

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE)	
)	C.R. No. 0102021643
vs.)	
)	
TORIAN D. BLEEN,)	
)	
Defendant.)	

Submitted January 12, 2007
Decided February 26, 2007

Kathleen Dickerson-Cosans, Esquire, Deputy Attorney General.
Kevin M. Howard, Esquire, counsel for Defendant.

**DECISION AND ORDER ON DEFENDANT’S MOTION
TO WITHDRAW GUILTY PLEA**

The above-captioned Defendant moves to withdraw his March 8, 2001 Plea of Guilty to Driving Under the Influence of Alcohol as a second offense. The State has not responded to the motion. For the following reasons, the motion is denied.

BACKGROUND

On February 16, 2001, the Defendant was arrested for several traffic charges, including Driving Under the Influence of Alcohol, in violation of 21 Del. C. § 4177. On March 8, 2001, the Defendant appeared at his arraignment before this Court and entered a guilty plea to that charge as a second offense. The Defendant was sentenced to eighteen months at Level V, suspended after serving

sixty days for Level II probation for sixteen months, with conditions of probation. On March 19, 2002, the Defendant was discharged from probation.

The Defendant filed this motion on December 13, 2006. The motion alleges that the Defendant, although represented by counsel at the time, did not knowingly and voluntarily enter his guilty plea because the “waiver of rights” list on the guilty plea form Defendant executed were not properly checked. Defendant submits that “this defect in the written record of his guilty plea casts some doubt on whether the defendant was advised of . . . his trial rights, his waiver of those rights and the implications of that waiver.”

DISCUSSION

Defendant served sixty days of his eighteen month sentence. He was subsequently discharged from probation on March 19, 2002. Thus Defendant is no longer in custody or subject to future incarceration on this sentence, and has not been for nearly five years. A motion to withdraw a guilty plea after the imposition of sentence is governed by Criminal Rule 61. That rule authorizes the Court to grant post-conviction relief to “a person *in custody or subject to future custody* under a sentence of this Court seeking to set aside a judgment of conviction on the ground that the Court lacked jurisdiction to enter the judgment or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction.” (Emphasis added.)

“In this case, [Defendant] is not in custody or subject to future custody. He has been discharged from probation. The Supreme Court has instructed several

times that in such a case, the defendant has no standing to bring a motion pursuant to Rule 61. *Gibbs v. State*, Del.Supr., No. 295, 1996, Hartnett, J. (October 9, 1996) (Order) at 4; *Guinn v. State*, Del.Supr., No. 549, 1992, Walsh, J. (April 21, 1993) at 2. The miscarriage of justice exception contained in Rule 61(i)(5) applies only to the time, repetitive motion, and procedural default bars; it does not apply to the standing bar. CCP Crim. R. 61(i)(5).”¹

Notwithstanding the Defendant’s lack of standing to make this motion, the Court has reviewed the audio recording of his March 8, 2001 plea and sentencing, and is satisfied that the Court fully engaged the defendant in a plea colloquy prior to sentencing, and that the Defendant knowingly, intelligently and voluntarily waived his rights and entered his guilty plea to the charge, even if he failed to physically check off the waived rights on his written plea form.

CONCLUSION

The Defendant lacks standing to file this motion to withdraw his March 8, 2001 guilty plea. The motion is **DENIED**.

IT IS SO ORDERED, this ____ day of February, 2007.

Kenneth S. Clark, Jr., Judge

¹ *State v. Beles*, Del. Super., 1997 WL 366899 at *3, Graves, J.