SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

May 27, 2004

Virgil Ray Morris, Jr.
13770 Wilson Hill Road
Georgetown, DE 19947

RE: State v. Morris, Def. ID# 0010008090

DATE SUBMITTED: February 26, 2004

Dear Mr. Morris:

Pending before the Court is a motion for postconviction relief which defendant Virgil Ray Morris, Jr. ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). This is my decision denying the motion.

Defendant was tried before a jury on a charge of driving under the influence in violation of 21 Del. C. § 4177(a). The jury found him guilty as charged. There was an issue as to whether defendant's prior driving under the influence ("D.U.I.") convictions should be considered for sentencing enhancement purposes, and the Court concluded that defendant had a sufficient number of prior convictions to be sentenced as a class E felon pursuant to 21 Del. C. §

4177(d)(4).[1] It sentenced him, on July 6, 2001, to five (5) years at Level 5. Upon successful completion of the Key Program and six (6) months at Level 5, the balance was suspended for one (1) year at Level 4, Crest, followed by three (3) years at supervision Level 3. The first six (6) months was a mandatory period of incarceration pursuant to statute. 21 Del. C. § 4177(d)(4).

Because defendant's health problems prevented him from participating in the Key Program, the Court, by order dated November 29, 2001, modified the sentence to allow him to undergo an eighteen (18) month program at Level 4, Recovery Center of Delaware after completing the mandatory six (6) months at Level 5.

On April 9, 2002, the Court again modified the sentence to allow defendant treatment. It suspended the non-mandatory portion of the Level 5 time to Level 3 probation and required him to enter the Veterans Administrative Residential Treatment Program at Coatesville, PA, and upon successful completion thereof, to serve the balance of his sentence at Level 3 probation.

Defendant appealed his conviction and sentence to the Supreme Court. He argued that the Superior Court improperly allowed an amendment of the indictment on the morning of trial and it erred in using his prior misdemeanor convictions to enhance his sentence. The Supreme Court ruled that it was not error for the Superior Court to allow the amendment of the indictment and that the trial court correctly concluded that it could consider his prior uncounseled misdemeanor convictions for sentence enhancement. Morris v. State, Del. Supr., No. 315, 2001, Berger, J. (June 4, 2002).

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[1] 21 Del. C. §4177(d) states: "Whoever is convicted of a violation of subsection (a) of this section shall: ... (4) For a fourth or subsequent offense occurring any time after 3 prior offenses, be guilty of a class E felony ... and imprisoned not less than 2 years nor more than 5 years. ... [T]he first 6 months of the sentence shall not be suspended, but shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind."

On February 24, 2004, defendant filed his first motion for postconviction relief in this proceeding.[2] Therein, he makes several arguments which I address below.

Defendant argues that the sentence was illegal because it exceeded the statutory maximum. He should advance that argument within the context of a motion filed pursuant to Superior Court Criminal Rule 35 ("Rule 35"). In any case, that argument is meritless. The statute, as set forth in footnote 1, supra, allows for the imposition of a sentence of up to five (5) years at Level 5, the amount of time he was given.

He further argues that the sentence was illegal because it was not actually a fourth offense D.U.I. This contention should have been filed as a Rule 35 motion. In any case, it, too, is legally meritless. Defendant appears to argue that in order for him to have been convicted of a fourth offense, he must have been convicted of his next most recent D.U.I. within the preceding five years. He also appears to argue that unless he had a conviction for a third offense D.U.I. under the statute as it now reads, he cannot be convicted of a fourth offense D.U.I.. The applicable statutes provide otherwise,[3] and this is a meritless claim.

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[2]Defendant apparently has filed two pending actions with the United States District Court in and for the District of Delaware.

[3]In 21 Del. C. § 4177(d)(4), it is provided in pertinent part:

> For a fourth or subsequent offense occurring **any time after 3 prior offenses**, be guilty of a class E felony.... [Emphasis added.]

In 21 Del. C. §4177B(e), it is provided in pertinent part:

> (1) Prior or previous conviction or offense. For purposes of §... 4177 ... of this title, the following shall constitute a prior or previous conviction or offense:
> a. A conviction pursuant to § 4175 (b) or § 4177 of this title, or a similar statute of any state or local jurisdiction, any federal or military reservation or the District of Columbia;

Defendant's third ground for postconviction relief, although captioned as "illegal sentence", actually attacks the conditions of his confinement while at Level IV. As explained in Rule 61(a):

> (1) Nature of proceeding. This rule governs the procedure on an application by a person ... subject to future custody under a sentence of this court seeking to set aside a judgment of conviction ... on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual or legal basis for a collateral attack upon a criminal conviction....

Rule 61 may not be used to advance constitutional claims stemming from a condition of confinement. This claim fails.

Defendant's only ground which is subject to consideration under Rule 61 is his first ground. His argument is not particularly clear, but I will address it as best I can.

> b. A conviction under a criminal statute encompassing death or injury caused to another person by the person's driving where driving under the influence or with a prohibited alcohol concentration was an element of the offense, whether such conviction was pursuant to a provision of this Code or the law of any state, local jurisdiction, any federal or military reservation or the District of Columbia;
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> c. Participation in a course of instruction or program of rehabilitation or education pursuant to § 4175(b), § 4177 or § 4177B of this title, or a similar statute of any state, local jurisdiction, any federal or military reservation or the District of Columbia, regardless of the existence or validity of any accompanying attendant plea or adjudication of guilt;
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> d. A conditional adjudication of guilt, any court order, or any agreement sanctioned by a court requiring or permitting a person to apply for, enroll in or otherwise accept first offender treatment or any other diversionary program under this section or a similar statute of any state, local jurisdiction, any federal or military reservation or the District of Columbia.
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> (2) Time limitations. For the purpose of determining the applicability of enhanced penalties pursuant to § 4177 of this title, the time limitations on use of prior or previous convictions or offenses as defined by this subsection shall be:
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> ***
>
> c. For sentencing pursuant to § 4177(d)(4) of this title there shall be no time limitation and all prior or previous convictions or offenses as defined in paragraph (1) of this subsection shall be considered for sentencing under § 4177(d)(4)....

He asserts "PREJUDICIAL PLAIN ERROR, SUPERIOR COURT "HEARSAY" VIOLATION". In support thereof, he maintains:

> Officer Flood, on direct, testified that he immeadiately [sic] administered (2) Two D.U.I. field soberity [sic] test [sic] immeadiately [sic] upon awakening movant. Trial attorney was ineffective for failing to object to this testimony, Trial Judge failed to intervene sua sponte and proscuter [sic] Mr. David Hume is guilty of proscutial [sic] misconduct.
>
> Hearsay testimony from Officer Flood did cause plain error to occour [sic], and did predjudice [sic] movant. At Dinner break during trial the jury was tied 6-6. Movant belives [sic] that their [sic] would have been a different verdict if plain error had not occoured [sic]. Mr. Hume stated the hearsay evidence over and over in his closing arugment's [sic].

Defendant is not procedurally barred from advancing this argument by way of his claim for ineffective assistance of counsel. However, there was no ineffective assistance of counsel because there is no merit to defendant's argument that the testimony regarding the field test results were hearsay. I look to the definitions pertinent to hearsay as set forth in Delaware Rules of Evidence, Rule 801.

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.
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> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The officer's testimony regarding his observations and recordings of defendant's performance on the various field tests was not hearsay. Since defendant's premise of the legal "error" fails, his entire claim fails.

For the foregoing reasons, I deny defendant's motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Michael F. McGroerty, Esquire
Bernard J. O'Donnell, Esquire
David Hume, IV, Esquire