

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

| | | |
|----------------------|---|--------------------------|
| STATE OF DELAWARE |) | |
| |) | RK11-08-0486-01 |
| v. _____ |) | Rape 4 th (F) |
| |) | |
| ROMAN E. BYLER, |) | |
| (ID. No. 1108003625) |) | |
| |) | |
| Defendant. |) | |

Submitted: October 1, 2013

Decided: October 2, 2013

Christopher R. Parker, Esq., Deputy Attorney General, Department of Justice, for
the State of Delaware.

Roman E. Byler, *Pro se.*

*Upon Consideration of Defendant's
Motion For Postconviction Relief
Pursuant to Superior Court Criminal Rule 61*

DENIED

YOUNG, Judge

State v. Byler

ID. No. 1108003625

October 2, 2013

ORDER

Upon consideration of the Defendant's Motion For Postconviction Relief, the Commissioner's Report and Recommendation and the record in this case, it appears that:

1. The Defendant, Roman E. Byler ("Byler"), pled guilty on February 20, 2012, to one count of Rape in the Fourth Degree, 11 *Del. C.* § 770. In exchange for Byler's plea, the State entered a *nolle prosequis* on the remaining charge of one count of Endangering the Welfare of a Child. The State agreed to recommend Byler receive eight years at Level V, suspended after two years at Level V, followed by two years at Level III . The plea agreement specified that Byler would be required to register as a Tier III sex offender. The Court agreed to the State's recommendation.

2. The Defendant did not appeal his conviction or sentence to the Delaware Supreme Court; instead he filed, *pro se*, the pending Motion For Postconviction Relief pursuant to Superior Court Criminal Rule 61. In his motion the defendant raises the following grounds for relief: 1) Ineffective assistance of Counsel; and 2) Prosecutorial misconduct.

3. The Court referred this motion to Superior Court Commissioner Andrea M. Freud pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of facts and conclusions of law.

4. The Commissioner has filed a Report and Recommendation concluding that the Motion For Postconviction Relief should be denied, because it is procedurally barred and meritless.

5. No objections to the Report have been filed.

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NOW, THEREFORE, after *de novo* review of the record in this action, and for reasons stated in the Commissioner's Report and Recommendation dated August 8, 2013,

IT IS ORDERED that the Commissioner's Report and Recommendation is adopted by the Court, and the Defendant's Motion For Postconviction Relief is **DENIED**.

/s/ Robert B. Young

J.

RBV/lmc

oc: Prothonotary

cc: The Honorable Andrea M. Freud

Christopher R. Parker, Esq.

Alexander W. Funk, Esq.

Roman E. Byler, JTVCC

File

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE)
)
 v.) RK11-08-0486-01
) Rape 4th (F)
ROMAN E. BYLER)
)
 Defendant.)
 ID. No. 1108003625)

COMMISSIONER'S REPORT AND RECOMMENDATION

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

Christopher R. Parker, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Roman E. Byler, *Pro se*.

FREUD, Commissioner
August 8, 2013

The defendant, Roman E. Byler (“Byler”), pled guilty on February 20, 2012, to one count of Rape in the Fourth Degree, 11 *Del. C.* § 770. Byler was also facing one count of Endangering the Welfare of a Child. In exchange for Byler’s plea, the State entered a *nolleprosequi* on the remaining charge and agreed to recommend Byler receive

eight years at Level V suspended after seven years for probation. The plea agreement specified that Byler would be required to register as a Tier III sex offender. Byler did not appeal his conviction or sentence to the Delaware Supreme Court. Instead he filed the pending motion for postconviction relief pursuant to Superior Court Criminal Rule 61.

BYLER'S CONTENTIONS

In his motion, he raises the following grounds for relief:

Ground One: Ineffectiveness of Counsel.
Failed to protect given right under Del C § 4121 and
Del C § 4120. See memorandum.

Ground Two: Prosecutorial misconduct.
Failure to follow the correct procedures in a plea
agreement for tier assignment per Del. C §§ 4121 &
4120.

