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

FRED S. SILVERMAN
JUDGE

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

Submitted: June 23, 2006
Decided: August 29, 2006

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	ID#: 9702013762
WILLIAM J. WEBB, JR.	)	
	)	

ORDER

Upon Defendant's First Motion for Postconviction Relief Challenging His 1997 Conviction and Sentence – *DENIED*

On May 1, 1997, Defendant pleaded guilty under former-Superior Court Criminal Rule 11(e)(1)(C) to burglary second degree. Defendant was immediately sentenced to one year in prison, followed by probation. Defendant did not file a direct appeal challenging his guilty plea or sentencing. Instead, over seven years later, on December 3, 2004, Defendant filed this Motion for Postconviction Relief under Superior Court Criminal Rule 61.

I.

The reason why Defendant did not challenge the 1997 plea and sentence is that the sentence was what he expected. Defendant only became upset with the 1997 plea and sentence after he violated the probationary part of the 1997 sentence on July 26, 1999. That was when he committed burglary first degree, assault first degree and endangering the welfare of a child. For those crimes, on June 23, 2000, Defendant not only was sentenced to seven and half years in prison, followed by probation at decreasing levels, but he also received a three year prison sentence for violating the probation imposed for the 1997 burglary.

Clearly, Defendant was upset about what happened in June 2000, but he did not file a direct appeal. Instead, on August 21, 2000, Defendant filed a motion for postconviction relief, alleging ineffective assistance of counsel concerning the June 2000 proceeding. That motion was summarily dismissed on October 2, 2000. Again, Defendant did not take a direct appeal. Instead, on October 27, 2000, Defendant filed his second motion for postconviction relief challenging the June 2000 proceeding. And again, the court summarily dismissed the motion on November 27, 2000. At that point, Defendant filed his first appeal.

Eventually, the case was remanded for the court to correct a technical defect in the June 2000 sentence order. Defendant filed an appeal from the re-sentencing, but on January 28, 2003 the Supreme Court finally affirmed the June 2000 conviction and sentencing.

II.

Having failed to knock-out his June 2000 plea and sentencing, Defendant, as mentioned, filed this motion on December 3, 2004. Originally, the motion was referred to the judge who presided over the June 2000 plea colloquy, sentencing and re-sentencing. Viewing Defendant's December 3, 2004 motion as Defendant's third motion for postconviction relief, the court denied the motion as procedurally barred. Defendant filed an appeal, arguing that the December 2004 motion, which challenged his May 1997 guilty plea, should have been decided by the judge who presided in May 1997, rather than the judge who presided in June 2000. On its face, the motion appeared procedurally barred under Rule 61(i)(1). Therefore, any violation of Rule 61(d)(1) was arguably harmless. Nevertheless, the Attorney General refused to argue harmless error, or any point. Instead, the Attorney General simply conceded error, yet again. Accordingly, the Supreme Court remanded. Hence, this decision.

Meanwhile, on September 12, 2005, while his appeal from the December 2004 decision denying postconviction relief in connection with the May 1997 guilty plea was pending, Defendant filed what actually was his third motion for postconviction relief challenging the June 2000 proceeding. On March 21, 2006, the judge who presided over the June 2000 proceeding denied Defendant's third motion for postconviction relief challenging that proceeding.

Now, back to this motion. On April 27, 2006, the State filed an unsolicited response to Defendant's motion for postconviction relief here. The State denominated its pleading as "Answer to Motion for Post-Conviction Relief." The court treated the State's filing as if it had been called for by Rule 61(f)(1) and, therefore, the court gave Defendant leave to reply, consistent with Rule 61(f)(3). Defendant filed a lengthy reply on May 26, 2006.

III.

As presented above, this motion, which was filed more than seven years after the judgment of conviction became final, is time-barred under Rule 61(i)(1). Furthermore, the motion is procedurally defaulted under Rule 61(i)(3). If Defendant had reason to believe the May 1997 proceeding was unlawful, he was procedurally required to raise his challenges through a direct

appeal in 1997. He was not entitled to wait until he got into trouble a couple of years later, much less to wait until late 2004.

Defendant attempts to avoid Rule 61(i)'s bars by claiming that the court lacked jurisdiction and there was miscarriage of justice because of a constitution violation in 1997. As to the jurisdictional claim, Defendant argues that the court lost jurisdiction when it sentenced him illegally by exceeding the sentence contemplated under his Rule 11(e)(1)(C) plea agreement. The May 1997 sentence was unconstitutional, according to Defendant, because by failing to "give specific performance by plea-agreement," the court violated the double jeopardy clause.

