

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID No. 1006015080
)	
PAUL BRUNHAMMER,)	
)	
Defendant.)	
)	

Submitted: August 16, 2017
Decided: September 22, 2017

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

Jan A.T. vanAmerongen, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Paul Brunhammer, Howard R. Young Correctional Center, Wilmington, Delaware,
pro se.

PARKER, Commissioner

This 22nd day of September 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

PROCEDURAL HISTORY

1. On October 2010, Defendant Paul Brunhammer was indicted for two counts of Rape in the Second Degree and one count of Sexual Solicitation of a Child. At the time of his indictment, Defendant was incarcerated in the State of New Jersey, serving a seven-year sentence imposed in September 2010.¹
2. In August 2015, while still serving the New Jersey sentence, Defendant moved to dismiss the indictment on the grounds that the State's delay in lodging the detainer against him was a denial of his right to a speedy trial. By Order dated December 7, 2015, the Superior Court denied Defendant's motion to dismiss. The Superior Court reasoned that although five years had elapsed since Defendant's indictment, the delay was solely attributable to Defendant's incarceration in New Jersey. The Superior Court further held that although Defendant claimed to have only recently learned of Delaware's indictment, he had not articulated actual prejudice caused by the delay.²
3. On December 14, 2015, Defendant filed a motion for reconsideration of his speedy trial motion. The motion for reconsideration was denied by the Superior Court by Order dated January 25, 2016.³
4. Defendant appealed the Superior Court's decision to the Delaware Supreme Court. His appeal was dismissed as an impermissible interlocutory appeal in a criminal case.⁴

¹ *Brunhammer v. State*, 2017 WL 991081, *1 (Del. 2017).

² Superior Court Docket No. 13, Superior Court Order dated December 7, 2015, at *2-4.

³ Superior Court Docket No. 22- Superior Court Order dated January 25, 2016.

⁴ *Brunhammer v. State*, 2016 WL 611822 (Del. 2016).

5. On January 20, 2016, the end of the incarcerative portion of Defendant's New Jersey sentence, Defendant was returned to Delaware to face the charges in the 2010 indictment.⁵

6. Upon his return, Defendant was appointed defense counsel and pleaded not guilty to the charges in the indictment.

7. During pretrial proceedings, the Superior Court twice granted requests to continue the trial to give Defendant and his counsel more time to review discovery.⁶

8. At Defendant's final case review on May 2, 2016, he pled guilty to Rape in the Third Degree, a lesser-included offense of Rape in the Second Degree. In exchange for Defendant's plea, the State agreed to enter a *nolle prosequi* on the other counts in the indictment and to recommend a sentence of no more than ten years of incarceration.

9. If Defendant had proceeded to trial, and had been convicted of all three charges of the indictment, two counts of Rape in the Second Degree and one count of Sexual Solicitation of a Child, Defendant faced a minimum mandatory sentence of four years of incarceration and a maximum sentence of 65 years of incarceration.

10. On July 15, 2016, the Superior Court sentenced Defendant to ten years of unsuspended Level V incarceration followed by two years of Level III probation.

11. Defendant filed a direct appeal to the Delaware Supreme Court. On March 13, 2017, the Delaware Supreme Court affirmed the judgment of the Superior Court.⁷ On direct appeal, Defendant did not challenge the validity of his guilty plea. Rather, Defendant sought to have his indictment dismissed and his sentence vacated on the grounds that the

⁵ *Brunhammer v. State*, 2017 WL 991081, *1 (Del. 2017).

⁶ See, *Brunhammer v. State*, 2017 WL 991081, *1 (Del. 2017).

