

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SEAN BOYER,)	
)	
Defendant Below,)	
Appellant,)	No. 418, 2002
)	
v.)	Court Below: Superior Court
)	of the State of Delaware in
STATE OF DELAWARE,)	and for New Castle County
)	
Plaintiff Below,)	Cr. ID No. 86002568DI
Appellee.)	
)	

Submitted: May 6, 2003
Decided: August 4, 2003

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices.

ORDER

This 4th day of August 2003, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. This is an appeal from a New Castle County Superior Court Order denying Sean Boyer’s motion for correction of his October 5, 1995 sentence. Boyer raises four arguments on appeal. First, Boyer argues that the Superior Court judge erred by denying his motion to correct his sentence under Superior Court Criminal Rule 35(a). Second, Boyer argues that the State’s delay in sentencing him violated his Sixth Amendment right to a speedy sentencing. Third, Boyer argues that the State violated his rights by portraying his burglary convictions as an

attempted rape. Finally, Boyer argues that the Superior Court judge abused his discretion by failing to grant relief given the circumstances surrounding Boyer's case. We conclude that the Superior Court judge did not err in his various rulings on the issues.

2. The circumstances of Boyer's case are unusual and the procedural history is complicated. On June 25, 1986, a New Castle County grand jury indicted Sean Boyer for the offenses of second degree burglary¹ and misdemeanor theft.² Both charges resulted from Boyer's break into the residence of Irene Ermilio in Newark, Delaware on April 26, 1986. Boyer entered into a plea agreement and pleaded guilty on October 7, 1986 to one count of second degree burglary. The State later entered a *nolle prosequi* on the misdemeanor theft charge. At a sentencing hearing in December 1986, a law enforcement agent from Pennsylvania informed the Court that Boyer's arrest in Newark constituted a violation of Boyer's parole in Pennsylvania.³ The sentencing judge rescheduled the hearing for April 1987. Boyer never attended that hearing, however, because Pennsylvania authorities took Boyer into custody on April 14, 1987.

¹ DEL. CODE ANN. tit 11, § 825 (2003).

² DEL. CODE ANN. tit. 11, § 841 (2003).

³ Boyer had been convicted in Pennsylvania of attempted rape, involuntary deviate sexual intercourse, and two counts of burglary.

3. When Boyer failed to appear for his sentencing date, the New Castle County Superior Court issued a *capias*. The Court did not know that Pennsylvania had incarcerated Boyer for violating his parole on his 1981 convictions in Pennsylvania. Pennsylvania authorities paroled Boyer on March 16, 1991 and he went to live with his mother in Clifton Heights, Pennsylvania. In August 1993 (thirty months after his Pennsylvania parole), a Delaware State trooper stopped Boyer for speeding in Delaware and took him into custody on the 1987 Superior Court *capias*. Superior Court scheduled Boyer for sentencing on October 20, 1993, but the sentencing judge continued the hearing in order to obtain an updated pre-sentence investigation. After Delaware contacted Boyer's Pennsylvania parole officer, Pennsylvania again violated Boyer for the Delaware speeding ticket and for leaving Pennsylvania without permission. Delaware then voluntarily returned him to Pennsylvania custody. Pennsylvania reincarcerated Boyer for an additional six months for his second parole violation. Although released from prison in Pennsylvania on April 27, 1994, Pennsylvania again violated Boyer (this was his third violation) in July 1994 for smoking marijuana, and Pennsylvania reincarcerated him until he completed his original 20 year sentence in April 2002.

4. In May 1995, Delaware issued a detainer to Pennsylvania for Boyer for the purpose of sentencing him for the 1986 second degree burglary conviction. On October 5, 1995, Boyer appeared in Delaware and a Superior Court judge

sentenced Boyer to eight years at Level V, suspended after six years for one year Level IV work release, followed by an additional one year Level III probation. The sentencing judge ordered Boyer to begin his sentence when he completed his Pennsylvania sentence.

