IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES DUFFY,	§	
	§	No. 135, 2012
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for Sussex County
STATE OF DELAWARE,	§	Cr. ID No. 84006719DI
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: August 3, 2012
Decided: September 12, 2012

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices

O R D E R

This 12th day of September 2012, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Charles Duffy, filed an appeal from the Superior Court's February 23, 2012 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61.[1] We find no merit to the appeal. Accordingly, we affirm.

(2) The record before us reflects that, in December 1984, Duffy was indicted on charges of Rape in the First Degree, Burglary in the First Degree, two counts of Burglary in the Second Degree, Attempted Burglary

[1] The Superior Court also denied the motion *sua sponte* pursuant to Rule 35(a).

in the Second Degree, Possession of a Deadly Weapon During the Commission of a Felony, Theft, Offensive Touching, Criminal Mischief and Disorderly Conduct. On July 8, 1985, Duffy entered a Robinson plea to one count of Rape in the First Degree.[2] On September 13, 1985, Duffy was sentenced to life in prison.[3]

(3) Over the years, Duffy has filed a number of motions in the Superior Court alleging that his plea was involuntary and that the attorney who represented him in connection with his plea rendered ineffective assistance. In 1986, Duffy appealed the Superior Court's denial of his motion for correction of illegal sentence under Rule 35(a) to this Court. We affirmed the Superior Court's judgment, stating that Duffy's claim of an involuntary plea was meritless as reflected in the plea colloquy and his signed plea agreement.[4] Duffy's subsequent postconviction motions were denied by the Superior Court as procedurally barred under Rule 61. In those instances where Duffy appealed from the Superior Court's judgment, this Court affirmed.[5]

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[2] *Robinson v. State*, 291 A.2d 279 (Del. 1972) (permitting the acceptance of a guilty plea in the absence of an admission of guilt).
[3] The record in this case contains a copy of the sentencing order, but does not contain a transcription of the sentencing hearing.
[4] *Duffy v. State*, 1986 WL 17363 (Del. July 31, 1986).
[5] *Duffy v. State*, 1987 WL 31556 (Del. Dec. 21, 1987); *Duffy v. State*, 1988 WL 117521 (Del. Oct. 28, 1988).

(4) In this appeal from the Superior Court's denial of his latest postconviction motion, Duffy claims that the Superior Court improperly denied his motion as time-barred and procedurally barred pursuant to Rule 61. He asserts that the "miscarriage of justice" exception of Rule 61(i) (5) applies to his claims due to a) his involuntary plea; b) his invalid plea agreement; and c) the ineffective assistance of his counsel. Duffy further argues that the recent decisions of the United States Supreme Court in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012) create a newly-recognized, retroactively applicable right, rendering the time bar of Rule 61(i) (1) inapplicable to his claims.[6] To the extent that Duffy fails to pursue claims in this appeal that he asserted in the Superior Court, all such claims are deemed to be waived and will not be addressed by this Court.[7]

(5) Duffy's first claim is that his plea was involuntary because both the judge and his counsel led him to believe that his sentence would be for 45 years at Level V, not for the remainder of his natural life.[8] As a related claim, Duffy also claims that his plea agreement is invalid due to the

[6] Rule 61(i) (1) (A motion for postconviction relief that asserts a "retroactively applicable right" is not time-barred if it is filed within one year after such right is "newly recognized" by the Delaware Supreme Court or the United States Supreme Court).
[7] *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his motion filed in the Superior Court, Duffy claimed that the Superior Court judge did not adequately explain the elements of the crime of Rape.
[8] We note that Duffy has not yet served 45 years on his Level V sentence.

"confusion" surrounding his sentence. The transcript of Duffy's July 8, 1985 plea hearing reflects that, during the plea colloquy, Duffy's counsel referred to a life term as equivalent to imprisonment for 45 years. When the Superior Court judge asked Duffy, "What is the sentence that must be imposed by the Court?" Duffy responded, "Forty-five." The judge, attempting to clarify Duffy's understanding of the parameters of his sentence, then stated, "Actually deemed by law to be a forty-five year sentence, but is a sentence for the balance of your natural life. For parole purposes and other purposes, excluding the twenty year business, it is a life sentence and to be deemed to be a forty-five year sentence."

