

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID No. 1508001475
)
 DAVID M. SCHEIDEGG,)
)
 Defendant.)
)

Submitted: April 18, 2017
Decided: May 16, 2017

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED.**

Matthew C. Bloom, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

David M. Scheidegg, Howard R. Young Correctional Center, Wilmington, Delaware,
pro se.

PARKER, Commissioner

This 16th day of May 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND, FACTS AND PROCEDURAL HISTORY

1. On August 31, 2015, Defendant David M. Scheidegg was indicted on the charge of driving under the influence of alcohol ("DUI") and additional motor vehicle charges arising out of an incident that occurred on August 2, 2015.

2. On February 3, 2016, Defendant pled guilty to a seventh-offense DUI. During the pendency of this case, there was another DUI charge pending against Defendant which resulted in a conviction, and a new DUI conviction would be Defendant's ninth DUI conviction.¹

3. A seventh offense DUI is a Class C felony, subject to incarceration of between 5 years to 15 years.²

4. The subject charges stemmed from an incident that occurred on August 2, 2015. Defendant, whose license had been suspended, was involved in a collision while driving on Philadelphia Pike in New Castle County, Delaware. A police officer responded to the scene of the motor vehicle collision involving a sedan and a minivan. The driver of the sedan was present at the scene of the accident but, according to a witness, the driver of the minivan left the scene. Assisting police units located Defendant walking along a road. Defendant had an odor of alcohol on his person and admitted to drinking at Murphy's Pub on Philadelphia Pike prior to the accident.³

¹ See, April 8, 2016 Sentencing Transcript, at *5.

² 21 *Del. C.* § 4177(a)(7).

³ Exhibit C and D to Original Affidavit of Defendant's Trial Counsel-Superior Court Docket No. 39; April 8, 2016 Sentencing Transcript, at *12-13; Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2.

5. Defendant told the police officer that he collided with another vehicle and he left the scene because he was afraid and he did not have a driver's license.⁴ Defendant consented to providing a breath sample to the Intoxilyzer. His blood-alcohol content was measured at 0.112%, above the legal limit in Delaware.⁵

6. As part of the plea agreement, the State agreed to cap its recommendation for unsuspended Level V time to a total of 5 years. The State also agreed to dismiss the remaining charges in the indictment.

7. Following a presentence investigation, on April 8, 2016, Defendant was sentenced to a total of four years of unsuspended Level V time, followed by decreasing levels of probation.

8. Defendant did not file a direct appeal to the Delaware Supreme Court.

DEFENDANT'S RULE 61 MOTION

9. Defendant filed the subject Rule 61 motion on October 31, 2016. In the subject motion, Defendant claims that his counsel was ineffective because: 1) his plea was "coerced"; 2) his counsel deprived him of his right to a suppression hearing; 3) his counsel failed to confront witnesses and subpoena witnesses for his defense; and 4) that he was denied the right to immediate medical treatment after the accident.

10. Before making a recommendation, the record was enlarged and Defendant's trial counsel was directed to submit an Affidavit responding to Defendant's ineffective

⁴ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2; Exhibits C and D to Original Affidavit of Defendant's Trial Counsel-Superior Court Docket No. 39.

⁵ 21 *Del. C.* § 4177(a)(4); Exhibits C and D to Original Affidavit of Defendant's Trial Counsel-Superior Court Docket No. 39.

assistance of counsel claims. Thereafter, the State filed a response to the motion. Finally, Defendant submitted a reply thereto.⁶

11. The claims raised in the subject motion are procedurally barred, waived and without merit.

A) One of the Claims Raised by Defendant is Procedurally Barred

12. Prior to addressing the substantive merits of any claim for postconviction relief the court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.⁷ If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.⁸

13. Rule 61(i)(3) required that Defendant raise his claims, with the exception of his ineffective assistance of counsel contentions, on direct appeal.⁹ Defendant's ineffective assistance of counsel claims are not procedurally barred by Rule 61(i)(3) because a Rule 61 motion is the appropriate vehicle for raising these claims.¹⁰

14. As to Defendant's claim that he was denied immediate medical treatment, this claim is procedurally barred by Rule 61(i)(3), for Defendant's failure to raise it on direct appeal. This claim was known to Defendant since the date of the incident, and certainly known to Defendant at the time he accepted the plea. Therefore, there is no justifiable reason for Defendant's failure to raise the issue in a direct appeal if Defendant genuinely believed the claim had any merit.