⁷ *Id.*

State's delay in filing the detainer led to a denial of his right to a speedy trial and other related claims.⁸

12. On direct appeal, the Delaware Supreme Court concluded that Defendant had entered into the plea knowingly, intelligently and voluntarily.⁹ The Delaware Supreme Court ruled that as a result of his guilty plea, Defendant waived his right to challenge any error occurring before the entry of the plea, even those of constitutional dimensions.¹⁰ The Delaware Supreme Court held that Defendant waived his right to appeal his speedy trial claims when he pled guilty to the charge of rape in the third degree.¹¹ The Delaware Supreme Court declined to consider Defendant's ineffective assistance of counsel claim on direct appeal.¹²

13. On August 18, 2016, and again on June 1, 2017, Defendant filed a motion for modification of sentence in the Superior Court.¹³ By Order dated July 20, 2017, the Superior Court denied Defendant's motion for modification of sentence. The court stated that the sentence was imposed pursuant to a plea agreement. The court further stated that the sentence was appropriate for all the reasons stated at the time of sentencing.¹⁴

FACTS

14. By way of background, the victim was a nine-year-old girl. Her mother had been dating Defendant. The cause of the break up was that Defendant told the victim's mother that he molested a ten-year-old boy in New Jersey, who was his ex-girlfriend's son. The victim's mother contacted New Jersey authorities which resulted in Defendant's arrest and

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Superior Court Docket Nos. 44 and 50.

¹⁴ Superior Court Docket No. 55- Superior Court Order dated July 20, 2017.

conviction in New Jersey. Defendant served a seven-year Level V sentence in New Jersey for aggravated sexual assault. Defendant was incarcerated in New Jersey from September 21, 2010 to January 20, 2016.

15. On May 15, 2010, police officers responded to the victim's mother's residence in Newark, Delaware in reference to a sexual abuse complaint involving her nine-year-old daughter. Prior to contacting the police, the victim's mother received a telephone call from her ex-husband, who told her about the sexual abuse. Apparently, the victim was staying at her father's residence for a weekend visitation when she disclosed to her father that sometime in August 2009, she was alone with Defendant inside her mother's residence in Newark. Defendant was watching her while her mother attended a meeting.

16. During this time, Defendant began to describe to the victim in graphic detail about sex acts between him and the victim's mother. Defendant then showed the victim a vibrator and described its use. Later that night, the victim, wearing a nightgown, was lying on the floor on her stomach watching television in the living room. Defendant snuck up behind her and placed his finger inside her buttocks. The victim questioned Defendant's actions and told him that she hated him.

17. On May 2, 2016, Defendant pled guilty to the lesser included offense of Rape in the Third Degree.

18. During the plea colloquy, Defendant admitted that he intentionally engaged in sexual penetration with the victim causing serious mental or emotional injury.¹⁵

19. At sentencing on July 15, 2016, Defendant stated:

¹⁵ May 2, 2016 Plea Transcript, at pgs. 10-12.

Your Honor, there's not a word I can say that can make what I did go away, that can make this situation better. There's nothing that I can say that would make everything better. I don't even profess to know what the victim in this case is going through, Your Honor. . . I ended up becoming the very same person that- - I became the very person that I hated, which was my father.

There's probably not a word that [the victim's mother] has said about me that's not true. I was a monster at that point. . . I didn't get help when I needed help until I had already hurt somebody. . . This is not something I want to happen again. It's detestable behavior. And I'm disgusted with the fact that I'm the one who perpetrated this behavior.¹⁶

20. Defendant filed a motion for modification of sentence in August 18, 2016. One of the grounds Defendant asserted in support of that motion was that he had accepted responsibility. Defendant stated that he had "accepted a plea agreement instead of pursuing a trial, accepted his responsibility and demonstrated remorse."¹⁷

DEFENDANT'S RULE 61 MOTION

21. Defendant filed the subject Rule 61 motion on July 17, 2017, which he supplemented on August 16, 2017.¹⁸ In the subject motion, Defendant has raised a number of claims which all fall into two categories. First, Defendant claims that the strength of the State's case should have been tested. Defendant claims that the State's witnesses should have been questioned as to their inconsistent statements and motives. Defendant further claims that he was deprived of the right to present witnesses in his own defense. Defendant claims that the failure to test the State's case and to present witnesses in his defense was attributed to his counsel's ineffective assistance. Second, Defendant contends that he was deprived of the right to a speedy trial and that his charges should be dismissed. Defendant

¹⁶ July 15, 2016 Sentencing Transcript, at pgs. 14-16 (emphasis added).

¹⁷ Superior Court Docket No. 44- August 18, 2016 Motion for Modification of Sentence, pg. 2.

¹⁸ Superior Court Docket Nos. 52 and 56.

also claims that his deprivation of his right to a speedy trial was attributable to his counsel's ineffective assistance.

