IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| RICHARD MARK TURNER, | § | |
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| Defendant Below-Appellant, | § | No. 265, 2002 |
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| | § | Court Below—Superior Court |
| v. | § | of the State of Delaware, |
| | § | in and for Kent County |
| STATE OF DELAWARE, | § | Cr.A. Nos. IK99-10-0132, |
| | § | -0134, and -0135 |
| Plaintiff Below-Appellee. | § | Cr. ID No. 9909014538 |
| | § | |

Submitted: October 11, 2002
Decided: December 13, 2002

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

**O R D E R**

This 13th day of December 2002, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Richard Mark Turner, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. Turner entered a *Robinson* plea[1] in January 2000 to first degree reckless endangering, third degree assault, and resisting arrest. The State nolle prossed other charges. The Superior Court declared Turner to be an habitual offender, in accordance with his plea agreement, and sentenced him, pursuant to 11 Del. C. § 4214(a), to ten and a half years at Level V

[1] *Robinson v. State*, 291 A.2d 279 (Del. 1972).

incarceration, suspended after serving seven years for twelve months at the Level V Key Program, suspended upon successful completion of the Key Program for six months at Level IV work release followed by two years at Level III probation. Turner did not appeal. Instead, he filed a motion for postconviction relief on July 25, 2001, which was referred to a Superior Court Commissioner. The Commissioner recommended that the petition be denied. Turner did not file any objections to the Commissioner's report. The Superior Court adopted the Commissioner's report and recommendation. This appeal followed.

(2) Turner asserts that he initially was arrested and arraigned in the Court of Common Pleas on misdemeanor charges only. He contends that the State made a plea offer on the misdemeanor charges (which was more favorable than the offer he ultimately accepted), but his then-attorney misrepresented the State's offer and persuaded him not to accept the plea offer immediately. As a result of not accepting the State's offer, Turner alleges that the State maliciously indicted him not only on the misdemeanor charges but also on the felony charge of reckless endangering. Turner's contentions on appeal are: (a) the State engaged in malicious prosecution by overcharging him and that his guilty plea was coerced as result; (b) the attorney who represented him at his arraignment in the Court of Common

Pleas was ineffective; and (c) the attorney who represented him during the plea proceedings in the Superior Court was ineffective for allowing him to plead guilty as an habitual offender because the State did not indict him as an habitual offender and the charge of reckless endangering is not a predicate offense under the habitual offender statute.

(3) Turner's first contention is that his guilty plea was coerced due to the prosecutor's misconduct in belatedly charging him with reckless endangering. Turner, however, did not raise this claim "in the proceedings leading to the judgment of conviction," and he has not established cause for, or prejudice resulting from, his failure to raise this claim in a timely fashion.[2] A claim of coercion in the plea bargaining process can only be substantiated if the State threatens to take action or takes action that is not legally authorized.[3] Although Turner was arrested initially only on misdemeanor charges, the State's indictment of Turner three weeks later on charges that included felony reckless endangering was not improper.[4] Consequently, we reject this claim.

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[2] *See* DEL. SUPER. CT. CRIM. R. 61(i)(3).

[3] *See Albury v. State*, 551 A.2d 53, 61 (Del. 1988).

[4] *See Evans v. Redman*, Del. Supr., No. 4, 1987, Horsey, J. (May 19, 1987) (holding that a subsequent indictment cures any defect in original complaint or warrant).

(4) With respect to his claims of ineffective assistance of counsel, Turner must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the outcome of the proceedings would have been different.[5] Turner's complaints regarding his counsel's representation at the Court of Common Pleas arraignment were not fairly raised in his petition below and, therefore, no factual record was presented to substantiate this claim. We will not consider this claim for the first time on appeal.[6]

(5) Next, Turner contends that his counsel in Superior Court was ineffective and should not have allowed him to plead guilty as an habitual offender because: (i) the State had not indicted him as an habitual offender under 11 Del. C. § 4214; and (ii) reckless endangering was not a predicate offense under the habitual offender statute. Neither of these contentions has any merit. The habitual offender statute does not set forth the elements of a crime for which a defendant could be independently indicted.[7] Furthermore, first degree reckless endangering is a felony[8] and can serve as a predicate

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[5] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

[6] DEL. SUPR. CT. R. 8.

[7] *See Gibbs v. State*, 208 A.2d 306, 308 (Del. 1965) ("Habitual criminality is a status and not a criminal offense under our law.").

[8] *See* DEL. CODE ANN. tit. 11, § 604 (2001) (first degree reckless endangering is a class E felony).

offense for habitual offender status under 11 Del. 4214(a), the statute pursuant to which Turner pled guilty and was sentenced. Thus, Turner's claims of ineffective assistance of counsel are simply unsubstantiated.

(6) Moreover, Turner's plea agreement and plea colloquy reflect that at the time of his guilty plea, Turner specifically expressed satisfaction with his counsel's performance. Turner also acknowledged that he qualified for habitual offender status given his prior criminal record. In the absence of clear and convincing evidence to the contrary, Turner is bound by those representations.[9] Based on the record presented, we find that Turner entered into his guilty plea knowingly and voluntarily.

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

BY THE COURT:

/s/ Carolyn Berger
Justice

[9] *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).