(6) The judge's explanation, while somewhat inartfully stated, nevertheless properly reflected the state of the law prior to the enactment of the Truth in Sentencing Act of 1989 ("TIS").[9] Specifically, the sentence of a defendant convicted of Rape in the First Degree was subject to §4346, the parole eligibility statute, which provided that the defendant would be imprisoned for the remainder of his natural life and would be eligible for parole only after 45 years spent in prison.[10] This Court has consistently so ruled in a series of cases beginning with *Evans v. State*, 872 A.2d 539, 557-

[9] Del. Code Ann. tit. 11, Chap. 42.
[10] Del. Code Ann. tit. 11, §4346(c).

58 (Del. 2005).[11] The record further reflects that Duffy's plea agreement and the sentencing order made no mention of a 45-year period and clearly stated that Duffy's sentence was imprisonment for the remainder of his natural life. For all of the above reasons, we conclude that Duffy's claims that his plea was involuntary, his plea agreement is invalid and that his involuntary plea represents a "miscarriage of justice" for purposes of Rule 61(i) (5) are without merit.[12]

(7) Duffy's second claim is that his counsel provided ineffective assistance in connection with his plea hearing because he did not properly inform Duffy that his sentence was for the remainder of his natural life. In order to prevail on a claim of ineffective assistance of counsel within the context of a voluntary plea such as Duffy's, a defendant must demonstrate that, but for error on the part of his counsel, he would not have entered a plea, but would have insisted on proceeding to trial.[13] Even assuming error on the part of Duffy's counsel, there was no prejudice to Duffy. If Duffy

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[11] *Evans* held that a pre-TIS life sentence for first degree rape was a sentence for the balance of the defendant's natural life and not for 45 years. See also *Nash v. State*, Del. Supr., No. 75, 2005, Berger, J. (Oct. 17, 2005); *Weaver v. State*, Del. Supr., No. 58, 2006, Berger, J. (July 10, 2006); *Ricketts v. State*, Del. Supr., No. 624, 2007, Holland, J. (Mar. 17, 2008); *Jackson v. State*, Del. Supr., No. 255, 2008, Ridgely, J. (Nov. 12, 2008).

[12] We disagree with the Superior Court's statement below that Duffy "clearly was told" that he would be released after 45 years. Then, as now, an inmate who is serving a pre-TIS sentence and is eligible for parole may be released only if the Board of Parole so decides. Del. Code Ann. tit. 11, §4347(c).

[13] *Albury v. State*, 551 A.2d 53, 60 (Del. 1988) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)).

had gone to trial and been convicted only of rape, the record reflects that he faced habitual offender status under §4214(b) and a sentence of life in prison without the possibility of parole on that conviction alone.[14] The record reflects that the State's case was strong, the risks of proceeding to trial were significant and that Duffy's decision to accept the plea provided a benefit to him. We, therefore, conclude that Duffy's claim of ineffective assistance of counsel and his claim that his counsel's ineffective assistance represents a "miscarriage of justice" for purposes of Rule 61(i) (5) are without merit.

(8) Duffy, finally, contends that the recent United States Supreme Court cases of *Lafler v. Cooper* and *Missouri v. Frye* create a newly-recognized, retroactively applicable right regarding counsel's performance in communicating plea offers from the State, rendering Rule 61(i) (1)'s time bar inapplicable to his claims. Because that issue was not presented to the Superior Court in the first instance, it is not ripe for review by this Court and we, therefore, decline to consider it.[15]

[14] The record reflects that Duffy had previously been convicted in Pennsylvania of Rape, Attempted Rape and Robbery, crimes for which he spent 15 years in prison, and had previously been convicted in Delaware of Assault and Battery, a crime for which he spent 7 years in prison.

[15] Supr. Ct. R. 8. The United States Supreme Court cases were decided after the Superior Court's decision in Duffy's case was issued.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.[16]

BY THE COURT:

/s/ Carolyn Berger
Justice

[16] To the extent Duffy argues that the Superior Court improperly denied his claims under Rule 35(a), we also affirm that portion of the Superior Court's decision below. The record reflects that Duffy's sentence was neither illegal nor imposed in an illegal manner. *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992).