

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

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

Submitted: January 28, 2015  
Decided: March 23, 2015

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

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 23rd day of March 2015, 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).<sup>1</sup>

3. Defendant had a criminal history which included, but was not limited to, four prior violent felonies. Defendant was convicted of: 1) Robbery Second Degree in 1992 in New York; 2) Distribution within 300 feet of a Park in 2002 in Delaware; 3) Assault First Degree in 2002 in Delaware; and 4) Possession of a Firearm During the Commission of a Felony in 2002 in Delaware.<sup>2</sup> 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).

4. Following a pre-sentence investigation, on January 31, 2014, Defendant was sentenced as follows: Robbery First Degree- 15 years at Level V suspended after 10 years for decreasing levels of supervision; Robbery First Degree- 15 years at Level V

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<sup>1</sup> Plea Agreement of October 28, 2013- Superior Court Docket No. 37.

<sup>2</sup> See, January 31, 2014 Sentencing Transcript, at pgs. 3-4.

suspended after 5 years for Level III probation; Conspiracy Second Degree- 2 years Level V suspended for 1 year Level II probation. Consequently, Defendant was sentenced to a total of 32 years incarceration at Level V, suspended after 15 years at Level V, followed by decreasing levels of probation.

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

6. Thereafter, Defendant filed a motion for modification of sentence.<sup>3</sup> 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.<sup>4</sup> Defendant appealed the denial of his motion for modification of sentence to the Delaware Supreme Court. By Order dated August 19, 2014, the Delaware Supreme Court affirmed the judgment of the Superior Court.<sup>5</sup>

## **FACTS**

7. On December 16, 2012, Trooper Jubb of the Delaware State Police was at the scene of a vehicle crash on Pulaski Highway when a Good Samaritan approached him and told him that the Wendy's on Pulaski Highway, Newark, Delaware was being robbed. Trooper Jubb left the crash scene and quickly headed to the Wendy's. Upon arrival, Trooper Jubb looked into the drive-thru window and observed a masked suspect inside the business. Trooper Jubb retrieved his Delaware State Police issued shotgun and set up a position where he could observe the exits.<sup>6</sup>

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<sup>3</sup> Superior Court Docket No. 46.

<sup>4</sup> Superior Court Docket No. 47.

<sup>5</sup> *Bissoon v. State*, 2014 WL 4104783 (Del.).

<sup>6</sup> Affidavit of Probable Cause-Superior Court Docket No. 1, Exhibit B; State's response to Defendant's Rule 61 Motion, pgs. 1-2.

8. Not long after Trooper Jubb set up his position, Defendant exited the Wendy's and ran toward the woods.<sup>7</sup> Trooper Jubb was able to see Defendant's face before Defendant fled eastbound towards Pulaski Highway.<sup>8</sup>

9. Trooper Jubb then observed a white male, later determined to be co-defendant Richard Novello, exit the building. Novello was wearing a green sweatshirt and a black eyepatch. He was holding a black trashcan as he exited Wendy's. As Novello attempted to flee with the trashcan, he was tased by Trooper Jubb and taken into custody. Inside the trashcan was the money taken during the robbery.<sup>9</sup>

10. Responding troopers and New Castle County Police Officers set a perimeter and a search was conducted for Defendant. Defendant was apprehended shirtless just outside the wooded area on South College Avenue. Trooper Jubb, upon seeing Defendant, positively identified Defendant as the black male suspect who fled the Wendy's immediately after the robbery.<sup>10</sup>

11. Detective Myers of the Delaware State Police searched the wooded area in the hopes of locating the firearm used by Defendant during the robbery. The gun was not located but a tan shirt was located and seized as evidence.<sup>11</sup>

12. One of the witnesses described the gunman as wearing a tan shirt and being of the height and weight of Defendant.<sup>12</sup> The tan shirt that was recovered in the wooded area had Defendant's DNA on it.<sup>13</sup>

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<sup>7</sup> January 31, 2014 Sentencing, pgs. 8-9, State's response to Defendant's Rule 61 Motion, pgs. 1-2.

<sup>8</sup> State's response to Defendant's Rule 61 Motion, pgs. 1-2.

<sup>9</sup> Affidavit of Probable Cause-Superior Court Docket No. 1, Exhibit B; State's response to Defendant's Rule 61 Motion, pgs. 1-2.

<sup>10</sup> Affidavit of Probable Cause-Superior Court Docket No. 1, Exhibit B; State's response to Defendant's Rule 61 Motion, pgs. 1-2.

