

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	ID No. 1412017874
	)	In and For Kent County
v.)	
	)	RK15-01-0183-01 DDeal Tier 4 (F)
JERMAINE D. BRINKLEY,	)	RK15-01-0187-01 DDeal Tier 4 (F)
	)	RK15-01-0191-01 Tier 5 Poss (F)
Defendant.	)	RK15-01-0203-01 Drug Dealing (F)
	)	RK15-01-0204-01 Drug Dealing (F)
	)	RK15-02-0095-01 DDeal Tier 4 (F)
	)	RK15-02-0106-01 Tier 5 Poss (F)
	)	RK15-02-0129-01 Consp. 2 nd (F)

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Lindsay A. Taylor, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Christopher S. Koyste, Esquire, for defendant.

FREUD, Commissioner
October 1, 2020

The defendant, Jermaine D. Brinkley, (“Brinkley”), pled guilty and was sentenced at his final case review on June 30, 2016 (“June 30, 2016 Sentence Order”) to three counts of Drug Dealing Tier 4 Quantity of Heroin, 16 *Del. C.* §4752; two counts of Tier 5 Aggravated Possession of Heroin, 16 *Del. C.* § 4752; two counts of Drug Dealing Heroin, 16 *Del. C.* §4754; and one count of Conspiracy in the Second Degree, 16 *Del. C.* § 512. He also faced one count of Racketeering, eight counts of

Drug Dealing Tier 4, eight counts of Tier 5 Possession of Heroin, two counts of Drug Dealing with Aggravating Factors, sixteen counts of Drug Dealing; thirty-six counts of Conspiracy in the Second Degree, three counts of Tier One Possession, two counts of Tier 3 Possession and one count of Resisting Arrest for which nolle prosequis were entered by the State in exchange for Brinkley's plea. As part of the plea deal the State agreed Brinkley's Level V time from a separate case, ID No. 1204003639, could be served concurrent with the Level V time imposed in this case. The State and Defense jointly recommended a sentence of 157 years incarceration, suspended after serving fourteen years, ten of which were minimum mandatory, followed by probation. The Court agreed with the sentence recommendation and sentenced Brinkley accordingly. Had Brinkley gone to trial and been found guilty as charged he faced substantial time in prison including an additional 32 years minimum mandatory. Brinkley did not appeal his conviction or sentence to the State Supreme Court.

This case presents unique procedural and factual issues which I will endeavor to outline. As noted above, during the Plea Colloquy both the State and the Defense agreed to recommend a sentence of 157 years incarceration suspended after serving a total of fourteen years, ten of which were minimum mandatory time. I will quote extensively from the Plea Colloquy.¹

MS. TAYLOR: ... As Your Honor will note, the original plea was for a presentence investigation, however, the State and defendant are requesting immediate sentencing which is the reason for the extremely tiny handwriting on the plea form.²

¹ While the colloquy is a bit disjointed at parts it is ultimately extremely clear as to all the parties' intentions, *State v. Brinkley*, Del. Super., ID No 1412017874, June 30, 2016.

² Transcript of Plea & Sentencing, p. 2.

MS. TAYLOR: ... Today the defendant will be pleading guilty to Count 17, IK15-01-0191, Aggravated Possession of a Tier 5 Quantity of Heroin; Count 26, IK15-01-0183, Drug Dealing Tier 4 Quantity of Heroin; Count 59, IK15-01-0187, Drug Dealing Tier 4 Quantity of Heroin; Count 67, IK15-01-0203, Drug Dealing Heroin; Count 73, IK15-01-0204, Drug Dealing Heroin; Count 94, IK15-02-0095, Drug Dealing Tier 4 Quantity of Heroin; Count 108, IK15-02-0106, Aggravated Possession of a Tier 5 Quantity of Heroin; Count 142, IK15-02-0129, Conspiracy Second Degree.

The State will enter a nolle prosequi on the remaining charges on this case upon entry of the plea.

The State and defendant are recommending immediate sentencing.

As to Count 17 - 25 years Level V suspended after two years minimum mandatory followed by 18 months Level III probation.

Count 26 - 25 years Level V suspended after three years, two of which are minimum mandatory, followed by one year Level IV work release followed by 18 months Level III probation.

Count 59 - 25 years Level V suspended after three years, two of which are minimum mandatory, followed by 18 months Level III probation.

Count 67 - 15 years Level V suspended after one year followed by one year Level III probation.

Count 73 - 15 years Level V suspended after one year followed by one year Level III probation.

As to Count 94- 25 years Level V suspended after two years minimum mandatory followed by 18 months Level III probation.

Count 108 - 25 years Level V suspended after two years minimum mandatory followed by 18 months Level III probation.

