## IN THE SUPREME COURT OF THE STATE OF DELAWARE

PHILLIP L. BREWER,	§
	§ No. 433, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 1009018564
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 31, 2012 Decided: January 15, 2013

Before STEELE, Chief Justice, JACOBS and RIDGELY, Justices

## ORDER

This 15<sup>th</sup> day of January 2013, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Phillip L. Brewer, filed an appeal from the Superior Court's July 12, 2012 order denying his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61.<sup>1</sup> The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

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<sup>&</sup>lt;sup>1</sup> Because this was Brewer's first postconviction motion and because the motion included claims of ineffective assistance of counsel, Brewer's counsel was asked to submit an affidavit responding to the claims. *Horne v. State*, 887 A.2d 973, 975 (Del. 2005).

Court's judgment on the ground that it is manifest on the face of the opening brief that this appeal is without merit.<sup>2</sup> We agree and affirm.

- (2) The record before us reflects that, on April 27, 2011, Brewer pleaded guilty to Possession With Intent to Deliver Cocaine, Maintaining a Vehicle for Keeping Controlled Substances, Resisting Arrest With Force and Tampering With Physical Evidence in connection with 3 separate criminal He was sentenced to a total of 27 years of Level V indictments. incarceration, to be suspended after 20 mandatory years at Level V as a habitual offender for decreasing levels of supervision.<sup>3</sup> On July 18, 2011, Brewer filed a motion for sentence reduction, which the Superior Court denied on August 2, 2011. Brewer did not file a direct appeal.
- In his postconviction motion filed in the Superior Court, (3) Brewer claimed that a) his counsel provided ineffective assistance by erroneously representing what his sentencing range would be; b) his counsel provided ineffective assistance by failing to investigate the facts and provide mitigating evidence in connection with his sentencing; and c) he should be eligible for good time credit. In connection with his first claim of ineffective assistance, Brewer argued that he was led to believe that the sentencing range was 5-13 years at Level V, rather than 3-20, that he was not given the

Supr. Ct. R. 25(a).
 Del. Code Ann. tit. 11, §§4204(k) and 4214(a).

chance to consult with his counsel about that change and was told by his counsel that he would be in prison only for 7 years and that no portion of that time would be mandatory. In its July 12, 2012 order, the Superior Court concluded that Brewer's postconviction motion was untimely pursuant to Rule 61(i) (1), but went on to find that, even if the motion had been timely, it was without merit.

- (4) In this appeal, Brewer claims that a) his motion was timely because he mailed it prior to the 1-year time deadline and his claims overcome any procedural bars; b) the sentencing judge imposed sentence with a closed mind; c) the sentencing range of 3-20 years was never presented to him for his approval; and d) he should be eligible for good time.<sup>4</sup>
- (5) Brewer's first claim on appeal is that his postconviction motion, which consisted of claims of ineffective assistance of counsel, was timely. While Brewer is correct that his motion was timely filed (although for reasons other than those cited by him),<sup>5</sup> the Superior Court correctly ruled that his claims had no merit. In order to succeed on a claim of ineffective assistance of counsel within the context of a guilty plea, Brewer had to

<sup>4</sup> Because Brewer's claim that his counsel failed to investigate the facts of his case and present mitigating evidence at sentencing has not been raised on appeal, it is deemed to be waived. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

<sup>&</sup>lt;sup>5</sup> Brewer filed his motion on May 2, 2012, within 1 year of the date his conviction became final---May 27, 2011. Super. Ct. Crim. R. 61(i) (1) and (m) (1).

demonstrate a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have proceeded to trial.<sup>6</sup> In the absence of any record support for that proposition, we conclude that the Superior Court properly found Brewer's ineffectiveness claims to be without merit.

- (6) Brewer's next three claims are interrelated and implicate his sentences, which were an integral part of his guilty plea, as reflected in the transcript of the April 27, 2011 hearing. The transcript reflects that, at the beginning of the hearing, the State requested that Brewer be sentenced as a habitual offender<sup>7</sup> on the charge of Possession With Intent to Deliver Cocaine, which carried a sentencing range of 3 to 20 years at Level V.<sup>8</sup> The State also requested that Brewer not be given any good time credit against his sentence.<sup>9</sup> Both the prosecutor and defense counsel presented these terms to the judge as part of a global agreement that had been reached by the State and the defendant.
- (7) The judge then proceeded to engage in the standard colloquy with Brewer to ensure that he understood the rights he was giving up by agreeing to plead guilty and that his plea was being entered knowingly and

<sup>&</sup>lt;sup>6</sup> Albury v. State, 551 A.2d 53, 60 (Del. 1988).

<sup>&</sup>lt;sup>7</sup> Del. Code Ann. tit. 11, §4214(a).

<sup>&</sup>lt;sup>8</sup> Del. Code Ann. tit. 16, §4763.

<sup>&</sup>lt;sup>9</sup> Del. Code Ann. tit. 10, §4204(k).

voluntarily. Brewer acknowledged that he was satisfied with his counsel's representation, that he had discussed the charges with his counsel, that he committed the offenses to which he was pleading guilty and that he understood the sentences that could be imposed.<sup>10</sup> Based on Brewer's representations, the judge accepted his guilty plea as knowing and voluntary.

- (8) At that point, the judge proceeded to the sentencing phase of the hearing. He noted that, because the prosecution and the defense had agreed on the terms of sentencing as stated by the prosecutor at the beginning of the hearing, he would sentence Brewer in accordance with the terms of that agreement, including the provision that Brewer would serve 20 mandatory years at Level V as a habitual offender and would receive no good time credit. Brewer acknowledged that he understood the terms of the agreement and accepted those terms. The judge then sentenced Brewer in accordance with the agreement reached by Brewer and the State.
- (9) We have reviewed the submissions of the parties as well as the transcript of the April 27, 2011 hearing carefully. None of Brewer's three claims regarding his sentence has merit. The record clearly reflects that the sentencing judge followed the terms of the agreement that had previously been reached by Brewer and the State. The record also reflects that Brewer

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Brewer acknowledged that he could be sentenced to a life term.

accepted all the terms of that agreement knowingly and voluntarily. Moreover, Brewer's voluntary guilty plea constituted a waiver of all defects occurring prior to the plea<sup>11</sup> and he is bound by the representations he made during his plea colloquy.<sup>12</sup>

(10) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

<sup>12</sup> Somerville v. State, 703 A.2d 629, 631 (Del. 1997).

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<sup>&</sup>lt;sup>11</sup> *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).