<sup>11</sup> Affidavit of Probable Cause-Superior Court Docket No. 1, Exhibit B; State's response to Defendant's Rule 61 Motion, pgs. 1-2.

<sup>12</sup> State's response to Defendant's Rule 61 Motion, pg. 2.

13. During their investigation, Delaware State Police learned that Defendant had been employed at the Wendy's but was fired a few months prior for repeatedly failing to appear for work.<sup>14</sup> Detective Daniel Grassi, the State's Chief Investigating Officer, interviewed the victims of the robbery. The victims described how Defendant made them lie on the floor of the Wendy's kitchen while he held them at gunpoint with a silver handgun.<sup>15</sup>

14. At one point during the robbery, Defendant struck a female victim on the head with the silver handgun and called her a "fat bitch" for not complying with his commands to get on the floor.<sup>16</sup> Defendant then took the manager to the office and forced her to turn over all the cash from the safe.<sup>17</sup>

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

15. On August 14, 2014, Defendant filed the subject motion for postconviction relief.<sup>18</sup> In the subject motion, Defendant raises nine claims: 1) Defendant was overcharged; 2) Defendant had three attorneys during the course of his case; 3) Defendant had a conflict of interest with his attorney; 4) the State failed to establish a chain of custody as to the evidence; 5) there was no probable cause to stop Defendant the night of the offense; 6) there was insufficient evidence to support his conviction; 7) Defendant had a reasonable expectation of privacy in the t-shirt seized by the police; 8) a

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<sup>13</sup> State's response to Defendant's Rule 61 motion, pg. 2.

<sup>14</sup> January 31, 2014 Sentencing Transcript, at pgs. 13-14.

<sup>15</sup> Affidavit of Probable Cause-Superior Court Docket No. 1, Exhibit B; State's response to Defendant's Rule 61 motion, pgs. 2.

<sup>16</sup> January 31, 2014 Sentencing Transcript, at pgs. 4-5.

<sup>17</sup> Affidavit of Probable Cause-Superior Court Docket No. 1, Exhibit B; State's response to Defendant's Rule 61 motion, pg. 2.

<sup>18</sup> Superior Court Docket No. 53.

general statement as to counsel's ineffectiveness based upon claims 1 through 7; and 9) Defendant's confession during his plea was coerced.

16. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter, the State filed a response to the motion. Finally, Defendant filed a reply thereto.<sup>19</sup>

17. 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>20</sup> If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.<sup>21</sup>

18. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;<sup>22</sup> (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances 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.<sup>23</sup>

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<sup>19</sup> Super.Ct.Crim.R. 61(g)(1) and (2).

<sup>20</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>21</sup> *Id.*

<sup>22</sup> If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

<sup>23</sup> Super.Ct.Crim.R. 61 (effective June 4, 2014).

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

**A) Procedural Bars Preclude Consideration of Some of Defendant's Claims**

20. In accordance with the procedural mandates, Defendant was required to raise his claims, with the exception of his ineffective assistance of counsel contentions, on direct appeal.<sup>24</sup> Defendant's ineffective assistance of counsel claims are not procedurally barred because a Rule 61 motion is the appropriate vehicle for raising this claim.<sup>25</sup>

21. With the exception of Defendant's ineffective assistance of counsel claims, all other claims raised by Defendant are procedurally barred by Rule 61(i)(3), for Defendant's failure to raise them on direct appeal. The procedurally barred claims include: Defendant's claim that he was overcharged (Count One); that he had three attorneys during the course of his case (Count Two); that the State failed to establish a chain of custody as to the evidence (Count Four); that there was no probable cause to stop Defendant on the night of the offense (Count Five); that there was insufficient evidence to support his conviction (Count Six); and that Defendant had a reasonable expectation of privacy in the T-shirt seized by police (Count Seven). These claims are procedurally barred by Rules 61(i)(3), for Defendant's failure to raise them on direct appeal.

**B) Defendant Waived His Claims Upon Entry of His Plea**

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

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<sup>24</sup> See, *Malin v. State*, 2009 WL 537060, at \*5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

<sup>25</sup> *Id.*

23. A defendant is bound by his answers on the plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.<sup>26</sup> 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 charges for which he was sentenced.

