

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID No. 1212011142
)
 HAROLD C. BISSOON, JR.,)
)
 Defendant.)
)

Submitted: May 12, 2017
Decided: June 1, 2017

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S SECOND MOTION FOR POSTCONVICTION RELIEF
SHOULD BE SUMMARILY DISMISSED**

Kathryn S. Keller, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Harold C. Bissoon, Jr., James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 1st day of June 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. On October 28, 2013, Defendant Harold C. Bissoon, Jr. pled guilty to two counts of Robbery First Degree and one count of Conspiracy Second Degree. As part of the plea agreement, the State agreed to dismiss all of the remaining charges which included two additional counts of Robbery First Degree and one count of Wearing a Disguise During the Commission of a Felony.

2. Also as part of the plea agreement, the State agreed to cap its recommendation for Level V time to 18 years. The State further agreed that it would not seek to have Defendant sentenced as a habitual offender, pursuant to 11 *Del. C.* 4214(a) or (b).¹ Had Defendant proceeded to trial and been convicted of even a single count of Robbery First Degree, he would have faced 25 years to life under 11 *Del. C.* § 4214(a), or an automatic life sentence under 11 *Del. C.* § 4214(b).

3. Following a pre-sentence investigation, on January 31, 2014, Defendant was sentenced to a total of 32 years at Level V, suspended after 15 years at Level V, followed by decreasing levels of probation.

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

5. Thereafter, Defendant filed a motion for modification of sentence.² By Order dated April 4, 2014, the Superior Court denied the motion on the basis that the sentence was appropriate for all the reasons stated at the time of sentencing.³ Defendant appealed the denial of his motion for modification of sentence to the Delaware Supreme Court. By

¹ Plea Agreement of October 28, 2013- Superior Court Docket No. 37.

² Superior Court Docket No. 46.

³ Superior Court Docket No. 47.

Order dated August 19, 2014, the Delaware Supreme Court affirmed the judgment of the Superior Court.⁴ The Delaware Supreme Court held that the sentence was a product of a plea agreement and was supported by reasons justifying the sentence, including Defendant's prior violent criminal activity and his repetitive criminal conduct.⁵

6. On August 14, 2014, Defendant filed his first Rule 61 motion for postconviction relief.⁶ In that motion, Defendant claimed, among other things, that he was overcharged and that there was insufficient evidence to support his conviction.⁷ Specifically, in one of the several claims raised in the motion, Defendant contended that, during the plea negotiations, his defense counsel failed to recognize that the State lacked evidence to prove that he was guilty of more than one count of robbery. According to Defendant, because of this alleged lack of evidence, the second count of robbery in the plea agreement should have been reduced to aggravated menacing. Defendant further contended that defense counsel's failure to negotiate a more favorable plea agreement constituted ineffective assistance of counsel.

7. On March 23, 2015, the undersigned Superior Court Commissioner issued her Report and Recommendation recommending that the Rule 61 postconviction motion be denied.⁸ The Commissioner recommended that Defendant's Rule 61 motion be dismissed since the claims raised therein were procedurally barred, waived and without merit. The Commissioner held that Defendant's claims were procedurally barred for failure to raise

⁴ *Bissoon v. State*, 2014 WL 4104783 (Del.).

⁵ *Id.*

⁶ Superior Court Docket No. 53.

⁷ Superior Court Docket No. 53.

⁸ *State v. Bissoon*, 2015 WL 1566863 (Del.Super.)

them on direct appeal, were waived upon the entry of his guilty plea, and were otherwise without merit.⁹

8. The Commissioner further noted that the record reflected that Defendant had entered into his plea knowingly, intelligently and voluntarily.¹⁰ At the time of his plea, Defendant also acknowledged his guilt as to each of the charges for which he pled guilty.¹¹ It was only after finding that Defendant's plea was entered into knowingly, intelligently and voluntarily that the court accepted the plea.¹²

9. By Order dated June 4, 2015, the Superior Court adopted the Commissioner's Report and Recommendation and denied Defendant's Rule 61 postconviction motion.¹³ Defendant appealed, and on December 7, 2015, the Delaware Supreme Court affirmed the decision of the Delaware Superior Court.¹⁴ The Delaware Supreme Court held that Defendant's ineffective assistance of counsel claim was without merit.¹⁵ The Delaware Supreme Court further held that Defendant's claims that the State lacked evidence to convict him of the offenses in the plea agreement were without merit.¹⁶

10. The Delaware Supreme Court recognized that a valid guilty plea waives any right to challenge the strength of the State's evidence.¹⁷ Defendant freely and voluntarily pled guilty to two counts of robbery and one count of conspiracy and thereby waived his right to challenge the strength of the State's case as to these convictions.¹⁸ The Delaware Supreme Court also recognized that Defendant received a significant benefit from the

⁹ *State v. Bissoon*, 2015 WL 1566863 (Del.Super.)

¹⁰ *State v. Bissoon*, 2015 WL 1566863, *4-5 (Del.Super.)

¹¹ *Id.*

¹² *Id.*

¹³ *State v. Bissoon*, 2015 WL 3646916 (Del.Super.).

¹⁴ *Bissoon v. State*, 2015 WL 8154402 (Del.).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

plea agreement negotiated since five additional charges were dismissed including two counts of robbery and two weapon offenses, and given the State's agreement not to seek an enhanced sentence.¹⁹

DEFENDANT'S SECOND RULE 61 MOTION

11. On May 8, 2017, Defendant filed his second Rule 61 postconviction motion. In the subject motion, he claims that his due process and equal protection constitutional rights were violated because there was not sufficient evidence or a sufficient legal basis to convict him of the second robbery conviction for which he pled guilty. In the subject motion, Defendant "does not seek to withdraw his plea or to be resentenced."²⁰ He seeks only to have his second robbery conviction vacated.

