

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE)
) IK02-04-0255-R1
 v.) IK02-04-0256-R1
)
BRIAN A. LEE,)
)
 Defendant.)
 ID No. 0203024367)

Submitted: March 10, 2004
Decided: April 19, 2004

O R D E R

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, Brian A. Lee ("Lee") was found guilty by a jury on July 15, 2002 to Unlawful Sexual Contact, second degree, 11 *Del. C.* § 768, as a lesser included offense of Rape in the fourth degree; and one count of Failure to Re-Register as a Sex Offender, 11 *Del. C.* § 4120. Pursuant to the Plea Agreement a Presentence investigation was requested. On September 10, 2002, the Court sentenced Lee to 18 months at Level V followed by probation. Lee did not appeal his conviction or sentence to the State Supreme Court. Lee subsequently filed a *pro se* motion for the modification of his sentence on December 2, 2002. In his motion Lee raised three issues including his claim that the victim was sixteen at the time of

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the offense and that his age and the victims age were less than four years apart. This Court denied Lee' s motion on January 22, 2003,¹ stating that the sentence was appropriate. Lee then filed a second motion to modify his sentence on March 18, 2003 which restated his earlier claims and added an additional claim concerning his intentions. On April 16, 2003 the Court again denied his motion this time as repetitive.²

Next Lee filed the instant motion for postconviction relief pursuant to Superior Court Criminal Rule 61. In his motion, Lee alleges two grounds for relief which are identical to the issues raised in his motions to modify his sentence.

(2) The Court referred this motion to Superior Court Commissioner Andrea M. 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 concluding that the motion for postconviction relief should be denied as procedurally barred by Rule 61(i)(3) and (4) for failure to prove cause and prejudice and as previously adjudicated.

(3) Pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62, the Court has conducted a careful and de novo determination. The Court finds that Lee' s claims are procedurally barred by Rule 61(i)(3) and (4).

¹ *State v. Lee*, Del. Super., ID No.0203024367, Ridgely, P.J. (January 22, 2003) (ORDER).

² *State v. Lee*, Del. Super., ID No.0203024367, Ridgely, P.J. (April 16, 2003) (ORDER).

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(4) Lee has alleged his plea was involuntary, the record clearly contradicts this allegation. Prior to entering his guilty plea, Lee filled out a Guilty Plea Form in his own handwriting. The transcript of the plea colloquy shows that Lee's guilty plea was knowingly and voluntarily made with a complete understanding of the consequences of entering the plea.

(5) 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 March 10, 2004,

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

dk

oc: Prothonotary

xc: Hon. Andrea M. Freud

Marie O' Connor Graham, Esq.

Lloyd A. Schmid, Esq.

Mr. Brian A. Lee, DCC

Order Distribution (w/Report & Recommendation)

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IN AND FOR KENT COUNTY

STATE OF DELAWARE)
) IK02-04-0255-R1
 v.) IK02-04-0256-RI
)
BRIAN A. LEE,)
)
 Defendant.)
 ID No. 0203024367)

Marie O' Connor Graham, Esq., Deputy Attorney General, Dover, Delaware, for the State of Delaware.

Brian A. Lee, *pro se*.

COMMISSIONER' S REPORT AND RECOMMENDATION

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

FREUD, Commissioner
March 10, 2004

The defendant Brian A. Lee, (" Lee") pled guilty on July 15, 2002, to Unlawful Sexual Contact, second degree, 11 *Del. C.* § 768, as a lesser included offense of Rape in the fourth degree; and one count of Failure to Re-Register as a Sex Offender, 11 *Del. C.* § 4120. Pursuant to the Plea Agreement a Presentence investigation was requested. On September 10, 2002, the Court sentenced Lee to

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18 months at Level V followed by probation. Lee did not appeal his conviction or sentence to the State Supreme Court. Lee subsequently filed a *pro se* motion for the modification of his sentence on December 2, 2002. In his motion Lee raised three issues including his claim that the victim was sixteen at the time of the offense and that his age and the victims age were less than four years apart. This Court denied Lee' s motion on January 22, 2003,³ stating that the sentence was appropriate. Lee then filed a second motion to modify his sentence on March 18, 2003 which restated his earlier claims and added an additional claim concerning his intentions. On April 16, 2003 the Court again denied his motion this time as repetitive.⁴ Next Lee filed the instant motion for postconviction relief pursuant to Superior Court Criminal Rule 61. In his motion, Lee alleges two grounds for relief which are identical to the issues raised in his motions to modify his sentence.

