IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	I.D. No. 1111010324
v.	)	
DAVEAR WHITTLE,	)	
Defendant.	)	

Submitted: June 18, 2015
Decided: July 8, 2015

Upon Defendant's *Pro Se* Motion for Postconviction Relief
& Request for Appointment of Counsel.
DENIED.

ORDER

This 8th day of July 2015, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. On November 7, 2014, Defendant, Davear Whittle, pled guilty to one count of Manslaughter and one count of Possession of a Firearm During the Commission of a Felony. Defendant was sentenced on January 9, 2015.

2. Five months later, in May, 2015, Defendant filed the instant motion for postconviction relief pursuant to Superior Court Criminal Rule 61. Defendant also filed a letter requesting that the Court appoint him

postconviction counsel. Defendant is not entitled to the appointment of counsel. Also, it appears from the record that Defendant is not entitled to relief, and the motion is subject to summary dismissal.

3. Defendant is not entitled to be appointed counsel under Superior Court Criminal Rule 61(e)(2) because the conviction has not been affirmed by final order upon direct appellate review, the motion does not set forth a substantial claim that the movant received ineffective assistance of counsel in relation to the plea of guilty, and the Defendant has not made the Court aware of any exceptional circumstances that would warrant the appointment of counsel.[1]

4. The Delaware Supreme Court has held that "[a defendant]'s voluntary guilty plea constitutes a waiver of any alleged errors occurring before the entry of the plea. Absent clear and convincing evidence to the contrary, [a defendant] is bound by the answers on the Truth–in–Sentencing

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[1] Superior Court Criminal Rule 61(e)(2). "The judge may appoint counsel for an indigent movant's first timely postconviction motion and request for appointment of counsel if the motion seeks to set aside a judgment of conviction that resulted from a plea of guilty . . . only if the judge determines that: (i) the conviction has been affirmed by final order upon direct appellate review or direct appellate review is unavailable; (ii) the motion sets forth a substantial claim that the movant received ineffective assistance of counsel in relation to the plea of guilty or nolo contendere; (iii) granting the motion would result in vacatur of the judgment of conviction for which the movant is in custody; and (iv) specific exceptional circumstances warrant the appointment of counsel." *Id.*

form and his . . . statements to the judge during the guilty plea colloquy."[2] The Court has also held that, through a voluntary and intelligent plea bargain, a defendant forfeits his right to challenge the underlying strength of the charge to which he pled guilty.[3]

5. Defendant's first ground for relief claims that he received ineffective assistance of counsel because his attorney "did not investigate case prior to plea agreement, failed to fully inform [Defendant] of conditions of plea also failed to provide innocence evidence at sentencing." In order to establish a claim of ineffective assistance of counsel in the context of a guilty plea challenge, a defendant must show that his attorney's deficient performance was so prejudicial that, but for counsel's errors, the defendant would not have pled guilty.[4]

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[2] *Purnell v. State*, 100 A.3d 1021, *3 (Del. 2014); *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997) ("With or without the witness oath, a defendant's statements to the Superior Court during the guilty plea colloquy are presumed to be truthful.").

[3] *Downer v. State*, 543 A.2d 309, 312 (Del. 1988) ("[Defendant], through a voluntary and intelligent plea bargain, has forfeited his right to attack the underlying infirmity in the charge to which he pleaded guilty.").

[4] "In the context of a guilty plea challenge, *Strickland* requires a defendant to 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." *Purnell v. State*, 100 A.3d 1021, *2 (Del. 2014) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

6. Before his original conviction was reversed,[5] Defendant had been sentenced to forty-nine years in prison. Instead of going to trial a second time, his attorney secured a plea deal under which the State would recommend only nine years in prison. On his Truth-in-Sentencing form, Defendant acknowledged that he was satisfied with his lawyer's representation, and that his lawyer fully advised him of his rights. The only specific facts Defendant includes about his lawyers representation state that his lawyer did not "provide innocence evidence at sentencing." Counsel acted reasonably in that respect because Defendant had already pled guilty to the crimes on November 7, 2014. In light of the guilty plea, evidence of "innocence" is singularly misplaced. Rather, in preparation for sentencing, Defendant's counsel submitted to the Court an eight page mitigation report written by a mitigation specialist and a sixteen page evaluation of the Defendant written by a PhD. The Court finds that Defendant's ineffective assistance claim is meritless.

7. Defendant's second ground for relief is conflict of interest. Defendant writes: "Honorable Judge Butler was once Chief Prosecutor then intervened in appointment of counsel, and specifically requested to reside

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[5] *See Whittle v. State*, 77 A.3d 239 (Del. 2013), *as corrected* (Oct. 8, 2013).

over sentencing, also reacted to 'Public Clamor.'" The Court recalls that there was extensive discussion about the Judge's prior familiarity with Defendant's case (there was none, but records were checked just to be sure). And the Court further recalls that it commented on the public's frustration with crimes such as that committed by Defendant – senseless shootings in Wilmington among young men involved in the drug trade. Public frustration at sentencing is in the mainstream of considerations at a criminal sentencing and depicts neither a conflict of interest nor any bias against the Defendant individually.

8. Defendant's third ground for relief is "Excessive Sentencing." Defendant writes: "The plea stated 2 to 5 years, yet I was sentenced to 20 years, thus 20 years is 5 plus over original min/man sentence of Murder 2nd degree." It seems that the Defendant objects to the fact that the Court imposed a longer prison sentence than the State's recommendation of nine years under the plea agreement. First, the State's recommendation is not binding upon the Court.[6] Second, when he pled guilty, Defendant acknowledged on his Truth-in-Sentencing form that the charges he was pleading guilty to carried a maximum combined period of incarceration of 50 years. Defendant was sentenced to 25 years in prison. 25 years in prison

[6] Superior Court Criminal Rule 11(e)(1)(B).

can hardly be labeled an "excessive" punishment for a Defendant who pled guilty to firing a handgun multiple times at an occupied stationary vehicle, thereby killing an occupant who was unarmed and seated in the passenger seat of the vehicle.

9. For the reasons set forth above, Defendant's motion is **DENIED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Charles E. Butler, Judge