Count 142 - two years Level V suspended for one year Level II probation.

Levels V and IV are to run consecutively.

Level III is to run concurrent.

The State notes for the record that Counts 67 and 73 are aggravated to the felony level C due to the defendant's prior qualifying Title 16 conviction.

The State also notes that the - - and the plea form indicates that it is the request of the parties that this sentence run concurrent with Case Number 1204003639.³

* * *

MR. MALIK: ... I would first note that Ms. Taylor's recitation of the terms and conditions of the plea agreement is correct and accurate. There were a lot of terms and conditions and she recited them all accurately.

I've reviewed the case carefully with my client, Your Honor, over the course to the past year and a half it's been and we met this weekend to discuss the case, to discuss the potential pleas. We met yesterday and, again, we're appreciative of the opportunity to meet and speak again

³ Transcript of Plea & Sentencing, pp. 3-5 (emphasis added).

today.

I believe that my client understands all aspects of the charges that he faces and all the facts behind the charges. We discussed the potential penalties and we discussed what the potential penalties would be pursuant to this plea agreement.

I also advised Mr. Brinkley that he did have the right to proceed to trial and he knows what his trial rights are and he's knowingly, intelligently, and voluntarily waiving them.

He is aware these are felony offenses. He already has a prior felony conviction but we went over the fact that this is a felony and there is a provision that no firearms can be possessed being a convicted felon.

Your honor, I've advised Mr. Brinkley that the recommendation, that has been made by the State and has been agreed upon to by the defense is just that, that the Court has the ability to accept or reject it. The Court has the final decision. He is aware of that.

I've advised him as well that even though there is immediate sentencing that's, again, discretionary with the Court. The Court can accept that or order a presentence investigation.

Your honor, based upon my discussions with Mr. Brinkley, I believe he understands all aspects of the plea agreement, the consequences and collateral consequences, and he is prepared to enter a knowing, voluntary and intelligent plead before Your Honor. Thank you.⁴

* * *

⁴ Transcript of Plea & Sentencing, pp. 7-9 (emphasis added).

THE COURT: I will tell the parties that I am fairly familiar with this case and all of its consequences since this was originally a wiretap case. So I am aware of the - - most, if not all, of the circumstances involved here.

The other question I have for the parties is that the agreement is that the Levels IV and V are to run **consecutive**. By my count, which is based upon lawyers' math which we know is notoriously inaccurate, although the parties standing before the Court may be excepted that they are more intelligent than I am, but I count a total of **15 years incarceration**.

Now, if you add up the - -

MR MALIK: IV and V?

THE COURT: if you add up the entire program here where the suspended Level V sentence is after a certain level of time but the level time adds up to 15 years.

Now, question for you. Is all that time at Level V to run concurrent or just the non-mandatory time?

In other words, some of these offenses have mandatory time based on the statute. Is the non-mandatory time to run concurrent or is it all Level V time to run concurrent?

MS. TAYLOR: **It's the request of the parties that it run consecutively.**

THE COURT: I'm sorry. I misread it. I see you - - you are looking at me puzzling and I understand that because I misread the word. I thought it said concurrent. I apologize. **So its's consecutive.**

MR. MALIK: Your honor, our understanding was there

was going to the **Level V total of 14 years** and then there would be one year Level IV.

THE COURT: Maybe I miscalculated.

MR. MALIK: and then the concurrent portion, Your Honor, you'll remember we had that case much like this when it was - -

THE COURT: Correct.

MR. MALIK: - - with Mr. Brinkley and that's the case we're asking the Court to run these sentences on this wiretap case concurrent with that other. It was two-and-a-half year sentence that the Court imposed on that case, Your Honor.

THE COURT: And you're asking the Court to run - - to have the sentence to run concurrent with that case, that is, the Level V time to run concurrent?

MS. TAYLOR: That's the request of the parties, Your Honor.

THE COURT: Okay. I just want to be real careful. I want to make the order very clear so we don't have any confusion - -

MR. MALIK: Yes, Your Honor.

THE COURT: - - at the DOC level.

MR. MALIK: Yes. This wiretap case we've agreed on 15 years Level V, one year at Level IV and then - -

MS. TAYLOR: 14.

MR. MALIK: I'm sorry. I'm confusing the situation, Your Honor. 14 years at Level V.

THE COURT: All right. Let me count that up again. Okay. You are correct. You are correct. I miscalculated on Court 142. I counted one year Level V. *It says two years Level V suspended* for one year Level II. So I'm inaccurate. So it is 14 years.

MR. MALIK: Yes, Your Honor.

THE COURT: Just to make the record clear, 14 years. But the 14 years, along with any Level IV time, is to run consecutive. Correct?