12. In second or subsequent postconviction motions, the motion shall be summarily dismissed unless the defendant establishes: 1) that *new* evidence exists that creates a strong inference that he is actually innocent of the charge for which he was convicted, or 2) the existence of a *new* rule of constitutional law made retroactive to cases on collateral review rendered his convictions invalid.²¹ If it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.²²

13. Defendant's second Rule 61 motion should be summarily dismissed. Defendant has not pled with particularity that any *new* evidence exists that creates a strong inference that he is actually innocent of the charge for which he was convicted nor that there is a *new* rule of law that would render his conviction invalid.

¹⁹ *Id.*

²⁰ See, Superior Court Docket No. 71, Memorandum of Law in support of Rule 61 Motion, at pg. 4.

²¹ Super.Ct.Crim.R. 61(d)(2)& (5); and Rule 61(i) (effective June 4, 2014).

²² Super.Ct.Crim.R. 61(d)(5).

14. Defendant does not raise anything new or recently discovered. Defendant's claims stem from facts known to him at the time of his plea in October 2013 and sentencing in January 2014. As such, Defendant has failed to meet the pleading requirements allowing him to proceed with his Rule 61 motion. In accordance with the mandates of Rule 61, Defendant's motion should be summarily dismissed.²³

15. The claims that Defendant raises in his subject motion were previously raised in his first Rule 61 motion, although couched somewhat differently. Like his prior Rule 61 motion, the claims raised in his second Rule 61 motion were waived when Defendant entered into his plea. As previously noted in the Commissioner's Report and Recommendation of March 25, 2015 in Defendant's first Rule 61 motion, 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.²⁴

16. Indeed, the Delaware Superior Court already held, and the Delaware Supreme Court already affirmed, that Defendant's claim that he could not be convicted of the second robbery charge in the plea agreement was waived and without merit.²⁵

17. As previously discussed, the Delaware Supreme Court already recognized that Defendant waived his right to challenge any alleged deficiencies with his guilty plea to two counts of robbery and one count of conspiracy when he freely and voluntarily pled guilty to those charges.²⁶

²³ Super.Ct.Crim.R. 61(d)(2) & 5; and Rule 61(i).

²⁴ *State v. Bissoon*, 2015 WL 1566863, *4-5 (Del.Super.); See also, *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).

²⁵ *Id.*

²⁶ *Bissoon v. State*, 2015 WL 8154402 (Del.).

18. Defendant's motion also falls short of other procedural requirements that must be met. If a procedural bar exists, then the claim is barred and the court should not consider the merits of the claim.²⁷

19. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;²⁸ (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances (ie. discovery of new evidence or new rule of constitutional law) warranting a subsequent motion being filed; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief however do not apply to a claim that the court lacked jurisdiction or to a claim that new evidence exists that movant is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.²⁹

20. In the subject action, Defendant's motion is time-barred. The final order of conviction was in March 2014³⁰, and this motion was filed in May 2017, over 3 years later.³¹ This motion was filed well outside the applicable one year limit. Defendant's claims, at this late date, are time-barred.

21. As previously discussed, Rule 61(i)(2) further precludes this court's consideration of Defendant's motion since Defendant has not satisfied the pleading requirements for proceeding with this motion. Defendant has not established that *new* evidence exists creating a strong inference of Defendant's actual innocence or the existence of a *new* rule

²⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

²⁸ Super.Ct.Crim.R. 61(i)(1).

²⁹ Super.Ct.Crim.R. 61 (effective June 4, 2014).

³⁰ Super.Ct.Crim.R. 61(m)(1).

³¹ Super.Ct.Crim.R. 61(i)(1).

of constitutional law made retroactive to this case that would render his conviction invalid.

22. Rule 61(i)(4) also precludes Defendant's claims raised herein since the claims have already been raised and adjudicated in some fashion in Defendant's first Rule 61 motion. Defendant's claims, which have already been raised and resolved in some fashion, cannot now be re-stated, refined and re-raised in order to again seek review.³²

23. Rule 61(i)(3) also prevents this court from considering any claim raised by Defendant at this late date that had not previously been raised. Defendant was aware of, had time to, and the opportunity to raise the claims presented herein a timely filed motion. Defendant's subject claims stem from facts known to Defendant at the time of his plea and at the time of sentencing. Defendant does not raise anything new or recently discovered.


24. Defendant has not established any prejudice to his rights and/or cause for relief. Defendant had time and opportunity to raise any issue raised herein in on direct appeal and/or in a timely filed postconviction motion. There is no just reason for Defendant's 3 year delay in doing so. Having been provided with a full and fair opportunity to present any issue desired to be raised in a timely filed motion, any attempt at this late juncture to raise, re-raise or re-couch a claim is procedurally barred.

25. Defendant has failed to meet the pleading requirements for proceeding with the subject motion and, therefore, the motion should be summarily dismissed. Defendant's motion is also time barred, waived, and otherwise procedurally barred.

³² *Johnson v. State*, 1992 WL 183069, at *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

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

IT IS SO RECOMMENDED.


Commissioner Lynne M. Parker

oc: Prothonotary
Andrew J. Witherell, Esquire