

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

May 18, 2006

James E. West
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. West, Def. ID# 0103022188

DATE SUBMITTED: March 21, 2006

Dear Mr. West:

Pending before the Court is a motion for postconviction relief which defendant James E. West ("defendant") has filed in this matter pursuant to Superior Court Criminal Rule 61 ("Rule 61"). Defendant also has filed a motion for correction of an illegal sentence pursuant to Superior Court Criminal Rule 35(a), although he has included that motion within the context of the Rule 61 motion. This is my decision on the pending motions.

Defendant initially pled guilty to charges of possession of a firearm during the commission of a felony ("PFDCF"); robbery in the second degree (a lesser included offense of the charged crime of robbery in the first degree); and conspiracy in the second degree. He was sentenced on November 7, 2001, as follows. As to the PFDCF conviction, he was sentenced to a mandatory 3 years at Level 5. As to the robbery in the second degree conviction, he was sentenced to Level 5 for a period of 5 years, suspended for 1 year at Level 4, Home Confinement

followed by 4 years at Level 3. As to the conspiracy in the second degree conviction, he was sentenced to 2 years at Level 5, suspended for 2 years at Level 2. On July 8, 2002, the PFDCF sentence was modified to give defendant credit for time served. After serving his Level 5 time and consequently finishing his sentence on the PFDCF conviction, defendant had trouble locating a host; consequently, the robbery in the second degree sentence was modified on January 30, 2004, to provide for defendant to be held at Level 4, Home Confinement or Work Release.

In 2004, defendant was violated on his probation. On September 9, 2004, he was found in violation and sentenced as follows. As to the robbery in the second degree conviction, he was given 5 years at Level 5 with credit for 34 days previously served, suspended for 34 days at supervision Level 4, followed by 2 years at Level 3 probation. The order instructed that he was to be given the 34 days credit time against his Level 4 sentence. As to the conspiracy conviction, he was given 2 years at Level 5, suspended for 2 years at Level 2 probation.

In February, 2005, defendant again was violated on a number of grounds. On February 18, 2005, a hearing was held. William E. Moore, Esquire, represented defendant at that hearing. Defendant acknowledged he had received new charges, but maintained he had defenses to those pending charges. He admitted he failed to report the arrests to his probation officer within 72 hours. He admitted he had missed three office appointments since October 28, 2004, but denied missing the other four appointments which Probation & Parole said he missed. He admitted he had smoked marijuana. He denied the allegation that he failed to report an address change. As to the curfew violation, the following exchange took place:

MR. MOORE: *** He had to get out of the residence that he was in. He did report that to his probation officer. The allegation is that he ended up in Rehoboth, but I think what he indicates there is that he may not have reported precisely

where he was in Rehoboth.

Do I have that correct, James?

THE DEFENDANT: Yes.

Transcript of February 18, 2005, Violation of Probation Hearing at page 3 (“2/18/05 Trans. at ___”). He did admit to an additional curfew violation on December 21, 2004.

As the quote from the transcript set forth below shows, Mr. Moore then conveyed information in mitigation of sentencing and defendant was provided the opportunity to speak at that time, but declined to speak.

MR. MOORE: There are some background circumstances that I would like to bring to the Court’s attention. I have somewhat already done so. He told his probation officer that he was getting out of Little Creek Apartments because there were problems there, and apparently the cousin he was living [sic] was getting evicted and there was alcohol involved in that apartment. He had to get away from that.

He indicates that he has a job. James in an electrician. He has had a job for four months, since going back into October, and he has a child on the way this coming October.

I know what the recommendation is. He asks that the Court consider twenty weekends and then reinstate his probation. The recommendation, from what I understand from the probation officer, is Boot Camp.

THE COURT: Or jail. Straight out jail.

Is there anything else that you like to share?

MR. MOORE: We have nothing further.

James, anything further?

THE DEFENDANT: No.

2/18/05 Trans. at 4-5.

The Court explained its sentencing decision and sentenced defendant as follows:

THE COURT: ***

Your background is this: You have eighteen arrests with forty-seven criminal charges. The charges consist of one felony robbery; one felony burglary; fourteen other felonies; two drug-related misdemeanors; one domestic-violence misdemeanor; and twenty-eight other misdemeanors. These offenses have yielded six felony and eleven misdemeanor convictions since your first arrest in 1996 at the age of thirteen.

Among the convictions are disorderly conduct; receiving stolen property; possession of cocaine; offensive touching; terroristic threatening; possession of cocaine; reckless endangering; possession of a deadly weapon during the commission of a felony; underage possession /consumption of alcohol; criminal mischief; possession of a deadly weapon by a person prohibited; robbery in the second degree, which is a lesser-included offense of robbery in the first degree; conspiracy second degree; and possession of a firearm during the commission of a felony.