⁶ Super.Ct.Crim.R. 61(g).

⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ *Id.*

⁹ See, Super.Ct.Crim.R. 61; *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

¹⁰ *Id.*

15. If a procedural bar exists, the court will not consider the merits of the claim unless the defendant can show that an exception found in Rule 61(i)(5) applies. Rule 61(i)(5) provides that consideration of an otherwise procedurally barred claim is limited to claims that the court lacked jurisdiction, or to claims that new evidence exists that creates a strong inference that the defendant is actually innocent of the underlying charges for which he was convicted; or to claims that a new rule of constitutional law applicable to that defendant's case would render his conviction invalid.¹¹

16. In the subject motion, Defendant is unable to overcome the procedural hurdles of Rule 61(i)(3) by showing an exception in Rule 61(i)(5) applies. Defendant has not established that the court lacked jurisdiction, that any new evidence existed to create a strong inference that Defendant is actually innocent of the underlying charges, or that a new rule of constitutional law exists that would render his conviction invalid. Defendant's claim as to the denial of immediate medical treatment is procedurally barred.

B) All of Defendant's Claims Were Waived Upon Entry of His Plea

17. In addition to Defendant's claim that he was denied immediate medical treatment being procedurally barred, all of Defendant's claims were also waived upon the entry of Defendant's guilty plea.

18. Although Defendant now claims that his plea was somehow defective and was not informed due to his counsel's ineffectiveness, Defendant's present claims are belied by the representations he made at the time he accepted his plea, admitted his guilt, and was sentenced.

¹¹ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i) (effective June 4, 2014).

19. A defendant is bound by his answers on the guilty plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.¹² In this case, the Truth-in-Sentencing Guilty Plea Form, Plea Agreement and plea colloquy reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the DUI charge for which he was sentenced.¹³

20. At the plea colloquy, Defendant represented to the court that he had read and understood the plea agreement and the Truth-in-Sentencing Guilty Plea Form, and that he had reviewed the terms of the plea with his counsel and that she answered any questions he had to his satisfaction.¹⁴

21. Defendant represented to the court that nobody was forcing him to enter his plea. Defendant represented that he was freely and voluntarily pleading guilty to the DUI charge. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.¹⁵

22. During the plea colloquy and in the Truth-in-Sentencing Guilty Plea Form, Defendant represented that he understood that by pleading guilty he was waiving his constitutional rights: to have a trial; to be presumed innocent until the State proves each and every part of the charges against him beyond a reasonable doubt; to a trial by jury; to hear and question witnesses; to present evidence in his defense; to testify or not testify; and to appeal, if convicted.¹⁶

¹² *State v. Harden*, 1998 WL 735879, *5 (Del. Super.); *State v. Stuart*, 2008 WL 4868658, *3 (Del. Super. 2008).

¹³ February 3, 2016 Plea Transcript; February 3, 2016 Plea Agreement; February 3, 2016 Truth-In-Sentencing Guilty Plea Form.

¹⁴ February 3, 2016 Plea Transcript, *8-12 .

¹⁵ February 3, 2016 Plea Transcript, *13-14; Truth-In-Sentencing Guilty Plea Form dated February 3, 2016.

¹⁶ February 3, 2016 Plea Transcript, at * 12-13; Truth-in-Sentencing Guilty Plea Form dated February 3, 2016.

23. Defendant represented that he understood that he was waiving each and every one of those rights by pleading guilty.¹⁷

24. Defendant admitted his guilt for the DUI charge for which he pled guilty.¹⁸ Only after finding that Defendant's plea was entered into knowingly, intelligently and voluntarily, did the court accept the plea.¹⁹

25. Defendant has not presented any clear, contrary evidence to call into question his prior testimony at the plea colloquy, Plea Agreement or answers on the Truth-In Sentencing Guilty Plea Form.