Lee' s first ground for relief simply restates the claims he raised in his motion for correction of an illegal sentence. He argues that the victim was sixteen at the time of the offense and that he should not have been charged with any crime. Lee' s second ground for relief is that his conduct did not meet the definition of the offense of Unlawful Sexual Contact in the second degree.

³ *State v. Lee*, Del. Super., ID No.0203024367, Ridgely, P.J. (January 22, 2003) (ORDER).

⁴ *State v. Lee*, Del. Super., ID No.0203024367, Ridgely, P.J. (April 16, 2003) (ORDER).

Under Delaware Law this Court must first determine whether Lee has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.⁵ This is Lee'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 the initial Rule 61 motion - are met. As noted, both of Lee's grounds for relief simply restate the claims he raised in his motion for correction of an illegal sentence. Rule 61(i)(4) bars any ground for relief that was formerly adjudicated unless reconsideration of the claim is warranted in the interest of justice.⁶ Lee raised his claims before and this Court found them meritless. Lee did not challenge the Court's ruling. Lee has made no attempt to argue why reconsideration of his claims is warranted in the interest of justice. The interest of justice exception of Rule 61(i)(4) has been narrowly defined to require that the movant show "that the subsequent legal developments have revealed that the trial court lacked the authority to convict or punish [him]."⁷ Lee has made no attempt to demonstrate why his claims should be revisited. This Court is not required to reconsider Lee's claim simply because it is "refined or restated."⁸

⁵ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁶ Super. Ct. Crim. R. 61(i)(4).

⁷ *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996); *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

⁸ *Riley v. State*, 585 A.2d 719, 721 (Del. 1990).

For this reason, both of Lee's grounds for relief should be dismissed as previously adjudicated under Rule 61(i)(4).

To the extent if any that any portion of Lee's claims were not raised earlier they would be barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice. Lee has made no attempt to demonstrate the cause or prejudice and therefore his claims would be clearly procedurally barred by Rule 61(i)(3). Additionally, Lee's claims concerning the age of the victim are simply stated, false and contradicted by the facts in the record.

To the extent, if any, that Lee has alleged his plea was involuntary, the record clearly contradicts this allegation. When addressing the question of whether a plea was constitutionally knowing and voluntary the court looks to the plea colloquy to determine if the waiver of constitutional rights was knowing and voluntary.⁹ At the guilty plea hearing, the Court asked Lee whether he understood the nature of the charges, the consequences of his pleading guilty and whether he was voluntarily pleading guilty. The Court asked Lee 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 Lee if he had discussed the guilty plea and its consequences fully with his attorney. The Court asked Lee if he was giving the plea of his own free will because he was in fact guilty. The Court also asked Lee if he was satisfied with his counsel's representation. The Court asked Lee if he was

⁹ *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

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in fact, guilty of the charge. Lee answered each of these questions clearly and affirmatively.¹⁰

Furthermore, prior to entering his guilty plea, Lee filled out a Guilty Plea Form in his own handwriting. Lee 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. Lee is bound by the statements he made on the signed Guilty Plea Form unless he proves otherwise by clear and convincing evidence.¹¹ I confidently find that Lee entered his guilty plea knowingly and voluntarily and any claim to the contrary is completely meritless.

After a complete review of the record in this case it is clear that Lee has failed to avoid the procedural bars of Rule 61(i). Consequently, I recommend that Lee' s postconviction motion be *denied* as procedurally barred by Rule 61(i)(3) and (4) for failure to prove cause and prejudice and as previously adjudicated. I also confidently find that Lee' s guilty plea was made knowingly and voluntarily with a

¹⁰ Transcript of guilty plea at 3 - 6.

¹¹ *Hickman v. State*, 1994 WL 590495 (Del. 1994); *Smith v. State*, 1990 WL 1475 (Del. 1990); *see also Sullivan v. State*, 636 A.2d 931, 938 (Del. 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).

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complete understanding of the consequences of entering the plea.

/s/ Andrea M. Freud

Commissioner Andrea M. Freud

oc: Prothonotary
cc: Hon. Henry duPont Ridgely
Marie O' Connor Graham, Esq.
Lloyd A. Schmid, Esq.
Mr. Brian A. Lee, DCC
Notebook