MS. TAYLOR: Correct, Your Honor.

THE COURT: Okay. Understood. All right. Thank you counsel. I will now turn to Mr. Brinkley.

Mr. Brinkley, you've heard the comments and presentations by counsel, both the State and the defense, we've gone over this plea agreement very carefully.

Is there anything about this plea agreement that you don't understand?

THE DEFENDANT: Yes. I understand everything.

THE COURT: You do?

THE DEFENDANT: Yes, sir.

THE COURT: Is it pretty clear to you at this point?

THE DEFENDANT: Yes.

THE COURT: So you agree with what's been said by counsel. Correct?

THE DEFENDANT: Yes, Sir.⁵

* * *

THE COURT: Thank you. Do you understand you're entering a plea of guilty to, in essence, eight counts?

THE DEFENDANT: Yes.

THE: Yes.

THE COURT: No. I mean - - 11 counts.

MS. TAYLOR: It's eight.

MR. MALIK: It's eight counts, You're Honor.

THE COURT: I guess you've combined.

MR. MALIK: We had, Your Honor, three Drug Dealing Tier 4's, two Drug Dealings no tier, two Aggravated Possession Tier 5, and a Conspiracy Second for a total of eight.

THE COURT: Okay. It's eight counts. I miscounted again.

THE CLERK: Here you go.

THE COURT: So it is eight counts. I recounted again. I apologize. It's eight counts.

The counts which I'm going to go over again real quickly

⁵ Transcript of Plea and Sentencing, pp. 9-13 (emphasis added).

in the sense that, enumerate them, that you are pleading guilty to a count of Aggravated Possession - - actually, two counts of Aggravated Possession, five counts of Drug Dealing of which of those five counts three counts are Tier 4 heroin and two counts are heroin, just, I guess, dealing in heroin, a Class C felony. Additionally, you're going to enter a plea to Conspiracy Second Degree.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And these counts, the three counts of Drug Dealing with a Tier 4 carry a maximum penalty of 2 to 25 years of which the two years is minimum mandatory required by law and there's three of them.

You also are pleading guilty to two of the Aggravated Possession of Heroin a Tier 5 and that carries a maximum penalty between 2 to 25 years each.

Two counts of Drug Dealing Heroin which each of those offenses carries a maximum penalty up to 15 years. There's no minimum mandatory required on that.

Also, Conspiracy Second Degree, which carries a maximum penalty to you of up to two years.

Associated with all of these offenses is potentiality of my assessing a fine.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So all together when you add up the total potential incarceration, you could be sentenced to 157

years in prison at Level V but you also have a minimum of, I guess, ten years minimum mandatory.

MR. MALIK: That's correct, Your Honor.

THE COURT: Ten years of minimum mandatory.

THE DEFENDANT: Yes, sir.

THE COURT: **Which I can't suspend.** Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Very good. Thank you. But, actually, you are actually - - the State is going to nolle prosequi the balance of all of the charges which, if you were convicted of all charges, that could result in excess of 500 years, I believe, potential incarceration. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you. Having said all of that, are you in fact pleading guilty with respect to the charges as set forth in the plea agreement?

THE DEFENDANT: Yes, sir.⁶

* * *

THE COURT: ... The Court will adjudicate Mr. Brinkley guilty of the charges set forth in the plea agreement. He will pay the cost of the prosecution plus all statutory surcharges.

⁶ Transcript of Plea & Sentencing, pp. 15-18 (emphasis added).

Given the extent and nature of the charges here, I'm not going to impose a fine.

The Court in connection with Count 17, which is IK15-01-0191, will sentence you as follows - 25 years Level V suspended after serving two years Level V, which is the minimum mandatory required by law, followed by 18 months Level III probation.

On Court 26 - 25 years Level V suspended after serving three years Level V, which is the minimum mandatory required by law, followed by one year at Level IV work release followed by 18 months Level III probation.

On Count 59 - - by the way, the IK number for that would be IK15-01-0187. I think I omitted the IK numbers in the other charges. So I will go back and do that. Count 17 is IK15-01-0191 and Count 26 is IK15-01-0183.

We're now on Count 59, IK15-01-187 - 25 years Level V suspended after serving three years, which is the minimum mandatory required - - I mean, strike that - - three years with two years of that offense minimum mandatory required by law followed by 18 months Level III probation.

In case I omitted that on Count 26, the sentence should be 25 years Level V suspended after serving three years, which two years is minimum mandatory required by law, followed by one year Level IV work release followed by 18 months Level III probation.

Count 67, IK15-01-0203, 15 years Level V suspended after serving one year at Level V followed by one year at Level III probation.

On Count 73, IK15-01-0204, 15 years Level V suspended

after serving one year followed by one year at Level III probation.

On Count 94, IK15-02-0095, 25 years Level V suspended after serving two years, of which the two years is the minimum mandatory required by law, followed by 18 months Level III probation.

On Count 108, IK15-02-0106, 25 years Level V suspended after serving two years, which is the minimum mandatory required by law, followed by 18 months Level III probation.

On Count 142 - two years Level V suspended for one year at Level II probation.

Levels V and IV on all counts to run consecutive.

Level III will run concurrent on all counts.

The sentence is to run concurrent with Case Number 120400 - - 4? 1204005639?

MS. TAYLOR: 3639, Your Honor. My apologies.

THE COURT: Oh. 3639.

MS. TAYLOR: Sorry about that, Your honor.⁷

As can be clearly seen from the transcript, the intent of the State, Defense Counsel, Brinkley and the Court ultimately when proclaiming from the bench the final sentence, was for Brinkley's Level V time in this case to all run consecutively and that he therefore serve fourteen years in jail, ten of which were minimum

⁷ Transcript of Plea & Sentencing, pp. 22- 24 (emphasis added).

mandatory which the Judge indicated he could not suspend.⁸ Brinkley acknowledged the same, clearly indicating he was aware of the minimum mandatory time at Level V he must serve would be ten years. The confusion in a part of the colloquy had to do with several issues. One being, as noted by the State, the parties agreed to immediate sentencing at the last minute leading to a very “busy” plea sheet with lots of tiny writing that no doubt caused some confusion while reciting the Plea Agreement. Secondly, Brinkley had a separate case to which he had previously pled guilty to and been sentenced, that was added into the mix. That separate case was to be served concurrent to the fourteen years jail time in this case. Under these facts it is no wonder that there was some confusion. That being said, a fair reading of the entire transcript especially the judge’s pronouncement that the Level V time would be consecutive, clearly shows the judge’s and parties’ intention. Nonetheless, when the sentence was entered into the Automated Sentencing Order Program (“ASOP”) by a court clerk, language was placed on the first page of the Sentence Order which mistakenly listed the jail time to be “concurrent.”

Commitment

Nolle Prosequi on all remaining charges in this case.

SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS.

ALL SENTENCES OF CONFINEMENT, SHALL RUN CONCURRENT.⁹

Later however in the same Sentence Order, at page 6 it is clear the intention is that the Level V time be “consecutive” when noting the following language:

⁸ Brinkley argues that at the time of the sentencing the Court “could” have had the minimum mandatory time run concurrently. However the Transcript of Plea & Sentencing clearly shows the Judge did not intend that especially since he clearly stated that he could not suspend that time.

⁹ *State v. Brinkley*, Del. Super., ID No. 1412017874, Sentence Order (June 30, 2016).

NOTES

This sentence is to run concurrent with case number 1204003639.

The Level 5 and Level 4 sentence is to run consecutive.

The Level 3 is the (sic) run concurrent.¹⁰

Thus the only place where “concurrent” is used as to Level V is on the first page of the Sentence Order, not in the Plea Agreement, not in the recitation of the Plea Agreement by the State, not by defense counsel, not by Brinkley himself, not in the Plea Colloquy and not by the Judge when stating the sentence. While researching this case I inquired with the Prothonotary concerning how such a thing could have occurred. While none of the clerks involved, understandably, recalled this particular case, several years later, I was told that when a clerk inputs the sentence into the automated system the “concurrent” and “consecutive” language are one on top of the other in a drop down box and thus it could be very easy for a clerk to accidentally hit the wrong box. The e-mail I received from our court paralegal attached a screen shot of the program used to input the sentence and is attached as Exhibit A. Therefore, I conclude, based upon the ease with which a clerk could mistakenly select the incorrect language and the clear record indicating the intention of all the parties and the Court that the Level V be consecutive, that a clerical error occurred during the inputting of the Sentence into ASOP. This conclusion is bolstered by this Court’s subsequent action and the conclusion drawn by the Delaware Supreme Court when it reviewed Brinkley’s appeal from the denial of the Motion to Correct an Illegal Sentence.

While I do not have all the details, the record and Brinkley’s motion suggest

¹⁰ Sentence Order June 30, 2016 at p. 6.

that due to the clerical error on the first page of his Sentence Order which listed the Level V time being “concurrent” the Department of Corrections calculated his sentence accordingly and set Brinkley to be moved to Level IV Work Release in mid-July 2017.¹¹ Since he had not yet been transferred to Level IV, Brinkley requested a copy of the docket and his Sentence Order on August 14, 2017. He subsequently filed a Motion for Correction of an Illegal Sentence under Superior Court Criminal Rule 35 on September 21, 2017. It appears that the Department of Corrections mistakenly moved Brinkley to Level IV in September 2017 based upon their calculation of a three year concurrent time. This error was subsequently discovered and he was returned to Level V on October 12, 2017. Next, the Sentencing Judge issued a corrected Sentence Order on October 17, 2017 when the error in Brinkley’s June 30, 2016 Sentence Order was discovered. Docket entry number 68 for September 22, 2017 states: “Corrected Sentence Order prepared on October 18, 2017 regarding the typographical error.” Clearly, the sentencing judge knew what his intentions were when he sentenced Brinkley and was instantly aware a clerical error had been made and rightfully issued a corrected Sentence Order pursuant to Superior Court Criminal Rule 36 which required no notice to Brinkley. On October 23, 2017 the Court denied Brinkley’s Motion for Correction of Illegal Sentence. Docket entry number 69 states: “The corrected Sentencing Order in place is a correct reflection of the colloquy and decision of this Court.”

Next, on November 22, 2017 Brinkley appealed the denial of his motion to the State Supreme Court who after review of the record along with the Transcript of the

¹¹ I must note however that the sentence also says hold at Level V pending availability of Level IV so even if the July 2017 release date was somehow correct that would not guarantee a release to Level IV.

Plea and Sentence likewise concluded that a clerical error had been made and denied Brinkley's appeal. As the Delaware Supreme Court noted and affirmed on July 10, 2018: "The Superior Court is authorized to correct a clerical error in an automated sentence order to make the record conform to the actual sentence imposed."¹²

Thus not only do I, after a thorough review of the complete record, but the Sentencing Judge and the State Supreme Court all conclude that the language on the first page of the June 30, 2016 Sentence Order stating the Level V would be "concurrent" was entered mistakenly due to a clear clerical error made by court staff while entering the order into the automated Sentence system and did not reflect the intent of the Sentencing Judge on June 30, 2016. After the Mandate was issued on July 26, 2018, the Superior Court docket has nothing on it until July 11, 2019 when Appointed Counsel filed a motion for postconviction relief on behalf of Brinkley.¹³

¹² *Brinkley v. State*, 2018 WL 3385614 citing Del. Super. Ct. Crim. R. 36 and *Gibbs v. State*, 229 A2d 502, 504 (Del. 1967),

¹³ Brinkley never filed a *pro se* motion under Superior Court Criminal Rule 61 nor did he petition this Court for the Appointment of Counsel. The Office of Conflicts Counsel for reasons unknown to the Court appointed counsel to represent Brinkley. Under the normal procedure of this Court it is extremely unlikely that counsel would have been appointed to represent Brinkley. Super. Ct. Crim. R. 61(e)(3) states that counsel should only be appointed in first postconviction motion following a guilty plea "if the motion seeks to set aside a judgment or conviction ... only if the judge determines that: (i) the conviction has been affirmed by final order on direct appeal...; (ii) the motion sets forth a substantial claim that the movant received ineffective assistance of counsel in relation to the guilty plea...; (iii) granting the motion would result in vacating of the judgment of conviction, ...; and (iv) a specific exception circumstance warrants appointment of counsel" (emphasis added). In this case none of these requirements are met. The motion does not seek to set aside the judgment, does not allege ineffective assistance of counsel in relation to the guilty plea nor would granting it result in vacating of the judgment. The motion is simply seeking to have Brinkley's sentence revert to the erroneous initial version and/or to be given the opportunity to be re-sentenced with a hearing and defense counsel present.

BRINKLEY 'S CONTENTIONS

In the Rule 61 motion, Brinkley's Appointed Counsel raises the following grounds for relief:

Ground one: This Court's October 17, 2017 corrected Sentence Order was imposed in violation of the United States and Delaware Constitutions and Deprived Mr. Brinkley of his right to procedural due process of law, substantive due process of law and the effective assistance of counsel.

Ground two: If this Court finds that it does not have jurisdiction under Rule 61 to grant the requested relief, this Court can nevertheless grant relief pursuant to Rule 35.

DISCUSSION

Under Delaware law, the Court must first determine whether Brinkley has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.¹⁴ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.¹⁵ Brinkley's motion was filed more than a year after his plea and sentence but within a year of the Mandate issuing after his appeal from his Motion for Correction of Illegal Sentence and is, as such, timely regarding that issue. Thus

¹⁴ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

¹⁵ Super. Ct. Crim. R. 61(i)(1).

the bar of Rule 61(i)(1) does not apply to the motion. As this is Brinkley's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.¹⁶ The bars to relief are inapplicable to a jurisdictional challenge or "to a claim that satisfies the pleading requirements of subparagraph (2)(i) or (2)(ii) of subdivision (d) of Rule 61."¹⁷ To meet the requirements of Rule 61(d)(2) a defendant must plead with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted¹⁸ or that he pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United State or Delaware Supreme courts, applies to the defendant's case rendering the conviction invalid.¹⁹ Brinkley's motion pleads neither requirement of Rule 61(d)(2). None of Brinkley's claims were raised at the plea, sentencing or on direct appeal. Therefore, they are barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice.

Prior to going any further in addressing Brinkley's claims I must note that

¹⁶ Super. Ct. Crim. R. 61(i)(3).

¹⁷ Super. Ct. Crim. R. 61(i)(5).

¹⁸ Super. Ct. Crim. R. 61(d)(2)(i).

¹⁹ Super. Ct. Crim. R. 61(d)(2)(ii).

Superior Court Criminal Rule 61 states clearly the scope of the rule:

Rule 61

(a) Scope of rule

(1) Nature of proceeding - This rule governs the procedure on an application by a person in custody under a sentence of this Court seeking to set aside the judgment of conviction or a sentence of death on the ground that the Court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a **criminal conviction or capital sentence**. A proceeding under this rule shall be known as a postconviction proceeding,²⁰

In his motion Brinkley never calls into doubt his criminal conviction, he does not claim innocence or ineffective assistance of counsel at his plea. Nor was he subject to a capital sentence. Brinkley's argument revolves around the correction of his sentence by this Court to remove the term "concurrent" from the first page of his June 30, 2016 Sentence Order, not that his conviction itself is flawed. Our State Supreme Court has held that when a defendant fails to contest the legality of their conviction any other claims are not cognizable under Rule 61.²¹ Consequently, Brinkley's motion is not properly filed under Rule 61.

Appointed Counsel argues that even if Brinkley's claim does not fall under the parameters of Rule 61 the Court should nevertheless grant the relief requested pursuant to Superior Court Criminal Rule 35. Rule 35 is the mechanism under which

²⁰ Super. Ct. Crim. R. 61(a)(1), (emphasis added).

²¹ *Gilmore v. State*, 135 A.3d 77, (TABLE), (Del. March 10, 2016), citing *Wilson v. State*, 2006 WL 1291369, *2 (Del. May 9, 2006) which held that defendant's sentencing claims were not cognizable under Rule 61.

the Court can correct an **illegal** sentence or reduce a sentence. It states in relevant part:

Rule 35 Correction or Reduction of Sentence.

(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 imposed ... 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. ...²²

© 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.²³

Brinkley's argument can be summarized as follows. He claims that the Court was in error when it *sua sponte* corrected the June 30, 2016 Sentence Order on October 17, 2017 to remove the "concurrent" language on page one and to add the automatically system generated language concerning the financial obligations without allowing him and counsel to be present in order to make arguments against the correction. Thus it seems he is saying that under Rule 35(a) the Court can grant the relief requested because the sentence was "imposed in an illegal manner" i.e. without the defendant or counsel present. Brinkley spends a great deal of time in his motion outlining various Federal and State case law for the proposition that a defendant is

²² 11 *Del. C.* § 4217 deals with the application by the Department of Corrections to reduce a Level V sentence for good cause. This provision is not relevant in Brinkley's case.

²³ Super. Ct. Crim. Rule 35(a), (b) and (c).

entitled to be present with counsel when a sentence is modified.²⁴ He also goes through case law which holds that in certain circumstances a defendant gains a legitimate expectation of release. I have reviewed all the cited cases and find that they are not on point in Brinkley's case. In the cases cited by Brinkley the various courts are all reviewing sentences that were modified for a number of different reasons but they were not corrected due to a clerical error made while entering the sentence in an automated sentence program as is the case with Brinkley's sentence. Not one of the cited cases is analogous to Brinkley's case.

As noted by the State Supreme Court in Brinkley's appeal from the denial of his sentence modification motion, his sentence was not modified under Superior Court Criminal Rule 35 but corrected under Rule 36.

Superior Court Criminal Rule 36 states:

Rule 36. Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the Court at any time and after such notice, if any, as the Court orders.

Delaware case law is clear that this Court may correct a sentence if there was a clerical error. In *Guyer v. State*²⁵ the defendant was found guilty as charged after a jury trial of three counts each of Receiving Stolen Property and Conspiracy in the Second Degree. Subsequently he was also found guilty in an unrelated matter. Guyer agreed to the second Trial Judge sentencing on both sets of convictions. That judge

²⁴ It must be noted that the court did not *modify* Brinkley's sentence on October 17, 2017 – it *corrected* the clerical error.

²⁵ 453 A.2d 462 (Del. 1982).

made it clear that he intended to impose an aggregate sentence of two years in jail for all the convictions.²⁶ Similarly in Brinkley's case the judge made it clear that he intended to have Brinkley serve a total of fourteen years in jail, ten of which would be minimum mandatory time.²⁷ In *Guyer* the State, prior to sentencing, mentioned that there was a possibility that certain offenses had merged. The Court sentenced Guyer to one year in prison on each of two Receiving Stolen Property charges and to probation on the remaining charges from the first case.²⁸

Subsequently, after Guyer began serving his sentence, upon a motion from the State, the court corrected the sentence order merging the three Receiving Stolen Property counts into one and the three Conspiracy in the Second Degree into one and gave Guyer one year in prison for each newly merged charge. On appeal the State Supreme Court noted:

The sentence correction that occurred here is clearly authorized by statutory and decisional law of Delaware. Superior Court Criminal Rule 36; *Gibbs v. State*, Del. Supr., 229 A.2d 502 (1967).

Criminal Rule 36 empowers the Superior Court to correct clerical mistakes in the record resulting from 'oversight or omission.' FN 5 In *Gibbs*, this Court applied the Rule to affirm a sentencing judge's correction of his ambiguous or erroneous recording of a sentence. 229 A.2d at 504. There, the sentencing judge expressed his intent to impose five consecutive five-year sentences, to be served concurrently with a sentence for life imprisonment. The sentence entered in the docket, however, was ambiguous, if not

²⁶ *Id.* at 464.

²⁷ Transcript of Plea & Sentencing at pp. 11 - 12, 17, 22 - 24.

²⁸ *Guyer* at 464.

erroneous, stating in part: '[i]mprisonment for five (5) years on each charge. Sentence to be concurrent with the one for life imprisonment.' The docket entry thus created the mistaken impression that the five-year sentences were to run concurrently with one another, not consecutively as intended.

In affirming the judge's Rule 36 order of correction, this Court looked to both the judge's recollection of the event and contemporaneous notations in his handwriting which appeared on the presentence report. Here, too, we must examine the court's expressed intent at the time of sentencing and any tangible evidence of that intent. Indeed, a letter from the judge to defense counsel is dispositive on this point. It shows that at the time of sentencing the judge knew that the sentences of two years incarceration may later have to be reassigned to different indictment numbers because of merger. The sentence ultimately imposed, therefore, merely manifested his original intent.²⁹

The facts in *Guyer* are analogous to Brinkley's case where the Sentencing Judge had the June 30, 2016 Sentence Order corrected to reflect his original intent, as clearly stated on the record, that Brinkley serve fourteen years total incarceration. Likewise in *State v. Sheppard* the court found that "the record clearly indicates that the reason for the corrected sentence was a 'clerical error' and therefore the court was permitted to correct the sentence 'at any time.'"³⁰ The Delaware Supreme Court also

²⁹ *Guyer v. State*, 453 A.2d 462, 464-465 (Del. 1982) (add footnotes omitted).

³⁰ *State v. Sheppard*, 1995 WL 108675 at *3 (Del. Super.) citing *Browne v. State*, Del. Super., ID No. K93-02-0056 and 0057A, Ridgely, PJ (May 11, 1993)(Order) and *Hudson v. State*, Del. Supr. No. 345, 1994, Hartnett, J. (Dec. 20, 1994)(Order).

affirmed this principle in *Jones v. State*³¹ stating that “Superior Court Rule 36, for example, permits the Superior Court to correct clerical errors in its records at any time. Accordingly, its provision for notice to the parties are optional.” The court in *Jones* went on to state that the Sentencing Judge may correct a clerical mistake without notice to the parties if the mistake appears on the face of the record.³² In Brinkley’s case it is clear that on the face of the record that the notation on the first page of the Sentence Order stating the sentences were to be served “concurrently” was a clerical mistake as noted earlier. Unlike *Jones* where the Court erroneously imposed a separate sentence for Jones being a habitual offender and did not correct a mere clerical error, in Brinkley’s case all the evidence points to the Judge’s intent to have Brinkley’s sentences be “consecutive” thus proving that the clerk simply clicked or checked the wrong button when entering the automated sentencing order.

More recently in *Wallace v. State*³³ the Delaware Supreme Court held that:

The Superior Court had the authority to correct its sentencing order to reflect its original intent. It is apparent in this case that the Superior Court’s October 8, 2004 Sentencing Order did not reflect its intent to honor the request of Wallace’s probation officer and give Wallace two years of concurrent probation at Level IV. Once the October 8, 2002 Sentencing Order was corrected to reflect the Superior Court’s original intent, Wallace’s motion to correct the sentence was properly denied.³⁴

Like in *Wallace* the court corrected Brinkley’s June 30, 2016 Sentence Order to

³¹ 672 A.2d 554, 555 (Del. 1996).

