SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

December 2, 2014

Warren Kinzer
SBI# 001
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

RE: *State of Delaware v. Warren Kinzer*, Def. ID# 1304021423 (R-1)

DATE SUBMITTED: November 19, 2014

Dear Mr. Kinzer:

Defendant Warren Kinzer ("defendant") filed a motion for postconviction relief on August 13, 2014, pursuant to Superior Court Criminal Rule 61 ("Rule 61").[1] This is my decision denying the motion.

In April, 2013, defendant was arrested on a count of continuous sexual abuse of a child and 21 counts of sexual abuse of a child by a person of trust in the second degree.

On November 8, 2013, defendant entered into a guilty plea to the charge of continuous sexual abuse of a child and one count of sexual abuse of a child by a person of trust in the second

[1]The applicable version of Rule 61 is that which took effect on June 4, 2014. A copy of this rule is enclosed herein.

degree.

By signing the Truth-in-Sentencing Form ("TIS Form"), defendant affirmed the following facts:

* He was freely and voluntarily pleading guilty;

* He was not threatened or forced into pleading guilty;

* **He had not been promised anything that was not stated in his written plea agreement;**

* He understood he was waiving his Constitutional trial rights;

* He understood the potential prison sentence;

* He was satisfied with his trial counsel's representation of him;

* He understood all of the information contained in the forms; and

* His answers were truthful.

Defendant confirmed all of these facts during the guilty plea colloquy. Specifically, he confirmed the following facts:

* He had had enough time to go over his case with his attorney.

* He was satisfied with his attorney's representation and had no complaints.

* He had read and signed both the TIS Form and Plea Agreement and had made the checkmarks on the TIS Form.

* His attorney explained the information in the two forms to him.

* His answers to the questions in the TIS Form were true.

* No one forced him to enter the plea.

* He understood each and every trial and appeal right he was giving up by entering the

plea.

* His attorney had explained each element of the offenses to which he was pleading guilty.

* His attorney had reviewed the evidence and the penalties of the law with him.

* He was freely and voluntarily giving up his trial rights and pleading guilty.

* The Court discussed with him his previously-expressed reluctance to enter a guilty plea and verified that taking the plea was his firm decision after talking with trial counsel and that he was fully satisfied with trial counsel's representation.

* The Court verified defendant understood that he was facing a sentence of up to 25 years on Count 1, with a minimum mandatory of 2 years, and up to 8 years on the second count. The Court specifically stated the following to him:

> THE COURT: *** So a judge can put you in jail for 33 years and, of course, is required to give you at least two years; do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, the guidelines, as long as a judge puts his or her reasonings on the record, then the guidelines are just that, they are guidelines. The judge tries to explain why the sentence is what is is and says it on the record. Whatever sentence a defendant gets in Delaware, that is pretty much the end of it; do you understand that?
>
> THE DEFENDANT: Yes, sir.[2]

The Court concluded that defendant made a knowing, intelligent and voluntary decision in pleading guilty.

As a part of the plea agreement, a presentence investigation report ("PSI") was to be

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[2]Transcript of November 8, 2013, Guilty Plea Colloquy at 9-10 (Docket Entry 19).

prepared before sentencing. Consequently, one was ordered.

The PSI noted that defendant had been physically disabled since 2002 due to the effects of diabetes, and it also noted defendant's history of abusing alcohol and that defendant considered himself to be an alcoholic.

On December 13, 2013, defendant came before the Court for sentencing. The Court explained that the aggravating factors in this case "include undue deprecation of the offense, vulnerability of the victim, and offense against a child."[3] Defendant was sentenced as follows. As to the conviction for continuous sexual abuse of a child, he was ordered to serve 25 years at Level 5, suspended after 12 years at Level 5 and upon successful completion of the Transitions Sex Offender Program, for varying levels of probation. As to the conviction for sexual abuse of a child, defendant was sentenced to 3 years at Level 5, suspended for 3 years at Level 3 probation.

Defendant did not appeal from his conviction and sentence. He filed a motion for sentence reduction,[4] and this Court denied that motion.[5]

In his postconviction motion, defendant makes several claims. They are as follows.