26. Since Defendant's plea was entered into voluntarily, intelligently and knowingly, Defendant waived his right to challenge any alleged errors, deficiencies or defects occurring prior to the entry of his plea, even those of constitutional proportions.²⁰ All of Defendant's claims presented herein, including those alleging ineffective assistance of counsel, stem from allegations of defects, errors, misconduct and deficiencies which existed at the time of the entry of the plea. All of Defendant's claims were waived when he knowingly, freely and intelligently entered his plea.²¹

C) Defendant's Claims Are Without Merit

27. In addition to one of Defendant's claims being procedurally barred and all of Defendant's claims being waived, Defendant's claims are also without merit. Defendant's first three claims allege ineffective assistance of counsel. In Claim One, Defendant alleges that his plea was coerced. In Claim Two, he alleges that his counsel

¹⁷ February 3, 2016 Plea Transcript, at * 12-13; Truth-in-Sentencing Guilty Plea Form dated February 3, 2016.

¹⁸ February 3, 2016 Plea Transcript, at *14.

¹⁹ February 3, 2016 Plea Transcript, at *14.

²⁰ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *Modjica v. State*, 2009 WL 2426675 (Del. 2009); *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2004).

²¹ See, *Mills v. State*, 2016 WL 97494, at *3 (Del.)

was ineffective for failing to follow through with his suppression motion. In Claim Three, he alleges that his counsel was ineffective for not preparing a defense. Defendant's fourth claim is that he was denied immediate medical treatment on the night of the incident.

28. In order to prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.²² The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.²³

29. In the context of a plea challenge, it is not sufficient for the defendant to simply claim that his counsel was deficient. The defendant must also establish that counsel's actions were so prejudicial that there was a reasonable probability that, but for counsel's deficiencies, the defendant would not have taken a plea but would have insisted on going to trial.²⁴ Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.²⁵

30. The United States Supreme Court has reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.²⁶ The United States

²² *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

²³ *Id.* at 687-88, 694.

²⁴ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997); *Premo v. Moore*, 131 S.Ct. 733, 739-744 (2011).

²⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

²⁶ *Premo v Moore*, 131 S.Ct. 733, 739-744 (2011).

Supreme Court cautioned that in reviewing ineffective assistance of counsel claims in the context of a plea bargain, the court must be mindful of the fact that “[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.”²⁷

31. Turning to the specific claims raised by Defendant in the subject motion, Defendant first claims that his counsel was ineffective because his plea was coerced in that he did not have a sufficient amount of time to consult with his counsel and his counsel did not conduct any investigation.

32. This claim that Defendant did not freely and voluntarily accept the plea is directly at odds with the representations he, himself, made to the court at the time he accepted the plea.

33. The transcript of the plea hearing reflects that counsel requested an opportunity to speak with Defendant about the State’s plea offer. A recess was granted at 10:01 a.m. so that counsel could confer with Defendant, and the recess ended at 11:13 a.m. Thus, Defendant had the opportunity to confer with counsel for over an hour.²⁸

34. Defendant’s counsel represents that during that over one hour period she reviewed in detail the discovery, plea offer and the court’s comments with regard to the suppression motion. Counsel advised Defendant that the court reviewed the pleadings and indicated that the suppression issue had been previously ruled on by the court and was highly unlikely to be successful. Counsel also advised Defendant that the State lowered its sentence recommendation from 6 years to 5 years at Level V, which would be rescinded and not reoffered again, if the suppression motion proceeded. Counsel further

²⁷ *Id.*, at pg. 741.

²⁸ February 3, 2016 Plea Hearing, at *4-5.

advised that the State would be seeking significantly more Level V time if Defendant was convicted at trial because a new conviction would be Defendant's 9th DUI.²⁹

35. Defense counsel represents that she also received and reviewed all law enforcement reports with Defendant. The reports revealed that Defendant agreed to the Intoxilyzer test and it registered a blood alcohol level of .112. Defendant also told the reporting law enforcement officer that he was driving the minivan at the time of the collision, that he left the scene of the accident because he did not have a driver's license and he was afraid, and that he had been drinking at Murphy's Pub on Philadelphia Pike prior to the accident.³⁰ Counsel did not contact law enforcement officers prior to trial because it would not have been helpful to Defendant's defense.³¹

36. Counsel further represents that at no time did Defendant indicate that he was with someone at the time of the incident or that witnesses for his defense were available. Counsel was not aware that there were any witnesses present during the incident which would have been helpful to Defendant's defense.³²

37. Defendant advised defense counsel that he understood the choices he had, the information he was provided and stated that he wanted to accept the plea offer. Defendant indicated that he had enough time to consider the plea and was sure that he

²⁹ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2-4.

³⁰ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2; Exhibit D (Police Report of August 2, 2015) to Original Affidavit of Defendant's Trial Counsel-Superior Court Docket No. 39.