24. At the plea colloquy, defense counsel represented that Defendant understood the facts of the case. Defendant also understood any defense (or lack thereof) that could be asserted at trial. Defense counsel represented to the court that Defendant had the opportunity to review all the records, which included the reports, evidence against him, and the conversations he had from the prison which served to further strengthen the State's already strong case. Defense counsel represented that the State's case against Defendant was very strong.<sup>27</sup>

25. Defense counsel represented to the court that he read the truth-in sentencing guilty plea form to Defendant line by line and that Defendant provided the answers to each of the questions.<sup>28</sup> After the form was completed, Defendant had another opportunity to review the completed form, along with the plea agreement.<sup>29</sup>

26. Defendant, himself, personally represented to the court that he had read and understood the truth-in sentencing guilty plea form and the plea agreement, had reviewed them with his counsel, and that counsel answered all the questions that he had.<sup>30</sup> Defendant represented that nobody was forcing him to enter his plea. Defendant

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<sup>26</sup> *State v. Harden*, 1998 WL 735879, \*5 (Del. Super.); *State v. Stuart*, 2008 WL 4868658, \*3 (Del. Super. 2008).

<sup>27</sup> October 28, 2013 Plea Transcript, at pgs. 4-7.

<sup>28</sup> October 28, 2013 Plea Transcript, at pg. 5.

<sup>29</sup> October 28, 2013 Plea Transcript, at pg. 6.

<sup>30</sup> October 28, 2013 Plea Transcript, at pgs. 7-8.

represented that he was freely and voluntarily pleading guilty to the charges listed in the plea agreement. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.<sup>31</sup>

27. 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 cross-examine witnesses against him; to present evidence in his defense; to testify or not testify; and to appeal, if convicted.<sup>32</sup> Defendant represented that all his answers in the Truth-in-Sentencing Guilty Plea Form were truthful and that he read and understood all the information on the form.<sup>33</sup>

28. Defendant represented that he had fully discussed this matter with his counsel and that he was satisfied with his counsel's representation.<sup>34</sup>

29. Defendant acknowledged that he understood he could be incarcerated for a total of between 6 to 52 years as a result of his guilty plea.<sup>35</sup> Defendant understood that the State had agreed to recommend no more than 18 years at Level V. Moreover, Defendant represented that he had not received any promises by anyone as to what his sentence would be.<sup>36</sup> Defendant represented that he was satisfied with his counsel's representation,

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<sup>31</sup> October 28, 2013 Plea Transcript, at pg. 9; Truth-In-Sentencing Guilty Plea Form dated October 28, 2013.

<sup>32</sup> Truth-in-Sentencing Guilty Plea Form dated October 28, 2013.

<sup>33</sup> Truth-in-Sentencing Guilty Plea Form dated October 28, 2013; October 28, 2013 Plea Transcript, at pgs. 6-8.

<sup>34</sup> October 28, 2013 Plea Transcript, at pg. 8; Truth-In Sentencing Guilty Plea Form dated October 28, 2013.

<sup>35</sup> October 28, 2013 Plea Transcript, at pgs. 8-9; Truth-In-Sentencing Guilty Plea Form dated October 28, 2013.

<sup>36</sup> October 28, 2013 Plea Transcript, at pg. 9; Truth-In-Sentencing Guilty Plea Form dated October 28, 2013.

that his counsel fully advised him of his rights, and that he understood the consequences of entering into his guilty plea.<sup>37</sup>

30. Defendant also acknowledged his guilt as to both counts of Robbery First Degree and to the Conspiracy Second Degree charge.<sup>38</sup> Only after finding that Defendant's plea was entered into knowingly, intelligently and voluntarily, did the court accept the plea.<sup>39</sup>

31. 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. As confirmed by the plea colloquy, Plea Agreement and the Truth-In Sentencing Guilty Plea Form, Defendant entered his plea knowingly, intelligently and voluntarily.

32. Since Defendant's plea was entered into voluntarily, intelligently and knowingly, Defendant waived his right to challenge any alleged errors or defects occurring prior to the entry of his plea, even those of constitutional proportions.<sup>40</sup>

33. The claims that Defendant seeks to raise in his Rule 61 motion were waived when Defendant voluntarily entered his plea. Indeed, all of Defendant's claims, including those alleging ineffective assistance of counsel stem from allegations of defects, errors, misconduct and deficiencies which occurred prior to the entry of the plea, and were all waived when Defendant knowingly, freely and intelligently entered his plea.

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<sup>37</sup> Truth-In-Sentencing Guilty Plea Form dated October 28, 2013.

