IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| JESUS PINKSTON, | § | |
| | § | |
| Defendant Below-Appellant, | § | No. 651, 2013 |
| | § | |
| | § | |
| v. | § | Court Below—Superior Court |
| | § | of the State of Delaware, |
| STATE OF DELAWARE, | § | in and for New Castle County |
| | § | Cr. ID 1004018182 |
| Plaintiff Below-Appellee. | § | |
| | § | |

Submitted: March 3, 2014
Decided: April 22, 2014

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

**O R D E R**

This 22nd day of April 2014, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Jesus Pinkston, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. Pinkston's counsel on appeal has filed a no-merit brief and a motion to withdraw pursuant to Rule 26(c). Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. Pinkston filed a response to his attorney's presentation raising five points for the Court's consideration on appeal. The State has

responded to Pinkston's points, as well as to the position taken by Pinkston's counsel, and has moved to affirm the Superior Court's judgment. We find no merit to Pinkston's appeal. Accordingly, we affirm.

(2) The record reflects that, on April 21, 2010, Pinkston was driving in Wilmington with a revoked license.[1] Pinkston knew that the vehicle he was driving had been reported stolen by the owner; therefore, he had altered the vehicle's license plate. Believing that he was being followed by a police officer, Pinkston began speeding and driving erratically in an effort to evade the officer. In the course of the ensuing chase, Pinkston struck three separate vehicles. Ultimately, he lost control of the car and killed a pedestrian standing on the sidewalk. Pinkston fled the scene. He was arrested on May 3, 2010 in Maryland.

(3) Pinkston was indicted on the following charges: Murder in the Second Degree, Leaving the Scene of a Collision Resulting in Death, Reckless Endangering in the First Degree, Reckless Driving, Disregarding a Red Light, Failure to Drive at a Speed Appropriate for Conditions, two counts of Leaving the Scene of a Collision Resulting in Property Damage or

[1] In fact, Pinkston previously had been declared a habitual driving offender. At the time of the crime in question, Pinkston was serving probation for a 2009 conviction for Conspiracy in the Second Degree and Unauthorized Use of a Credit Card. As part of that sentence, Pinkston had been ordered not to possess a car key or even sit in the driver's seat of a vehicle unless he was licensed and insured.

Injury, Driving into Oncoming Traffic on Divided Highways, Aggressive Driving, Receiving Stolen Property, Forgery in the Second Degree, Driving After Judgment Prohibited, Driving While License is Suspended or Revoked, and No Proof of Insurance.

(4) In May 2011, Pinkston pled guilty to Manslaughter (as a lesser included offense to Murder in the Second Degree), Leaving the Scene of a Collision Resulting in Death, and Reckless Endangering in the First Degree. The State dismissed the remaining charges. In his plea colloquy, Pinkston acknowledged that he faced a sentence that could range from three years to thirty-five years in prison. He stated that he was "very" satisfied with his counsel's representation and that he was pleading guilty because he was, in fact, guilty of the charges. The Superior Court ordered a presentence investigation. On July 29, 2011, the Superior Court sentenced Pinkston on all three charges to a total period of thirty-two years at Level V incarceration to be suspended after serving twenty-five years in prison for decreasing levels of supervision.

(5) Pinkston did not file a direct appeal to this Court. Instead, in October 2011, Pinkston, with the assistance of counsel, filed a motion for sentence modification. The gist of defense counsel's motion was that the sentencing court had not given sufficient consideration to Pinkston's

mitigating evidence, which consisted of a psychological evaluation that Pinkston had undergone in preparation for trial. Defense counsel argued, among other things, that the twenty-five year sentence imposed for Pinkston's Manslaughter conviction was so excessive compared to the presumptive SENTAC guideline of two to five years and compared to sentences imposed upon other defendants under similar circumstances. Counsel also argued that Pinkston's sentence was disproportionate in light of the expert's psychological report. The Superior Court denied Pinkston's motion on December 9, 2011. Pinkston did not appeal.

(6) Instead, Pinkston filed a *pro se* motion for postconviction relief on July 11, 2012. The Superior Court appointed counsel to represent Pinkston. Counsel filed an amended motion for postconviction relief on January 11, 2013. The motion alleged that: (i) the trial court failed to adequately advise him of his rights during the plea colloquy; (ii) counsel rendered ineffective assistance of counsel by failing to file a direct appeal or otherwise advising Pinkston of his appeal rights; (iii) trial counsel was ineffective for failing to allow Pinkston to read a copy of the expert psychological report before Pinkston pled guilty; and (iv) the sentencing judge failed to give appropriate deference to the plea agreement and was impermissibly biased in favor of the victim.

(7) The motion was referred to a Superior Court Commissioner. The Commissioner expanded the record by obtaining responses from Pinkston's trial counsel and the State. After considering all of Pinkston's claims, the Commissioner issued a twenty-three page report recommending that postconviction relief be denied. On November 8, 2013, the Superior Court approved the Commissioner's report and denied Pinkston's motion. This appeal followed.

(8) Counsel has filed a no-merit brief under Rule 26(c) and has moved to withdraw on the ground that there are no arguable issues for appeal. In response to his counsel's Rule 26(c) brief, Pinkston has raised five points for the Court's consideration.[2] First, he contends that his trial counsel was ineffective for failing to give him a copy of the psychological evaluation. Second, Pinkston contends that his sentence is disproportionate. Third, he contends that the Superior Court erred in failing to find that his trial counsel was ineffective for not filing a direct appeal. Fourth, he asserts that the trial judge was biased against him. Finally, he contends that the trial

[2] Pinkston's response attempts to incorporate by reference any legal ground for review previously argued to the Superior Court since January 2012. The attempt to incorporate an argument by reference, however, is insufficient to preserve and present an argument for this Court's review. *Ploof v. State*, 75 A.2d 811, 822-23 (Del. 2013). We consider only those five claims that Pinkston has properly raised to the Court. *See Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

judge did not give sufficient weight to mitigating evidence in sentencing him.

