

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 Plaintiff,)
)
 v.) I.D. # 91009844DI
)
CHRISTOPHER R. DESMOND)
)
 Defendant.)
)

Submitted: March 14, 2005
Decided: May 13, 2005

On Defendant's Motion for Correction of an Illegal Sentence. **DENIED.**

ORDER

Thomas E. Brown, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Christopher R. Desmond, Smyrna, Delaware.

COOCH, J.

This 13th day of May, 2005, upon the "motion for correction of an illegal sentence" filed by Christopher Desmond ("Defendant"), it appears to the Court that:

1. Defendant has filed this motion for a correction of an illegal sentence pursuant to Superior Court Criminal Rule 35 (a).¹ For the reasons stated below, Defendant's Motion is **DENIED**

2. Defendant was convicted by a jury in November 1992 of ten counts of Robbery in the First Degree, 11 *Del.C.* §832, two counts of Conspiracy in the Second Degree, 11 *Del.C.* §512, ten counts of Possession of a Deadly Weapon During the Commission of a Felony ("PDWDCF"), 11 *Del.C.* §1447, ten counts of Possession of a Deadly Weapon by a Person Prohibited ("PDWBPP"), 11 *Del.C.* §1448, three counts of Theft (felony), 11 *Del.C.* §841 and one count of Escape Third Degree, 11 *Del.C.* §1251. These

¹ This case has a lengthy post-verdict procedural history. The Delaware State Supreme Court affirmed defendant's conviction on direct appeal on November 14, 1994 in *Desmond v. State*, 654 A.2d 821 (Del. 1994). A motion for rehearing was denied in December 1994. Defendant's first motion for postconviction relief was denied in *State v. Desmond*, 1995 Del. Super. LEXIS 508 *aff'd*, 692 A.2d 411 (Del. 1996). Defendant's writ of habeas corpus before the United States District Court for the District of Delaware was denied in *Desmond v. State*, 1999 WL 33220036 (D. Delaware 1999). Defendant's second motion for postconviction was denied in *Desmond v. State*, Del. Super., ID #91009844DI, Cooch, J. (Dec. 4, 2000), *aff'd*, 768 A.2d 468 (Del. 2001). In July 2001, this Court denied defendant's motion for a writ of habeas corpus. A Writ of certiorari was dismissed by the Delaware Supreme Court in *In re Desmond*, 782 A.2d 263 (Del. 2001). Defendant's appeal of the denial of his writ of habeas corpus was affirmed in *Desmond v. Snyder*, 788 A.2d 527 (Del. 2001). Defendant's third motion for postconviction relief was denied in *State v. Desmond*, 2002 Del. Super. LEXIS 481, *aff'd*, 818 A.2d 970 (Del. 2003). Defendant's fourth motion for postconviction relief was denied in *State v. Desmond*, 2004 Del. Super. LEXIS 120, *aff'd* 2004 Del. LEXIS 307. Defendant's fifth motion for postconviction relief was denied in *State v. Desmond*, 2005 Del. Super. LEXIS 74, *aff'd Desmond v. State*, Del. Super., _ A.2d _, No. 90, 2005, Ridgely, J. (May 10, 2005).

charges arose out of a series of robberies at three supermarkets committed in 1991 in northern New Castle County.

3. Defendant argues that his sentences of five years at Level V for each of the ten robbery in the first degree charges are illegal because this Court enhanced his sentence based on his allegedly perjurious trial testimony.²

Defendant bases his argument, in part, upon a January 13, 1993 letter from the Deputy Attorney General in which the prosecutor informed the Court that the State was going to partially base its sentencing recommendation upon Defendant's perjurious trial testimony. Defendant contends that "[w]here a sentencing scheme requires the existence of aggravating factors in order to impose a sentence in excess of statutor[ily] imposed sentencing guidelines . . . such factors [must] be found by a jury beyond a reasonable doubt."³ Defendant argues that the "sentencing judge [has] to make [a] finding on the record which would have allowed him to enhance [Defendant's] sentence based upon the State's claim of perjury."⁴

4. As part of his sentence, Defendant was sentenced to five years on each of the ten counts of Robbery in the First Degree, 11 *Del.C.* §832, with

² Defendant's Motion for Correction of an Illegal Sentence at 2.

³ *Id.* at 3.

⁴ Defendant's "Informal Reply" at 1.

the first two years being mandatory. In 1991, when the crimes Defendant was charged with committing occurred, 11 *Del. C.* §832 defined robbery in the first degree as a class B felony.⁵ A class B felony under 11 *Del. C.* §4205(b)(2) provided for a sentence of “not less than two years [and] up to twenty years to be served at Level V.”⁶ Section 4205(d) provided that “[w]here a minimum sentence is required by subsection (b) of this section, such sentence shall not be subject to suspension by the court.”⁷

5. Defendant has relied on *Blakely v. Washington*⁸ and *Apprendi v. New Jersey*⁹ for the proposition that “other than the facts of prior convictions, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt.”¹⁰ Defendant recognizes that *Apprendi* applies only to cases in which the sentence exceeded the statutory maximum sentence. However, Defendant contends that this Court would be “mistaken[.]” if it

⁵ 11 *Del. C.* §832(a) (1989 Interim Supplement).

⁶ 11 *Del. C.* §4205(b)(2) (1989 Interim Supplement).

⁷ 11 *Del. C.* §4205(d) (1989 Interim Supplement).

⁸ *Blakely v. Washington*, 124 S. Ct. 2531 (2004)

⁹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁰ Defendant’s Motion for Correction of an Illegal Sentence at 3, quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

reasoned that *Apprendi* did not apply to his case because Defendant “claims he was entitled to a 2 year sentence based upon his first conviction for Robbery First Degree.”¹¹ Defendant’s arguments are without merit.

Blakely and *Apprendi*, cited by Defendant, are not applicable to Defendant’s claim because those cases involved sentences that were enhanced by aggravating factors beyond their statutory maximums. The aggravating factors in those cases had to be presented to the jury for the jury to make a finding. In Defendant’s case, there was no enhancement beyond the statutory maximum as the statute (§4205) allowed for a sentence up to 20 years and Defendant’s sentence of 5 years is below this maximum. In addition, as the Delaware Supreme Court recently held in *Benge v. State*, “*Blakely* does not impact Delaware's sentencing scheme because the SENTAC guidelines are voluntary and non-binding.”¹²

6. Defendant also relies on the very recent Delaware Supreme Court case *Fuller v. State*¹³ for the proposition that when a perjury claim, cited by the prosecution, is used to enhance a defendant’s sentence, “[t]he trial judge must identify on the record at least some specific facts, not just conclusions,

¹¹ Defendant’s Motion for Correction of an Illegal Sentence at 4.

¹² *Benge v. State*, 2004 Del. LEXIS 506 at *3.

¹³ *Fuller v. State*, 860 A.2d 324 (Del. 2004).

showing that the defendant engaged in such conduct.”¹⁴ However, *Fuller* does not provide support for Defendant’s claim. In *Fuller*, the defendant’s brother committed perjury at the defendant’s trial and the Court sentenced defendant to the statutory maximum sentence based solely on the perjured testimony, finding that the defendant “at a minimum knew of his brother’s false testimony and allowed it at trial.”¹⁵ The Delaware Supreme Court vacated the defendant’s sentences, while affirming the convictions.¹⁶ The Supreme Court noted that the defendant exercised his Fifth Amendment rights at trial and sentencing and “no negative inference [could] be drawn” from this exercise.¹⁷ The Supreme Court held that “the State presented no evidence that [the defendant] suborned perjury, nor did the trial judge make independent findings from competent evidence in the record to establish that [the defendant] willfully did so.”

¹⁴ *Fuller*, at 333. Arguably, there was no enhancement at all of Defendant’s sentence based the fact that under the 1991 T.I.S., the presumptive sentence for Robbery in the First Degree was 2 to 5 years and Defendant’s sentence was within the presumptive standard.

¹⁵ *Id.* at 332.

¹⁶ *Id.* at 334.

¹⁷ *Fuller* at 334.

The *Fuller* Court contrasted the facts in *Fuller* with the facts in *United States v. Dunnigan*.¹⁸ In *Dunnigan*, the United States Supreme Court explained that

[i]t is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.¹⁹

The *Dunnigan* Court held that “[u]pon a proper determination that the accused has committed perjury at trial, an enhancement of sentence is required by the Sentencing Guidelines.”²⁰ The Court in *Dunnigan* further held that “a . . . court must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice, or an attempt to do the same, under the perjury definition we have set out.”²¹ However, the Supreme Court explained:

¹⁸ *United States v. Dunnigan*, 507 U.S. 87 (1993).

