

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE, )  
)  
Plaintiff, )  
)  
v. ) Cr. ID No. 1407009305  
)  
JY'AIRE D. SMITH, )  
)  
Defendant. )  
)

Submitted: May 5, 2017  
Decided: June 12, 2017

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

Monil D. Amin, Esquire, Deputy Attorney General, Department of Justice, Wilmington,  
Delaware, Attorney for the State.

Jy' Aire D. Smith, Sussex Correctional Institution, Georgetown, Delaware,  
*pro se.*

PARKER, Commissioner

This 12th day of June 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

**BACKGROUND, FACTS AND PROCEDURAL HISTORY**

1. On July 21, 2014, Defendant Jy'Aire D. Smith was indicted on the charges of Possession of a Firearm by a Person Prohibited ("PFBPP") and Possession of Ammunition by a Person Prohibited ("PABPP").
2. On December 16, 2014, Defendant pled guilty to the charge of PABPP. As part of the plea agreement, the State agreed to dismiss the PFBPP charge.
3. If convicted of the PFBPP charge, Defendant was facing a minimum mandatory prison term of 10 years.<sup>1</sup> By pleading guilty only to the PABPP charge, Defendant was not exposed to any minimum mandatory time and his exposure to prison was capped at a maximum of 8 years.
4. The charges stemmed from the seizure of a gun and ammunition from Defendant's belongings at the residence where he was staying. The State had photographs of Defendant holding a gun with unique characteristics. The gun seized from Defendant's residence had the same unique characteristics as the gun Defendant was holding in the photographs.<sup>2</sup> The State's evidence against Defendant was strong and he faced the likelihood of being convicted of both charges at trial thereby facing a prison sentence of not less than 10 years and up to 33 years.

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<sup>1</sup> December 16, 2014 Plea Transcript, at pgs. 3-5; June 26, 2015 Sentencing Transcript, at pgs. 4-5; 11 Del. C. § 1448(e).

<sup>2</sup> December 16, 2014 Plea Transcript, at pgs. 5, 11-12.

5. After the plea was entered but before sentencing, Defendant requested the appointment of new counsel to represent him.<sup>3</sup> The court granted Defendant's request and appointed new counsel to represent Defendant.<sup>4</sup>

6. Following a presentence investigation, on June 26, 2015, Defendant was sentenced to a total of eight years at Level V, suspended after three years, followed by probation.

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

### **DEFENDANT'S RULE 61 MOTION**

8. On June 27, 2016, Defendant timely filed the subject Rule 61 motion.<sup>5</sup> In the subject motion, Defendant claims: 1) that his counsel was ineffective because counsel did not provide him with his Rule 16 discovery packet and because defense counsel told him that counsel did not want to go to trial; 2) that he was sentenced incorrectly because his sentence exceeded sentencing guidelines; and 3) that his new attorney did not have enough time to prepare for trial after his previous attorney was removed from the case and that the whole process should have started all over again.

9. Before making a recommendation, the record was enlarged and Defendant's counsel were both directed to submit Affidavits responding to Defendant's ineffective assistance of counsel claims. Thereafter, the State filed a response to the motion. Finally, Defendant was afforded an opportunity to submit a reply thereto.<sup>6</sup>

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<sup>3</sup> See, Superior Court Docket Nos. 19, 22.

<sup>4</sup> See, Superior Court Docket No. 21.

<sup>5</sup> Superior Court Criminal Rule 61(m)(1) provides that a judgment of conviction is final 30 days after the Superior Court imposes sentence if the defendant does not file a direct appeal. In this case, Defendant did not file a direct appeal. Therefore, his conviction became final on July 26, 2015, 30 days after his June 26, 2015 sentence. This motion filed on June 27, 2016, was timely filed within the one year period permitted for the filing of Rule 61 motions.

<sup>6</sup> Super.Ct.Crim.R. 61(g).

10. 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**

11. 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.<sup>7</sup> If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.<sup>8</sup>

12. Rule 61(i)(3) required that Defendant raise his claims, with the exception of his ineffective assistance of counsel contentions, on direct appeal.<sup>9</sup> 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.<sup>10</sup>

13. As to Defendant's claim that he was sentenced incorrectly because his sentence exceeded sentencing guidelines, 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 his sentencing on June 25, 2015. Therefore, there is no justifiable reason for Defendant's failure to raise the issue on direct appeal if Defendant genuinely believed the claim had any merit.

14. 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

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

<sup>8</sup> *Id.*

<sup>9</sup> 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).

<sup>10</sup> *Id.*

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.<sup>11</sup>

15. 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 that he was sentenced incorrectly is procedurally barred.

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

16. In addition to Defendant's claim that he was sentenced incorrectly being procedurally barred, all of Defendant's claims were waived upon the entry of Defendant's guilty plea.

