

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

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 0408022175
	)	
PAUL EDWARD WEBER	)	
	)	
Defendant.	)	

Submitted: April 22, 2014  
Decided: July 29, 2014

**On Defendant’s Motion for Correction of Sentence – DENIED**  
**On Defendant’s Motion for Sentencing Hearing and Correction of Sentence – DENIED**  
**On Defendant’s Motion to Vacate – DENIED**  
**On Defendant’s Motion for Evidentiary Hearing and Leave to Supplement the Record – DENIED**  
**On Defendant’s *Pro Se* Motion for Postconviction Relief – STAYED**  
**On Defendant’s *Pro Se* Motion for Appointment of Counsel – GRANTED IN PART**  
**On Defendant’s *Pro Se* Request for a Hearing – DENIED**

**OPINION**

Andrew Vella, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorney for State of Delaware.

Leo John Ramunno, Esquire, 5149 W. Woodmill Drive, Suite 20, Wilmington, DE 19808. Attorney for Defendant.

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**CARPENTER, J.**

Before this Court is a plethora of motions, letters, and other requests sent to this Court in connection with Defendant Paul Weber's ("Weber") criminal conviction and sentence. This is the Court's attempt to synthesize all of Defendant's requests made both through counsel and *pro se*. After a careful review of the record and the overwhelming amount of filings made on the defense side of this case, the Court was able to separate the requests into two categories: (I) the Rule 35 Motions and related requests and (II) the Rule 61 Motion and related requests. Each will be addressed in turn.

### **FACTUAL AND PROCEDURAL BACKGROUND**

A grand jury indicted Weber on September 20, 2004, on charges of Attempted Robbery First Degree and Attempted Carjacking First Degree. In March 2005, following a trial, a jury convicted Weber of both charges. As a result, this Court sentenced Weber to 25 years at Level V for Attempted Robbery First Degree, and three years at Level V for Attempted Carjacking First Degree. Weber appealed his convictions and sentences.

On appeal, the Delaware Supreme Court affirmed Weber's conviction for Attempted Carjacking First Degree. However, the court reversed Weber's conviction for Attempted Robbery First Degree and remanded for a new trial on

the basis that this Court erroneously denied Weber an instruction on the lesser included offense of Offensive Touching.

The State retried Weber for Attempted Robbery First Degree in April 2010. The jury, again, convicted him. Weber filed a post-trial motion for judgment of acquittal, which this Court denied. In July 2010, the State moved to declare Weber a habitual offender for sentencing purposes, which this Court granted following a December 17, 2010 habitual offender hearing. In October 2010, Weber moved to enforce a plea bargain the State had previously offered. This Court denied Weber's motion in a memorandum opinion stating that Weber had rejected the State's plea bargain and instead had chosen to go to trial. Weber also moved to have his sentences merged. This Court denied that motion as well.

This Court later sentenced Weber to 25 years at Level V for Attempted Robbery First Degree. Weber then appealed his second conviction and sentence, which was affirmed by the Delaware Supreme Court on February 21, 2012. Thereafter, counsel for Defendant filed three motions under Superior Court Criminal Rule 35 and Defendant filed a Motion for Postconviction Relief under Rule 61 with related motions for appointment of counsel and a hearing. This is the Court's decision on those motions.

## DISCUSSION

### I. THE RULE 35 MOTIONS

There are three Rule 35 Motions pending: (A) Motion for Correction of Sentence; (B) Motion for Sentencing Hearing and Correction of Sentence; and (C) Motion to Vacate.<sup>1</sup> The State has made one blanket response to all three motions; that they are not appropriate under Rule 35 as they challenge issues that occurred before sentencing. Specifically, the first motion seeks to challenge the State's revocation of a plea agreement, the second, the declaration of habitual offender status, and the third, the retrial after the Supreme Court's reversal. The first two motions do not fit within Rule 35's scope and, while reviewed below, will be summarily denied. The third motion, which rests on double jeopardy grounds, although within Rule 35's purview, fails for substantive reasons. Before addressing the individual motions in more detail, it is important to first delineate the scope of Rule 35.

