

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID No. 9904015635
)	
KENNETH JOHNSON,)	
)	
Defendant.)	
)	

Submitted: February 2, 2011
Decided: March 3, 2011

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

Richard G. Andrews, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Kenneth Johnson, Delaware Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 3rd day of March 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Kenneth Johnson pled guilty on October 5, 2000 to three counts of Robbery First Degree in connection with a jewelry store robbery that took place on June 3, 1997. The State entered a *nolle prosequi* on the remaining counts of the indictment which included three counts of possession of a deadly weapon during the commission of a felony, one count of conspiracy second degree, and one count of criminal mischief. Defendant was sentenced to two years mandatory minimum on each of the robbery first degree charges, for a total of six years at Level V imprisonment, followed by three years of probation.

2. Defendant did not file a direct appeal.

3. On February 25, 2002, Defendant Johnson filed his first motion for postconviction relief pursuant to Rule 61. In that motion he raised two grounds both alleging ineffective assistance of counsel. Defendant contended that the indictment was defective and his plea uninformed based on the ineffective assistance of his counsel. Specifically, Defendant contended that based on the ineffective assistance of counsel he pled guilty to three robbery charges when the offense should have constituted one single robbery. Defendant also contended that based on the ineffective assistance of counsel he pled guilty even though the indictment was defective and resulted in him receiving three consecutive sentences for the same offense. As a result of his counsel's alleged ineffective assistance, Defendant sought to withdraw his guilty plea.

4. In connection with that motion, Johnson's trial counsel's affidavit was obtained (which was filed on or about May 22, 2002), which responded to Johnson's claims. The

State also filed a response (which was filed on or about June 13, 2002). After defense counsel's Affidavit and the State's response were submitted, Defendant Johnson submitted a reply (which was filed on or about June 27, 2002).

5. Following full briefing on Defendant's motion, by Order dated September 11, 2002, the Superior Court denied Defendant's motion.¹ In denying Defendant's first motion for postconviction relief, the Superior Court found no merit to Defendant's contention that he entered his guilty plea on an uninformed basis.² The Superior Court looked to the Truth-In-Sentencing Plea Form executed by Defendant on October 5, 2000 which stated that Defendant "freely and voluntarily decided to plead guilty", that his lawyer had "fully advised him of his rights and of his guilty plea", and that Defendant had "read and understood all the information contained in this form."³

6. Thereafter, Defendant filed a motion for review of sentence which was denied by Order dated May 13, 2009.⁴ Defendant also filed a motion for correction of sentence which was denied by Order dated November 6, 2009.⁵

7. Defendant filed his second motion for postconviction relief on January 20, 2010. In Defendant's second motion, he raised a number of ineffective assistance of counsel contentions ultimately seeking to withdraw his guilty plea. Defendant contended that his counsel was ineffective in his advice about the law governing the nature and elements of the charges which rendered his plea improper and subjected him to double jeopardy. Defendant also contended that his counsel was ineffective for failing to pursue his motion to suppress physical evidence. In an amendment to that motion, Defendant further

¹ *State v. Johnson*, 2002 WL 31045232 (Del.Super.)

² *Id.* at *2.

³ *Id.*

⁴ Superior Court Docket No. 39.

⁵ Superior Court Docket No. 41.

contended that his counsel was ineffective for failing to seek the dismissal of his indictment based on the State's failure to bring him to trial within 180 days under the Interstate Agreement on Detainers Act. Finally, Defendant asserted that counsel was ineffective for failing to conduct a proper pretrial investigation.

8. Defendant contended that his failure to raise some of these contentions in his first Rule 61 motion was due to the fact that he obtained newly discovered evidence.

9. By Order dated March 24, 2010, the Superior Court denied Defendant's motion.⁶ The Superior Court held that Defendant's claims were time-barred, repetitive, conclusory and without merit. The Superior Court again reiterated that it appeared that Defendant had voluntarily accepted his plea after legal advice from counsel. The Superior Court also ruled that Defendant failed to adequately demonstrate a "miscarriage of justice."⁷

10. Defendant appealed the Superior Court's denial of his second motion for postconviction relief to the Delaware Supreme Court. The Delaware Supreme Court affirmed the judgment of the Superior Court denying Defendant's motion for postconviction relief.⁸ The Delaware Supreme Court held that the Superior Court did not err in denying Defendant's second motion for postconviction relief because the motion was time-barred, repetitive and formerly adjudicated, and that Defendant failed to overcome these procedural hurdles.⁹

11. On January 21, 2011, Defendant filed the subject motion for postconviction relief. In the subject motion, Defendant again raises ineffective assistance of counsel contentions ultimately seeking to withdraw his guilty plea. On February 10, 2011,

⁶ Superior Court Docket No. 50.

⁷ *Id.*

⁸ *State v. Johnson*, 2010 WL 3027069 (Del.).

⁹ *Id.*

Defendant filed an amendment to his motion for postconviction relief seeking to add additional grounds. In the amendment, Defendant contends that his trial counsel deliberately altered the plea and sentencing transcript in order to cover up the miscarriage of justice and in order to support his Affidavit filed in response to Defendant's first Rule 61 motion.

12. Although Defendant contended that his motion was based on newly discovered evidence, the newly discovered evidence to which he was referring was his trial counsel's Affidavit filed in 2002 in response to his first motion for postconviction relief, the plea and sentencing transcript of October 5, 2000; and a FBI report(s)- which Defendant had in his possession at least by the time he filed his second postconviction relief motion.

13. 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 61.¹⁰ If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.¹¹ 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.¹²

14. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within three years of a final order of conviction;¹³ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must

¹⁰ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹¹ *Id.*

¹² Super.Ct.Crim.R. 61(d)(4).