17. Although Defendant now claims that his plea was somehow not informed due to his counsel's ineffectiveness, Defendant's Rule 61 claims are belied by the representations he made at the time he accepted his plea, admitted his guilt, and was sentenced.

18. 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.<sup>12</sup> In this case, the Truth-in-Sentencing Guilty Plea Form, Plea Agreement and plea colloquy

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

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

reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the charge for which he was sentenced.<sup>13</sup>

19. 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 counsel answered any questions he had to his satisfaction.<sup>14</sup>

20. 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 PABPP charge. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.<sup>15</sup> Defendant also represented that nobody made any promises as to what he sentence was going to be.<sup>16</sup>

21. 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.<sup>17</sup>

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<sup>13</sup> December 16, 2014 Plea Transcript; December 16, 2014 Plea Agreement; December 16, 2014 Truth-In-Sentencing Guilty Plea Form.

<sup>14</sup> December 16, 2014 Plea Transcript, \*8-9 .

<sup>15</sup> December 16, 2014 Plea Transcript, \*10-11; Truth-In-Sentencing Guilty Plea Form dated December 16, 2014.

<sup>16</sup> December 16, 2014 Plea Transcript, \*10.

<sup>17</sup> December 16, 2014 Plea Transcript, at \* 9-10; Truth-in-Sentencing Guilty Plea Form dated December 16, 2014.

22. Defendant represented that he understood that he was waiving each and every one of those rights by pleading guilty.<sup>18</sup>

23. Defendant admitted his guilt for the PABPP charge for which he pled guilty.<sup>19</sup> Only after finding that Defendant's plea was entered into knowingly, intelligently and voluntarily, did the court accept the plea.<sup>20</sup>

24. 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.

25. 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.<sup>21</sup> 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 and/or at sentencing. All of Defendant's claims were waived when he knowingly, freely and intelligently entered his plea.<sup>22</sup>

### **C) Defendant's Claims Are Without Merit**

26. 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 claims that his trial counsel was ineffective for not providing him with Rule 16 discovery and for not wanting to go to trial, and that his second counsel was ineffective for not

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<sup>18</sup> December 16, 2014 Plea Transcript, at \* 9-10; Truth-in-Sentencing Guilty Plea Form dated December 16, 2014.

<sup>19</sup> December 16, 2014 Plea Transcript, at \*10-11.

<sup>20</sup> December 16, 2014 Plea Transcript, at \*11.

<sup>21</sup> *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).

<sup>22</sup> See, *Mills v. State*, 2016 WL 97494, at \*3 (Del.)

having enough time to prepare for trial after his first counsel was replaced and for the whole trial process not starting all over. Finally, Defendant claims that he was sentenced incorrectly because his sentence exceeded the presumptive sentence.

27. Turning first to the ineffective assistance of counsel claims, 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.<sup>23</sup> 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.<sup>24</sup>

28. 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.<sup>25</sup> Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>26</sup>

29. The United States Supreme Court has reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.<sup>27</sup> The United States Supreme Court cautioned that in reviewing ineffective assistance of counsel claims in the

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<sup>23</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>24</sup> *Id.* at 687-88, 694.

<sup>25</sup> *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).

<sup>26</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>27</sup> *Premo v Moore*, 131 S.Ct. 733, 739-744 (2011).



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.”<sup>28</sup>

30. Turning to the specific claims raised by Defendant in the subject motion, Defendant first claims that his counsel was ineffective for not providing him with his Rule 16 discovery packet so he could properly defend himself and for telling Defendant that he did not want to go to trial.

31. Counsel, in his Affidavit in response to Defendant’s Rule 61 motion, represents that he had discussed in detail with Defendant the evidence against him on several occasions prior to trial.<sup>29</sup> On the day of trial (which was also the day of the plea), December 16, 2014, counsel went over with Defendant the physical evidence in detail. Upon seeing the actual gun that was at issue in the trial and seeing its similarities to the gun Defendant was holding in photographs, Defendant agreed with counsel that it was in his best interest to take the plea.

32. Counsel also made the same representations on the record during the plea colloquy that he now makes in his Affidavit in response to Defendant’s Rule 61 motion.<sup>30</sup> Tellingly, at no time during the plea colloquy did Defendant ever contest counsel’s representations that he had been fully made aware of the State’s evidence against him.

33. During the plea colloquy, counsel further represented to the court that he discussed all the factual allegations with Defendant, discussed the penalties he was facing, and that Defendant understood he had the option of going to trial or accepting the plea, and that Defendant further understood that if he was convicted at trial he was facing

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<sup>28</sup> *Id.*, at pg. 741.

