

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID No. 0804033000
	)	
CURTIS N. MERCER,	)	
	)	
Defendant.	)	
	)	

Submitted: September 16, 2011  
Decided: October 5, 2011

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT  
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE SUMMARILY DISMISSED.**

James J. Kriner, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Curtis N. Mercer, Delaware Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 5th day of October 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On January 16, 2009, Defendant Curtis Mercer was convicted of four counts of Rape in the First Degree, one count of Kidnapping in the First Degree, two counts of Possession of a Deadly Weapon During the Commission of a Felony, one count of Burglary in the First Degree, one count of Tampering with Physical Evidence, one count of Misdemeanor Theft and one count of Terroristic Threatening. On March 6, 2009, Defendant was sentenced to four consecutive life sentences plus nine additional years at Level V.

2. On September 9, 2009, Defendant filed a direct appeal to the Delaware Supreme Court. By Order dated November 25, 2009, the Delaware Supreme Court affirmed the convictions and sentences.<sup>1</sup>

3. On July 6, 2010, Defendant filed his first motion for postconviction relief. In that motion Defendant raised a number of ineffective assistance of counsel claims as well as various other claims.

4. Before ruling on Defendant's first motion for postconviction relief, the Court enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter, Defendant filed a response thereto.<sup>2</sup>

---

<sup>1</sup> *State v. Mercer*, 2009 WL 4164765 (Del.).

<sup>2</sup> Superior Court Criminal Rule 61(g)(1).

5. By Order dated December 15, 2010, the Superior Court denied Defendant's motion for postconviction relief.<sup>3</sup> The Superior Court found Defendant's contentions, including his ineffective assistance of counsel claims, to be without merit.

6. Defendant appealed the Superior Court's December 15, 2010 Order denying his first motion for postconviction relief to the Delaware Supreme Court. By Order dated July 20, 2011, the Delaware Supreme Court affirmed the Superior Court's denial of Defendant's motion for postconviction relief.<sup>4</sup>

7. On September 9, 2011, Defendant filed the subject motion for postconviction relief. In the subject motion, Defendant raises two claims of ineffective assistance of counsel. Specifically, Defendant claims that his counsel was ineffective for failing to seek the suppression of an in-court identification of the Defendant at trial. Defendant also claims that his counsel was ineffective for failing to "develop and present every issue that held trial error or violated a constitutional right".

8. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.<sup>5</sup> If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.<sup>6</sup> Moreover, if it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.<sup>7</sup>

---

<sup>3</sup> *State v. Mercer*, 2010 WL 5307842 (Del.Super.).

<sup>4</sup> *State v. Mercer*, 2011 WL 2927774 (Del.).

<sup>5</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>6</sup> *Id.*

<sup>7</sup> Super.Ct.Crim.R. 61(d)(4).

9. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;<sup>8</sup> (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to a claim that the court lacked jurisdiction or to a colorable claim 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 of conviction.<sup>9</sup> Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”<sup>10</sup>

10. The claims that Defendant raises in the subject motion are procedurally barred, conclusory and without merit.

11. Defendant’s claims are procedurally barred. Rule 61(i)(1) applies because Defendant filed this motion more than one year after his final order of conviction. Defendant raises nothing new or recently discovered. Defendant’s final order of conviction was in November 2009, and this motion filed in September 2011, was filed almost two years later, clearly outside the applicable one year limit.

---

<sup>8</sup> If the final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

<sup>9</sup> Super.Ct.Crim.R. 61(i)(5).

<sup>10</sup> Super.Ct.Crim.R. 61(i)(4).

12. Moreover, under the court rules and case authorities, it is well established that defendants are entitled to one direct appeal and one motion for postconviction relief.<sup>11</sup>

While the law provides ways around the one direct appeal-one postconviction relief format, those ways are limited. They only work in extreme and extraordinary cases. Were it not for Rule 61(i) prohibitions against repetitive motion practice, defendants serving lengthy prison sentences, such as Mr. Mercer, could litigate endlessly.

13. In addition, Rules 61(i) (2) and (3) would prevent this Court from considering any additional arguments or claims not previously raised on direct appeal and/or in Defendant's first Rule 61 motion. Defendant could have included anything he so desired in his first Rule 61 motion. Defendant raises nothing new or recently discovered and there was nothing preventing him from raising the claims asserted herein on direct appeal and/or in a timely filed Rule 61 motion.

