

March 13, 2001

Donald Gregory
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

RE: State v. Gregory, Def. ID# 9802000985
State v. Gregory, Def. ID# 9802008794

DATE SUBMITTED: February 13, 2001

Dear Mr. Gregory:

Defendant Donald Gregory ("defendant") has filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). This is my decision denying his various requests.

FACTS

On or about February 2, 1998, defendant was arrested on two counts of misdemeanor theft and one count of felony theft. An information containing these charges dated February 23, 1998, was filed. These charges are contained in the file of State v. Gregory, Def. ID# 9802000985.

On or about February 12, 1998, defendant was arrested on two

counts of robbery in the second degree. An information dated March 17, 1998, was filed. These charges are contained in the file of State v. Gregory, Def. ID# 9802008794.

On May 5, 1998, defendant entered into a guilty plea pursuant to Superior Court Criminal Rule 11(e)(1)(c) to two of the five above-noted charges. Defendant pled guilty to Cr. A. No. S98-02-0459, a robbery in the second degree charge, and to Cr. A. No. S98-02-0129, a theft misdemeanor charge.

In the Truth in Sentencing Guilty Plea Form ("guilty plea form") defendant answered in the affirmative to the following two questions:

Have you freely and voluntarily decided to plead guilty to the charges listed in your written plea agreement?

Are you satisfied with your lawyer's representation of you and that your lawyer has fully advised you of your rights and of the result of your guilty plea?

In that same form, defendant answered in the negative to the following question: "Has your attorney, the State or anyone threatened or forced you to enter this plea?"

During the plea colloquy, defendant, after being sworn, confirmed that his answers to the questions in the guilty plea form and the plea agreement were true. He also confirmed he was satisfied with his attorney's representation of him in the matter.

On the plea agreement form, it is indicated that defendant was to be placed in the Key Program while at Level 5 and upon successful completion, to be in the Crest Program while at Level 4. Also on that form, it was indicated that if defendant was not

in Key or Crest, he shall participate in another similar inpatient program. The State explained during the presentation of the plea agreement that this was a condition of the sentence. The Court accepted the guilty plea and imposed the agreed-upon sentences.

As to Cr. A. No. S98-02-0459, defendant was sentenced in pertinent part as follows:

Effective May 5, 1998, the defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of four (4) years, giving credit for time served on this charge. Upon successful completion of Key Program, Level 5 is suspended for one (1) year at Supervision Level 4, Crest or appropriate aftercare program, followed by one (1) year at Supervision Level 3, followed by one (1) year at Supervision Level 2, consecutive to any probation previously imposed.

As to Cr. A. No. S98-02-0129, the sentence provided in pertinent part as follows:

The defendant is placed in the custody of the Department of Correction at Supervision Level 5 for a period of one (1) year, consecutive to S98-02-0459. This sentence is suspended for one (1) year at Supervision Level 2, consecutive to S98-02-0459.

Defendant did not appeal.

On February 17, 1999, the Central Institutional Classification Board denied defendant entry into the Key Program. In a letter to the Court dated June 1, 1999, Department of Corrections explained the basis for this denial as follows:

On 2/17/99, inmate Gregory's case was reviewed by the Central Institutional Classification Board for Medium Low/Key South. Two members of that committee had to abstain from voting.... The other members voted unanimously (5-0) to disapprove inmate Gregory for Key/South (SCI) at the time due to disciplinary infractions and mental health issues. Inmate Gregory is prescribed psychotropic medication (paranoid

schizophrenic) and when he does not take it, he becomes irrational, assaultive toward staff and other inmates, and has auditory hallucinations. Inmate Gregory is not suitable for a dormitory setting at the present time.

Every effort is made to ensure compliance of court order and/or stipulated treatment programs. The committee did make a referral to our mental health provider to place Gregory in the Chronic Care Unit at SCI until he is stabilized on his medication and also, to provide him with mental health counseling. ... It is hoped that once he is stabilized on medication, he can then be reconsidered for admission to the Key Program.

*** Reports from staff indicate that if he does take his medications he is able to do well. It is when he stops that problems arise.

On September 22, 2000, after defendant had again quit taking his medications and become violent, the Court entered an order that required defendant to undergo a psychological evaluation and comply with directions for counseling, testing or treatment that may be recommended by the evaluator, Corrections, the State Hospital, or probation. On November 30, 2000, due to defendant's further decompensation, this Court ordered that defendant comply with medication and treatment offered by the Psychiatrist and Mental Health Staff at Sussex Correctional Institution.

