

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
	)	Cr. ID. Nos. 2310012496
	)	2311006492
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	
LUIS J. ORTIZ,	)	
	)	
Defendant.	)	

ORDER APPOINTING RULE 61 COUNSEL

Defendant filed a Motion for Correction of Sentence pursuant to Superior Court Criminal Rule 35(a), or alternatively, Post-Conviction Relief pursuant to Superior Court Criminal Rule 61.

Defendant requested the appointment of Rule 61 counsel, which was initially denied. However, an issue has arisen during briefing that now warrants the appointment of counsel.

Specifically, in this matter, Defendant accepted a plea in which he pled guilty to two counts of Robbery 1st Degree and one count of Conspiracy 2nd Degree and the parties agreed to a joint sentence recommendation of ten years of incarceration. The parties believed at the time of the plea that each count of Robbery 1st Degree carried a 5- year minimum mandatory sentence. Following

the plea colloquy, Defendant was immediately sentenced. The Court followed the joint sentence recommendation of the parties and sentenced Defendant to ten years of incarceration, five years minimum-mandatory on each of the two Robbery 1st Degree convictions, followed by decreasing levels of supervision.

The parties now realize that each count of Robbery 1st Degree conviction carried a 3-year minimum mandatory sentence rather than the 5-year minimum mandatory sentence imposed.

Of course, the sentence imposed is incorrect and cannot stand. The issue that has arisen is how should this incorrect sentence be rectified.

The State and Defendant's trial counsel represent that during plea negotiations it was the intent of the parties to fashion a plea in which the State and the Defendant would jointly agree to recommend a ten-year prison sentence. The State claims that the appropriate remedy is for the Defendant to be resentenced so that the minimum mandatory portion of the sentence can be properly reduced to six years.

The Defendant, who is currently representing himself, is advocating for the plea to be vacated. Although there appears to be some merit to Defendant's position, it is apparent that Defendant does not understand the full ramifications of the relief he is requesting.

Defendant is under the mistaken impression that if the plea is vacated, the charges covered by the plea deal will still be the only charges that he will be facing and that the only issue remaining is what better sentence he could negotiate. It appears that Defendant believes that if the plea is vacated, he will be able to renegotiate his sentence and is hoping it can be renegotiated to six years of incarceration (the 3-year minimum-mandatory sentence for both counts of the Robbery 1st convictions) rather than the 10-year prison term he is serving.

Clearly, Defendant does not understand the ramifications of the relief he is requesting. Defendant does not appear to understand that if the plea is vacated, the clock is essentially turned back to the moment before the plea was entered, and all the dismissed charges are reinstated. That means that all five counts of Robbery 1st Degree that Defendant was facing, before three of those five counts were dismissed as a result of the plea, would all be reinstated. That means that all the firearms charges that Defendant was facing including the two counts of Possession of Firearm during the Commission of a Felony (“PFDCF”), each carrying a minimum-mandatory five- year sentence, will be reinstated. That means that all the other firearms charges will also be reinstated.

Furthermore, if the State chose, the State could have sought sentencing of Defendant as a habitual offender, pursuant to 11 *Del. C.* § 4214(d), in which Defendant’s minimum sentence would be the statutory maximum on the violent

felonies. For the five counts of Robbery 1st Degree alone, if convicted and the State sought habitual sentencing, Defendant was facing a minimum sentence of 25 years for each count, for a total of 125 years of incarceration. The State's entitlement to seek sentencing of Defendant as a habitual offender will also be reinstated if the plea was vacated.

Defendant does not appear to understand that if the plea is vacated, the State is not compelled to reoffer another plea, and if it decides to do so, it is not bound to offer a plea to the same charges that was previously offered. The State is not bound to offer a plea to only ten years of incarceration but could seek a sentence carrying more prison time.

The reality of the situation is that vacating the plea may result in a more detrimental, and perhaps a vastly more detrimental, outcome to Defendant than the plea he accepted.

For this reason, Rule 61 counsel is hereby appointed to represent Defendant. It is hopeful that following the appointment of counsel, Rule 61 counsel and the State are able to reach a stipulated proposed course of proceeding.

IT IS SO ORDERED.

/s/ Lynne M. Parker
Commissioner Lynne M. Parker

cc: Prothonotary
Nicole T. Whetham Warner, Deputy Attorney General
John S. Edinger, Esquire
Mr. Luis J. Ortiz