<sup>29</sup> See, Superior Court Docket No. 36- Affidavit of counsel in response to Rule 61 motion.

<sup>30</sup> December 16, 2014 Plea Hearing, at \* 5

a minimum mandatory prison term of 10 years.<sup>31</sup> Again, Defendant never contested at the time of the plea that he was fully apprised of all factors to be taken into consideration when making the decision whether or not to accept the plea or go to trial.

34. Despite Defendant's present contentions, at the time Defendant accepted the plea Defendant, personally, represented to the court 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.<sup>32</sup> Defendant represented that nobody was forcing him to enter his plea, that he was freely and voluntarily pleading guilty to the PABPP charge, and that he was satisfied with his counsel's representation.<sup>33</sup>

35. The record reflects that Defendant was adequately advised of the evidence against him, the charges, the plea offer, and the penalties he would be facing if the plea was accepted and the penalties he would be facing if the plea was not accepted. The State's case against Defendant was strong, and if convicted at trial, Defendant was facing a sentence of not less than 10 years and up to 33 years of incarceration. It was not deficient in any regard for defense counsel to advise Defendant that in light of the circumstances it was in his best interest to accept the plea.

36. Counsel's advice to Defendant to accept the plea because counsel did not want to go to trial was sound advice, and not deficient in any regard, in light of the plea offer, the

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<sup>31</sup> December 16, 2014 Plea Hearing, at \* 8.

<sup>32</sup> December 16, 2014 Plea Hearing, at \*8-10.

<sup>33</sup> December 16, 2014 Plea Hearing, at \*8-10; Truth-in-Sentencing Guilty Plea Form dated December 16, 2014.

strong evidence against him, and the significantly greater sentence Defendant was facing if convicted at trial.

37. Defendant received a significant benefit from the plea agreement negotiated by counsel. Any claim that the plea was not informed is belied by Defendant's representations at the time of the plea and is without merit. Defendant's claim that his counsel at the time of the plea was deficient in any respect is without merit and belied by the record.

38. Defendant's claim that his substituted counsel did not have enough time to prepare for trial after his first attorney was replaced and that the trial process should have started all over again, is without merit. Substituted counsel represents that after he was appointed to represent Defendant, which was prior to Defendant's sentencing, counsel reviewed the evidence in the case with Defendant and Defendant agreed that it was in his best interest to move forward with sentencing.<sup>34</sup> This claim lacks any factual support and is without merit.

39. Turning to Defendant's final claim, Defendant claims that he was sentenced incorrectly because his sentence was greater than the presumptive sentence. This claim is also without factual support and is without merit. It is well settled that a defendant has no legal or constitutional right to appeal a sentence solely on the ground that it deviates from the presumptive sentencing guidelines.<sup>35</sup> A sentence within the statutory limits prescribed by the legislature is generally not reviewable.<sup>36</sup> The SENTAC sentencing

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<sup>34</sup> See, Superior Court Docket No. 35- Affidavit of Substituted Counsel in response to Rule 61 motion.

<sup>35</sup> *Jenkins v. State*, 2014 WL 43114, \*2 (Del.); *Thomas v. State*, 2012 WL 5499649, at \*1 (Del.); *Gaines v. State*, 571 A.2d 765, 766-67 (Del. 1990).

<sup>36</sup> *Haskins v. State*, 1991 WL 165563 (Del.).

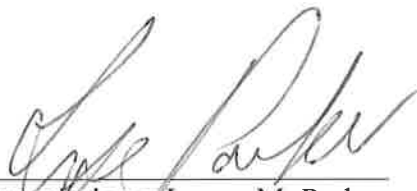
guidelines are voluntary and nonbinding.<sup>37</sup> In this case, Defendant was sentenced within the sentencing range authorized by the legislature. The sentence was within all statutory limits. The court could have legally sentenced Defendant up to the maximum penalty of 8 years in prison. Defendant's sentence of 3 years of unsuspended Level V prison time, was well within the statutory limits.

40. In this case, the court expressly stated on the record the aggravating circumstances that led to the court's imposition of the sentence imposed. At sentencing, the court noted that Defendant's repetitive criminal conduct and his non-amenable to a lesser sanction were aggravating circumstances that led to the sentence imposed.<sup>38</sup> The sentence was proper and Defendant's claim is without merit.

41. Defendant's claims are procedurally barred, waived and without merit.

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

**IT IS SO RECOMMENDED.**

  
Commissioner Lynne M. Parker

cc: Prothonotary  
Ralph D. Wilkinson, IV, Esquire  
John A. Barber, Esquire

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<sup>37</sup> *Jenkins v. State*, 2014 WL 43114, \*2 (Del.).

<sup>38</sup> See, June 26, 2016 Sentencing Transcript, at \*15.