5. Boyer returned to Pennsylvania to serve out his Pennsylvania sentence and never appealed his 1995 Delaware sentence on the second degree burglary charge. On April 23, 1999, Boyer filed a *pro se* motion for postconviction relief. The Superior Court judge found it to be procedurally barred under Superior Court Criminal Rule 61(i)(e) because Boyer failed to file a motion for postconviction relief within three years after the judgment of conviction. Boyer completed his Pennsylvania sentence in 2002 and returned to Delaware to begin serving the sentence imposed in 1995. On March 11, 2002, Boyer filed a motion for modification of sentence in Superior Court. After a remand from this Court, the parties endeavored to recreate what transpired at Boyer's 1995 sentencing hearing. The Superior Court judge then denied Boyer's motion for modification of sentence.

6. Delaware law is well established that appellate review of sentences is narrowly limited.⁴ This Court, when reviewing a sentence within statutory limits, will not find an error of law or an abuse of discretion unless it is clear from the

⁴ *Mayer v. State*, 604 A.2d 839, 842 (Del. 1992).

record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability.⁵

7. Rule 35(a)⁶ allows this Court to correct an illegal sentence at any time. The “narrow function of Rule 35 is to permit correction of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.”⁷ Rule 35(a) is designed to correct errors only where a sentence was imposed outside of the statutory maximum, or where a sentence constitutes double jeopardy.⁸ Boyer’s claims reach beyond the scope of Rule 35(a). Boyer’s sentence neither exceeded the statutory maximum under 11 *Del. C.* §§ 825 and 4205(b) nor did it violate Boyer’s constitutional double jeopardy protection. Furthermore, a sentence is illegal only if it “is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.”⁹ Boyer does not contend that his sentence was illegal in any of these respects and we cannot construe Boyer’s sentence to be illegal in any other manner.

⁵ *Id.* at 843.

⁶ DEL. SUPER. CT. CR. R. 35(a). This rule states: The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

⁷ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998) (quoting *Hill v. United States*, 368 U.S. 424, 430 (1962) (emphasis in the original)).

⁸ *Tatem v. State*, 787 A.2d 80, 81 (Del. 2001); *Brittingham*, 705 A.2d at 577.

8. The right to a speedy trial is guaranteed by the Sixth Amendment to the U.S. Constitution and the Delaware Constitution, Article I, Section 7.¹⁰ The constitutional right to a speedy trial also governs one's rights to speedy sentencing.¹¹ As was the case when this Court decided *Key v. State*, there is no definitive U.S. Supreme Court decision interpreting the Sixth Amendment to the U.S. Constitution concerning "speedy sentencing." We acknowledge that there are perceptible distinctions between speedy trial concepts and the requirement of timely sentencing. "The right to a speedy trial not only helps ensure 'that all accused persons [will] be treated according to decent and fair procedures,' but also protects society's interest 'in providing a speedy trial.' The interest in maximum speed consistent with fairness, in fresh memories likely to approach full accounts of the facts, in prompt vindication and relief of the innocent, and in swift punishment of the guilty ... are matters of broad public moment."¹² A speedy sentencing claim, however, concerns the rights of a convicted defendant as opposed to an accused awaiting trial. We recognize the continuing public interest in promptly disposing of the Court's business and that swift punishment is "of broad public moment."¹³ Nevertheless, we reaffirm the approach taken in *Key* and

⁹ *Brittingham*, 705 A.2d at 578 (quoting *United States v. Dougherty*, 106 F.2d 1514, 1515 (10th Cir. 1997)).

¹⁰ *Middlebrook v. State*, 802 A.2d 268, 270 (Del. 2002).

¹¹ *Key v. State*, 463 A.2d 633, 636 (Del. 1983).

¹² *Middlebrook*, 802 A.2d at 273 (internal quotations omitted).

¹³ *Id.*

assuming that the Sixth Amendment requires speedy sentencing, an allegedly unconstitutional delay should be examined in much the same way as an asserted denial of the right to speedy trial.