¹⁹ *Dunnigan*, at 97-98.

²⁰ *Dunnigan*, at 98.

²¹ *Dunnigan*, at 95.

[a] court's determination that enhancement is required is sufficient, however, if, as was the case here, the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury. [Citation omitted.] ("The court finds that *the defendant was untruthful at trial with respect to material matters* in this case. By virtue of her failure to give truthful testimony on material matters *that were designed to substantially affect the outcome of the case*, the court concludes that the false testimony at trial warrants an upward adjustment by two levels" (emphasis added)). Given the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken, there is ample support for the District Court's finding.²²

This Court finds that *Dunnigan* is apposite.

Unlike the defendant in *Fuller*, Defendant did take the stand during trial and testified, among other things, that the victims were told to lie about their identification of Defendant, that the State Police coached them and that the victims did in fact lie at trial. Defendant argued at sentencing that his testimony was only an expression of his opinion of what had happened and was not something he knew to be factually wrong.²³ This Court considered the State's request that Defendant gave perjurious testimony; however, unlike the trial court in *Fuller*, this Court did not sentence Defendant based solely on the alleged perjurious testimony. This Court stated that it "rel[ied], in some part, not exclusively . . . [and] not for the most part, on what the

²² *Dunnigan*, at 95.

²³ Sentencing Transcript January 15, 1993 at 14-15. Defendant did concede that "if he knew it was wrong, it would be perjury." Sentencing Transcript January 15, 1993 at 15.

Court [found] to be false testimony.”²⁴ This Court further substantiated its sentence by noting that: Defendant continued to deny involvement in the crimes, despite overwhelming evidence to the contrary;²⁵ Defendant had “a significant prior record”;²⁶ Defendant did not benefit from the rehabilitation given to him in prison because he engaged in criminal activity within months of being released from prison;²⁷ and Defendant “seem[ed] to have a lifetime of criminal conduct, [and] no regard for the truth or the criminal laws of this State.”²⁸

In addition, like the District Court in *Dunnigan*, there was ample evidence in the record for this Court to have properly enhanced Defendant’s sentence for the allegedly perjurious testimony. Defendant’s testimony that there was a conspiracy between the State Police and the witnesses to, in essence, frame Defendant for the charged crimes, was contradicted by the evidence linking him to the crimes including money from one of the robberies found in his home during a search conducted less than 12 hours

²⁴ Sentencing Transcript January 15, 1993 at 18.

²⁵ *Id.* at 18.

²⁶ *Id.* at 16.

²⁷ *Id.* at 18.

²⁸ Sentencing Transcript January 15, 1993 at 17.

after the robbery.²⁹ Unlike *Fuller*, in which there was no evidence adduced to connect the defendant to the perjury, this Court was satisfied with the evidence in the record at Defendant's trial that he had committed perjury "in an unlawful attempt to avoid responsibility."

6. Defendant's argument that he was "entitled to a two year sentence based upon his first conviction for Robbery First Degree" is also without merit. Defendant argues that "the T.I.S. sentencing scheme allowed the court to sentence a defendant for First Offense Robbery First degree . . . to two years mandatory level 5 without other aggravating factors."³⁰ First, Defendant's sentence was not enhanced by the use of aggravating factors as explained above. Second, Defendant did not have an entitlement to any specific sentence, even for a so-called "first offense." The 1991 T.I.S. and, more specifically, §4502 did not "allow" the Court to sentence Defendant to two years at Level V, but mandated that the Court had to impose at least a two year mandatory sentence as part of the presumptive sentence under the T.I.S. Defendant has apparently mistaken the statutory two year mandatory part of §4205 as a default "first offense" conviction sentence, instead of a

²⁹ While this Court did use this as factor at sentencing, Defendant's accusations against the witnesses amounted in effect to a further victimization of those witnesses.

³⁰ Defendant's Motion at 2.

compulsory punishment.

For the foregoing reasons, Defendant's "motion for correction of an illegal sentence" is **DENIED**.

IT IS SO ORDERED.

oc: Prothonotary
cc: Investigative Services