

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS GORDON,	§	
	§	No. 11, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0610025194
Appellee.	§	

Submitted: June 10, 2011
Decided: September 6, 2011

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

O R D E R

This 6th day of September 2011, it appears to the Court that:

(1) The appellant, Thomas Gordon, filed this appeal from the Superior Court’s denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). In the December 29, 2010 decision, the Superior Court denied Gordon’s sentencing claims as procedurally barred under Rule 61(i)(4) and his ineffective assistance of counsel claim as without merit for failure to demonstrate prejudice.

(2) The Court has carefully considered the parties’ briefs and the Superior Court record, including the transcript of Gordon’s June 8, 2007

sentencing.¹ We have determined that there is no merit to Gordon's appeal and affirm for the reasons stated by the Superior Court in its well-reasoned decision dated December 29, 2010.²

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹ The sentencing transcript was not a part of the Superior Court record in Gordon's 2010 appeal from the denial of his motion for reduction of sentence and motion for correction of sentence. *See Gordon v. State*, 2010 WL 2169517 (Del. Supr.) (affirming denial of motion for reduction of sentence and motion for correction of sentence).

² *See State v. Gordon*, Del. Super., Cr. ID No. 0610025194, (Dec. 29, 2010) (order) (attached as Exhibit A).

#26

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

STATE OF DELAWARE)
)
 v.) ID No. 0610025194
)
 THOMAS GORDON,)
)
 Defendant.)

Submitted: September 16, 2010
Decided: December 29, 2010

On Defendant's Motion for Postconviction Relief - DENIED.

ORDER

Annemarie Hayes, Esquire, Department of Justice, 820 North French Street,
Wilmington, Delaware 19801. Attorney for State of Delaware.

Thomas Gordon, James T. Vaughn Correctional, Smyrna, Delaware. *Pro Se*
Defendant.

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NEW CASTLE COUNTY
2010 DEC 29 PM 2:19

CARPENTER, J.

On this 29th day of December 2010, upon consideration of Defendant's *Pro Se* Motion for Postconviction Relief, it appears to the Court that:

1. Thomas J. Gordon ("Defendant") has filed a *Pro Se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). For the reasons set forth below, the motion is denied.
2. On December 11, 2006, Gordon was indicted on five counts: (1) Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance; (2) Assault Second Assault Law Enforcement Officer While Performing Duties; (3) Possession of a Controlled Substance within 300 Feet of a Park, Recreation Area or Place of Worship; (4) Offensive Touching of Law Enforcement Officer; and (5) Terroristic Threatening. On April 5, 2007, the Defendant entered into a plea agreement with the State and pled guilty to Assault Second; Possession of a Controlled Substance within 300 Feet of a Park; and Terroristic Threatening. The remaining charges were dropped in exchange for the guilty plea.
3. A presentence investigation report was completed in relation to Gordon's guilty plea. The report includes an evaluation detailing Gordon's extensive history of juvenile offenses and his parents' serious mental health

problems.¹ The report in addition reflected that the Defendant had been treated for mental health issues at the St. Jones Center and Bradford Place. The Defendant's records from these institutions had been requested, but not received, when the Defendant was sentenced on June 8, 2007.

4. While the Defendant was serving the above sentence, he attacked a correctional officer at the Vaughn Correctional Center. He subsequently pled guilty to Assault Second for this conduct, and an updated presentence report was ordered. The 2010 report notes that soon after the Court had sentenced Mr. Gordon for the charges in 2007, this Court received "voluminous records" from the Division of Child Mental Health, which "revealed an even more troubled childhood than was portrayed in the original Presentence Report."² On February 5, 2010, Gordon was sentenced by a different judge to eighteen months of Level V incarceration in relation to the above assault. The updated presentence report included the mental health records that were previously received.
5. On November 13, 2009, Gordon filed a *pro se* motion for sentence reduction, alleging that the Court had improperly sentenced him before the completion of his presentence investigation report. Gordon subsequently

¹ Presentence Investigation Report, May 22, 2007.

² Presentence Investigation Report, Jan. 26, 2010.

filed a *pro se* motion for correction of an illegal sentence based on the same grounds on January 21, 2010. This Court denied Gordon's motions, finding that the sentence previously imposed was "fair and appropriate."³ On appeal, the Delaware Supreme Court affirmed, declaring Gordon's appeal "without merit," noting that both of Gordon's motions were procedurally defaulted as not timely filed and that Gordon had failed to substantiate his claims that his sentence was based on a misleading presentence report.⁴

6. Gordon filed this *Pro Se* Motion for Postconviction Relief on August 27, 2010. In it, Gordon asserted three related grounds for relief: (1) that the Court violated Gordon's right to due process of law by sentencing him before the completion of his presentence investigation report; (2) that the plea agreement was unfulfilled by the imposition of a sentence while the presentence report remained incomplete; and (3) that he was denied effective assistance of counsel because his counsel failed to advise him that his presentence report did not include his mental health records and failed to object at his sentencing to the incomplete report.

³ Docket 017.

⁴ *Gordon v. State*, No. 93,2010 (Del. May 25, 2010).

7. Upon review of Gordon's Motion for Postconviction Relief, it appears to the Court that the first two grounds of his motion are procedurally barred under Rule 61(i)(4). Under this section, a defendant may not raise any ground for relief that was formerly adjudicated in any proceeding, "unless reconsideration of the claim is warranted in the interest of justice."⁵ The "interest of justice" exception is extremely narrow and will be satisfied "only if the defendant presents either subsequent legal developments demonstrating that 'the trial court lacked the authority to convict or punish the defendant' or significant factual developments justifying reconsideration of the formerly adjudicated issue."⁶ In other words, "[t]he Court need not reconsider a claim which has received prior 'substantive resolution' simply because the defendant has repackaged or restated the same claim" as a constitutional argument.⁷
8. Gordon's initial claims here are premised on the argument that the Court improperly sentenced him before the completion of his presentence investigation report. Gordon is essentially revisiting the arguments he made in his motion to reduce his sentence and his motion for correction of an

⁵ Super. Ct. Crim. R. 61(i)(4).