³² *Id.* citing *United States v. Werber*, 51 F.3d 342, 347 (2nd Cir. 1995).

³³ 925 A.2d 505 (Del. 2007).

³⁴ *Id.* at 2.

reflect the original intent of not only the Sentencing Judge, but the State, defense counsel and Brinkley himself as evidenced by the Transcript of the Plea and Sentencing.

Brinkley throughout his Rule 61 motion and Reply brings up case law where the court either added something new to a sentence at a later date as in *Moore v. State*³⁵ and *Pruitt v. State*.³⁶ Nothing was added to Brinkley's sentence, it was corrected to reflect the intent of the sentencing judge.³⁷ Additionally, the original June 30, 2016 Sentence Order itself stated the terms of incarceration were to be "consecutive" on the final page further demonstrating the clear clerical error while inputting it into the automated sentencing system on the first page of the Sentence Order.

In *Owens v. State*,³⁸ *Nave v. State*,³⁹ and *Jones v. State*,⁴⁰ cited by Brinkley, the modification of the sentence had to do with the modification of an initially illegal sentence, not, as is the case here the correction of a clerical error. Brinkley continues conflating the two issues and persistently fails to acknowledge that a clerical mistake was made, not an illegal sentence or a change of mind by the judge at a later date.

Brinkley focuses on a small snippet of the Transcript of Plea & Sentencing

³⁵ *Moore v. State*, 15 A.3d 1240 (Del. 2011).

³⁶ *Pruitt v. State*, 805 A.2d 177 (Del. 2002).

³⁷ As noted earlier Brinkley contends the language added concerning the court retaining jurisdiction in order to collect costs and fines or restitution somehow enhanced his sentence. He is mistaken since he was not fined or ordered to pay restitution and consequently this automated language could not change his sentence.

³⁸ *Owens v. State*, 2013 WL 85185 (Del.) (Table).

³⁹ *Nave v. State*, 783 A.2d 120 (Del. 2001).

⁴⁰ *Jones v. State*, 672 A.2d 554 (Del. 1996).

where the Sentencing Judge says he “wants to be very clear” as evidenced that there may have been some question as to the judge’s original intent during the sentencing. I find this argument lacking given the clear record of the State, the defense, the Plea Agreement and the Judge all stating multiple times throughout the course of the plea and sentence that the intent of all sides was for Brinkley to serve fourteen years incarceration. To follow Brinkley’s argument would reward him for a clerk’s misfortunate erroneous action of checking off the wrong box in the automated sentencing system.

Brinkley also argues that he had a “legitimate expectation of liberty” in his June 30, 2016 sentence once he was mistakenly moved to the Work Release Center. The key word here is “legitimate” since the June 30, 2016 Sentence Order was on its face erroneous as a result of the clerical error he could have no “legitimate expectation.” Brinkley also claims that he actually thought his jail time might be “concurrent.” Given the record and his acknowledgment during the Plea assenting to the fourteen year sentence, I find his claim hard to believe.

Brinkley also argues that there will be a “chilling effect” if the court does not grant relief because he moved to correct his sentence before he was transferred to Level IV and thus future defendants will not feel inclined to file motions under Rule 35 sentence errors. I also find this argument a stretch since Brinkley’s case is unique in its nature and the countervailing interest of the State in not having defendants benefit from a clerical error and gain the windfall of getting out of jail sooner than they bargained for is stronger.

Finally, Brinkley raises issue with the addition into the October 17, 2017 Sentence Order of the costs and fines language. As I noted earlier this language is part of the mandatory automated sentencing system language that went into effect

between Brinkley's June 30, 2016 Sentence Order and the October 17, 2017 correction of his sentence. This language is automatically placed in all sentences by the system and cannot be removed. To the extent Brinkley argues this altered his sentence he is mistaken because no fines or restitution have ever been added to his sentence so his argument is moot.

CONCLUSION

In conclusion I find that the clear record in this case proves beyond any reasonable doubt that the language in the June 30, 2016 Sentence Order concerning "concurrent" Level V time on page one was put in the Sentence Order as a result of a clerical error and that the court acted properly in correcting the sentence to reflect the clear intent of the Sentencing Judge, the State, defense counsel and Brinkley himself and consequently Brinkley did not have a constitutional right to be present or have counsel when the sentence was corrected by the Court. I further find that Brinkley's claims are not cognizable under either Superior Court Criminal Rule 61 or Rule 35 and should be **denied** as lacking standing. I have also thoroughly reviewed all of Brinkley's claims and conclude that they lack merit.

/s/ Andrea M. Freud
Commissioner

AMF/dsc
oc: Prothonotary