> Ground one : Judge Stokes Failure
>
> Judge Stokes sentenced me to 12 yrs and his assistant ordered the programs it should have come out of his mouth
>
> Ground two: Failure to submit everything P.S. Investigator
>
> Failure to submit my Disability since 2002
> Failure to submit my chemical Dependency My rights were violated by not

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[3]Transcript of December 13, 2013, Sentencing at 6-7 (Docket Entry 18).

[4]Docket Entry 14.

[5]Docket Entry 15.

submitting this information

Ground three: Failure to submit everything My Attorney

Failure to follow up with Del. Guidance and the School Guidance Counselor Also my Chemical Dependency Ineffective Counsel

The final argument he presents is as follows:

The Assistant Attorney General lying by not telling me verbally one thing and another at trial. He said he would recommend 2-5 yr. when I took the plea deal.

Although this Court normally should consider the procedural bars first, these claims are so obviously defective that the Court considers them on their merits.

Ground one. This claim is incomprehensible. A claim must not be vague or conclusory; it must be clear and specific.[6] Defendant has failed to state a clear claim in ground one, and the claim fails.

Ground two. This claim is factually incorrect. The PSI contained the information that defendant claims it did not contain. This claim fails as being factually meritless.

Ground three. Again, defendant has the responsibility to state his claim for ineffective assistance of counsel clearly.[7] He has failed to establish what the information from Delaware Guidance and the School Guidance Counselor would have shown. As noted above, this Court was familiar with defendant's chemical dependency.

Assuming defendant had made a clear and non-conclusory, claim, then:

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the familiar two-part test of *Strickland v. Washington*. FN 15 "In the context of a guilty plea challenge, *Strickland* requires a defendant to show that: (1) counsel's

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[6] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[7] *Id.*

representation fell below an objective standard of reasonableness; and (2) counsel's actions were so prejudicial that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." FN 16.

FN 15 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

FN 16 *Somerville v. State*, 703 A.2d 629, 631 (1997) (internal quotation marks omitted) (citing *Albury v. State*, 551 A.2d 53 (1988)).[8]

As to the first prong, there is a strong presumption that trial counsel's representation was reasonable.[9] The second prong of *Strickland* requires defendant to show how counsel's error resulted in prejudice.

"Mere allegations of ineffectiveness will not suffice. A defendant must make specific allegations of actual prejudice and substantiate them." The "failure to state with particularity the nature of the prejudice experienced is fatal to a claim of ineffective assistance of counsel." In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." [Footnotes and citations omitted.].[10]

Here, defendant's complaint is with the length of the sentence imposed. However, as noted earlier, he entered the plea knowing the length of sentence he was facing. Thus, he cannot establish that he would not have taken the plea if he had known the sentence that was to be imposed was as long as it is. This claim fails.

Defendant's final argument appears to be that the prosecutor promised to recommend a lesser period of incarceration. However, defendant verified in the TIS Form that he had not been

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[8] *Purnell v. State*, 2014 WL 4536558, *2 (Del. Sept. 12, 2014).

[9] *Strickland v. Washington*, 466 U.S. at 689-90.

[10] *Hoskins v. State*, 2014 WL 4722716, *3 (Del. Sept. 22, 2014).

promised anything not stated in the plea agreement. Defendant is bound by his testimony prior to the acceptance of the plea and by his answers on the TIS Form in the absence of clear and convincing evidence to the contrary.[11] Defendant has not offered any such evidence. This claim fails.

Defendant has not asked for the appointment of counsel. This Court will appoint counsel where a guilty plea is involved only if the Court determines that the motion sets forth a substantial claim that the movant received ineffective assistance of counsel in relation to the plea of guilty and the granting of the motion would result in vacatur of the judgment of conviction for which the movant is in custody and/or specific exceptional circumstances warrant the appointment of counsel.[12] Defendant's assertions do not rise to that level. Counsel shall not be appointed.

For the foregoing reasons, I deny defendant's motion for postconviction relief and I conclude defendant is not entitled to the appointment of counsel in connection with this motion.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothontary's Office
John W. Donahue, IV, Esquire
Robert H. Robinson, Jr., Esquire

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[11]*Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

[12]Rule 61(e)(2).