DISCUSSION

Under Delaware law, this Court must first determine whether Byler has met the procedural requirements of Superior Court Criminal Rule 61(I) before it may consider the merits of his postconviction relief claim.¹ This is Byler's first motion for postconviction relief, and it was filed within one year of his conviction becoming final. Therefore, the requirements of Rule 61(i)(1) - requiring filing within one year and (2) - requiring that all grounds for relief be presented in initial Rule 61 motion, are met. Byler's claims were not raised at the plea, sentencing, or on direct appeal. Therefore,

¹ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

they are barred by Rule 61(i)(3), absent a demonstration of cause for the default and prejudice. To some extent each of Byler's claims are based on ineffective assistance of counsel; therefore, he has alleged cause for his failure to have raised them earlier.

The State argues that Byler's motion appears to be more of a motion to modify his sentence as he is not claiming he is innocent or arguing he would not have pled guilty. He simply asserts he should be Tier II not Tier III. Rule 61(a)(1) allows a defendant to set aside a conviction based "...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 a capital sentence." Since Byler does not claim his plea was improper or that his sentence is improper, aside from the Tier designation, it would appear that he has failed to state a claim for relief and his motion should be dismissed. I will, however, review the claim for the benefit of the court.

If Byler's claim does state a claim for relief, Rule 61(i)(3) does not bar it as to Byler's claims of ineffective assistance of counsel, provided he demonstrates that his counsel was ineffective and that he was prejudiced by counsel's actions. To prevail on his claim of ineffective assistance of counsel, Byler must meet the two-prong test of *Strickland v. Washington*.² In the context of a guilty plea challenge, *Strickland* requires a defendant show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial and that the result of a trial would have been his

² 466 U.S. 668 (1984).

acquittal.³ The failure to establish that a defendant would not have pled guilty and would have proceeded to trial is sufficient cause for denial of relief.⁴ In addition, Delaware courts have consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.⁵ When examining the representation of counsel pursuant to the first prong of the *Strickland* test, there is a strong presumption that counsel's conduct was professionally reasonable.⁶ This standard is highly demanding.⁷ *Strickland* mandates that, when viewing counsel's representation, this Court must endeavor to “eliminate the distorting effects of hindsight.”⁸

Following a complete review of the record in this matter, it is abundantly clear that Byler has failed to allege any facts sufficient to substantiate his claim that his attorney was ineffective. I find counsel's affidavit, in conjunction with the record, more credible than Byler's vague and entirely unsubstantiated contention that his counsel's representation was ineffective. Byler's counsel clearly and unequivocally denies the

³ *Id.* at 687.

⁴ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)(citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988))(citations omitted).

⁵ See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

⁶ *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689).

⁷ *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990)(quoting *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986)).

⁸ *Strickland*, 466 U.S. at 689.

allegations.

Furthermore, Byler argues that the Rape Fourth has a presumptive tier level of Tier II and he was sentenced to Tier III without the State first filing a motion with the Court before sentencing. Setting aside the fact that Byler uses the wrong mechanism to seek redress and is time barred under the ninety day limit imposed by Rule 35 (Byler filed the instant motion on July 25, 2013 after being sentenced on February 20, 2012, in violation of the ninety day rule as set forth in the rule),⁹ he leaves out a crucial portion of the controlling statute. While Byler states that 11 *Del. C.* § 4121(d)(7) requires a state file a motion of intention to seek a higher tier level than the presumptive prior to sentencing, he ignores the final clause which makes the motion “unnecessary if any written plea agreement relating to the conviction clearly informs the defendant of the State’s intention to request a higher Tier designation.”¹⁰ The written plea agreement between the State and Byler relating to this conviction clearly states that the Court is requested to sentence the defendant to register as a Tier III offender. Notice as foreseen by the statute is clearly provided and therefore there is not illegality to the sentence in this case.

Because Byler couches his “illegal manner of sentence imposed” claims as ineffective assistance and misconduct claims, these will be briefly addressed. First, a prosecutor who follows the law in offering a plea which requires the defendant to agree

⁹ Super. Ct. Crim. R. 35, *see also State v. Donohue*, 2008 Del. Super. Ct. LEXIS 438, holding that motions for correction of sentence illegally imposed are properly denied if filed as a Rule 61 motion.

