

INTRODUCTION

Before the Court is Defendant Keith Berry's ("Defendant") Motion for Postconviction Relief ("Motion"). Defendant filed the instant Motion for Postconviction Relief as well as a motion for appointment of counsel on October 26, 2020. Defendant was appointed counsel, who filed a Motion to Withdraw on March 10, 2022. This Court will consider both Defendant's Motion for Postconviction Relief as well as Defense Counsel's Motion to Withdraw. For the reasons stated below, Defendant's Motion for Postconviction Relief is **DENIED**. Counsel's Motion to Withdraw is **GRANTED**.

BACKGROUND

On November 13, 2018, Defendant was taken into custody. On December 17, 2018, a Delaware grand jury returned a four count indictment, charging Defendant with two counts of Possession or Control of a Firearm by a Person Prohibited ("PFBPP"), and one count of Possession or Control of Ammunition by a Person Prohibited and one count of Possession of Marijuana.

On February 21, 2019, Defendant's Prior Counsel moved to suppress on behalf of Defendant. On August 16, 2019, this Court held a suppression hearing and subsequently denied Defendant's motion to suppress.

On September 9, 2019, Defendant pled guilty to one count of PFBPP and he was immediately sentenced to 10 years level V, suspended after 5 years, for 18

months level III. Defendant received credit for the 103 days previously served. Defendant did not file an appeal to the Supreme Court of Delaware.

On October 26, 2020, Defendant filed a *pro se* motion for postconviction relief and *pro se* motion for appointment of counsel. The Court appointed Christopher S. Koyste, Esquire, to represent Defendant. Mr. Koyste filed a motion to withdraw as counsel on March 10, 2022, stating that Defendant's claims were without merit.

DEFENDANT’S ASSERTIONS

On the face of Defendant’s Motion, he asserts four grounds for postconviction relief. However, upon reading the supplemental writing attached to the Motion, there are six grounds to support his Motion. The first claim is ineffective assistance of counsel. He alleges his trial counsel made “errors so serious that counsel was not functioning guaranteed by the Sixth Amendment.” He explains that his trial counsel was ineffective for failing to conduct a thorough investigation and failing to inform him of a six-month-old warrant which interfered with Defendant’s suppression hearing. The second, third, and fourth claim allege that there was an error in the plea agreement/guilty plea which resulted in Defendant unknowingly receiving an enhanced statutory sentence and resulted in an illegal sentence in violation of the Sixth Amendment. The two additional claims found within the text of his Motion are claim 5, judicial misconduct and claim 6, prosecutorial misconduct. He alleges that the State and this Court “appeared to conspire against Mr. Keith Berry in a mock

trial knowing very well they were in cohorts deliberately loading and rigging Mr. Berry's trial." It seems as if Defendant's prosecutorial misconduct claim arose from the State seeking to obtain favorable testimony from Defendant in an unrelated criminal matter.

DISCUSSION

Claim 1, 5, and 6: Rule 61 Postconviction Relief

The Court must address Defendant's motion in regard to Rule 61(i) procedural requirements before assessing the merits of his motion.¹ If a procedural exists, then the Court will not consider the merits of the postconviction claim.²

Rule 61(i)(1) bars motions for postconviction relief if the motion is filed more than one year from final judgment.³ Defendant's Motion is time barred by Rule 61(i)(1) because Defendant did not appeal his conviction to the Delaware Supreme Court, so the judgment of conviction became final on October 9, 2019, 30 days after his September 9, 2019 sentencing. Defendant had until October 9, 2020 to timely file for Postconviction Relief, however, Defendant did not file until October 26, 2020, 17 days after his opportunity to file expired. Rule 61(i)(2)⁴ bars successive

¹ Super. Ct. Crim. R. 61 (i)(1).

² *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

³ See Super. Ct. Crim. R. 61 (i)(1) (motion must be filed within one year of when conviction becomes final); Super. Ct. Crim. R. 61(m)(1) (If the defendant does not file a direct appeal, the judgment of conviction becomes final 30 days after the Superior Court imposes sentence).

⁴ Super. Ct. Crim. R. 61(i)(2).

postconviction motions, which is not applicable as this is Defendant's first postconviction motion. Rule 61(i)(3) bars relief if the motion includes claims not asserted in the proceedings leading to the final judgment.⁵ This bar is applicable to Defendant's claims. Ordinarily, ineffective assistance of counsel, like claim 1, cannot have been raised in any direct appeal, therefore the procedural bar would not apply. However, the exception for ineffective assistance of counsel claims only applies if the motion was timely filed.⁶ Here, Defendant did not file within 1 year of his conviction becoming final, therefore, this procedural bar applies even to Defendant's ineffective assistance of counsel claim. Finally, Rule 61(i)(4) bars relief if the motion is based on a formally adjudicated ground.⁷ This bar does not apply.

This Court need not address the substance of Defendant's motion because Rule 61(i)(1) bars motions for postconviction relief if the motion is filed more than one year from final judgment. Therefore, Defendant's Motion for Postconviction Relief is **DENIED**.

⁵ Super. Ct. Crim. R. 61(i)(3).

⁶ See *State v. Berry*, 2016 WL 5624893, at *4 (Del. Super. Ct. June 29, 2016); see also *Watson v. State*, 2013 WL 5745708, at *2 (Del. Oct. 21, 2013).

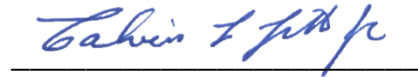
⁷ Super. Ct. Crim. R. 61(i)(4).

Claim 2, 3, and 4: Rule 35 Motion to Modify Sentence

Defendant's second, third, and fourth claim allege that there was an error in the plea agreement/guilty plea which resulted in Defendant unknowingly receiving an enhanced statutory sentence and resulted in an illegal sentence in violation of the Sixth Amendment. The sentence in this case was imposed pursuant to a Plea Agreement. Pursuant to Criminal Procedural Rule 11(c)(1), the Court addressed the defendant personally in open court and determined that the defendant understood the nature of the charge to which the plea was offered, the mandatory minimum penalty provided by law, and the maximum possible penalty provided by law. Accordingly, the defendant acknowledged in open court that the range of possible penalties included the sentence that was imposed by the Court in this case. Additionally, under Superior Court Criminal Rule 35, Defendant's Motion for Reduction of Sentence must have been made within 90 days of the imposition of the sentence unless extraordinary circumstances exist. The Motion was filed more than 90 days after the imposition of the sentence and is, therefore, time barred. The Court does not find the existence of any extraordinary circumstances. The sentence is appropriate for all the reasons stated at the time of sentencing. No additional information has been provided to the Court which would warrant a reduction or modification of this sentence. Defendant's Motion for a Modified Sentence is **DENIED.**

CONCLUSION

After reviewing Defendant's Motion for Postconviction relief, Counsel's Motion to Withdraw, and all other relevant materials, the Court finds that Defendant's Motion for Postconviction Relief is procedurally barred and Defendant's Motion to Modify his Sentence is without merit. Accordingly, Defendant's Motion for Postconviction Relief is **DENIED** and Defendant's Motion for a Modified Sentence is **DENIED**. Counsel's Motion to Withdraw is **GRANTED**.

A handwritten signature in blue ink, reading "Calvin L. Scott, Jr.", is positioned above a horizontal line.

Judge Calvin L. Scott, Jr.