14. Defendant had time and opportunity to raise any issue in his prior postconviction proceedings and either did so, or neglected to do so. Indeed, the issues raised in this motion are all related to counsel's conduct at the time of trial and on direct appeal. Obviously, Defendant was aware of, had time to, and the opportunity to raise any issue presented herein in a timely filed motion. Having already been provided with a full and fair opportunity to present any issue desired to be raised, any attempt at this late juncture to raise a new claim is barred.

15. Although Defendant's claims are procedurally barred, for the sake of completeness, it is noted that they are also without merit.

16. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level

---

<sup>11</sup> *State v. Bass*, 2004 WL 396372 (Del.Super.), *aff'd*, 2004 WL 1535769 (Del.).

“below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.<sup>12</sup> The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.<sup>13</sup>

17. In Defendant’s first claim he contends that his counsel was ineffective for failing to seek the suppression of an in-court identification of him at trial. The central issue in this case, however, was not whether Defendant was the perpetrator, but rather whether Defendant’s contact with the victim was consensual. Indeed, Defendant admitted to being at the victim’s house on the day at issue and to engaging in sexual intercourse with her. Defendant claimed, however, that his contact with the victim was consensual.<sup>14</sup> The victim testified to her account of the events that transpired on the day at issue and the Defendant, through his videotaped statement, gave his account of the events that transpired. The jury, as the trier of fact, determined the weight to be given to their respective versions. Consequently, Defendant, who admitted to being at the scene, cannot establish that he suffered actual prejudice as a result of the in-court identification of him.

18. As to Defendant’s second claim, that his counsel failed to develop and present every issue that held trial error or violated a constitutional right on direct appeal, is too conclusory and lacking in detail to establish a claim of ineffectiveness. Defendant fails to

---

<sup>12</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>13</sup> *Id.* at 687-88, 694.

<sup>14</sup> State’s Trial Exhibit No. 55- videotaped statement of Defendant; January 13, 2009 Trial Transcript, pg. 20; January 14, 2009 Trial Transcript, pgs. 164-66; January 16, 2009 Trial Transcript, pgs. 55-57, 74-75 (Defendant voluntarily gave a statement and placed himself at the scene of the crime.)

elaborate on this conclusory contention. Defendant states only that counsel should have raised the issues that were not properly preserved in his first motion for postconviction relief.

19. Whether or not the issues presented in Defendant's first motion for postconviction relief were properly preserved, the Superior Court considered the merits of each of the issues raised in that motion and found them all to be without merit.<sup>15</sup> Thereafter, the only issues that the Delaware Supreme Court did not address on their merits on the appeal of the denial of Defendant's first motion for postconviction relief were those issues that Defendant, himself, failed to raise in the Superior Court in his first motion for postconviction relief.<sup>16</sup> Consequently, Defendant has only himself to blame for his own failure to have raised claims in the Superior Court in his first motion for postconviction relief.

20. In the subject motion, Defendant fails to elaborate on his claim of wrongdoing by his counsel for counsel's alleged failure to raise unspecified claims. Defendant fails to state specifically what issue or issues should have been raised and thereafter to show how he suffered any prejudice by the failure to raise the issue or issues. Defendant has not explained what good faith basis existed for the raising of any other issue that was not already raised on appeal. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>17</sup>

21. Since Defendant's claims are procedurally barred, Defendant must meet one of the exceptions to overcome the bars to relief. In this case, Defendant has failed to

---

<sup>15</sup> See, *State v. Mercer*, 2010 WL 5307842 (Del.Super.).

<sup>16</sup> See, *State v. Mercer*, 2011 WL 2927774, at \*1- 2 (Del.)

<sup>17</sup> *Younger v. State*. 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, \*2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief.)

overcome any of the procedural bars by showing a “colorable claim that there was a miscarriage of justice” or that “reconsideration of the claim is warranted in the interest of justice.” The “miscarriage of justice” exception is a “narrow one and has been applied only in limited circumstances.”<sup>18</sup> The Defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”<sup>19</sup> The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. It is clear from Defendant’s motion that Defendant’s claim does not meet the high standard that the fundamental fairness exception requires. The Court does not find that the interests of justice require it to consider these otherwise procedurally barred claims for relief.

For all of the foregoing reasons, Defendant’s Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**

---

Commissioner Lynne M. Parker

cc: Prothonotary  
Dade D. Werb, Esquire

---

<sup>18</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>19</sup> *Id.*