IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	ID #9906010540
ALBERT STEWART	)	
	)	
Defendant.	)	

Submitted: August 19, 2002
Decided: November 14, 2002

On Defendant's *Pro Se* Motion for Postconviction Relief.
DENIED IN PART; DEFERRED IN PART.

ORDER

This 14th day of November, 2002, upon consideration of a *pro se* Motion for Postconviction Relief filed by Albert Stewart (the "Defendant"), it appears to the Court that:

1. Defendant has filed this Motion for Postconviction Relief (the "Motion") pursuant to Superior Court Criminal Rule 61. For the reasons stated below, Defendant's Motion as to certain grounds raised is **DENIED**, and other grounds asserted are referred to Defendant's sentencing judge.

2. This order discusses those parts of the Motion (Grounds Three, Four and Five) that ultimately involve Defendant's challenge, based upon a

claim of ineffective assistance of counsel, to a guilty plea that he entered.[1] In disposing of those grounds, the Court considers the offenses for which Defendant was originally indicted, the discussions between the State and Defendant's counsel ("Counsel") leading to Defendant's plea agreement, and the documents that Defendant executed before this Court accepted his plea.

In July 1999, a grand jury returned an indictment that charged Defendant with one count of Rape First Degree (title 11, section 773 of theDelaware Code), one count of Rape Second Degree (title 11, section 772 of the Delaware Code), and two counts of Unlawful Sexual Contact Second Degree (title 11, section 768 of the Delaware Code). All four counts arose out of Defendant's sexual activities with Rochandra Vinson, a female under the age of 16 (at that time). Defendant was then approximately 37 years old, and he held a "position of trust, authority, or supervision"[2] in relation to the victim in that he worked as an overnight counselor at the Seton Villa group home where the victim resided.

Shortly after the events underlying the indictment occurred, Defendant was summoned to the headquarters of the New Castle County

[1] Those parts of the Motion that raise sentencing issues (Grounds One and Two) are now referred to the sentencing judge in Defendant's case, the Honorable Carl Goldstein.

[2] See DEL. CODE ANN. tit. 11, §§ 772(a)(2)(h), 773(a)(6) (2001).

Police Department. Defendant appeared at the police department and was read his Miranda[3] rights. Defendant then gave a taped confession. The State was apparently in possession of evidence that implicated Defendant.

Counsel entered his appearance on Defendant's behalf at Defendant's initial case review. At that time, the State extended a plea offer to one count of Rape First Degree (which carried a term of incarceration of "not less than 15 years [and] up to life imprisonment to be served at Level V….")[4] and agreed to nolle prosse the remaining charges in the indictment.[5] Defendant rejected that offer "[o]n the advise of [C]ounsel…."[6]

Plea offer discussions continued. A second offer was then extended, this time to one count of Rape Second Degree (which carried a minimum mandatory sentence of "10 years at Level V[ ]");[7] Defendant rejected this second plea offer again based "[o]n the advise of [C]ounsel."[8] Notably, the

[3] See Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the prosecution may not use in its case in chief statements given during a custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

[4] DEL. CODE ANN. tit. 11, § 4205 (b)(1) (2001).

[5] See Ex. "A" to Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02.

[6] Letter from Thomas A. Pedersen to the Court of 5/29/02, at 2.

[7] DEL. CODE ANN. tit. 11, § 772(c) (2001).

[8] Letter from Thomas A. Pedersen to the Court of 5/29/02, at 2.

State continued to consider bringing additional charges against Defendant, as evidenced by the following written statement at the top of this second plea offer: Defendant's "case should go to a judge's problem calendar until another unrelated sex case is resolved…."[9]

After rejecting the second plea offer, Defendant filed a motion to suppress the confession that he had earlier given to the New Castle County Police Department. Defendant argued that his confession was coerced and that Defendant had asserted his right to discontinue the interview before having given his confession.[10] After holding an evidentiary hearing the Court denied Defendant's motion.[11] Trial was set for September 26, 2000.

Counsel and the State continued to discuss the possibility of a plea offer. In a June 8, 2000 letter to defense counsel, the State asserted that it would "not offer anything less than a plea to Rape [Third] Degree."[12] A postscript to that letter also stated that "more likely than not, [any forthcoming plea offer] will get worse the closer to trial we get[ ][.]"[13]

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[9] See Ex. "B" to Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02.

[10] See Def.'s "Motion for Suppression" (Dkt. #6).

[11] State v. Stewart, Del. Super., ID #9906010540, Del Pesco, J. (Nov. 30, 1999) (Bench Ruling).

[12] Letter from Donald R. Roberts, Esquire to Thomas A. Pederson, Esquire of 6/8/00 (Ex. "C" to Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02).

[13] Id.

Counsel recommended to his client that Defendant accept this offer despite Counsel's (correct) assertion that "a plea to Rape Third Degree carries a two year minimum mandatory jail sentence[ ]";[14] underlying Counsel's recommendation was his stated belief that "[s]hould…[Defendant] [have] decide[d] to take the matter to trial…[Defendant] would [have] be[en] found guilty of…[Rape First Degree and Rape Second Degree] and face[d] a minimum twenty-five year sentence."[15]

Despite the June 8, 2000 letter offering a plea of no less than Rape Third Degree, the State extended a third plea offer to Rape Fourth Degree and to one count of Unlawful Sexual Contact Second Degree shortly before Defendant's case was to go to trial.[16] The offer was extended under Superior Court Criminal Rule 11(e)(1)(C) as it then existed, which meant that the State and Counsel had "[a]greed that a specific sentence [wa]s the appropriate disposition of…[Defendant's] case."[17] The agreed-upon

[14] Letter from Thomas A. Pederson, Esquire to Albert Stewart of 6/15/00, at 1 (Ex. "D" to Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02).

[15] Id.

[16] The rape charge carried a sentence of "up to 10 years to be served at Level V," (DEL. CODE ANN. tit. 11, § 4205(b)(3) (2001)) and the unlawful sexual contact charge carried a sentence of "up to…[two] years to be served at Level V." (DEL. CODE ANN. tit. 11, § 4205(b)(7) (2001)).

[17] Super. Ct. Crim. R. 11(e)(1)(C) (2000) (amended 2001).

sentence[18] contained in the offer was for 10 years at Level V suspended after two years for six months at Level IV followed by two years at Level Three with the remainder at Level II.[19]

Defendant accepted this third plea offer, which required him to execute a form which provided, *inter alia*, that Defendant understood that there was no mandatory minimum sentence attached to the crimes to which he was pleading guilty, that no one had promised him what length of sentence the Court would impose (except to the extent that he agreed that a two year Level V sentence was appropriate), that the total amount of consecutive jail time he could face would be 12 years, that the offenses to which he was pleading required him to be registered as a sex offender, that Counsel had fully advised him of his rights and that he was satisfied with Counsel's representation, and that he had read and understood all of the information contained in the form. The Court thereafter accepted Defendant's plea, following a Rule 11(e)(1)(C) colloquy.

Following the Court's acceptance of Defendant's guilty plea, Counsel wrote to the Court requesting a rescheduling of Defendant's sentencing. In

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[18] Which the Court could then "accept or reject…or…defer…decision…[on] until there ha[d] been an opportunity to consider…[a] presentence report." Super. Ct. Crim. R. 11(e)(2) (2000) (amended 2001).

[19] See Ex. "A" to Letter from Donald R. Roberts, Esquire to the Court of 7/19/02.

that letter (a copy of which was sent to Defendant),[20] Counsel inadvertently stated that Defendant had "accepted a…plea agreement which w[ould] require him…to serve…[18] months at [L]evel V."[21] The Court declined to defer Defendant's sentencing.

Defendant was thereafter sentenced as follows: as to the Rape Fourth Degree, eight years at Level V suspended after two years for six years at Level IV suspended after six months at Level III suspended after two years for the balance at Level II; as to the Unlawful Sexual Contact Second Degree, two years at Level V suspended for two years at Level II. Defendant's sentence under the Unlawful Sexual Contact Second Degree charge was to run concurrent with his sentence under the Rape Fourth Degree charge, neither of which offenses required any mandatory minimum time.

Following his sentencing, Defendant filed at least four *pro se* motions for modification or reduction of his sentence.[22] Additionally, Defendant filed a *pro se* petition for a writ of habeas corpus. None of Defendant's motions or his petition was granted.

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[20] See Ex. "E(1)" to Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02.

[21] Letter from Thomas A. Pederson, Esquire to the Court of 11/21/00 (Ex. "E(2)" to Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02).

[22] See Dkt. #20, #23, #25, and #49.

3. In this Motion, Defendant raises five grounds of alleged violations of his rights. The first two grounds relate to the sentence that this Court imposed after Defendant pleaded guilty and will not now be considered, but rather will be referred by the Court to the judge who sentenced Defendant. Discussion of the remaining three grounds Defendant asserts in his Motion, all of which essentially allege ineffective assistance of counsel, follows.

In Ground Three, Defendant asserts that he was a victim of selective and vindictive prosecution in that "[t]here were…[four] recent Delaware similar cases [sic] [reported in the News Journal] that show…[Defendant's] rights of [e]qual [p]rotection were violated" in the plea offer that was extended to him. In Ground Four of the Motion, Defendant claims that Counsel "fell below standards in his representation and had it not been for ineffective assistance of counsel the results may have been different from the [p]lea offered by the State, to the accepted plea being accepted by the sentencing [j]udge, [and] to the amount of time imposed…." As part of this ground, Defendant alleges that Counsel promised that Defendant would serve no more than eighteen months in prison if he pleaded guilty pursuant to the State's final plea offer. In Ground Five of the Motion, Defendant asserts that this Court "erred when denying…[Defendant's] motion to

suppress the taped recorded [sic] confession" he gave to the New Castle County Police.

In invited response, Defendant's trial counsel declares that "the fact that [C]ounsel was able to obtain a plea…[23] years below what…[Defendant] would have gotten had he gone to trial [and been found guilty of Rape First Degree and Rape Second Degree]…speaks volumes of [C]ounsel's performance…and is the only evidence which truly need be considered by the Court."[23] Counsel states that it was "[C]ounsel's goal from the outset that should the Court admit the [D]efendant's statements[ ] to obtain a plea offer which did not contain minimum mandatory jail time."[24] Counsel represents that he "never, at any time, explained to the [D]efendant that he would serve no more than…[18] months [as Defendant has claimed][,]" but that Counsel explained that "if sentenced to the two years recommended in the…plea agreement, [Defendant] could earn a maximum of a six month reduction of sentence if he earned all of the good time credit for which he would be eligible."[25]

[23] Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02, at 1.

[24] Id. at 2.

[25] Id. at 2-3.

The State, at the Court's request, has submitted a response to Grounds Three, Four and Five of the Motion. With regard to Defendant's claim of selective and vindictive prosecution, the State responds that "[t]o the extent the four cases [reported in the News Journal and] noted by the [D]efendant had a different result—that does not constitute a *per se* claim of selective or vindictive prosecution[,]" as "none of th[ose] [four prosecutions] was as supported by evidence as the case against…[Defendant]."[26] With regard to Defendant's claim of ineffective assistance of counsel, the State argues that "the facts belie the [D]efendant's contention," and that even though Counsel's letter to the Court in regard to rescheduling Defendant's sentencing was in error when it suggested that Defendant's plea "was to 18 months," Counsel was nevertheless "successful" in negotiating a plea offer with no mandatory minimum time.[27] Finally, with regard to Defendant's claim that this Court erred when it did not grant his suppression motion, the State contends that Defendant is procedurally barred from raising this issue because the issue was already ruled upon by this Court at the time of the motion.

[26] Letter from Donald R. Roberts, Esquire to the Court of 7/19/02, at 2.

[27] Id. at 3.

4. Before addressing the merits of any claim raised in a motion seeking postconviction relief, the Court must first apply the rules governing the procedural requirements of Superior Court Criminal Rule 61. Rule 61(i)(4) provides that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice." The "interest of justice" exception of Rule 61(i)(4) has "been narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish [the movant]."[28] Because this Court previously ruled on Defendant's suppression motion, relitigation of that claim would normally be barred by Rule 61(i)(4). Because Defendant has not shown that this Court lacked authority to convict or punish him, Defendant does not fall within the rule's "interest of justice" exception, and Defendant cannot now attack the correctness of the ruling. Accordingly, Ground Five of Defendant's Motion is **DENIED**.

5. With regard to discriminatory prosecution claims, a leading treatise states that "[b]oth the federal and the state cases dealing with

[28] State v. Wright, 653 A.2d 288, 298 (Del. Super. Ct. 1994) (citing Flamer v. State, 585 A.2d 736, 746 (Del. 1990)

discriminatory prosecution commonly assert that the defendant must establish that the discrimination was intentional or purposeful."[29] With regard to vindictive prosecutions, that same treatise states that "any challenge to the initial decision to prosecute as a vindictive prosecution will require proof by the defendant that a vindictive motive actually exists."[30] Thus both discriminatory and vindictive prosecution claims require a defendant to prove as an element of their claim the requisite intent.

