IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	
JEROME CLARK,	)	ID NO. 1301000400
	)	
Defendant.	)	

Date Submitted: May 14, 2014
Date Decided: August 26, 2014

On Defendant's Motion for Post-Conviction Relief. **DENIED.**
On Defendant's Motion for Correction of Sentence. **GRANTED.**

ORDER

James A. Robb, Esq., 4677 Summit Bridge Road, Middletown, Delaware 19709.

Matthew B. Frawley, Esq., Deputy Attorney General, Delaware Department of Justice, Carvel State Office Building, 820 N. French Street, Wilmington, Delaware 19801. Attorney for the State.

Scott, J.

Introduction

Before the Court is Defendant Jerome Clark's ("Defendant") Motion for Post-conviction Relief filed on October 1, 2013. The Court has reviewed the parties' submissions. For the following reasons, Defendant's motion for post-conviction relief is **DENIED**. However, pursuant to Del. Super. Crim. Rule 35(a), Defendant's request to correct his sentence for the charge for Criminal Mischief under $1,000 is **GRANTED**.

Background

On May 29, 2013, the day of trial, Defendant pled guilty to the charges of Burglary in the Third Degree and Criminal Mischief under $1,000. As part of the Plea Agreement, the State sought a declaration that Defendant be declared a Habitual Offender under 11 *Del. C.*§ 4214(a). The State recommended restitution and agreed to deferred sentencing and to cap its Level V recommendation at two years, followed by 8 months at Level IV, then two years at Level III. Defendant signed the Plea Agreement and the Truth-and-Sentencing Guilty Plea Form.

Prior entering his plea, the Court gave Defendant an opportunity to discuss the terms of the State's offer with his trial counsel, Raymond Otlowski, Esquire ("Mr. Otlowski").[1] Mr. Otlowski informed the Court that he believed that Defendant understood the consequences of entering the

[1] Plea Trans. at 8:7-9 (May 29, 2013).

plea.[2] The Court then engaged in a plea colloquy with Defendant. Defendant confirmed that he reviewed, signed and understood the plea agreement and the Truth-in-Sentencing Guilty Plea Form.[3] He also acknowledged that the penalty could range from zero to life, that he qualified as a habitual offender under § 4214(a), and that his plea was voluntary.[4]

August 23, 2013, the day of Defendant's sentencing,[5] Defendant requested that the Court allow him to withdraw his plea because he was very stressed when he entered into the agreement.[6] The Court denied the request because it found that it "lacked good faith basis to allow" it.[7] Defendant was then sentenced to two years at Level V without the benefit of early release "pursuant to 11 *Del. C.* § 4204(k)" for the burglary charge and 6 months at Level V, suspended for one year at Level III for the charge of Criminal Mischief under $1,000.[8] Defendant was declared a habitual offender under §4214(a) and required to pay restitution.[9]

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[2] *Id.* at 11:7-14.
[3] *Id.* at 12-13.
[4] *Id.* at 13:5-9.
[5] A sentencing hearing was held on June 14, 2013. Defendant did not appear, but Mr. Otlowski explained to the Court that Defendant was considering withdrawing his plea. Sentencing Transcript (June 14, 2013), D.I. 48.
[6] Sentencing Transcript (August 23, 2014).
[7] *Id.*
[8] Sentence Order (Aug. 23, 2013).
[9] *Id.*

On October 1, 2013, Defendant filed this Motion for Post-conviction Relief based on three grounds. First, Defendant argues that his plea should be withdrawn because he was stressed when he decided to enter the plea agreement. Second, Defendant asserts a claim for ineffective assistance of counsel, alleging that Mr. Otlowski informed him that there was no mandatory sentence despite the fact that "Defendant has a 4204(k) sentence therefore making it mandatory."[10] Third, Defendant argues that his sentence for Criminal Mischief under $1,000 is incorrect and that it must be limited to 30 days at Level V. Defendant was appointed counsel to assist him with this motion and, on January 24, 2014, his appointed counsel filed an Amended Motion for Post-conviction Relief.[11] Defendant's appointed counsel reasserted Defendant's argument that he was unaware of the sentencing consequences of being declared a habitual offender.[12]

[10] Def. Mot. for Post-conviction Relief.
[11] D.I. 39.
[12] On October 29, 2013, Attorney James A. Robb, Esq. ("Mr. Robb") moved to withdraw as Defendant's appointed counsel asserting that Defendant failed to allege sufficient grounds in support of his motion.(D.I. 23). Attorney Robb later indicated that he intended to continue to represent Defendant and filed the Amended Motion for Post-conviction Relief. In the motion to withdraw, Mr. Robb argued that Defendant's argument based on § 4204(k) was not a sufficient ground because no mention was made of § 4204(k) in the sentencing transcript, the section was inapplicable, and he was actually sentenced under § 4214(a), not § 4204(k). Mr. Robb also asserted that Mr. Otlowski acknowledged that there was no dispute as to the application of § 4214(a) and that Mr. Otlowski did not state that a mandatory sentence would not be imposed. Mr. Robb agreed that the sentence was incorrect for Defendant's charge of Criminal Mischief under $1,000.

Mr. Otlowski has filed an affidavit in response to Defendant's motion.[13] According to Mr. Otlowski, he "had at least fifteen visits and/or discussions with [Defendant] concerning evidence, preparation for trial, possibility of a plea and the severity of the sentence-life in prison."[14] He explained that "[t]he initial plea offer was five years at level five, some level four time and level three time with a flow down."[15] Mr. Otlowski believed it would be in Defendant's best interest to negotiate a lower plea since Defendant was unable to locate his witness.[16] On the day of trial, Mr. Otlowski negotiated the plea from five years to two years.[17] He informed Defendant that his sentence "would be served to the day in jail" and he believed that Defendant understood his explanation.[18]

The State argues that the record fails to support Defendant's claim for ineffective assistance of counsel. According to the State, Defendant fully understood his sentence and accepted the plea on his own accord after having the opportunity to speak with Mr. Otlowski about the terms of the plea and reviewing and signing the Truth-in-Sentencing Form and the Plea Agreement. In addition, the State asserts that Defendant had ample opportunity to object to the terms of the Plea Agreement. However, the

[13] Otlowski Affidavit, D.I. 49.
[14] *Id.* at ¶ 2.
[15] *Id.* at ¶4.
[16] *Id.* at ¶3.
[17] *Id.* at ¶6.
[18] *Id.*

State does not oppose a correction of Defendant's sentence for Criminal Mischief under $1,000.

Discussion

As an initial matter, the Court finds that Defendant's motion is not procedurally barred under Del. Super. Ct. Crim. R. 61(i).[19] The Court will now address the merits of Defendant's motion. In order for a defendant to prevail on a claim for ineffective assistance of counsel, he must "show that: (1) counsel's 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."[20] When the Court applies this two-part test when ineffective assistance is asserted as a ground to withdraw a guilty plea,[21] it will afford counsel a "strong presumption of reasonableness"[22] and "evaluate the conduct from counsel's perspective at the time."[23]

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[19] *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990)("This Court applies the rules governing procedural requirements before giving consideration to the merits of the underlying claim for postconviction relief.")
[20] *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(internal quotations and citations omitted).
[21] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).
[22] *Smith v. State,* 991 A.2d 1169, 1174 (Del. Supr. 2010)(quoting *Strickland,* 466 U.S. 668,689 (1984))(internal quotations omitted).
[23] *Id.*

Defendant's claim for ineffective assistance of counsel must fail because Mr. Otlowski's representation did not fall below an objective standard of reasonableness. Defendant asserts that he was informed that there was his burglary charge would not carry a mandatory sentence. In his affidavit, Mr. Otlowski stated that he explained to Defendant that his Level V sentence would have to be served "to the day" and that he believed that Defendant understood. The Plea Transcript shows that Defendant was given an opportunity to discuss the Plea with Mr. Otlowski, that Mr. Otlowski "honestly believe[d] that [Defendant] kn[ew] exactly what he was doing" and "the possibilities of what he could get for sentencing."[24] The Plea Transcript also shows that Defendant stated that he understood the range of penalties,[25] the consequences of his plea,[26] and that the State was seeking to qualify him as a habitual offender under § 4214(a).[27] Defendant declined to ask the Court any further questions regarding the plea.[28] Furthermore, Defendant signed the Plea Agreement and the Truth-in-Sentencing Form. Based on the statements in Mr. Otlowski's affidavit, Defendant's signatures on the Plea Agreement and the Truth-in-Sentencing Form, and Mr. Otlwoski's and Defendant's statements to the Court during the entry of the

