisfied that counsel fully advised him of his rights and of the consequences of his guilty plea. Once again, Cheeks answered in the affirmative.

4) On December 10, 1999, after reviewing the defendant's presentence report and hearing argument, a different judge sentenced Cheeks on the first count to five years imprisonment at Level V, to be suspended after two and one-half years for two and one-half years at Level IV, to be suspended after one year for the balance at Level III.

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[4] References to the April 5, 1999 Plea Colloquy transcript will be cited as TR. at ___.
[5] TR. at 4-5.
[6] TR. at 6.
[7] TR. at 8. Each count to which Cheeks pleaded guilty is a Class D Felony with a maximum statutory sentence of eight years at Level V. *See* 11 *Del. C.* §§ 612, 4205(b)(4).
[8] TR. at 9-10.
[9] References to the Dec. 10, 1999 Sentencing transcript will be cited as ST. at ___.

On the second count, the Judge sentenced Cheeks to five years imprisonment at Level V, to be suspended after two and one-half years for two and one-half years at Level II. The Judge ordered the two sentences to run consecutively. Thus, the total length of Cheeks' sentence to be served at Level V was two years more than the maximum sentence recommended by the State in the plea agreement, but 11 years less than the maximum possible sentence of 16 years.

5) On August 15, 2000, Cheeks submitted a direct appeal to the Delaware Supreme Court of his sentence. The Supreme Court considered and rejected Cheeks' claim that the trial court abused its discretion by failing to acknowledge any of the mitigating factors advanced by him during his sentencing hearing. The Supreme Court affirmed the sentencing decision on September 25, 2000.

6) Cheeks has now moved this Court for postconviction relief under Superior Court Criminal Rule 61. He asserts two separate grounds for relief, both of which are variations on the theme of denial of his sixth amendment right to effective assistance of counsel. Under his first ground for relief, Cheeks has asserted he was denied effective assistance because counsel did not request that the plea be accepted pursuant to

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[10] ***See Cheeks v. State*, Del. Supr., No. 6,2000, Veasey, C.J. (Sept. 25, 2000) (ORDER).**

Super. Ct. Crim. R. 11(e)(1)(C). Cheeks' second ground for relief contends ineffective assistance due to counsel's failure to object to the State's alleged violation of the plea agreement during the sentencing hearing.

7) Under Delaware law, in order for this Court to consider the merits of a Motion for Postconviction Relief, the movant must first overcome the substantial procedural bars contained in Rule 61(i). Under Rule 61, postconviction claims for relief must be brought within three years of the movant's conviction becoming final. Further, any ground for relief not asserted in a prior postconviction motion is thereafter barred, unless consideration of the claim is necessary in the interest of justice. The interest of justice exception requires that the movant show that "subsequent legal developments have revealed that the court lacked the authority to convict or punish him." Similarly, grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for the procedural default, and (2) prejudice from violation of the

[11] *Flamer v. State*, Del. Supr., 585 A.2d 736, 745 (1990); *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990).
[12] Super. Ct. Crim. R. 61(i)(1).
[13] Super. Ct. Crim. R. 61(i)(2).
[14] *Flamer v. State*, Del. Supr., 585 A.2d 736, 746 (1990).

movant's rights. However, these bars to relief are inapplicable to jurisdictional challenges or to colorable claims of miscarriages of justice stemming from constitutional violations that "undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." In addition, any ground for relief that was formerly adjudicated in the proceedings leading to judgment of conviction or in a prior postconviction proceeding is thereafter barred from consideration, unless there was a miscarriage of justice of constitutional proportions. After considering the motion, response, reply, and all supporting documents, the Court may order an evidentiary hearing on any issue(s) raised.

8) In this case, Cheeks filed his motion for postconviction relief on November 13, 2000, well within the three year time limitation set in Rule 61. Consequently, his claims are not procedurally barred by Rule 61(i)(1). 9) Cheeks first claims his counsel's failure to request that his plea be accepted pursuant to Super. Ct. Crim. R. 11(e)(1)(C) constituted ineffective assistance of counsel. Under the standard

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[15] Super. Ct. Crim. R. 61(i)(3).
[16] *State v. Getz*, Del. Super., 1994 WL 465543, *1, Ridgely, P.J. (Jul. 15, 1994) (citing to Super. Ct. Crim. R. 61(i)(5)).
[17] Super. Ct. Crim. R. 61(i)(4).
[18] Super. Ct. Crim. R. 61 (h)(1).

