

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTONIO L. MALLOY,	§
	§ No. 635, 2010
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
STATE OF DELAWARE,	§ for Kent County
	§ Cr. ID 0608024829
Plaintiff Below-	§
Appellee.	§

Submitted: January 24, 2011

Decided: March 28, 2011

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

ORDER

This 28th day of March 2011, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record on appeal, it appears to the Court that:

(1) The appellant, Antonio Malloy, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Malloy's opening brief that his appeal is without merit. We agree and affirm.

(2) On October 1, 2007, Malloy pled guilty to one count of trafficking cocaine and one count of possession of cocaine within 1000 feet

of a school. In exchange for his guilty plea, the State dismissed nineteen other criminal charges and a violation of probation (VOP) charge. During the plea colloquy, the judge pointed out to Malloy that the plea agreement included a provision requiring Malloy to complete the Key Program while incarcerated. The judge asked Malloy if he would like to complete the program during his last year of confinement. Malloy responded that he would prefer to do it as soon as possible. The judge told Malloy that he would include a provision in the sentencing order stating that Malloy should complete Key during the first two years of his twenty-year prison term but that he could not promise Malloy that the Department of Correction (DOC) would follow through. Pursuant to the plea agreement, the Superior Court sentenced Malloy to a total period of 35 years at Level V incarceration, to be suspended after serving 20 years at decreasing levels of supervision.

(3) In November 2007, the Superior Court conducted a hearing to review Malloy's sentence after the DOC informed the sentencing judge that the Key Program, which was designed to be completed during an inmate's last two years of incarceration, would not benefit Malloy if he completed the program earlier and then had to be returned to the general prison population to complete the remainder of his 20 year sentence. At the review hearing, Malloy's counsel asked the Superior Court to modify Malloy's sentence to

eliminate the requirement that he complete the Key Program. The State did not object to this request. Accordingly, the Superior Court modified Malloy's sentence solely to eliminate completion of the Key Program as a requirement of the sentence. Malloy did not appeal the Superior Court's modification of his sentence.

(4) In September 2008, Malloy filed a motion for postconviction relief arguing that his plea agreement was unfulfilled, the State breached its plea agreement with him, and his trial counsel was ineffective for failing to move to withdraw his plea based on the State's breach of the agreement. The gist of Malloy's complaints is that he would not have pled guilty if he had known that he would not be able to complete the Key Program during the first two years of his sentence. A Superior Court Commissioner issued a report and recommended that Malloy's motion for postconviction relief be denied. The Superior Court judge accepted the Commissioner's report and recommendation and denied Malloy's motion. This appeal followed.

(5) In reviewing the Superior Court's denial of postconviction relief, this Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.¹ Rule 61(i)(3) bars litigation of any claim that was not asserted in the proceedings leading to the judgment of

¹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

conviction unless the defendant can establish cause for the procedural default and prejudice. Claims of ineffective assistance of counsel, however, are excused from this requirement because these claims generally cannot be raised at trial or on direct appeal.² Moreover, claims of ineffective assistance of counsel, if substantiated, can establish cause for a defendant's failure to raise his claims sooner.³

(6) In this case, we find no abuse of discretion in the Superior Court's denial of postconviction relief. At the November 2007 sentence review hearing, Malloy, through his counsel, requested the Superior Court to remove the Key Program requirement from his sentence. The Superior Court granted his request and made no other change to his sentence. By requesting the sentence modification, Malloy waived any right to claim that his plea agreement was not fulfilled or that the State somehow violated its plea agreement with him.⁴

(7) Moreover, we find no merit to Malloy's contention that his counsel was ineffective for failing to move to withdraw his plea once it became clear that Malloy would not be able to attend the Key Program during the first two years of his sentence. To prevail on his claims of ineffective assistance of counsel, Malloy was required to establish that (i) his

² *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985).

³ *Younger v. State*, 580 at 556.

⁴ *See Page v. State*, 2010 WL 2169506 (Del. May 10, 2010).

counsel's representation fell below an objective standard of reasonableness; and (ii) but for his counsel's errors, he would not have pled guilty but would have insisted on going to trial, resulting in his acquittal.⁵

(8) In this case, Malloy pled guilty to two criminal charges in exchange for the State's agreement to dismiss nineteen other charges and a VOP and to recommend a twenty year prison term. If Malloy had not pled guilty and would have insisted on going to trial, he would have faced a possible life sentence if convicted. Moreover, as the Superior Court noted, the possibility of Malloy's conviction following trial was strong because the evidence reflected that Malloy had sold drugs to an undercover police officer. Under these circumstances, we find no abuse of discretion in the Superior Court's conclusion that counsel committed no error in failing to move to withdraw Malloy's plea agreement upon learning that Malloy would not be able to complete the Key Program during the first two years of his sentence.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁵ *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985).