22. The relief that Defendant is seeking in the subject Rule 61 motion is not for the plea to be vacated and for him to proceed to trial but rather for the plea to vacated and for all the charges to be dismissed.¹⁹

23. If it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case 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.²⁰

24. The subject motion should be summarily dismissed because the claims raised herein are procedurally barred, waived and without merit.

Defendant's Claims Are Procedurally Barred

25. 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 61.²¹ If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.²²

26. Superior Court Criminal Rule 61(i)(4) precludes Defendant from raising any claims which were already raised and adjudicated in some fashion on Defendant's direct appeal. Moreover, Superior Court Criminal Rule 61(i)(3) required that Defendant raise his claims, with the exception of his ineffective assistance of counsel contentions, on direct appeal.²³

¹⁹ See, Superior Court Docket No. 52- Defendant's Motion for Postconviction Relief, at pg. 20.

²⁰ Super.Ct.Crim.R. 61(d)(5).

²¹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

²² *Id.*

²³ See, *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

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.²⁴

27. In the subject motion, all of Defendant's claims, with the exception of his ineffective assistance of counsel claims, are procedurally barred on the grounds that they were already raised and adjudicated on direct appeal, or that Defendant was required to, but failed to, raise the claim on direct appeal.

28. The Delaware Supreme Court has already held that Defendant entered into his guilty plea knowingly, intelligently and voluntarily, and that as a result he waived the right to challenge any errors occurring prior to the entry of his plea, even those of constitutional dimension.²⁵ All of the claims raised by Defendant in the subject motion allege errors occurring prior to the entry of his plea, and all of the claims, with the exception of his ineffective assistance of counsel claims, are procedurally barred as a result thereof.

29. Defendant's claims related to the denial of his speedy trial rights were already raised and adjudicated on direct appeal and are now procedurally barred. Defendant's claims related to his inability to test the strength of the State's evidence and his right to present evidence in his own defense were required to be raised on direct appeal and are also procedurally barred. All of the claims raised herein were known to Defendant prior to the entry of his guilty plea. There is no justifiable reason for Defendant's failure to raise any issue in a direct appeal if Defendant genuinely believed the claims had any merit.

30. 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

²⁴ *Id.*

²⁵ *Brunhammer v. State*, 2017 WL 991081, *2 (Del. 2017).

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.²⁶

31. 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 admitted his guilt and represented to the court that everything the victim's mother's said about the incident was true. That he "was a monster" and that he was the "one who perpetrated this behavior" on the victim. 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 claims, with the exception of his ineffective assistance of counsel claims, are procedurally barred.

Defendant's Claims Were Waived Upon Entry of His Guilty Plea

32. In addition to being procedurally barred, Defendant's claims were also waived upon the entry of Defendant's guilty plea.

33. The Delaware Supreme Court on direct appeal has already held that under the circumstances reflected in this record, it is clear that Defendant entered into the plea with full knowledge of the rights he was waiving as a result of pleading guilty to one count of third degree rape.²⁷

34. During the plea colloquy and in the Truth-in-Sentencing Guilty Plea Form, Defendant represented that he read and understood that by pleading guilty he was waiving

²⁶ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i) (effective June 4, 2014).

²⁷ *Brunhammer v. State*, 2017 WL 991081, *2 (Del. 2017).

his constitutional rights: to have a speedy trial by jury; to be presumed innocent until the State proves each and every part of the charges against him beyond a reasonable doubt; to hear and question the witnesses against him; to present evidence in his defense; to testify or not testify; and to appeal, if convicted.²⁸

35. Defendant represented that he understood that he was waiving each and every one of those rights by pleading guilty.²⁹

36. At the time he entered into his plea, Defendant told the Superior Court that he understood the charge against him and the penalty he faced, that he was pleading guilty because he was, in fact, guilty of the charge, and that no one was forcing him to plead guilty.³⁰

37. Defendant also represented that he was satisfied with his defense counsel's representation of him and that he had been fully advised of his rights.³¹

38. Defendant is bound by the representations he made on the Truth-in-Sentencing Guilty Plea Form and during the plea colloquy in the absence of clear and convincing evidence to the contrary.³²

39. Defendant's valid guilty plea waived any right to test the strength of the State's evidence, the right to hear and question witnesses and to present evidence in his own defense, and the right to obtain appellate review of the denial of his speedy trial rights.

²⁸ May 2, 2016 Plea Transcript, at * 9-10; Truth-in-Sentencing Guilty Plea Form dated May 2, 2016.

²⁹ May 2, 2016 Plea Transcript, at * 9-10; Truth-in-Sentencing Guilty Plea Form dated May 2, 2016.

³⁰ *Brunhammer v. State*, 2017 WL 991081, *2 (Del. 2017); May 2, 2016 Plea Transcript, at *10-12.

³¹ *Brunhammer v. State*, 2017 WL 991081, *2 (Del. 2017); Truth-in-Sentencing Guilty Plea Form dated May 2, 2016.

³² See, *Evans v. State*, 2016 WL 6196456 (Del.); *State v. Harden*, 1998 WL 735879, *5 (Del.Super.); *State v. Stuart*, 2008 WL 4868658, *3 (Del.Super. 2008).

40. All of Defendant's claims presented herein were waived when he knowingly, freely and intelligently entered his plea.³³

Defendant's Claims Are Without Merit

41. Defendant claims that his counsel was somehow ineffective for not testing the strength of the State's case through examination of the State's witnesses as to their inconsistencies and motives, and by not presenting witnesses in Defendant's defense. Defendant also claims that his counsel was somehow ineffective because he was deprived of his right to a speedy trial.

42. It is important to emphasize that Defendant made the voluntary decision to plead guilty to the lesser charge of rape in the third degree thereby waiving his right to test the strength of the State's evidence, to hear and question witnesses and to present evidence in his own defense. Had Defendant proceeded to trial, his counsel would have cross-examined the State's witnesses and presented evidence in Defendant's defense. By pleading guilty, Defendant waived the right to do so and his counsel cannot be deemed ineffective for not doing that which Defendant waived by operation of his plea.

43. It is also important to emphasize that Defendant not only admitted his guilt at the time of his plea but elaborated in detail on his criminal behavior at his sentencing. He represented to the court at the time of his plea and at the time of sentencing that he had committed the charge for which he pled guilty. He further represented to the court that the victim's mother was telling the truth, that he committed the criminal acts on the victim,

³³ See, *Mills v. State*, 2016 WL 97494, at *3 (Del.); *Day v. State*, 2011 WL 3617797 (Del.) (claim that counsel was ineffective for failing to file a suppression motion was waived when defendant voluntarily entered his guilty plea, since voluntary guilty plea waives any claims of error occurring prior to the entry of the plea); *Hickman v. State*, 1994 WL 590495 (Del.).

and that he was a monster. To now contend that his counsel was ineffective for not testing the State's evidence to establish his innocence is directly contrary to his representations to the court at the time of his plea and sentencing.

44. In addition, Defendant was not represented by counsel at the time he presented his speedy trial motion, and at the time he sought reconsideration of the denial of that motion. Counsel was not appointed until Defendant was returned to Delaware to face the Delaware charges after his incarceration in New Jersey ended. At that point, Defendant's speedy trial motion had already been adjudicated in the Superior Court. Counsel could not have been ineffective in his handling of that motion since he had nothing to do with the handling of that motion.

45. Defendant's allegations of ineffective assistance are merely conclusory. Defendant does not offer concrete allegations of actual prejudice. Defendant merely reargues his speedy trial rights claims and alleges that his counsel was ineffective because his counsel did not reassert such claims.³⁴ Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.³⁵

46. At the time Defendant accepted the plea he was faced with a choice. Defendant could proceed to trial, facing three felony charges, and facing significantly greater jail time if convicted, but preserving his right to appeal the denial of his speedy trial claims, or he could accept the plea with significantly reduced charges but waive his right to appeal.

47. Defendant received a significant benefit by pleading guilty to the one charge of rape in the third degree and being spared significantly more jail time, if convicted of all three

³⁴ See, *Hickman v. State*, 1994 WL 590495 (Del.).

³⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del.Super. 2004).

felony charges at trial. Defendant's guilty plea represented a rational choice given the pending charges, the evidence against him, and the possible sentence he was facing.