You have had two previous violations of adult probation. The evaluation is that you are a violent young offender with six felony convictions. It is up to me, at the end of the day, to make a decision, and I am going by your background. I am finding that you have a propensity for violence. Your history is such that you are a danger to the community. For that reason, I am going to impose the straight Level 5 time.

As to 01-04-0594, having been found to be in violation of Probation Conditions 1, 2, 7, and 13 as to the events of December 31st, 2004, Allegation No. 2 on that, in light of your background and history, you are resentenced as follows:

You are placed in the custody of the Department of Corrections at Supervision Level 5 for a period of five years.

As to 01-04-0597, you are resentenced as follows:

You are placed in the custody of the Department of Corrections at Supervision Level 5 for a period of two years, suspended for eighteen months Level 3.

It is also to be noted that this is your second violation in this case.

2/18/05 Trans. at 6-8.

Defendant did not file an appeal from this sentence.

On January 23, 2006, defendant filed his original motion for postconviction relief. He has filed amendments to the motion, the last amendment being filed on March 21, 2006. I consider the original motion and all amendments herein. This is my decision addressing the pending motions.

The first step this Court takes is to determine if the claims defendant advances in this Rule 61 motion may proceed or if they are procedurally barred. In the version of Rule 61(i) which applies to defendant's case, it is provided as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

Defendant's motion is timely filed. Super. Ct. Crim. R. 61(i)(1).

Defendant claims that the Court abused its discretion in imposing the sentence it imposed

where the probation officer recommended 6 months at Boot Camp. This claim is procedurally barred as defendant could have raised the issue on appeal. Super. Ct. Crim. R. 61(i)(3).

Defendant has not attempted to show any exceptions to the bar exist. This claim is denied as it is procedurally barred.

Defendant argues the Court abused its discretion in imposing the sentence it imposed when it was only defendant's second violation in this case. He argues that at least one other defendant has been given more chances to violate before the full Level 5 time was imposed. This claim is procedurally barred as defendant could have raised it on appeal. Id. Defendant has not attempted to show any exceptions to the bar exist. This claim is denied as it is procedurally barred.

Defendant alleges he was not afforded proper allocution. He maintains that he was sentenced and then asked if he had anything to say.

This claim is procedurally barred because defendant did not raise the issue on appeal and defendant has not made any attempt to show an exception to the bar exists. Id. Even if the Court deemed the miscarriage of justice exception in Rule 61(i)(5)¹ to be established and considered this claim, it concludes the claim is meritless. It is factually incorrect. The Court provided defendant with an opportunity to speak before sentencing him. This claim fails.

Defendant alleges the Court violated his due process rights "by not disclosing [sic] the evidence against him, and absent a written statement by the fact finder as to the evidence relied on and reasons for revoking his probation."

¹This exception is "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."

This claim is procedurally barred because defendant failed to raise it on appeal and defendant has not made any attempt to show an exception to the bar exists. Super. Ct. Crim. R. 61(i)(3). Even if the Court deemed the miscarriage of justice exception in Rule 61(i)(5) to be established and considered this claim, it concludes the claim is meritless. First, a review of the transcript evidences that the Court reviewed each allegation against defendant. Second, there is no requirement that the Court issue its findings in writing. The Court explained its reasoning, conclusions and decisions orally. That is sufficient. This claim fails.

Defendant claims that the Court exhibited a closed mind. In support of that claim, he maintains the Court never gave him a “meaningful platform to question anything submitted against him.” He argues, also, that the Court did not consider mitigating evidence in deciding his sentence. This claim, too, is procedurally barred because defendant had the opportunity to raise it on appeal and did not do so. Id. Defendant has not attempted to establish any exceptions to the procedural bar exists. This claim would fail even if the Court considered it by concluding that the miscarriage of justice exception existed.

As explained in Weston v. State, 832 A.2d 742, 746 (Del. 2003):

A judge sentences with a closed mind when the sentence is based on a preconceived bias without consideration of the nature of the offense or the character of the defendant. n7 ***

----- Footnotes -----

n7 Ellerbe v. State, 755 A.2d 387 (Del. 2000).

----- End Footnotes-----

The judge must have an open mind for receiving all information related to the question of mitigation. n8

----- Footnotes -----

n8 Shelton v. State, 744 A.2d 465, 513 (Del. 1999).