outlined in *Strickland v. Washington*, in order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that 1) counsel's representation fell below an objective standard of reasonableness; and 2) counsel's actions were prejudicial to his defense, creating a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The *Strickland* standard is highly demanding and under the first prong of the test, there is a "strong presumption that the representation was professionally reasonable." A plea offer originates with the State which is not obliged to agree to a sentencing recommendation and did not do so in this instance. In this regard, the Court asked Cheeks if counsel had fully discussed the plea agreement with him, had advised him of his rights, and counseled him on the consequences of his guilty plea. To all inquiries, Cheeks responded in the affirmative. Furthermore, Cheeks twice reviewed and signed the plea agreement that clearly indicated his plea was not being accepted pursuant to Rule 11(e)(1)(C). Thus, Cheeks' assertion that counsel did not properly advise him of the terms of the plea agreement is without merit. Given the foregoing, the

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[19] *Strickland v. Washington*, 466 U.S. 668 (1984). *See also Albury v. State*, Del. Supr., 551 A.2d 53 (1988).
[20] *Strickland v. Washington*, 466 U.S. at 688, 694; *Albury v. State*, 551 A.2d at 58.
[21] *Stone v. State*, Del. Supr., 690 A.2d 924, 925 (1996); *Flamer v State*, Del. Supr., 585 A.2d 736, 753 (1990).
[22] TR. at 4-10.

defendant has failed to demonstrate that counsel's assistance was inadequate and thus the defendant has failed the first prong of the *Strickland* test.

As to the second prong of the *Strickland* test, the movant is required to make and substantiate concrete allegations of both unreasonable attorney conduct and actual prejudice. In assessing attorney performance, every effort must be made "to eliminate the distorting effects of hindsight." Since the Court has found that Cheeks was apprised of his rights, his failure to demonstrate what more his counsel should have done is fatal. Upon a review of the record, this Court finds no error or omission on the part of counsel; there is no entitlement to a Rule 11(e)(1)(C) plea. Furthermore, during the plea colloquy, the Court asked Cheeks, "Are you satisfied that your attorney has fully advised you of your rights and of the consequences of the guilty plea?" Cheeks responded, "Yes, ma'am." Absent clear and convincing evidence to the contrary, the defendant is bound by that statement.

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[23] **TR. at 1.**
[24] ***Robinson v. State*, Del. Supr., 562 A.2d 1184, 1185 (1989); *Harris v. State*, Del. Supr., No. 418, 1987, Christie, C.J. (Mar. 4, 1988)(ORDER).**
[25] ***Strickland v. Washington*, 466 U.S. at 688.**
[26] **TR. at 9-10.**
[27] ***Wright v. State*, Del. Supr., No. 400,1991, Walsh, J. (Feb. 20, 1992)(ORDER); *Fullman v. State*, Del. Supr., No. 268,1989, Christie, C.J. (Feb. 22, 1989)(ORDER).**

10) Cheeks second ground for relief contends that counsel's failure to object to the State's unwillingness to state a recommendation for time to be served at Level V constitutes ineffective assistance of counsel. As stated above, the defendant must meet both prongs of the *Strickland* test in order to prevail on this claim. A review of the record reveals that the prosecutor said, "I'm not going to give a recommended level five time. *The State capped its recommendation level five at three years*, but no level five time, however long, will give this child back what this defendant took from him." Although the prosecutor prefaced her statement regarding the recommendation with a comment indicating that the defendant's sentence would be left to the discretion of the Court, clearly the prosecutor honored the terms of the agreement. There was no reason for counsel to object to the prosecutor's statement. Given the foregoing, Cheeks' claim is without merit and he has failed to demonstrate that counsel's assistance fell below an objective standard of reasonableness.

Cheeks has also failed to demonstrate actual prejudice due to counsel's failure to object during the sentencing hearing. At his plea colloquy, Cheeks had been advised that the State's recommendation was

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[28] **ST. at 10-11. Emphasis added.**

only a recommendation, and that ultimately, his sentence would be determined by the Court. As noted above, the Court was properly advised of the State's recommendation, thus counsel had no basis for an objection. Therefore, Cheeks' second ground for relief, having failed both prongs of the *Strickland* test, is specious.

11) Cheeks has argued two separate grounds for relief. Both grounds are without merit. An evidentiary hearing is unnecessary. Based on the foregoing reasons, Cheeks Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Anthony L. Cheeks, M.P.C.J.F.
Mark H. Conner, Esquire, Deputy Attorney General

[29] **TR. at 6.**