9. In *Middlebrook v. State*, this Court examined the United States Supreme Court decision of *Baker v. Wingo* and enumerated a four factor test to determine whether a particular defendant has been deprived of the right to a speedy trial.¹⁴ These four factors include: (i) the length of delay; (ii) the reason for the delay; (iii) the defendant's assertion of the right to a speedy trial and/or sentencing hearing; and (iv) prejudice to the defendant.¹⁵ These factors must be considered together with any other circumstances that may be relevant.¹⁶ Since "these factors have no talismanic qualities, courts must still engage in a difficult and sensitive balancing process."¹⁷

10. As noted by the Superior Court judge, Boyer's speedy sentencing argument is procedurally barred by the three-year time limitation under Rule 61(i)(1).¹⁸ Even assuming arguendo that Boyer's speedy sentencing claim was properly before this Court, Boyer's speedy sentencing claim lacks merit.

¹⁴ *Middlebrook*, 802 A.2d at 273 (referring to *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ DEL. SUPER. CT. CR. R. 61(i)(1). This rule states: A motion for post-conviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final,

11. The first *Barker* factor concerns the delay in the defendant's trial and/or sentencing. Boyer argues that the nine year delay between his arrest and sentence requires this Court to find a presumption of prejudice. Despite Boyer's incarceration in Pennsylvania for most of the time between his arrest and sentence, we cannot say that the nine years is so negligible as to obviate closer examination. Thus, the duration about which Boyer complains is pertinent to the issues here.¹⁹

12. The second *Barker* factor concerns the reason for the delay in the defendant's trial and/or sentencing. The length of delay requires a factual analysis that is dependent upon the circumstances of the particular case.²⁰ "Different weights are assigned to different reasons for the delay."²¹ For instance, a deliberate attempt to delay in order to hamper the defense is weighted heavily against the State whereas a more neutral reason for the delay should be weighted less heavily against the State.²² Moreover, a valid reason may justify appropriate delay and will not weigh against the State at all.²³ In the present case, the State has offered a valid reason for the nine-year delay between Boyer's arrest and sentence. Boyer was incarcerated in Pennsylvania for a substantial time during this delay. Boyer has not alleged a deliberate attempt to impair or harass the defense or that

more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

¹⁹ See *Key*, 463 A.2d at 636.

²⁰ *Id.*

²¹ *Id.* at 274.

²² *Id.*

the State sought to gain some unfair tactical advantage. We cannot, however, overlook the fact that but for the *capias* issued by the Superior Court in 1987, the State made little effort, if any, to have Boyer sentenced on the burglary charge until the issuance of the detainer in 1995; and, in fact, voluntarily released Boyer to Pennsylvania before sentencing him.

13. The third *Barker* factor concerns when and if the defendant asserts his constitutional right to a speedy trial and/or sentencing. When and if the defendant asserts his constitutional right to a speedy trial and/or sentencing hearing is important to determine whether the defendant was denied this constitutional right.²⁴ Not surprisingly, Boyer never requested a sentencing hearing. Even worse, Boyer waited approximately four years after his sentence to raise for the first time his right to a speedy sentencing. “Lack of protest ‘will make it difficult for a defendant to prove that he was denied a speedy trial.’”²⁵ This factor weighs heavily in favor of the State.

14. The fourth *Barker* factor is prejudice to the defendant. “Prejudice, of course, should be assessed in the light of the interest of the defendant which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety

²³ *Middlebrook*, 802 A.2d at 274.

²⁴ *Id.* at 275.

²⁵ *Key*, 463 A.2d at 637 (quoting *Barker*, 407 U.S. at 532.).