48. In order to prevail on an ineffective assistance of counsel claim in the context of a plea challenge, Defendant must demonstrate that (1) his defense counsel's conduct fell below an "objective standard of reasonableness," and (2) there is a reasonable probability that, but for counsel's errors, Defendant would not have entered a guilty plea and would have insisted on going to trial.³⁶ The burden of proving ineffective assistance of counsel is on the defendant.³⁷ Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.³⁸

49. The United States Supreme Court has reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.³⁹ The United States 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."⁴⁰

50. In the subject motion, the relief requested by Defendant is that his plea be vacated and all the charges in the indictment dismissed. Defendant does not even allege, much less establish, that but for his counsel's alleged ineffective assistance he would not have taken the plea and would have instead insisted on going to trial.

³⁶ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Hickman v. State*, 1994 WL 590495 (Del.)(applying *Strickland* to guilty pleas).

³⁷ *Oliver v. State*, 2001 WL 1751246 (Del.).

³⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

³⁹ *Premo v Moore*, 131 S.Ct. 733, 739-744 (2011).

⁴⁰ *Id.*, at pg. 741.

51. Defendant has not presented any scenario in which the relief he seeks- the dismissal of his case- would be granted in this Rule 61 motion. If Defendant were to have prevailed on the merits of his claim that the strength of the State's case was not tested, the result would be to set this matter for trial so that the State's case could be tested. It would not result in the dismissal of all the charges in the case in this Rule 61 motion. Likewise, in order for Defendant to obtain appellate review of the denial of his speedy trial claims, he would need to go to trial on the charges, and appeal after conviction. Defendant made the strategic decision to forgo the appeal of the speedy trial claim, to waive his trial rights, and to accept the plea offer.

52. Defendant does not seem to appreciate that if the plea was vacated, it would be vacated in its entirety. All of the dismissed charges would be reinstated, and this matter would be set for trial. Defendant would again be placed in the same position he was in prior to accepting the plea. He would again be facing three felony charges and facing up to maximum sentence of 65 years of incarceration, if convicted at trial.

53. Defendant's Rule 61 motion falls short of meeting the threshold standard for stating an ineffective assistance of counsel claim. Defendant does not even allege that but for his counsel's alleged ineffectiveness he would not have accepted the plea and would have instead insisted on going to trial. Defendant has failed to even state, let alone establish, an ineffective assistance of counsel claim.

54. Moreover, there is no evidence that any alleged error on the part of counsel, either prior to or in connection with the guilty plea hearing, altered the outcome of Defendant's case. The record reflects that Defendant admitted that he committed the crime for which he pled guilty, both at the plea hearing and at his sentencing, and again in a motion for

modification of sentence. Defendant explained to the court at his sentencing that: “There’s probably not a word that the [victim’s mother] has said about me that’s not true. I was a monster at that point.”

55. Under the circumstances of this case, defense counsel cannot be charged with error in failing to argue a lack of evidence supporting Defendant’s commission of the crime.⁴¹ No further investigation by defense counsel was warranted.

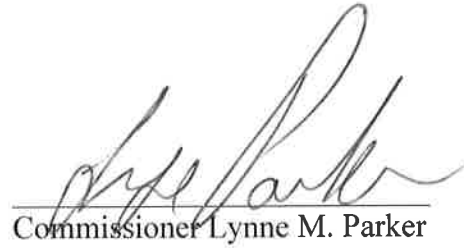
56. At the time of his plea, Defendant represented to the Superior Court that he voluntarily entered his plea and was satisfied with his counsel’s representation. Moreover, Defendant acknowledged that he understood that he was waiving his right to appeal his speedy trial claims and waiving his right to test the strength of the State’s evidence. In the absence of clear and convincing evidence to the contrary, Defendant is bound by his answers on the guilty plea form and by his sworn testimony prior to the acceptance of his guilty plea. Defendant has not sustained his burden of demonstrating that his counsel rendered ineffective assistance in any respect.

57. As discussed above, Defendant’s guilty plea was knowingly, voluntarily and intelligently entered. Defendant’s claims are procedurally barred, waived and without merit.

⁴¹ See, *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).

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

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc: Prothonotary
James O. Turner, Esquire