

**SUPERIOR COURT  
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801  
(302) 255-0669

Submitted: February 28, 2005  
Decided: March 30, 2005

STATE OF DELAWARE	)	
	)	
v.	)	ID#: 0303014017 &
	)	0311021435
TAWAYNE POWELL,	)	
	)	
Defendant.	)	

**ORDER**

Upon Defendant's Motion for Postconviction Relief - - Summarily ***DISMISSED***

On October 22, 2004, Defendant, Tawayne Powell, filed a Motion for Postconviction Relief under Superior Court Criminal Rule 61, challenging his re-sentencing on May 27, 2004. Although Powell alleges "double jeopardy," his actual claim has more to do with due process.

Basically, after Powell was sentenced to prison on May 25, 2004, he fled. The next day, he turned himself in and he was re-sentenced on May 27, 2004, with the court adding more imprisonment to the sentence. Now, Powell protests that the re-sentencing violated his plea agreement and the court could not re-sentence

“unless [the court] was expressly authorized to act.”

Because the presiding judge is unavailable, the motion has been properly referred for preliminary consideration under Superior Court Criminal Rule 61(d)(1). As discussed below, after preliminary review of the motion and the record, it plainly appears that the motion is appropriate for summary dismissal under Rule 61(d)(4). Defendant’s claims are procedurally barred. The court also observes that they lack merit.

### I.

In summary, Defendant was sentenced to prison on May 25, 2004. After he was sentenced, Defendant asked for a brief stay so that he could put his affairs in order. The court denied that request. But after the court recessed, Defendant was momentarily unattended and he left the courthouse. The next day, Defendant turned himself in and the day after that, he was brought before the original sentencing judge.

The court appointed the Public Defender to represent Defendant. The appointed counsel then asked whether the proceeding was a *capias* return or a sentencing. The court explained: “It’s going to be a sentencing. I have to re-sentence him because he didn’t go to prison when he was supposed to.” The court further stated: “Well, I’m going to vacate the sentence I imposed on Tuesday and I’m going to impose a different sentence today.”

Defendant was allowed to explain why he left the courthouse after sentencing. The court responded:

Mr. Powell, unfortunately, it doesn't make it look like probation is a likely benefit to you if you can't even stay in the courtroom and go to prison when you're supposed to.

The court then revoked the previously suspended prison sentence on the lead charge. The court imposed two years, six months of actual imprisonment, which it had originally suspended at Defendant's sentencing two days earlier immediately before Defendant fled.

Specifically, for Possession with intent to deliver marijuana, Defendant originally received five years in prison, suspended after two years and six months, followed by probation. For Manufacturing or delivery, he received two years six months in prison, suspended after three months. In total, Defendant originally received seven years in prison, suspended after three years, then probation. When Defendant was re-sentenced, the court re-imposed the two years, six months it had originally imposed and it re-imposed the two years, six months that it originally had suspended on the Possession with intent charge.

## **II.**

Defendant is not entitled to postconviction relief because he did not

take an appeal from the re-sentencing. Accordingly, his claim was procedurally defaulted under Rule 61(i)(3) and (4). Defendant was obligated to raise with the trial court his objections to the re-sentencing. Then, he was obligated to file an appeal. He did neither. Now, Defendant has not shown cause for relief from his procedural defaults. Therefore, his claim is barred under Rule 61(i)(3) and (4).<sup>1</sup>

### III.

Although considering Defendant's claims is not justified in the interest of justice, the court observes that when he pleaded guilty, Defendant told the court that no one had promised what the sentence would be. Defendant knew that he was facing as much as five years in prison on the Possession with intent to deliver charge, regardless of what his Plea Agreement said. And, as a matter of law, the court was not bound by the written Plea Agreement.<sup>2</sup>

When Defendant fled the courthouse, he violated the sentence order. Thus subjecting himself to re-sentencing, as if he had violated probation.<sup>3</sup> The

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<sup>1</sup> Super. Ct. Crim. R. 61(i)(3); *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995); *Younger v. State*, 560 A.2d 552, 555 (Del. 1990).

<sup>2</sup> Super. Ct. Crim. R. 11(e)(2) ("if the agreement is of the type specified in subdivision (e)(1)(c), the court may accept or reject the agreement"); *Somerville v. State*, 703 A.2d 629, 633 (Del. 1997) (holding that the Superior Court is not bound by plea agreements it has not accepted).

<sup>3</sup> *Williams v. State*, 560 A.2d 1012, 1013 (Del. 1989) ("Superior Court, in the  
(continued...)

court, therefore, was entitled to re-sentence Defendant and impose imprisonment that it had originally suspended. As the court explained, Defendant's behavior after he was sentenced demonstrated that he was a greater risk on probation. The re-sentencing hearing was not elaborate, but it was enough.

**IV.**

For the foregoing reasons, Defendant's Motion for Postconviction Relief is summarily **DISMISSED** under Superior Court Criminal Rule 61(d)(4). The Prothonotary shall cause Defendant to be notified.

The court will retain jurisdiction for ninety days after all of Defendant's open charges, including any appeals, are resolved. So long as the court retains jurisdiction, Defendant has leave to ask for sentence reduction. Thereafter, Superior Court Criminal Rule 35's provisions shall apply.

**IT IS SO ORDERED.**

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Judge

oc: Prothonotary (Criminal Division)  
pc: Cynthia Kelsey, Deputy Attorney General  
Robert Surles, Deputy Attorney General  
Christopher Tease, Esquire  
Kester I.H. Crosse, Esquire  
Tawayne Powell, HYCF

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<sup>3</sup>(...continued)  
proper exercise of its discretion, may revoke a prior grant of probation”).