<sup>38</sup> October 28, 2013 Plea Transcript, at pg. 9-11.

<sup>39</sup> October 28, 2013 Plea Transcript, at pg. 11.

<sup>40</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).

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

34. In addition to some of Defendant's claims being procedurally barred and all of Defendant's claims being waived, all of Defendant's claims are also without merit.

#### **Overview**

35. Before addressing each of the claims that Defendant raised in his Rule 61 motion, it is important to emphasize that given the State's strong case against Defendant, if Defendant rejected the plea and went to trial and was convicted of even one count of Robbery First Degree, he was facing a 25 year to life sentence if sentenced as a habitual offender under 11 *Del. C.* § 4214(a), or an automatic life sentence if sentenced under 11 *Del. C.* § 4214(b).

36. Defendant received a significant benefit by pleading guilty. He was sentenced to 15 years at Level V, rather than face the potential of a minimum of a much longer prison sentence and up to a life sentence, if convicted at trial. His guilty plea represented a rational choice given the pending charges, the evidence against him, and the potential sentence he was facing.

37. Defendant's specific claims raised in his Rule 61 motion will now each be addressed in turn.

#### **Defendant's Specific Claims**

38. Defendant first claims that he was overcharged. Defendant contends that a robbery charge should have been downgraded to an aggravated menacing charge instead. As previously discussed, Defendant could have rejected the plea agreement and had a trial on the merits. He could have challenged this charge at trial. Defendant waived his trial, and his right to contest this charge, when he knowingly, voluntarily and

intelligently entered his plea. As a practical matter, even if Defendant had been acquitted at trial of even three of the four Robbery First Degree charges, and convicted of only one, he would still be facing significantly more jail time than he was sentenced to by taking the plea. This claim is without merit.

39. Defendant's second claim is that he had three court appointed attorneys during the course of his case and claims that it was ineffective for there not to be an investigation as to why this occurred. As previously discussed, this claim (as well as all the others) was waived at the time Defendant entered his guilty plea since this claim stems from an alleged deficiency prior to the entry of the plea.

40. Moreover, in order to prevail on an ineffective assistance of counsel claim 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>41</sup> Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>42</sup>

41. The United States Supreme Court has reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.<sup>43</sup> 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

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<sup>41</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>42</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>43</sup> *Premo v Moore*, 131 S.Ct. 733, 739-744 (2011).

the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.”<sup>44</sup>

42. Defendant has not established that his counsel was deficient in any regard nor has he established that he suffered any actual prejudice as a result thereof. The fact that two prior attorneys were either conflicted from representing Defendant, or for whatever reason chose not to do so, and a third attorney was appointed and thereafter represented Defendant for the duration of the case, does not rise to a claim of ineffective assistance. Defendant was represented by counsel during the pendency of his case, and his counsel appears to have provided effective representation. There is no showing of any deficient performance or a showing of any actual prejudice as a result thereof.

43. Defendant’s third claim is that he had a conflict of interest with his attorney. Apparently, on June 11, 2013 and again on August 29, 2013, Defendant filed motions to dismiss his trial counsel. During the pendency of those motions, the State met with a prison informant who provided the State with information that Defendant was going to lie to the court about his counsel in order to have him removed from the case. Defendant advised the informant that he was concocting a story that would get his attorney in trouble and a new attorney would need to be appointed to represent him.<sup>45</sup>

44. Several weeks later, the Office of Chief Disciplinary Counsel (the “ODC”) received a letter from Defendant alleging exactly what the prison informant had told the State weeks prior. The ODC performed a complete and thorough investigation into the allegations made by Defendant against his counsel. The ODC concluded that the

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<sup>44</sup> *Id.*, at pg. 741.

<sup>45</sup> State’s response to Defendant’s Rule 61 motion, at pg. 3; Affidavit of Defense Counsel in response to Defendant’s Rule 61 motion, at pgs. 2-4.

allegations were fabricated. It found the complaint to be without merit and the grievance was dismissed.<sup>46</sup>

45. In addition to the complaint filed with the ODC, Defendant also filed a civil suit against defense counsel in the Justice of Peace Court No. 13. The civil suit that Defendant filed in Justice of Peace Court 13 was never prosecuted and was also dismissed.<sup>47</sup>