⁶ *State v. Edwards*, No. 0402010188, 2009 WL 477307, *3 (Del. Super. Feb. 24, 2009) (quoting *State v. Fatir*, 2006 WL 3873238, at *3 (Del. Super. Dec. 12, 2006)). See also *Weedon v. State*, 750 A.2d 521, 526 (Del. 2000).

⁷ *Edwards*, 2009 WL 477307 at *3.

illegal sentence. This Court previously denied Gordon's motions to reduce his sentence, concluding that the sentence imposed was "fair and appropriate."⁸ In so holding, the Court indicated that it would not have treated Gordon any differently on the basis of the information that has become available since the sentencing. The Delaware Supreme Court affirmed the Court's ruling on May 25, 2010.

9. In response to this motion, this Court has again thoroughly examined the record in Defendant's case. It is evident from a review of the transcript of Gordon's sentencing on June 8, 2007 that both the Court and his counsel were aware at the time of the sentencing that Gordon had a history of juvenile offenses and a family history of severe mental illness and that he likely suffered mental health problems of his own. This was supported by the reference in the presentence report that he had been treated for mental health issues at the St. Jones Center and Bradford Place. While the Court may not have had detailed records of the Defendant's treatment, it was able to consider the Defendant's treatment needs as a mitigating factor in crafting his sentence. This is evidenced by the Court's sentencing order requiring that the Defendant while incarcerated was to be transported to the

⁸ Docket 017.

Delaware Psychiatric Center for an evaluation and development of a treatment plan and an additional requirement that the Defendant comply with that plan. It is difficult to envision a different outcome when the record reflected such a significant concern regarding the mental health of the Defendant. Accordingly, it does not appear that Defendant has advanced any argument indicating that there are *significant* new legal or factual developments warranting the application of the interest of justice exception under Rule 61(i)(4). If anything, the information subsequently received would have caused the Court to be even more concerned about the threat the Defendant would potentially be to himself and others, and public safety perhaps would have justified a longer level 5 sentence.⁹ Therefore, based upon the above, Gordon's first two claims are procedurally barred under Rule 61(i)(4).

10. Defendant also claims that he was denied the effective assistance of counsel. Defendant argues first that his counsel was ineffective in failing to address the Court at Defendant's sentencing about the status of the presentence investigation report and in failing to file a motion for continuance after noticing that the report was incomplete. Defendant also contends that his

⁹ Defendant's subsequent conviction for assaultive behavior while incarcerated would support such a conclusion.

counsel lied to him about the status of his presentence investigation report. A colorable ineffective assistance claim is not subject to the procedural bars contained in Rule 61(i)(1), (2), or (3)¹⁰ and the procedural bar under Rule 61(i)(4) is not applicable here because Defendant has not previously presented an ineffective assistance of counsel claim. Accordingly, the Court will address the merits of Defendant's ineffective assistance claim.

11. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part test of *Strickland v. Washington* by showing both: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the errors by counsel amounted to prejudice.¹¹ To satisfy the first prong, the defendant must overcome a "strong presumption that the representation was professionally reasonable."¹² To satisfy the second prong, a defendant "must affirmatively demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the proceeding would have had a different result."¹³ The defendant must satisfy both *Strickland* prongs to prevail.¹⁴

¹⁰ *Edwards*, 2009 WL 477307 at *2.

¹¹ 466 U.S. 668, 688, 694 (1984).

¹² *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996) (citation omitted).

¹³ *Edwards*, 2009 WL 477307 at *2.

¹⁴ *See Edwards*, 2009 WL 477307 at *2.

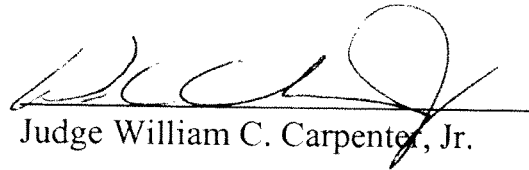
12. Here, even assuming that Defendant could show that counsel's representation was not professionally reasonable, Defendant's ineffective assistance claim fails because he cannot demonstrate prejudice as a result of Defendant's alleged errors. Defendant makes no claim in his motion that he would have declined the guilty plea and gone to trial but for his counsel's failure to properly advise him about the status of his presentence investigation report. Instead, Defendant appears to argue that he would have received a more favorable sentence but for counsel's failure to object to the "incomplete" presentence report or to move for a continuance to allow for the delivery of additional records before sentencing. This Court has already indicated, in its response to Defendant's motion for sentence reduction, that it considered Defendant's sentence "fair and appropriate"¹⁵ and that it considered the Defendant's mental health concerns in crafting its sentence. In addition, the Court in this opinion has indicated the records subsequently provided would have caused the Court to consider imposing a greater Level 5 sentence, not a lesser one. As such, there is nothing in the record to support Defendant's claim that the outcome of the proceeding would have been different but for counsel's alleged errors and Defendant

¹⁵ Docket 017.

cannot affirmatively show prejudice by the failure to object to the presentence report. Accordingly, Defendant's claim of ineffective assistance of counsel must also fail.

13. For the above reasons, Defendant's Motion for Postconviction Relief is hereby DENIED.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.

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