Rule 35 states in full:

**(a) 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.

**(b) Reduction of Sentence.** The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is

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<sup>1</sup> The analysis of this Motion includes the supplements submitted by defense counsel on April 17, 2014.

imposed. This period shall not be interrupted or extended by an appeal, except that a motion may be made within 90 days of the imposition of sentence after remand for a new trial or for resentencing. The court may decide the motion or defer decision while an appeal is pending. The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 Del.C. § 4217. The court will not consider repetitive requests for reduction of sentence. The court may suspend the costs or fine, or reduce the fine or term or conditions of partial confinement or probation, at any time. A motion for reduction of sentence will be considered without presentation, hearing or argument unless otherwise ordered by the court. **(c) Correction of Sentence by Sentencing Court.** The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.<sup>2</sup>

Further, the rule's scope has been addressed in a recent decision by the Delaware Supreme Court as follows:

A motion for correction of sentence under Rule 35(a) is very narrow in scope. The purpose of the rule is to permit correction [*sic*] an illegal sentence, *not* to reexamine errors occurring at trial or prior to the imposition of sentence. Rule 35(a) presupposes a valid conviction. Relief under Rule 35(a) is available only if the sentence imposed exceeds the statutorily authorized limits, violates the Double Jeopardy Clause, is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.<sup>3</sup>

Working within this scope, the Court now turns to the substance of each motion.

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<sup>2</sup> Super. Ct. Crim. R. 35.

<sup>3</sup> *Buchanan v. State*, 80 A.3d 959 (Del. 2013) (internal citations omitted) (TABLE).

### A. Motion for Correction of Sentence

In the first Rule 35 Motion, Defendant argues for the enforcement of a plea agreement originally made to Defendant but later changed and revoked. The Court ruled on December 15, 2010, that Defendant was not legally entitled to the plea agreement because it had been withdrawn before he accepted it. Defendant argues that the Court should readdress the issue as the constitutional underpinnings of his argument that the plea agreement be enforced have been more fully articulated in cases decided since the Court's prior decision.<sup>4</sup> Specifically, Defendant argues that the United States Supreme Court has clarified that the Sixth Amendment applies to plea bargaining and, "although a defendant has no right to a plea offer, the State must nevertheless act in accord with the dictates of the Constitution when it opts to act in a field where its action has significant discretionary elements."<sup>5</sup> Defendant points specifically to *Lafler v. Cooper*,<sup>6</sup> where the United States Supreme Court held that counsel's ineffective assistance of counsel in encouraging the defendant] to reject a reasonable plea required the State to reoffer it, and to *McNair v. State*,<sup>7</sup> where the Delaware Supreme Court clarified that a defendant must be credited for all Level V time

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<sup>4</sup> See Def.'s Mot. for Correction of Sentence (citing *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *McNair v. State*, 15 A.3d 217 (Del. 2011)).

<sup>5</sup> *Id.*

<sup>6</sup> 132 S. Ct. 1376 (2012).

<sup>7</sup> 15 A.3d 217 (Del. 2011) (TABLE).

served, an issue allegedly affecting Defendant's decision whether to accept the State's offer.

While the facts surrounding the plea negotiations are confusing at best, it appears that after the case was reversed and remanded for a new trial, plea discussions occurred between the parties and the State's desire was for Defendant to serve an additional five years of incarceration for the Robbery offense.

Defendant appeared to have been willing to accept the five years but wanted the State to also agree that he would get credit for the time he had been incarcerated.