¹⁰ 11 *Del. C.* § 4121(d)(7) .

to a recommendation of a specific Tier designation in conformity with the law (see discussion of 11 *Del. C.* § 4121(d)(7) *supra*), cannot be said to have committed misconduct. Byler claims instead the prosecutor acted inconsistently with his *incomplete* recitation of the law.¹¹ Having failed to show that the prosecutor failed to follow the law, Byler's claim is meritless.

Second, Byler claims his counsel acted ineffectively by not requiring the State to settle for a Tier II designation. Byler faced sentencing as a habitual offender. Byler was previously convicted of felony Theft (08/11/10), Home Improvement Fraud (2 counts - 02/14/05 and 08/02/07) and Burglary Third (01/16/02). Byler was subject to a period of incarceration under 11 *Del. C.* § 4214(a) of 15 years to life if convicted on the charge to which he pled.¹² *Strickland v. Washington*,¹³ requires an Ineffective Assistance of Counsel allegation to show that counsel's representation fell below an acceptable threshold and that the defendant suffered prejudice such that confidence in the outcome is left in doubt. The Delaware Supreme Court in *Cannon v. State*, held that ". . . a defendant in a Rule 61 filed after a guilty plea must demonstrate that but for counsel's unprofessional errors, he would not have pleaded guilty but would have insisted on [a]

¹¹ *Id.*

¹² 11 *Del. C.* §§ 4214(a), 4201(c), 4205(b)(3).

¹³ 466 U.S. 668 (1984).

trial.”¹⁴ Further, actual prejudice must be concretely alleged.¹⁵

Byler fails to meet his burden on each score. He does not deny his guilt but argues only that he was assigned the wrong registration tier.

Further the fact that Byler faced life imprisonment if convicted of any of the felonies charged and accepted a seven year period of incarceration, makes any implied claim that he would not have taken the plea offered if he somehow could have held out for a lower tier designation purely speculative and logically inconsistent. Byler has failed to allege any breach of the law, incompetence by his counsel or prejudice to himself by the State’s insistence that he agree to a Tier III registration. His postconviction claims fail.

Even assuming, *arguendo*, that counsel’s representation of Byler was somehow deficient, Byler must satisfy the second prong of the *Strickland* test, prejudice. In setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk dismissal.¹⁶ In an attempt to show prejudice, Byler simply asserts that his counsel was ineffective.

Furthermore, prior to entering his guilty plea, Byler signed a Guilty Plea Form and Plea Agreement in his own handwriting. Byler’s signatures on the forms indicate that he understood the constitutional rights he was relinquishing by pleading guilty and that he

¹⁴ 2007 Del. Supr. Lexis 33, *2.

¹⁵ *Id.*

¹⁶ *Larson v. State*, 1995 WL 389718, at *2 (Del. Supr.)(citing *Younger*, 580 A.2d 552, 556 (Del. 1990)).

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freely and voluntarily decided to plead guilty to the charges listed in the Plea Agreement. Byler is bound by the statements he made on the signed Guilty Plea Form, unless he proves otherwise by clear and convincing evidence.¹⁷ I confidently find that Byler entered his guilty plea knowingly and voluntarily and that Byler's grounds for relief are completely meritless.

I find that Byler's counsel represented him in a competent and effective manner and that Byler has failed to demonstrate any prejudice stemming from the representation. I also find that Byler's guilty plea was entered knowingly and voluntarily. I also find Byler's motion should be dismissed for failure to state a claim upon which relief may be given. Consequently, I recommend that the Court *deny* Byler's motion for postconviction relief as procedurally barred and totally meritless.

/s/ Andrea Maybee Freud
Commissioner

AMF/dsc

oc: Prothonotary
cc: Hon. Robert B. Young
Christopher R. Parker, Esq.
Alexander W. Funk, Esq.
Roman E. Byler, VCC
File

¹⁷ *Sommerville* 703 A.2d at 632.