On February 12, 2001, defendant filed the pending Rule 61 motion. In that motion, he asserts that the plea was coerced and the plea in which he entered was not the one to which he agreed. He also argues that the plea agreement was unfulfilled. Finally, he argues that the sentence imposed was illegal.

DISCUSSION

1) Rule 35 Claim

I will address, first, defendant's contention that the sentence imposed was illegal. This claim should be advanced pursuant to Rule 35(a),¹ not Rule 61.

Defendant argues that the Court imposed a seven year sentence on the robbery in the second degree conviction when the most which could be imposed was five years. Robbery in the second degree is a Class E felony. 11 Del. C. § 831(a).² The Court may sentence a defendant up to five years of incarceration upon a conviction of that charge. 11 Del. C. § 4205(b)(5).³ The Court imposed a four year period of incarceration on this conviction. Consequently, the sentence was legal. This claim is meritless.

2) Rule 61 Claims

Defendant's Rule 61 motion contains three prongs. Although he does not specify the relief he seeks, I assume he wishes to withdraw his guilty plea.

This Court first must determine if there are any procedural bars to the claims in the postconviction relief motion, and if

¹In Superior Court Criminal Rule 35(a), it is provided in pertinent part:

Correction of sentence. The court may correct an illegal sentence at any time....

²In 11 Del. C. § 831, it is provided in pertinent part: "Robbery in the second degree is a class E felony."

³In 11 Del. C. § 4205(b)(5), it is provided:

The term of incarceration which the court may impose for a felony is fixed as follows:

(5) For a class E felony up to 5 years to be served at Level V.

there are, the Court must apply them. Younger v. State, Del. Supr., 580 A.2d 552, 554 (1990).

Motions for postconviction relief must be brought within three years from the date when the conviction became final. Rule 61(i)(1). The motion at hand was timely filed. In addition, since this is the defendant's first motion for postconviction relief, the bar of Rule 61(i)(2)⁴ does not apply.

Where a defendant asserts grounds for relief which could have been asserted in the proceedings leading to judgment of conviction, the Court does not normally consider those grounds. As explained in State v. Taylor, Del. Super., Cr.A. No. IK94-06-0047-0052, Maybee, Comm. (March 4, 1999) at 4-5, aff'd, Del. Super., Cr.A. No. IK94-06-0047 - 0052, Ridgely, P.J. (April 28, 1999):

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 fault; and 2) prejudice from a violation of the movant's rights. The bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim or miscarriage of justice stemming from a constitutional violation that "undermines the fundamental legality, reliability, integrity or fairness of the proceeding leading to the judgment of conviction." [Citations and footnotes omitted.]

Defendant argues that his attorney coerced him into entering the plea. He also argues that the plea agreement into which he entered turned out not to be the plea to which he agreed. These

⁴ (i) Bars to relief. ***

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

two claims are procedurally barred because defendant did not raise them in proceedings leading to the judgment of conviction and he has not shown that an exception to this bar exists.

The claims fail even if considered on the merits. Defendant does not provide facts supporting his contention that he was coerced into entering into the plea. He does not assert he was physically forced into entering into the plea. Defendant also does not provide any facts supporting his contention that the plea agreement he actually entered differed from what he thought it was to be. The record of the plea colloquy and of the forms defendant signed makes clear that defendant voluntarily and knowingly entered into the plea, was well aware of the terms of the plea and that he would not be going to trial, understood the sentence he was facing, and was satisfied with trial counsel's representation in the matter. Absent clear and convincing evidence to the contrary, he is bound by these statements. Fullman v. State, Del. Supr., 560 A.2d 490 (1989); Martin v. State, Del. Supr., No. 381, 1994, Hartnett, J. (April 28, 1995); Hickman v. State, Del. Supr., No. 298, 1994, Veasey, C.J. (October 11, 1994); Wright v. State, Del. Supr., No. 284, 1992, Moore, J. (September 24, 1992); Wright v. State, Del. Supr., No. 400, 1991, Walsh, J. (February 20, 1992). These claims fail.

The final ground defendant advances is that the plea agreement was unfulfilled since he never was allowed entry into the Key Program. What defendant actually is arguing is that Department of Corrections has not complied with the sentence of

the Court. However, defendant's actions have prevented him from entering the Key Program. Defendant refuses his medication for his mental illness, he decompensates, and his behavior during this decompensation precludes his entry into the Key Program. Because defendant, and not the Department of Corrections, has precluded his entry into the Key Program, defendant cannot assert that Department of Corrections did not comply with the sentencing order. This ground fails, also.

CONCLUSION

For the foregoing reasons, the Court denies defendant's motion.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Melanie Withers, DAG
Merritt Burke, III, Esquire