46. An office conference was held between the State, defense counsel and the court in order to discuss how to proceed.<sup>48</sup> After the ODC, following a complete and thorough investigation, determined that the allegation was fabricated, the complaint without merit, and the grievance dismissed, the court denied Defendant's motion to appoint new counsel. The court did not want to allow a defendant to manipulate the court system in order to force another appointment (choice) of counsel. The court determined that Defendant had created his own problem, by fabricating allegations in an attempt to have another attorney appointed to represent him, and that he was not entitled to new counsel.<sup>49</sup>

47. In defense counsel's Affidavit in response to Defendant's Rule 61 motion, as well as during the plea colloquy, defense counsel represented that he had fully and thoroughly discussed all the facts, circumstances, records, reports, potential defenses (or lack

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<sup>46</sup> State's response to Defendant's Rule 61 motion, at pg. 3; Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 2-4.

<sup>47</sup> State's response to Defendant's Rule 61 motion, at pg. 3; Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 2-4.

<sup>48</sup> State's response to Defendant's Rule 61 motion, at pg. 3; Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 2-4.

<sup>49</sup> State's response to Defendant's Rule 61 motion, at pg. 3; Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 2-4.

thereof) and investigations he undertook to prepare for trial.<sup>50</sup> Defense counsel secured a private investigator to interview Defendant and any and all witnesses he provided. The witness statements did not support the version of events as related by Defendant. Defense counsel explored Defendant's potential defense(s), and determined that any such defense was risky (at best), if not fabricated. Defendant was fully and thoroughly aware of the facts and circumstances of the case and the choices he had.<sup>51</sup>

48. Under the facts and circumstances of this case, the decision to accept the plea was prudent and reasonable. It appears that in reality it is not the lack of his counsel's preparation that Defendant is dissatisfied with but with the fact that his counsel did not find his defense to be viable or his purported witnesses to be helpful.

49. Defense counsel's Affidavit denying that he was ineffective in any respect is fully supported by Defendant's representations to the court at the time of his plea and on his Truth-In Sentencing Guilty Plea Form. This claim is without merit.

50. Defendant's fourth claim is that the State failed to establish a chain of custody as to the evidence. Again, Defendant could have rejected the plea agreement and elected to go to trial and put the State to its proofs. He could have challenged the chain of custody of whatever evidence he believes should have been challenged. Defendant waived his trial, and his right to contest this charge, when he knowingly, voluntarily and intelligently entered his plea. This claim is without merit.

51. Defendant's fifth claim is that there was no probable cause to stop him the night of the offense. First, at his preliminary hearing, after the court heard the evidence, it

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<sup>50</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 2-4; October 28, 2013 Plea Transcript, at pgs. 4-7.

<sup>51</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 2-4; October 28, 2013 Plea Transcript, at pgs. 4-7.

determined that probable cause existed and that the case should be bound over for further prosecution. The case was then subsequently submitted to a Grand Jury who also determined probable cause existed and returned an indictment. Defense counsel, in his Affidavit, represents that under the facts and circumstances of this case, there was absolutely no basis to file a motion to dismiss and it would have been frivolous to do so.<sup>52</sup>

52. Second, Defendant could have rejected the plea agreement and had a trial on the merits. He could have raised challenges to the State's case. Defendant waived his trial, and his right to contest the charges against him, when he knowingly, voluntarily and intelligently entered his plea. This claim is without merit.

53. Defendant's sixth claim is that there was insufficient evidence to support his conviction. Defendant appears to contend that his counsel was ineffective for not challenging the "shirt" evidence on the grounds of chain of custody. At trial, it appears that Trooper Jubb would have identified Defendant as the black male suspect exiting the Wendy's after the robbery. The suspect fled to a wooded area on Pulaski Highway. Defendant was apprehended shirtless just outside the wooded area. A tan shirt was recovered in the wooded area with Defendant's DNA on it. Witnesses to the robbery would testify that the gunman was wearing a tan shirt and was the same height, weight and race as Defendant, a former employee of the Wendy's.

54. At the time of the plea, Defendant admitted his guilt to the charges for which he pled guilty. Defendant could have rejected the plea agreement and had a trial on the merits. He could have challenged the sufficiency of the evidence and put the State to its burden of proof. Defendant waived his trial, and his right to contest the charges against

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<sup>52</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pg. 5.

him, when he knowingly, voluntarily and intelligently entered his plea. This claim is without merit.