Here, Defendant has cited four other cases reported in the local newspaper that Defendant alleges demonstrate a discriminatory and vindictive prosecution against him; the defendants in the articles Defendant cites had all committed rape crimes, but apparently none received sentences as lengthy as Defendant's. The sentences actually received by four other persons in New Castle County convicted of rape have very minimal, if any, bearing upon Defendant's case. The fact that Defendant confessed (such confession already having been ruled admissible by the Court) serves to reinforce the State's position. The Court finds that Defendant has therefore failed to demonstrate an intentional discrimination or vindictive motive in

[29] 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.4(d), at 59 (2d ed. 1999) (citations omitted).

[30] Id. § 13.5(1), at 66 (citations omitted).

the State's prosecution of him. Accordingly, Ground Three of Defendant's Motion is **DENIED**.

6. To succeed on a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different."[31] Defense counsel's performance should be evaluated by eliminating "the distorting effects if hindsight" or speculation about what trial counsel could have done better.[32] Moreover, any "review of counsel's representation is subject to a strong presumption that the representation was professionally reasonable."[33]

The two-part test for evaluating a claim of ineffective assistance of counsel "applies [also] to challenges to guilty pleas based on ineffective assistance of counsel."[34] In an analogous situation, the United States Supreme Court has held that constitutionally requiring a state to furnish a defendant with information about parole eligibility before a court accepts a

[31] Albury v. State, 551 A.2d 53, 58 (Del. 1988) (quoting Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)).

[32] Gattis v. State, 697 A.2d 1174, 1178 (1997).

[33] Flamer, 585 A.2d at 753.

[34] Hill v. Lockhart, 474 U.S. 52, 58 (1985).

plea of guilty "would be inconsistent with the current rules of procedure governing the entry of guilty pleas…[under Rule 11]."[35] Furthermore, that Court has held that where an attorney provides erroneous advice to a criminal defendant concerning parole eligibility, "the voluntariness of the plea depends on whether counsel's advice [']was within the range of competence demanded of attorneys in criminal cases[']."[36]

Here, it was "[C]ounsel's goal from the outset that should the Court admit the [D]efendant's statements[ ] to obtain a plea offer which did not contain minimum mandatory jail time."[37] Counsel has met that goal in negotiating the plea agreement Defendant entered into and which this Court accepted. The Court has no way of knowing what Counsel did or did not convey to Defendant on the possible length of sentence that he might receive except within the context of the Rule 11(e)(1)(C) colloquy (in which Defendant stated that he understood, *inter alia*, the maximum penalty provided by law and the fact that the Court may in certain circumstances depart from any applicable sentencing guidelines), the Rule 11(e)(1)(C) plea

[35] Id. at 56.

[36] Id. (citation omitted).

[37] Id. at 2.

offer that the State had extended and that Defendant had accepted, and the guilty plea form Defendant executed therewith.

It is true that Counsel erred when he wrote the Court (and copied Defendant on same) that Defendant had "accepted a…plea agreement which w[ould] require him…to serve…[18] months at [L]evel V[,]"[38] but as Hill v. Lockhart indicates, even when an attorney provides erroneous advice to a criminal defendant concerning things such as parole eligibility, counsel's advice need only be "within the range of competence demanded of attorneys in criminal cases." Here, Defendant claims ineffective assistance of counsel based on anticipation of early release for "good time" credits, but the Court finds that Counsel's representation of Defendant was "within the range of competence" required in that he successfully negotiated a plea offer with no mandatory minimum jail time. Accordingly, Defendant has failed to satisfy the two-part test for proving ineffective assistance of counsel, and Ground Four of his Motion is accordingly **DENIED**.

7. For the reasons stated above, Defendant's Motion for Postconviction Relief as to Grounds Three, Four, and Five is **DENIED**. This Motion is now referred to Judge Goldstein for his consideration of

[38] Letter from Thomas A. Pederson, Esquire to the Court of 11/21/00 (Ex. "E(2)" to Letter from Thomas A. Pedersen, Esquire to the Court of 5/29/02).

Grounds One and Two (which raise sentencing issues).

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary
xc: The Honorable Carl Goldstein
Donald R. Roberts, Esquire, Deputy Attorney General
Thomas A. Pedersen, Esquire
Albert Stewart, *pro se*
Investigative Services