Assuming that the court violated the May 1997 plea agreement's Rule 11(e)(1)(C) sentence agreement, which it did not, the error would not be jurisdictional. The court has jurisdiction over burglaries, and the sentence did not exceed the statutory maximum.

Blakely v. Washington,[1] relied upon by Defendant, does not apply here because Defendant was sentenced in 1997, and *Blakely* does not apply retroactively.[2] Furthermore, *Blakely* does not apply to sentences imposed

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[1] *Blakely v. Washington*, 542 U.S. 296 (2004).

[2] *In re Elwood*, 408 F.3d 211, 212-213 (5th Cir. 2005); *see also United States v. Edwards*, 442 F.3d 258, 268 (5th Cir. 2006); *see*

under Delaware's sentencing framework.[3] Even if *Blakely* applied to sentences from 1997, and if *Blakely* applied to Delaware sentences, Defendant's sentence passes muster under *Blakely*. Defendant's sentence not only fell within the sentencing guidelines, it was

consistent with Defendant's plea agreement, as discussed below.

Defendant's argument that he is not a lawyer entitles him to a loose reading of his claims. But, it does not excuse his procedural defaults, much less establish prejudice. Thus, Rule 61(i)(5)'s exception to Rule 61(i)'s procedural bars does not apply.

IV.

Defendant's motion also includes claims of ineffective assistance of counsel "at Pre-and Trial stages." The problem with that is Defendant pleaded guilty. In the process, he admitted that he knowingly entered a specific dwelling intending to commit criminal mischief there. He further assured the court that he was pleading guilty because he was, in fact, guilty.

Viewed against that backdrop, the court cannot see how a better

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also Flamer v. State, 585 A.2d 736, 749 (Del. 1990).

[3] *Riego v. State*, 2005 WL 2465819 (Del.).

investigation "would have turned up that the charges amounted only to Criminal Mischief over 1500. . . , " as Defendant contends. As mentioned, Defendant admitted that he broke into a home intending to commit criminal mischief, and that amounts to burglary second degree.

Criminal mischief and burglary second degree, however, are not the same offense for double jeopardy purposes. In order to commit a burglary second degree, it is necessary to enter or remain unlawfully in a dwelling. In order to commit criminal mischief, it is not necessary to enter or remain unlawfully in a dwelling, or any particular place. By the same token, in order to commit burglary second degree, it is not necessary to enter the dwelling with the intent to commit criminal mischief, any criminal intent will do.

In summary, Defendant has failed to allege or prove that his counsel's efforts fell below a reasonably objective standard. And, other than through a self-serving, conclusory allegation, Defendant has not proved that he suffered any prejudice.[4] To the contrary, Defendant obtained a substantial benefit by pleading guilty, instead of facing trial on both indicted charges.

V.

[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

Finally, although Defendant's motion is procedurally barred, as a courtesy to Defendant, the court observes that his claim has no substantive merit. Defendant's Rule 11(e)(1)(C) plea agreement specified that the State would recommend "1 yr L5, followed by Probation [.]" That is all the plea agreement said about the sentencing recommendation. From that, Defendant concludes that the most that the court could impose under any circumstance was one year in prison. That interpretation, however, would write out of the sentencing agreement the "followed by Probation" language. Defendant received the agreed upon, one year prison sentence. If, after he had finished serving that year in prison, Defendant had not violated the probationary part of the sentence, he would not have gone back to prison. In truth, Defendant had no problem with the 1997 sentence when it was handed down.

In closing, the court also observes that if the May 1997 sentence violated the Rule 11(e)(1)(C) plea agreement, all that would mean is Defendant would be allowed to withdraw his guilty plea, he would be eligible to stand trial and, if convicted, be sentenced for burglary second degree and felony criminal mischief.

VI.

For the foregoing reasons, Defendant's first motion for postconviction relief challenging his May 1997 guilty plea and sentence is

DENIED.

IT IS SO ORDERED.

August 29, 2006 /s/ Fred S. Silverman

Date Judge

oc: Prothonotary
pc: Cathy Howard, Clerk of the Supreme Court of Delaware
Loren C. Meyers, Deputy Attorney General
William Webb, DCC