----- End Footnotes-----

The transcript of the proceedings evidences the factual inaccuracy of defendant's assertions in support of this claim. Defendant was given the opportunity to present mitigating evidence. He, through counsel, actually presented some mitigating evidence and this Court considered it. In his moving papers, he argues that he should have been able to discuss classes he had taken and his educational pursuits as well as information about his family and employment status. He presented information on his employment status and his family. He was given the opportunity to speak on these other matters. He chose not to. The Court listened to what defendant had to present, considered the fact this was his second violation on this case, and considered defendant's significant criminal history. Defendant has not shown any evidence of a "closed mind." This claim fails.

Defendant argues that the Court's sentencing decision was based upon "misinformation".

In support of that claim, he argues:

The judge considered movants [sic] juvenile delinquency record for the purpose of enhancing punishment, when movant was denied counsel at such proceedings, which was constitutionally invalid.

He also argues that he never had a possession of cocaine charge.²

²The Violation of Probation Report listed convictions for two counts of possession of cocaine. A review of defendant's criminal history does not show any convictions for possession of cocaine. That criminal history does, however, reflect two convictions for possession of a non-narcotic Schedule I controlled substance. Defendant has two drug convictions. That the convictions were not for possession of cocaine was irrelevant to the Court's decision on the

Defendant had the opportunity to address his criminal history and to appeal this matter to the Supreme Court and did not do so. Id. He has failed to establish any exceptions to the bar exist. I will not assume the existence of any exceptions to the bar. Defendant cannot attack the validity of prior convictions in Family Court in this Court at this stage of the proceedings. Defendant's criminal record is what it is. It was appropriate for the Court to consider it in making its decision. Matters v. State, 759 A.2d 602 (Del. 2000); Mayes v. State, 604 A.2d 839, 842-43 (Del. 1992). This claim fails.

Defendant also advances a claim of ineffective assistance of counsel. Since this is the first time defendant could advance this claim, it is not procedurally barred.

To establish a claim of ineffective assistance of counsel, defendant must show that trial counsel's representation fell below an objective standard of reasonableness and but for the attorney's unprofessional errors, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). With regard to the actual prejudice aspect, "[d]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694. In advancing a claim for ineffective assistance of counsel, a defendant must set forth specific, concrete allegations; vague, conclusory allegations fail. Younger v. State, 580 A.2d 552, 555 (Del. 1990).

Defendant argues that trial counsel was ineffective because he failed to examine the files

sentence it imposed. In fact, the drug convictions played no role in the Court's decision on the sentence it imposed.

of defendant's prior convictions and determine those convictions were invalid because he allegedly was not represented by counsel at that time. Defendant does not contend that he told trial counsel beforehand that there might be a problem with his previous convictions. That issue is something of which only defendant would have knowledge. No trial counsel has a duty to examine each file in each of a defendant's previous cases and look for problems which might support an attack on those prior convictions. Trial counsel was not ineffective. This claim fails.

Defendant argues that 11 Del. C. § 4333(b) prevented the Court from imposing a jail term of greater than two years. This statute provides in pertinent part as follows: "The length of any period of probation or suspension of sentence shall be limited to: (1) Two years, for any violent felony in this title as designated in § 4201(c) of this title...."

The argument actually should have been filed as a motion to correct an illegal sentence pursuant to Superior Court Criminal Rule 35(a).³

The argument fails for a number of reasons. Defendant is arguing that if the Court can only impose 2 years of probation, it is not allowed to impose more than 2 years at Level 5 upon a violation of probation. First, § 4333(b) does not limit the Level 5 time which may be imposed. 11 Del. C. § 4333. The Court "was authorized to reimpose the full amount of the suspended portion of his original sentence, giving credit only for time served at Level V incarceration. [Footnote and citation omitted.]" Richardson v. State, Del. Supr., No. 405, 2005, Steele, C.J. (Dec. 16, 2005) at 3. Furthermore, defendant initially was sentenced before 11 Del. C. § 4333(b) was

³In Super. Ct. Crim. R. 35(a), it is provided:

Correction of sentence. The 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.

passed, and consequently, the statute is not applicable to his sentence. Id.; Sewell v. State, 839 A.2d 666 (Del. 2003). Thus, the Court denies this motion for correction of an illegal sentence.

Defendant also argues that he is entitled to credit time for time served on the robbery second conviction while awaiting Level 4 space availability on that sentence. The Court has reviewed defendant's incarceration record and has determined defendant is entitled to 59 credit days against his robbery second sentence. The additional time defendant seeks as credit is time during which he was held at Level 4, and he is not entitled to credit for time served while at Level 4. I am amending my order of February 18, 2005, to award defendant with the 59 days of credit time.

For the foregoing reasons, I deny defendant's pending motions except to the extent I grant him credit time of 59 days.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
William E. Moore, Esquire
Department of Justice