³¹ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2-3.

³² Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2; Exhibit C to Original Affidavit of Defendant's Trial Counsel-Superior Court Docket No. 39.

wanted to accept it after weighing all of the information. Counsel carefully answered all of Defendant's questions and made sure he did not feel rushed in his decision making.³³

38. Indeed, Defendant represented to the court, at the time he accepted the plea, that he had an opportunity to discuss with counsel the plea, to go over the plea agreement, the Truth-In-Sentencing Guilty Plea Form, and to discuss the constitutional rights he would be waiving by accepting the plea. Defendant represented to the court that counsel answered all his questions to his satisfaction and that he wanted to accept the plea. He represented to the court that he was not coerced in any way to enter into the plea agreement.³⁴ Defendant represented that nobody was forcing him to enter his plea, that he was freely and voluntarily pleading guilty to the DUI charge, and that he was satisfied with his counsel's representation.³⁵

39. Defendant's claim that his plea was coerced in any way is without merit and belied by the record. Defendant's counsel was not deficient in any respect.

40. Turning to Claim Two, Defendant claims that his counsel was ineffective because his counsel did not follow through with a suppression hearing. A suppression motion had been filed and was pending at the time Defendant accepted the plea. The State advised that the plea offer would be rescinded after the suppression motion was decided, and the court who reviewed the motion, advised that there was little likelihood of success on the motion.

41. Defendant reviewed and weighed the strength of his suppression motion, the strength of his defense as well as the strength of the State's case. In addition, Defendant

³³ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2-5.

³⁴ February 3, 2016 Plea Hearing, at *8-14.

³⁵ February 3, 2016 Plea Hearing, at *13-14; Truth-in-Sentencing Guilty Plea Form dated February 3, 2016.

weighed the lowered Level V sentence recommendation in the State's plea offer and the possibility of receiving more Level V time if he lost at trial.³⁶ Defendant knew he had been convicted of an additional DUI during the pendency of this case and that the State could weigh this information at sentencing and that he could be facing the possibility of a longer jail sentence.³⁷ Based on all these considerations, the strategic decision was made to forgo the suppression motion and accept the plea.

42. Defendant's claim that counsel was ineffective for not proceeding with the suppression motion is without merit. Defendant made the strategic decision to forgo the suppression hearing and to accept the plea offer.

43. Defendant contends that at the case review hearing on December 21, 2015, the court stated that the case was to "start over." It is not clear what such a statement would mean or how it would give rise to any actionable ineffective conduct on behalf of trial counsel. Defendant had not yet had a suppression hearing or trial. There was nothing to "start over" since nothing had yet been decided.

44. The transcript of the December 21, 2015 case review reveals that the State requested a continuance of the trial date then scheduled for January 7, 2016 due to the unavailability of one of its witnesses. During the case review, Defendant's counsel requested a continuance of the suppression hearing, then scheduled for December 22, 2015, since she had just taken over the representation of Defendant and the trial date was going to be continued. The court granted both continuance requests.³⁸ The granting of the continuances of the suppression hearing and the trial does not give rise to any

³⁶ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *5-6.

³⁷ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *5-6.

³⁸ See, December 21, 2015 Case Review Transcript.

ineffectiveness of counsel claim. Nothing had yet been conducted nor decided. This claim is without merit.

45. Turning to Defendant's third claim, that counsel was ineffective for failing to confront and/or subpoena his accusers, or call witnesses for his defense, Defendant gave up that right willingly when he accepted the plea as he indicated on the Truth in Sentencing Guilty Plea form and as he confirmed to the court during the plea colloquy.³⁹

46. Defendant was well-aware that by accepting the plea he was waiving his right to proceed with his suppression motion, to present witnesses and evidence, to challenge the State's case against him, to cross-examine witnesses and to have a jury decide the case.⁴⁰

47. In Defendant's reply, he appears to be contending that there was an issue as to whether he was the person driving the minivan at the time of the collision and that counsel should have further investigated this issue. However, this contention is at odds with the statement Defendant made to the police at the time of collision that he was the driver of the minivan involved in the accident and that he left the scene of the accident because he was scared and had no driver's license.⁴¹

48. This contention is also directly at odds with his admission of guilt at the time he accepted the plea on February 3, 2016, in which he represented to the court that he was driving a motor vehicle on Philadelphia Pike in Wilmington, Delaware while under the influence of alcohol.⁴²

³⁹ February 3, 2016 Truth in Sentencing and February 3, 2016 Plea Transcript at *12-13.