The State was unwilling to change its position on the additional five years of incarceration but it advised Defendant that it would agree to seven years and then

would agree to Defendant's time credit he had requested. That offer was not accepted. In the contractual context that plea offers are made, the State was free to

withdraw an offer and change its conditions until Defendant accepted the

agreement. It appears that what Defendant is arguing now is that since by law he

would be entitled to credit for time he served, the State's refusal to include it in the agreement was improper and caused him to reject the plea offer. Even if this is

true, there was clearly no agreement here, since in simple terms, the State wanted

Defendant to serve an additional five years of incarceration and Defendant was

only willing to accept the offer if it meant five years minus his nearly two years of

incarceration, i.e. an additional three years of incarceration. While during the plea negotiations the recommendation from the State may have changed to try to address the time served issue, at no time did the State waver from its demand of an additional five years.

From the Court's perspective this is simply a reflection in hindsight of Defendant's remorse now realizing his sentencing conditions dramatically changed by his habitual offender status and he would like to receive the benefit of an offer he never accepted or that the State agreed to. While the Court can understand that desire, he has no legal basis for that remedy.

Therefore, the Court finds this claim is not within the narrow scope of Rule 35 and Defendant's Motion for Correction of Sentence is denied.

B. Motion for Sentencing Hearing and Correction of Sentence

In his second Rule 35 Motion, Defendant argues that he should have never been declared a habitual offender because attempts are not included in 11 *Del. C.* § 4214(a). Defendant argues that this Court wrongfully invoked Section 4214(a) during sentencing and imposed a "mandatory" sentence of 25 years with the caveat that, had the Court had discretion, it would have imposed far less. Defendant argues that prior to sentencing, another Superior Court judge ordered briefing on whether an attempt would render Defendant a habitual offender, but when this

judge took over, Defendant contends that there was no hearing on the issue and he was declared a habitual offender without proper analysis.<sup>8</sup> Defendant argues that Rule 35 is the only means to pursue this claim as the Delaware Supreme Court refused to address the issue on appeal since there was neither a record of, a hearing on, nor a final decision made by this Court. Defendant has simply mischaracterized the decision of the Delaware Supreme Court and this Court on this issue.

The Court has reviewed Defendant's Opening Brief on appeal and finds it fails to set forth any argument about the Court's decision granting his habitual status and in turn, such was never considered by the Supreme Court. The only seemingly related argument Defendant attempted was: "whether convictions and sentencing for both Attempted Carjacking and Attempted Robbery First Degree constituted prohibited cumulative punishment in violation of double jeopardy[.]"<sup>9</sup>

In relation to this argument, the Supreme Court found:

Having carefully considered the decision and judgment of the Superior Court dated January 14, 2011, together with the briefs filed by the parties, the Court has determined the following: To the extent that the issues raised on appeal are factual, the record evidence supports the trial judge's factual findings; to the extent that the issues raised are attributed to an abuse of discretion, the record does not support those assertions;

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<sup>8</sup> The Court has no knowledge of any conflicting decisions from the Court. However, it does note that the initial trial was handled by another judge, but on remand the case was reassigned by the President Judge.

<sup>9</sup> *Weber v. State*, 38 A.3d 271, 278 (Del. 2012) *cert. denied*, 133 S. Ct. 225 (U.S. 2012).

and, to the extent the issues raised are legal, they are controlled by settled Delaware law, which was properly applied.<sup>10</sup>

Further, as the Supreme Court notes, this Court did conduct a habitual offender hearing after the first conviction and thereafter granted the State's Motion for habitual status.<sup>11</sup> After the second conviction, the Court again conducted a habitual offender hearing and granted the State's motion on December 17, 2010. Notwithstanding the inaccurate reporting of this case's procedural history, the claim is also outside the scope of Rule 35 and could, on that ground alone, be denied. Notwithstanding, the Delaware Supreme Court had held prior to Defendant's sentencing that a conviction of an attempt to commit a felony is treated as a qualifying felony for habitual offender purposes.<sup>12</sup> Therefore, in spite of Defendant's argument to the contrary, this issue had been resolved, and binding case law would have precluded the Court of ruling in Defendant's favor.

Finally, even if this Court believed the required habitual offender sentencing for this offense to be extreme, by law there is no recourse as the sentence given here was mandated by statute and it is the responsibility of the legislature, not the Court, to establish these parameters.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 274 ("In July 2010, the State moved to declare Weber a habitual offender for sentencing purposes. The trial judge granted that motion following a December 17, 2010 habitual offender hearing.").

<sup>12</sup> See, e.g., *Murphy v. State*, 905 A.2d 747 (Del. 2006) (TABLE); *Harris v. State*, 840 A.2d 1242 (Del. 2004) *Shockley v. State*, 854 A.2d 1159 (Del. 2004) (TABLE).

### C. Motion to Vacate

Defendant's last Rule 35 Motion argues that the second trial, after remand from the Delaware Supreme Court, should have never occurred as Defendant was already put in jeopardy for the crime charged and the Supreme Court's reversal amounted to an acquittal, thus barring a retrial.<sup>13</sup> Defendant again misunderstands the Supreme Court's ruling.

On appeal, the Supreme Court analyzed whether this Court should have included, within the jury instructions, an instruction for a lesser included offense of first degree robbery. The Court found that since there was "sufficient evidence to support an acquittal of the first degree robbery charge"<sup>14</sup> the lesser included offense should have also been included in the jury instructions. Defendant argues that this finding amounts to the Supreme Court acquitting him on the first degree robbery charge, thus barring any retrial on that charge based on double jeopardy grounds.<sup>15</sup>

Double jeopardy arguments are within the scope of Rule 35, however, this Motion is denied on substantive grounds. The Supreme Court's decision states: "After carefully reviewing the record, we find sufficient evidence to support an

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<sup>13</sup> See Def.'s Mot. to Vacate at 1-2 (citing *Evans v. Michigan*, 133 S. Ct. 1069 (2013); *Weber v. State*, 971 A.2d 135 (Del. 2009); *Robertson v. State*, 41 A.3d 406 (Del. 2012)).

<sup>14</sup> *Weber v. State*, 971 A.2d at 142.

<sup>15</sup> See Def.'s Mot. to Vacate (citing *Tibbs v. Florida*, 457 U.S. 31, 102 S. Ct. 2211 (1982)).

acquittal of the First Degree Robbery charge and a conviction of the lesser included offense of Offensive Touching.”<sup>16</sup> This holding does not mean that Defendant *should* have been acquitted but merely that a reasonable jury *could* have acquitted Defendant on the robbery charge and they should have been allowed to consider the lesser included offense of Offensive Touching. The Supreme Court explains such, stating: “If the jury did not find [the victim’s] testimony entirely credible, they *could* have concluded that the State failed to prove beyond a reasonable doubt that Weber attempted first degree robbery.”<sup>17</sup> This finding led the Supreme Court to conclude that a lesser included offense should have been presented to the jury. The Supreme Court did not find that acquittal would have been the only reasonable verdict from the jury but rather, as is often the case, the jury could have also reasonably acquitted Defendant and, thus, should have been given the opportunity to consider a lesser included offense. As a result, Defendant’s double jeopardy claim is without merit and will be denied.

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<sup>16</sup> *Weber v. State*, 971 A.2d at 142.

<sup>17</sup> *Id.* (emphasis added).

#### D. Motion for Evidentiary Hearing and Leave to Supplement the Record

Counsel for Defendant recently filed a Motion for Evidentiary Hearing and Leave to Supplement the Record. Specifically, counsel argues that a hearing and additional briefing is needed due to the State's "perplexing argument" that Rule 35 is not the proper vehicle for the claims proffered. Counsel writes:

The State's absentee defense on the merits places the Defendant in a vulnerable position and at a distinct disadvantage. The Defendant is unable to rebut any seemingly well-reasoned but nevertheless flawed objections to the four claims, and this lack of adversarial testing does not further the interests of justice. Accordingly, the Defendant should be afforded the opportunity to submit ancillary argument and to be heard prior to any disposition by the Court.

