SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

December 29, 2011

Glen Ducote
James T. Vaughn Correctional Center
Smyrna, DE

RE: State v. Glen Ducote
ID No. 0305001806

Submitted: September 21, 2011
Decided: December 29, 2011

On Defendant's Motion for Postconviction Relief - DISMISSED

Dear Mr. Ducote:

The Court has before it the second Rule 61 postconviction motion you filed in the above-captioned case. In this motion, you assert that the Court violated your Sixth Amendment rights by (1) not allowing you to represent yourself, and (2) failing to investigate and address your complaints regarding your trial counsel. The Court finds both of these assertions to be without merit, and your motion will be denied.

As an initial matter, the Court must determine whether any of the procedural bars of Rule 61(i) apply.[1] Prior to its amendment on July 1, 2005, Rule 61(i)(1) precluded consideration of any motion for postconviction relief filed more than three years after the judgment of conviction became final. The three-year

[1] *See Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) ("The first inquiry of any analysis of a post-conviction relief claim is whether the petitioner meets the procedural requirements of Rule 61.").

limitation applies in this case because your conviction became final before the Rule 61 amendment. Even so, your motion is plainly time-barred as it is now being filed six years after the Supreme Court affirmed your conviction.[2]

Certain constitutional claims are excepted from Rule 61(i)(1)'s time limitation. The rule reflects that "bars to relief do not apply to colorable claims that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity, or fairness of the proceedings leading to the judgment conviction."[3] This exception is narrow and only applies when the movant can present some credible evidence that he has been denied a substantial constitutional right.[4] While you have invoked this fundamental fairness exception in your motion for postconviction relief, arguing that the trial court deprived you of your Sixth Amendment rights to self-representation, the record simply fails to support these conclusory claims.

First, you allege that you were denied your right to represent yourself and to present your defense to the jury during trial because the trial court refused to address your "request to . . . proceed *pro se*."[5] A defendant invokes his right to self-representation when the record reflects that he waived his right to counsel so explicitly that no reasonable person could say he did not request to proceed without counsel.[6]

You admit that you never requested to proceed *pro se* either before or during your trial. And while you claim that you waived your right to counsel, the record simply does not reflect that either. You moved the trial court to dismiss current counsel *and appoint new counsel*. While you are correct that "new" counsel more to your liking was not appointed to represent you, this does not translate into a Sixth Amendment violation. The record reflects that you never

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[2] Rule 61(i)(1) allows the Court to consider time-barred motions for postconviction relief that assert "a retroactively applicable right that is newly recognized after the judgment of conviction is final," but Mr. Ducote makes no such assertion.

[3] Super. Ct. Crim. R. 61(i)(5).

[4] *See Younger v. State*, 580 A.2d 552, 555 (Del. 1990) ("The fundamental fairness exception . . . is a narrow one and has been applied only in limited circumstances."), *State v. Wharton*, 1991 WL 138417, at *5 (Del. Super. June 3, 1991) (defining "colorable basis" or "colorable entitlement" as some credible evidence which takes the claim past the frivolous state), *and Jackson v. State*, 1995 WL 439270, at *3 (Del. Jul. 19, 1995) (holding that the movant bears the burden of showing that he has been deprived of a substantial constitutional right).

[5] Def.'s Mot. for Postconviction Relief.

[6] *See Merritt v. State,* 2011 WL 285097, at *3 (Del. Jan. 27, 2011) (TABLE) (noting that the right to self-representation can only be invoked when the defendant makes a knowing waiver of his right to counsel in such a manner that no reasonable person could say the waiver was not made).

asked to proceed *pro se*. Instead you wanted different counsel and such a request does not equate to a request to proceed *pro se*. In fact, your own motion and the record in this case clearly negate any inferences that you asserted this right.

Secondly, you allege that the trial court denied you your right to counsel because it did not investigate your dissatisfaction with appointed counsel. It is important to emphasize that a defendant's right to counsel is not an absolute right to counsel of the defendant's choice.[7] Rather, the Sixth Amendment guarantees the defendant an effective advocate.[8] In this case, both the Superior Court and the Supreme Court heard and denied your claims of ineffective assistance of counsel in an earlier motion for postconviction relief[9] and the trial record clearly shows that Mr. O'Neill effectively and appropriately represented you during the trial. Without more than what appears to be a disagreement between you and counsel as to how the litigation should be handled, the trial judge was not required to conduct a colloquy.[10] Litigation decisions are left to the discretion of counsel, and unless a soured relationship affects counsel's ability to represent the defendant, that relationship will not be disturbed.

Based on the foregoing analysis, the Court finds that your Sixth Amendment right to counsel has not been violated and your motion for postconviction relief is summarily dismissed.

Sincerely yours,

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

cc: Diane Walsh, Esquire
James Brendan O'Neill, Esquire
Prothonotary

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[7] *See Bultron v. State*, 897 A.2d 758, 762-763 (Del. 2006) (explaining that the Sixth Amendment guarantees a defendant's right to effective, if not preferred, counsel).
[8] *See id.*
[9] *See State v. Ducote*, 2006 WL 3872845 (Del. Super. Sept. 20, 2006), *aff'd*, 925 A.2d 503 (Del. 2007) (TABLE). Any new claims of ineffective assistance of counsel that Mr. Ducote raises are barred by Super. Ct. Crim. R. 61(i)(4) because they have been formerly adjudicated. The Court need not consider these new claims in the interest of justice or to avoid a miscarriage of justice under Rule 61(i)(5) because these exceptions require, at a minimum, that the motion and the record suggest entitlement to relief. Such is not the case here.
[10] *See Merritt v. State*, 2011 WL 285097, at *4 (Del. Jan. 27, 2011) (TABLE) (finding that a colloquy was not required because the defendant did not clearly invoke his right to self-representation).