[24] Plea Trans. at 11:7-14 (May 29, 2013).
[25] *Id*. at 13:5-9.
[26] *Id*. at 14:12-14.
[27] *Id.* at 13:10-14.
[28] *Id.* at 13:18-21.

plea, the Court finds that Defendant was fully informed that he was being sentenced under § 4214(a) as a habitual offender based on the charge of Burglary in the Third Degree and that it was mandatory that the sentence be served in the entirety. For this reason, Mr. Otlowski's representation was reasonable.

Defendant argues that he was not informed that his sentence was mandatory under § 4204(k).[29] The Court acknowledges that the Sentencing Order does state that Defendant was sentenced to two years at Level V without the benefit of early release "pursuant to 11 *Del. C.* § 4204(k)."[30] However, the Plea Transcript makes no reference of § 4204(k), all parties referenced § 4214(a) throughout the plea process, and § 4214(a) is provided in Defendant's signed Plea Agreement. The relevant portion of § 4214(a) states:

> Notwithstanding any provision of this title to the contrary, any sentence of less than life imprisonment imposed pursuant to this subsection shall not be subject to suspension by the court, **and shall be served in its entirety at a full custodial Level V institutional setting without the benefit of probation or parole**, except that any

[29] Section 4204(k)(1) states, in pertinent part:

> Except as provided in this subsection, notwithstanding any statute, rule, regulation or guideline to the contrary, the court may direct as a condition to a sentence of imprisonment to be served at Level V or otherwise that all or a specified portion of said sentence shall be served without benefit of any form of early release, good time, furlough, work release, supervised custody or any other form of reduction or diminution of sentence.

[30] Sentence Order (Aug. 23, 2013).

> such sentence shall be subject to the provisions of §§ 4205(h), 4217, 4381 and 4382 of this title.[31]

Defendant's argument based on § 4204(k) is unpersuasive because Defendant was aware that he was being declared a habitual offender under § 4214(a) for the burglary charge and that section requires a Level V sentence to "be served in its entirety".[32]

The Court may allow a defendant to withdraw a guilty plea "upon a showing by the defendant of any fair and just reason."[33] After reviewing the record, the Court does not view Defendant's stress as a sufficient reason to permit the withdrawal of the guilty plea.

The final matter for the Court to address is Defendant's sentence for the charge of Criminal Mischief under $1,000. Under Del. Super. Ct. Crim. R. 35(a), "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence."[34] 11 *Del. C.* § 811 provides that

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[31] § 4214(a) (emphasis added).
[32] § 4214(a).
[33] Del. Super. Ct. Crim. R. 32(d) states:
> If a motion for withdrawal of a plea of guilty or nolo contendere is made before imposition or suspension of sentence or disposition without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.At any later time, a plea may be set aside only by motion under Rule 61.

[34] Del. Super. Ct. Crim. R. 35(a).

criminal mischief is an "unclassified misdemeanor" when the amount is less than $1,000.[35] Section 4206(c) provides:

> The sentence for an unclassified misdemeanor shall be a definite sentence fixed by the court in accordance with the sentence specified in the law defining the offense. If no sentence is specified in such law, the sentence **may include up to 30 days incarceration at Level V** and such fine up to $575, restitution or other conditions as the court deems appropriate.[36]

Under the above section, Defendant's sentence of 6 months at Level V, suspended for one year at Level III for the charge of Criminal Mischief under $1,000 is reduced to 30 days at Level V, suspended for one year at Level III.

Conclusion

For the forgoing reasons, Defendant's Motion for Post-conviction Relief is **DENIED**. Defendant's request to correct his sentence for the charge for Criminal Mischief under $1,000 is **GRANTED**.

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.

[35] § 811(b)(3).
[36] § 4206(c) (emphasis added).