The Court, having carefully considered and denied the Rule 35 Motions on both procedural and substantive grounds is certain that a hearing and supplemental documents from counsel would not change the outcome. The rule does not require a hearing nor does the Court believe additional argument would have been of assistance. Thus, this request is denied.<sup>18</sup>

## II. THE RULE 61 MOTION

Defendant's *pro se* filings in relation to his Rule 61 Motion initially seem overwhelming, however, they boil down to three requests: (1) appointment of an

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<sup>18</sup> Counsel's Motion contained substantive arguments applicable to the Rule 35 Motions, which were considered, as applicable, in the above discussion.

attorney to aid in his Rule 61 Motion; (2) a “12-minute hearing” on why he needs counsel and other issues already raised by counsel in the Rule 35 Motions; and (3) appointment of an attorney to help Defendant challenge the validity of a prior forgery conviction (used as a prior conviction for habitual offender purposes). This Court hereby grants Defendant’s request for counsel in his Rule 61 Motion, denies at this time his request for a hearing, and denies his request for the appointment of separate counsel to challenge a prior conviction.

Defendant filed his Rule 61 Motion on August 6, 2013, along with a Motion for Limited Appointment of Counsel. Thereafter he filed another Motion for Counsel (along with other requests) which left the Court uncertain as to the specific requests he was making. As such, the Court asked Defendant to clarify his request by letter on December 26, 2013. Defendant’s response by letter filed January 24, 2014, was that he wanted Mr. Ramunno to continue with the Rule 35 Motions and he wanted a new attorney(s) to help him with two claims: (1) challenging the validity of a prior forgery claim and (2) his Rule 61 claims. Further, Defendant wishes to have a “12-minute hearing” where he can be heard on the following issues: (1) the Supreme Court’s holding that there was “sufficient evidence to support an acquittal of the First Degree Robbery charge;” (2) the Court’s use of two prior convictions, which Defendant alleges were non-

qualifying for habitual offender purposes; (3) alleged improper conduct by the State during plea negotiations; (4) Defendant's request for counsel to challenge the forgery conviction; and (5) Defendant's request for counsel for his present Rule 61.

Since this is the first Rule 61 filing in this matter, the Court will appoint Defendant counsel to pursue a Rule 61 Motion.<sup>19</sup> Defendant needs to be aware, however, there are limits as to what may be presented in such motion and in what context they can be argued. This will likely mean that counsel will need to review Defendant's assertions and, when appropriate, file an amended Rule 61 Motion asserting those claims that counsel, in good faith, finds have merit and fit within the procedural context of such motion. Defendant should be aware that this may also mean that issues he believes should be raised, his counsel may find in their professional judgment are without merit and should not be pursued. Therefore, the present Rule 61 filed by Defendant *pro se* will be stayed with the expectation that an amended Rule 61 Motion will be filed. The Court will, therefore, not address the plethora of other claims made by Defendant in his *pro se* motion at this time.

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<sup>19</sup> See Super. Ct. Crim. R. 61 ("The court will appoint counsel for an indigent movant's first timely postconviction proceeding.").

## CONCLUSION

For the aforementioned reasons, all of Defendant's Rule 35 Motions and supplemental filings by counsel are hereby **DENIED**. Defendant's request to appoint counsel to assist him with his Rule 61 motion is **GRANTED**.

Defendant's *Pro Se* Motion for Postconviction Relief is **STAYED** pending the appointment of counsel and the submission of amended pleadings, if appropriate.

Defendant's request for a hearing to address his Rule 61 issues is hereby **DENIED** without prejudice.<sup>20</sup>

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

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Judge William C. Carpenter, Jr.

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<sup>20</sup> The ruling on Defendant's *Pro Se* Motions includes and disposes of all related filings in the record to date even if not explicitly referenced herein.