⁴⁰ February 3, 2016 Plea Transcript, at *12-13.

⁴¹ See, Superior Court Docket No. 39, Affidavit of Trial Counsel- Exhibit C.

⁴² February 3, 2016 Plea Transcript, at *14.

49. Finally, this contention that he was not driving at the time of the accident is also directly at odds with his admission to the court during sentencing. At the time of sentencing, Defendant stated:

MR. SCHEIDEGG: She is absolutely right, I was involved in the incident. Maybe the cars were a little mixed up, but I was absolutely involved. And I definitely have a lifelong streak with alcohol battle.

THE COURT: Well, I mean, you were driving even under your unusual description of the events?

MR. SCHEIDEGG: **Yeah, I was definitely driving.**⁴³

50. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.⁴⁴ Defense counsel represents that Defendant admitted to the police that he collided with another vehicle and left the scene because he was afraid and did not have a driver's license, and that he was picked up shortly thereafter while walking on the roadside.⁴⁵ Counsel reviewed all law enforcement reports which revealed that Defendant agreed to the Intoxilyzer test and it registered a blood alcohol level of .112%. Defendant told the police that he had been drinking alcoholic beverages at a pub prior to driving the vehicle.

51. At no time did Defendant indicate to defense counsel that he was with someone at the time of the accident, or that there were witnesses available for his defense. Counsel was unaware of the existence of any witnesses that would have been helpful to Defendant's defense.⁴⁶

⁴³ April 8, 2016 Sentencing Proceeding, at *13 (emphasis added).

⁴⁴ *Premo v. Moore*, 131 S.Ct. 733, 739-744 (2011).

⁴⁵ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *2-5.

⁴⁶ Superior Court Docket No. 41- Amended Affidavit of Defendant's Trial Counsel in response to Defendant's Rule 61 motion, at *1-6.

52. Defendant waived his right to confront and/or subpoena witnesses at the time he accepted his plea. The decision to accept the plea thereby waiving the right to confront and/or subpoena witnesses does not appear to be deficient in any regard. There is no factual basis in support of Defendant's claim that any further investigation by defense counsel was warranted and that further investigation would have changed the outcome of a trial, or that defense counsel would have changed her recommendation on the plea offer as a result.

53. Turning to the final claim, Claim Four, Defendant claims he was denied medical treatment by the arresting officers during the course of his detention. This is more of a civil claim than a collateral attack on his criminal conviction. Defendant does not explain how these facts, even if true, would support his motion for postconviction relief. In any event, this claim is procedurally barred for Defendant's failure to raise it on direct appeal, and was waived when he voluntarily plead guilty.

54. As discussed above, Defendant's guilty plea was knowingly, voluntarily and intelligently entered. Any claim that the plea was coerced, that he was not fully informed, or that he somehow did not understand the consequences of entering into the plea is belied by Defendant's representations at the time of the plea and sentencing, and is without merit. Any such claims were waived when Defendant accepted the plea offer. Defendant's claims are procedurally barred, waived and without merit.


55. Defendant's request for the appointment of counsel is denied. Defendant's conviction resulted from a guilty plea. Rule 61 provides that counsel is to be appointed

in a first timely filed Rule 61 motion to assist a defendant whose conviction resulted from a guilty plea only in certain limited exceptional situations.⁴⁷

56. Those situations include that defendant has stated a substantial claim that he received ineffective assistance of counsel and that exceptional circumstances warrant the appointment of counsel.⁴⁸ Having fully, thoroughly and carefully considered Defendant's motion and the evidentiary record, Defendant has not set forth a substantial claim that he received ineffective assistance of counsel nor is there the existence of an exceptional circumstance which would give rise to the entitlement to the appointment of counsel. Since Defendant has failed to overcome the procedural hurdles warranting the appointment of counsel, the appointment of counsel is denied.⁴⁹

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

oc: Prothonotary
Cathy A. Johnson, Esquire

⁴⁷ Superior Court Criminal Rule 61(e)(2).

⁴⁸ Superior Court Criminal Rule 61(e)(2)(ii) and (iv).

⁴⁹ See, Super.Ct.Crim.R. 61(e)(2).