and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.”²⁶ We also recognize that until sentence is imposed, a defendant cannot seek an appeal, pardon, commutation, or a reduction of his sentence.²⁷ Boyer has failed to assert any prejudice from the delay in sentencing. In his brief, Boyer argues that he suffered the anxiety of never knowing whether Delaware had any intent to sentence him, that Pennsylvania might have discharged him from his parole or that he might not have violated his Pennsylvania parole on three different occasions had he been promptly sentenced in Delaware, that he fell in love and had a child during one of his brief stints out of Pennsylvania prison while on parole and that he has now been deprived of that relationship.²⁸ While sitting in jail wondering if a neighboring State might require additional incarceration might cause anxiety, none of Boyer’s assertions of prejudice rise to level discussed in *Barker*. Boyer did not suffer from any Delaware imposed pretrial (after sentence) incarceration nor was he concerned whether a trial would produce a not guilty verdict. Boyer also did not suffer any impairment to his defense as a result of the delay. In fact, the circumstances of his life at the time of the Delaware sentencing arguably improved his ability to assert mitigating circumstances. Consequently, this factor weighs in favor of the State.

²⁶ *Barker*, 407 U.S. at 532. Of course, we consider these interest in light of the fact that Boyer stands convicted rather than accused.

²⁷ *Key*, 463 A.2d at 637.

15. After balancing the four factors from *Middlebrook* and *Barker*, we conclude the State did not deprive Boyer of his constitutional right to speedy sentencing. The Pennsylvania incarceration constituted a valid reason for the nine-year delay between Boyer's Delaware guilty plea and Delaware sentencing. Boyer, not the State, violated his Pennsylvania parole which caused the delay in sentencing. Finally, Boyer has neither asserted nor suffered any prejudice as a result of Delaware's delay in sentencing him. Thus, even assuming that Boyer's speedy sentencing claim is not barred by the three year time period for the filing of a postconviction relief motion under Superior Court Criminal Rule 61, the State did not deprive Boyer of his constitutional right to a speedy sentence. Further, we must consider Delaware's policy against concurrent sentencing. Title 11, Section 3901(d)²⁹ expresses clear legislative intent that no sentencing of confinement shall run concurrently. Therefore, Boyer had every expectation that his Delaware sentence will be served after he served his time in Pennsylvania. Any anxiety that he allegedly suffered as a result of this reality flows directly as a consequence of his conviction and not as a result of any delay in imposing punishment.

16. Boyer also argues that it was unconstitutional and unfair for the State, without ever indicting him on attempted rape and/or proving such an allegation

²⁸ Appellant's Op. Br. at 18.

beyond a reasonable doubt to a jury, to ask the Superior Court judge to consider an alleged attempted rape at sentencing. However, a sentencing judge has broad discretion to consider “information pertaining to a defendant’s personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted.”³⁰ Moreover, the Superior Court judge stated that he was well aware of the sentencing elements for second degree burglary and that he sentenced Boyer according to those elements and not the elements of the alleged attempted rape.³¹ Even if Boyer articulated a right grounded in either the U.S. or Delaware Constitutions supporting this claim, there could be no violation as the State’s comments were not considered by the sentencing judge.

17. Finally, Boyer argues that given the extraordinary circumstances surrounding the imposition of his sentencing, the Superior Court judge had an obligation to “right the wrong” of his 1995 sentence. Boyer points to the following facts in making this argument: (i) after Boyer was sentenced in 1995, he spent an additional seven years completing his sentence in Pennsylvania; (ii) Boyer was a productive inmate who completed numerous prison programs and courses, including every program offered regarding the rehabilitation of sex offenders; (iii) Boyer’s family needs him to care for his elderly mother whose health is starting to

²⁹ DEL. CODE ANN. tit. 11, § 3901(d) (2003). This section states: No sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently with any other sentence of confinement imposed on such criminal defendant.

fail; (iv) Boyer will continue to be an incarcerated father to his ten-year old son; and (v) Boyer has recently undergone chemotherapy and surgery to treat cancer. However, the Superior Court judge properly rejected Boyer's mitigating arguments in the exercise of his discretion. Rule 35(a) is limited to correcting illegal sentences, not a sentence that occurs under circumstances that a defendant now considers unfair or inequitable.

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

BY THE COURT:

/s/ Myron T. Steele
Justice

³⁰ *Mayes*, 604 A.2d 842.

³¹ *State v. Boyer*, Del. Super., ID # 86002568DI, Cooch, R.J. (June 21, 2002) (ORDER).