55. Defendant's seventh claim is that he had a reasonable expectation of privacy in the T-shirt that was found in the woods and seized by the police. He contends that his Fourth Amendment Right against search and seizure was violated. Defense counsel, in his Affidavit, succinctly addresses this claim. Defense counsel states that: "Notwithstanding that defendant entered a Guilty plea, waiving his Constitutional right to trial, including his right to pursue a Motion to Suppress Evidence or to challenge the admissibility of evidence, Defendant had absolutely no claim under the Fourth Amendment. The shirt located by the police, and ultimately connected to Defendant Bissoon via identification and DNA, was abandoned property. Apparently Defendant Bissoon removed the shirt from his body and discarded the same in what is alleged as his attempt to flee the scene of the crime."<sup>53</sup> This claim is without merit.

56. Defendant's eighth claim is a general contention of his counsel's alleged ineffectiveness based upon the other claims raised in his Rule 61 motion. Defendant's claim is without merit. Defense counsel's Affidavit denying that he was ineffective in any respect is fully supported by Defendant's representations made to the court at the time of his plea that he was satisfied with his counsel's representation. Defendant is bound by his previous representation.

57. The decision to accept the plea, and not go to trial, does not appear to be deficient in any regard. Defense counsel's representation of Defendant was not deficient and Defendant cannot establish that he suffered any prejudice as a result thereof. Defendant cannot establish that he would have received a lesser sentence if he proceeded to trial.

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<sup>53</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 5-6.

Defendant has failed to satisfy either prong of the *Strickland* test and, therefore, his claims of ineffective assistance of counsel fail. This claim is without merit.

58. Defendant's last claim is that his plea was coerced. This claim is directly at odds with the representations Defendant, himself, made to the court at the time he accepted his plea. Indeed, at that time, Defendant represented that nobody was forcing him to enter his plea. A defendant is bound by his answers on the plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.<sup>54</sup>

59. At that time of the plea, Defendant represented that he was freely and voluntarily pleading guilty to the charges listed in the plea agreement. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.<sup>55</sup>

60. Defendant has not presented any clear, contrary evidence to call into question his prior testimony at the plea colloquy or answers on the Truth-In Sentencing Guilty Plea Form. Defendant's claim that his plea was coerced is without merit.

61. Defendant received a significant benefit by pleading guilty and being spared, if convicted, of being declared a habitual offender. Defendant's guilty plea represented a rational choice given the pending charges, Defendant's significant prior criminal record, and the possible sentence he was facing.

62. Defendant understood that by accepting the plea offer he was waiving his right to a trial by jury, waiving his right to contest the sufficiency of the evidence, waiving his

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<sup>54</sup> *State v. Harden*, 1998 WL 735879, \*5 (Del. Super.); *State v. Stuart*, 2008 WL 4868658, \*3 (Del. Super. 2008).

<sup>55</sup> October 28, 2013 Plea Transcript, at pg. 9; Truth-In-Sentencing Guilty Plea Form dated October 28, 2013.

right to cross-examine witnesses, present a defense, and to appeal any conviction.<sup>56</sup> Defendant could have elected to go to trial and put the State to its proofs. Defendant chose instead accept a plea offer in return for the State dismissing additional felony charges and agreeing not to seek to sentence Defendant as a habitual offender. As discussed above, Defendant's guilty plea was knowingly, voluntarily and intelligently entered. Defendant cannot now seek to contest the sufficiency of the evidence or the alleged shortcomings of his counsel during the pre-trial and plea process. Defendant's claims were waived when he knowingly, voluntarily and intelligently accepted the plea offer.

63. Defendant's request for the appointment of counsel was denied.<sup>57</sup> Defendant's conviction resulted from a guilty plea. Rule 61, as amended effective June 4, 2014, 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.<sup>58</sup> Having fully, thoroughly and carefully considered Defendant's motion and the evidentiary record, none of the exceptional circumstances giving rise to the entitlement to the appointment of counsel exist in this case. Since Defendant has failed to overcome the procedural hurdles warranting the appointment of counsel, the appointment of counsel was denied.<sup>59</sup>

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<sup>56</sup> October 28, 2013 Plea Transcript; Truth-in-Sentencing Guilty Plea Form dated October 28, 2013.

<sup>57</sup> Superior Court Docket No. 61.

<sup>58</sup> Superior Court Criminal Rule 61(e)(2).

<sup>59</sup> See, Super.Ct.Crim.R. 61(e)(2).

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

**IT IS SO RECOMMENDED.**

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/s/  
Commissioner Lynne M. Parker

cc: Prothonotary  
Andrew J. Witherell, Esquire