(9) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[3]

(10) In considering Pinkston's claims of error, this Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.[4] The Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.[5] Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred unless the petitioner can establish: (i) cause for his failure to raise the claim earlier; and (ii) prejudice. Moreover, Rule 61(i)(4) bars litigation of any claim that previously was adjudicated unless

---

[3] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

[4] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

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

reconsideration of the claim is warranted in the interest of justice.

(11) In this case, two of Pinkston's claims—that the trial judge did not give sufficient weight to his mitigating evidence and that his sentence was disproportionate—were previously raised and rejected by the Superior Court when it denied Pinkston's motion for modification of sentence. The sentencing transcript reflects that the trial judge specifically considered Pinkston's significant mental health problems and his extraordinarily difficult childhood in crafting an appropriate sentence.[6] Under the circumstances, even if Pinkston's sentencing claims were reviewable in this Rule 61 proceeding,[7] we do not find that reconsideration of Pinkston's previously adjudicated claims is warranted in the interest of justice. Accordingly, we reject these two arguments on appeal.

(12) Pinkston next contends that his trial counsel was ineffective for failing to give him a copy of the expert's psychological report prior to the entry of his guilty plea. To prevail on an ineffective assistance of counsel claim, a defendant must satisfy the familiar *Strickland* test. That is, "[a] defendant must first show that that his counsel's representation fell below an

[6] Pinkston concedes that his sentence falls within the statutory range of authorized sentences for his crimes.

[7] *See Wilson v. State*, 2006 WL 1291369 (Del. May 9, 2006) (holding that Rule 61 "provides a procedure for a criminal defendant to set aside a *conviction* or a *capital* sentence" and that Rule 35 sets forth the procedure to challenge a non-capital sentence).

objective standard of reasonableness. Second, the defendant must show that the deficient performance prejudiced the defense."[8] In the context of a guilty plea, to establish prejudice the defendant must demonstrate a reasonable probability that, but for his counsel's unprofessional errors, the defendant would not have pled guilty but would have insisted on going to trial.[9]

(13) In this case, trial counsel stated in his affidavit that he discussed the contents of the expert's report with Pinkston but purposefully did not allow Pinkston to read a copy of it. Counsel told Pinkston that the report did not provide any actual legal defense to the charges but was helpful because it highlighted Pinkston's difficult upbringing and his struggle with mental health issues. Counsel told Pinkston that he would not give him a copy of the report because he wanted Pinkston to focus on expressing remorse for his actions. Counsel was concerned that Pinkston might rely on the report to try to excuse his criminal behavior. According to counsel, Pinkston understood and did not object to counsel's strategic decision to not give him the report.

[8] *Neal v. State*, 80 A.3d 935, 941-42 (Del. 2013) (internal quotations omitted).

[9] *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

(14) The Commissioner concluded that counsel's tactical decision was reasonable under the circumstances and did not constitute error. We agree with that assessment. Moreover, Pinkston cannot establish any prejudice from counsel's failure to give him a copy of the report. Pinkston contends that, if he had seen the report prior to accepting the State's plea offer to Manslaughter, he would have directed his counsel to negotiate a better plea offer, or else he would have proceeded to trial on the charge of Murder in the Second Degree and used the psychological report to argue in favor of a lesser included offense such as Manslaughter or Vehicular Homicide. Given that Pinkston *actually* pled guilty to the lesser included offense of Manslaughter, his contention that he would have chosen to go to trial and argue for a Manslaughter conviction simply makes no sense. Consequently, we find no merit to Pinkston's claim of ineffective assistance of counsel because there is neither attorney error nor prejudice.

(15) Pinkston next contends that the Superior Court erred in failing to find that his trial counsel was ineffective for not filing a direct appeal. We disagree. A review of the record reflects that Pinkston entered his guilty plea knowingly, intelligently, and voluntarily. Indeed, Pinkston does not even argue in this appeal that his guilty plea was defective in any way. Accordingly, the only arguable claim that counsel could have raised on

direct appeal would have been a challenge to Pinkston's sentence. Our review of sentences on direct appeal, however, is limited.[10] As we already noted, Pinkston's sentence was within statutory limits. Moreover, the Superior Court considered all relevant evidence, including Pinkston's mitigating evidence, when it crafted its sentence. The outcome of a direct appeal would have yielded no different result than the motion for modification of sentence that counsel did pursue. Under the circumstances, we find no cause or prejudice from counsel's failure to file a direct appeal.

(16) Pinkston's final claim is that the Superior Court judge was biased against him in denying his postconviction motion. Pinkston does not allege any specific grounds to support his claim of bias. He simply claims that the judge was biased because she denied his motion. We find no abuse of the Superior Court's discretion in denying Pinkston's motion. The denial of his motion reflects no evidence of bias.[11] We reject this claim.

(17) This Court has reviewed the record carefully and has concluded that Pinkston's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Pinkston's counsel has made a

[10] *Cruz v. State*, 990 A.2d 409, 416 (Del. 2010).

[11] *Los v. Los*, 595 A.2d 381, 384 (Del. 1991) (holding that a claim of judicial bias must stem from an extrajudicial source).

conscientious effort to examine the record and the law and has properly determined that Pinkston could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice