IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
	)	**Crim. ID No. 1411002179**
v.	)	
	)	**Cr. A. Nos. 14-11-0948, etc.**
	)	
CHARLES R. COLBURN,	)	
	)	
Defendant.	)	

Submitted: May 12, 2016
Decided: June 1, 2016

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

This 1st day of June, 2016, upon consideration of the written submissions filed, the Commissioner's Report and Recommendation, and the record in this matter, it appears to the Court that:

(1) Charles R. Colburn was charged by Information on January 7, 2015, with a variety of drug, firearm, and driving offenses. That same day, Colburn pleaded guilty to one count each of Drug Dealing, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Firearm by a Person Prohibited ("PFBPP"), and a then-pending violation of probation at a fast-track violation of probation calendar.[1] He did so in exchange for dismissal of the

[1] *See* DEL. CODE ANN. tit. 16, § 4752(1) (2015) (drug dealing as a class B felony); *id*. at tit. 11, § 1447A (possession of a firearm during the commission of a felony); *id.* at § 1448(a)(1) (possession of a firearm by a person prohibited). Plea Agreement, *State v. Charles R. Colburn*, ID No. 1411002179 (Del. Super. Ct. Jan. 7, 2015).

remaining charges, the State's agreement not to pursue sentencing as a habitual criminal,[2] and a favorable joint sentencing recommendation—a Level V sentence not to exceed nine years.[3] The Court followed the parties' joint sentencing recommendation and Colburn was immediately sentenced: (a) for PFDCF – five years at Level V; (b) for PFBPP – two years at Level V; and (c) for Drug Dealing – 25 years at Level V, suspended after two years for 23 years at Level IV (DOC Discretion), suspended after one year for 18 months at Level III.[4] He filed no direct appeal from his conviction or sentence.[5]

(2) Colburn timely filed a *pro se* motion for postconviction relief pursuant to Superior Court Criminal Rule 61. This motion was referred to a Superior Court

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[2] DEL. CODE ANN. tit. 11, § 4214(a) (2014) (providing that a person who has been thrice previously convicted of a felony and is thereafter convicted of another felony may be declared a habitual criminal offender; the Court may then, in its discretion, impose a sentence of up to life imprisonment for that or any subsequent felony).

[3] Plea Agreement, *State v. Charles R. Colburn*, ID No. 1411002179 (Del. Super. Ct. Jan. 7, 2015). Seven of those years were mandatory minimum terms of incarceration. DEL. CODE ANN. tit. 11, §§ 1447A(c) (2015) ("A person convicted [of PFDCF], and who has been at least twice previously convicted of a felony in this State or elsewhere, shall receive a minimum sentence of 5 years at Level V . . . ."); *id.* §§ 4205(b)(2) & (d) (sentence "[f]or a class B felony [is] not less than 2 years . . . [and any] minimum, mandatory, mandatory minimum or minimum mandatory sentence [ ] required by subsection (b) of [§ 4205] . . . shall not be subject to suspension by the court").

[4] Sentencing Order, *State v. Charles R. Colburn*, ID No. 1411002179 (Del. Super. Ct. Jan. 7, 2015); Corrected Sentencing Order, *State v. Charles R. Colburn*, ID No. 1411002179 (Del. Super. Ct. Jan. 15, 2015).

[5] Colburn did, however, file a Rule 35(b) motion requesting a reduction of his sentence (D.I. 6). His request was denied. *State v. Colburn*, 2015 WL 1881181 (Del. Super. Ct. Apr. 24, 2015).

Commissioner in accordance with 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of fact, conclusions of law, and recommendations for disposition.[6]

(3) The Commissioner filed her Report and Recommendation on April 28, 2016. The Commissioner recommended that the Court deny Colburn's motion for postconviction relief.[7]

(4) "Within ten days after filing of a Commissioner's proposed findings of fact and recommendations . . . any party may serve and file written objections."[8] Neither party has filed an objection to the Commissioner's Report and Recommendation.

(5) The Court accepts the Commissioner's recommendation to deny Colburn relief, but denies his postconviction motion on different bases.[9]

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[6] Super. Ct. Crim. R. 62 (commissioners may make proposed findings of fact and recommendations on Rule 61 motions).

[7] *State v. Colburn*, 2016 WL 1756503 (Del. Super. Ct. Apr. 28, 2016) (Comm. Rep. and Rec.).

[8] Super. Ct. Crim. R. 62(a)(5)(ii) ("The written objections shall be entitled 'Appeal from Commissioner's Findings of Fact and Recommendations.'"); *id.* at 62(b) (seeking reconsideration of a Commissioner's order in a case dispositive matter is "appealing the findings of fact and recommendations of [the] Commissioner").

[9] *Id.* at 62(a)(5)(iv) ("A judge may accept, reject, or modify, in whole or in part, the findings of fact or recommendations made by the Commissioner."). *See Shaw v. State*, 2008 WL 1952089, *1 n.9 (Del. May 6, 2008) (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (appellate court may affirm for different reasons than trial court)); *Stevens v. State*, 110 A.3d 1264, 1270 (Del. Super. Ct. Jan. 20, 2015) (same).

(6) This is Colburn's first and timely motion for postconviction relief. He makes two ineffective assistance of counsel claims alleging: (a) that his counsel inaccurately told him he was not eligible for concurrent sentencing; and (b) that his counsel failed to ask the Court to impose concurrent sentences at his sentencing hearing.[10] At the Court's request, Colburn's trial/plea counsel, Allison S. Mielke, Esquire, submitted an affidavit addressing Colburn's claims. (D.I. 14).

(7) The Commissioner was wholly correct that if Colburn filed his motion merely to again attack the length of his sentence and again attempt to have the Court amend his sentences to run concurrently, such a claim is not cognizable under Rule 61. Delaware courts have held repeatedly that claims challenging the validity or length of a sentence are not permitted under Rule 61; rather, criminal defendants must request revision through Rule 35.[11] But Colburn seemingly claims that it was ineffective assistance of counsel that caused him to enter his plea with faulty sentencing information and led to the consecutive sentences imposed.[12]

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[10] Def.'s Rule 61 Mot., at 3.

[11] *See Gilmore v. State*, 2016 WL 936990, at *1 (Del. Mar. 10, 2016) ("sentencing claims are not cognizable under Rule 61"); *Wilson v. State*, 900 A.2d 1291369, at *2 (Del. May 9, 2006) (claim of illegal sentence not cognizable under Rule 61, but must be addressed under Rule 35); *State v. Berry*, 2016 WL 1169131, at *4 (Del. Super. Ct. Mar. 16, 2016) ("[T]he Delaware Supreme Court has repeatedly held that defendants cannot use Rule 61 postconviction proceedings to challenge non-capital sentences.").

[12] Def.'s Rule 61 Mot., at 3.

(8) One claiming ineffective assistance of counsel must demonstrate that: (a) his defense counsel's representation fell below an objective standard of reasonableness, and (b) there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different.[13] When addressing the prejudice prong of the ineffective assistance of counsel test in the context of a challenged guilty plea, an inmate must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[14] When addressing the prejudice prong of the ineffective assistance of counsel test in the context of a sentencing hearing, an inmate must show that "there is a reasonable probability that, but for the counsel's error, the result of [his] sentencing would have been different."[15]

(9) There is always a strong presumption that counsel's representation was reasonable.[16] Too, one claiming ineffective assistance "must make specific allegations of how defense counsel's conduct actually prejudiced the proceedings,

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[13] *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Alston v. State*, 2015 WL 5297709, at *3 (Del. Sept. 4, 2015).

[14] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)); *Sartin v. State*, 2014 WL 5392047, at *2 (Del. Oct. 21, 2014); *State v. Hackett*, 2005 WL 3060976, at *3 (Del. Super. Ct. Nov. 15, 2005).

[15] *Brawley v. State*, 1992 WL 353838, at *1 (Del. Oct. 7, 1992); *State v. Torres*, 2015 WL 5969686, at *11 (Del. Super. Ct. Oct. 2, 2015).

[16] *See Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

rather than mere allegations of ineffectiveness."[17] And an inmate must satisfy the proof requirements of both prongs to succeed on an ineffective assistance of counsel claim. Failure to do so on either prong will doom the claim, and the Court need not address the other.[18] Colburn can demonstrate neither.

(10) Colburn first complains that Mielke's advice was deficient when she told him he was not eligible for concurrent sentencing under 11 *Del. C.* § 3901.[19] But Mielke was correct—Colburn was ineligible for concurrent sentencing. Section 3901(d) specifically prohibits concurrent sentencing for PFDCF and certain PFBPP convictions.[20] So, while Colburn's drug dealing conviction was eligible for concurrent sentencing, each of his two weapons convictions was statutorily disqualified. The sentences for neither could be made to run concurrently with the drug dealing count. In short, Mielke was right in her recitation of the applicable sentencing law and provided reasonable professional assistance when advising Colburn thereon.

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17 *Alston*, 2015 WL 5297709, at *3 (citing *Wright*, 671 A.2d at 1356).

18 *Strickland*, 466 U.S. at 697; *Ploof v. State*, 75 A.3d 811, 825 (Del. 2013) ("*Strickland* is a two-pronged test, and there is no need to examine whether an attorney performed deficiently if the deficiency did not prejudice the defendant.").

19 Def.'s R. 61 Mot., at 3; DEL. CODE ANN. tit. 11, § 3901 (2015).

20 *Id.* at § 3901(d) ("[N]o 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 for any conviction of . . . [p]ossession of a firearm during the commission of a felony . . . or for any sentence for possession of a firearm by a person prohibited where the criminal defendant was previously convicted of a Title 11 violent felony.").

(11) Colburn also claims that Mielke should have argued for concurrent sentencing during his sentencing hearing. But Colburn ignores two salient facts. First, he could not receive concurrent sentences for the crimes he committed. Second, he (with Mielke) and the State entered into a plea agreement in which both parties expressly agreed to recommend that Colburn serve a nine-year term of imprisonment.[21] To recommend a sentence other than that bargained for in the plea agreement would have breached that agreement,[22] and as Mielke notes, would have contravened her "ethical duties to the court and her professional obligation to abide by the agreement of the parties."[23] This Court cannot find Mielke's refusal to violate the plea agreement by advocating for concurrent sentencing was unreasonable when: (a) concurrent sentencing was never an option; (b) such a

[21] Plea Agreement, *State v. Charles R. Colburn*, ID No. 1411002179 (Del. Super. Ct. Jan. 7, 2015) ("State and Defendant agree to recommend: a sentence incorporating a total of non-suspended Level Five time of nine years.").

[22] *United States v. Williams*, 510 F.3d 516, 521-24 (3d Cir. 2007) (review of a defendant's alleged breach of a plea agreement by failure to abide by agreed-upon sentencing recommendation requires application of basic principles of contract law); *Chavous v. State*, 953 A.2d 282, 286-87 (Del. 2008) (adopting *Williams* standard of review of alleged breach of a plea agreement and noting that standard applies whether it is a defendant or the State that is alleged to have breached it).

[23] Def. Counsel's Aff., at 4. *See United States v. Menlendez*, 55 F.3d 130, 136 (3d Cir. 1995) ("When a defendant stipulates to a point in a plea agreement, he 'is not in a position to make . . . arguments [to the contrary].'").

violation could have induced the State to withdraw the plea entirely;[24] and (c) it would have been a breach of counsel's ethical obligation to do so.

(12) Colburn has not overcome his "high burden"[25] to show that Mielke acted unreasonably when she properly advised him on the applicable sentencing law; declined to present an argument to the Court that she knew would fail; and refused to argue a position that contravened the plea agreement that Colburn "chose to accept . . . in hopes of securing a better deal than he would have faced post-indictment facing mandatory time and habitual offender sentencing."[26] On this basis alone – *i.e.*, failure to show that his counsel's performance was in any way deficient – Colburn's petition should be denied.[27]

(13) But Colburn fails also to demonstrate that, but for Mielke's performance, there is a reasonable probability that: (a) he would not have pleaded

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[24] *See United States v. Hallahan*, 756 F.3d 962, 972-73 (7th Cir. 2014) (defendant's material breach of a plea agreement excuses the government's obligation to recommend the guideline, or government may "elect to terminate the entire agreement or seek to enforce the remainder of the contract").

[25] *See, e.g., Panuski v. State*, 41 A.3d 416, 422 (Del. 2012) (defendant must meet "high burden" to prove *Strickland* violation).

[26] Def. Counsel's Aff., at 9.

[27] *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."); *State v. McGlotten*, 2011 WL 987534, at *4 (Del. Super. Ct. Mar. 21, 2011) ("To restate the requirements of *Strickland*, a defendant must establish two things, not just one: that trial counsel's performance was deficient **and** that but for that deficiency, the outcome of the proceedings would have been different. If a defendant cannot establish both prongs, then the ineffective assistance of counsel claim fails.") (emphasis in original).

guilty and would have insisted on going to trial; or (b) the result of his sentencing would have been different. Colburn has never said that he wished (or wishes) to withdraw his plea and take his chances at trial. No, he wants the many benefits of his plea bargain and more – a shorter imprisonment term than he expressly agreed to. Nor can Colburn show that his sentence would have been different had Mielke made the futile arguments he now posits. Indeed, when Colburn moved the Court under Criminal Rule 35(b)[28] for effectively the same sentence reduction he seeks now through postconviction relief, the Court "fully reviewed [ ] Colburn's application, the record of his case, [ ] Colburn's prior supervision history, and all sentencing information available" and "f[ound] its original sentencing judgment is appropriate for the reasons stated at the time it was rendered."[29] Because Colburn has failed to show that Mielke's performance prejudiced his defense in any way, he is due no relief.[30]

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[28] *See Hewett v. State*, 2014 WL 5020251, at *1 (Del. Oct. 7, 2014) ("When, as here, a motion for reduction of sentence is filed within ninety days of sentencing, the Superior Court has broad discretion to decide whether to alter its judgment."); *see also State v. Remedio*, 108 A.3d 326, 331 (Del. Super. Ct. 2014) ("The reason for such a rule is to give a sentencing judge a second chance to consider whether the initial sentence is appropriate;" such a request is essentially a plea for leniency – an appeal to the sentencing court to reconsider and show mercy).

[29] *State v. Colburn*, 2015 WL 1881181, at *3 (Del. Super. Ct. Apr. 24, 2015).

[30] *Swan v. State*, 28 A.3d 362, 383 (Del. 2011) (observing that *Strickland* requires that an inmate make both showings – deficient performance and prejudice – and "'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'") (quoting *Strickland*, 466 U.S. at 697).

(14) Colburn has not met his burden of demonstrating that his counsel's representation fell below an objective standard of reasonableness or that, but for any alleged errors by counsel, he would have obtained a different sentence. Accordingly, the Commissioner's recommendation for disposition is **ACCEPTED**; Colburn's Motion for Postconviction Relief must be **DENIED.**

SO ORDERED this 1st day of June, 2016.

PAUL R. WALLACE, JUDGE

Original to Prothonotary

cc: Brian J. Robertson., Deputy Attorney General
Allison S. Mielke, Esquire
Mr. Charles R. Colburn, *pro se*