¹³ Since the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. 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).

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.¹⁴ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”¹⁵

15. The claims that Defendant raises in the subject motion, like the claims he raised in his second motion for postconviction relief, are time-barred, repetitive, conclusory and without merit.

16. In this case, Defendant’s claims are procedurally barred. Rule 61(i)(1) applies because Defendant filed this motion more than three years after his final order of conviction. Defendant’s final order of conviction was in November 2000, and this motion filed on January 2011, was filed over 10 years later, clearly outside the applicable three-year limit.

17. To the extent Defendant genuinely discovered something new that would have impacted his conviction, it was required to be raised within one year of its discovery.¹⁶ In this case, Defendant states in conclusory fashion that his motion is based on new and/or recently discovered evidence, but all the evidence to which he refers was known to him at the time he filed his second postconviction relief motion over a year ago.

¹⁴ Super.Ct.Crim.R. 61(i)(5).

¹⁵ Super.Ct.Crim.R. 61(i)(4).

¹⁶ Super.Ct.Crim.R. 61(i)(1).

Consequently, Defendant should have, at the very latest, raised any such “new” contentions in his prior motion. At this late date any claim is now time-barred.

18. 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.¹⁷ 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, such as Mr. Johnson, could litigate endlessly.

19. In addition to being time-barred, Rule 61(i) (4) also precludes the Court’s consideration of Defendant’s claims presented herein. It appears that all of the claims presented herein were already raised and adjudicated in some fashion in Defendant’s prior postconviction relief motions. In both of Defendant’s prior postconviction relief motions he challenged his trial counsel’s conduct and advices and sought to withdraw his guilty plea. In Defendant’s second motion for postconviction relief he contended that his counsel did not perform a proper pretrial investigation. In both prior motions, Defendant contended that his counsel failed to properly defend him and gave him incorrect advice. Here to, yet again, Defendant contends that his counsel did not perform a proper pretrial investigation. In the subject motion, Defendant contends that the improper pretrial investigation included: the failure to properly investigate his case, the failure to properly defend him, and the failure to obtain discovery including reports, statements, and Brady material.

20. In Defendant’s prior motions, he raised his counsel’s alleged ineffective assistance in failing to pursue his motion to suppress, failing to seek the dismissal of the

¹⁷ *State v. Bass*, 2004 WL 396372 (Del.Super.), *aff’d*, 2004 WL 1535769 (Del.).

charges based on the Interstate Agreement on Detainers Act, and failing to challenge the three separate first degree robbery charges. Here to, yet again, Defendant raises these same contentions. Like the other two Rule 61 motions, Defendant again contends that as a result of the alleged shortcomings of his counsel, he should be permitted to withdraw his guilty plea since his plea was not knowing and voluntary. Consequently, the contentions that Defendant raises in the subject motion have already been raised and adjudicated in prior postconviction relief motions and are barred by Rule 61(i)(4).

21. To the extent that Defendant has restated or refined any of his claims, the Superior Court is not required to re-examine any claim that has received “substantive resolution” at an earlier time simply because the claim is now refined or restated.¹⁸

22. Rules 61(i) (2) and (3) would prevent this Court from considering any additional arguments or claims not previously raised. Defendant could have included anything he so desired in his first, timely filed, Rule 61 motion. Nothing stopped him from raising the claims asserted herein. There was no reason why Defendant could not have raised the issues presented herein in his first Rule 61 motion nor, for that matter, in his second Rule 61 motion.

23. It is important to emphasize that Defendant signed a Truth-In Sentencing Guilty Plea Form prior to entering his guilty plea in which he stated that he had not been promised what his sentence will be, that he had not been threatened or forced to enter the plea, that he was satisfied with his lawyer’s representation, that his lawyer fully advised him of his rights, and that he freely and voluntarily decided to plead guilty.¹⁹

¹⁸ *Johnson v. State*, 1992 WL 183069, *1 (Del.Supr.).

¹⁹ Truth-In Sentencing Guilty Plea Form dated October 5, 2000.

24. Moreover, by signing the Truth-In Sentencing Guilty Plea Form, Defendant further acknowledged that by pleading guilty he would not have a trial and therefore waived his constitutional rights to confront witnesses, present evidence, present a defense, testify or not testify, and appeal any decisions.²⁰

25. Before accepting Defendant's plea, the Court engaged Defendant Johnson in a plea colloquy to ascertain that his plea was entered knowingly, intelligently and voluntarily.²¹ Defendant stated that he signed the guilty plea form after reviewing it thoroughly and carefully with his counsel. At the guilty plea hearing, Defendant stated that he had not been promised anything in exchange for the plea, that he had not been threatened or forced to enter the plea, and that he read and understood the rights that he gave up as stated on the Truth-In Sentencing Guilty Plea Form.²² Defendant represented that he was satisfied with his counsel's representation.²³

26. During the plea colloquy, Defendant admitted to the offenses to which he pled guilty.²⁴ Defendant expressly acknowledged that his guilty plea was being entered knowingly, voluntarily and intelligently.²⁵

27. During the plea colloquy, Defendant represented that he understood that all legal defenses were forever waived and forfeited by the entry of his guilty plea. He expressly acknowledged that he was waiving his right to proceed with his motion to dismiss the case under the interstate compact on detainers and his motion to suppress evidence.²⁶

²⁰ *Id.*

²¹ October 5, 2000 Guilty Plea and Sentencing Transcript

²² *Id.* at pgs. 6-9.

²³ *Id.*

²⁴ *Id.* at 9-11.

²⁵ *Id.* at 12.

²⁶ *Id.* at 11.

28. A defendant is bound by his answers on the guilty plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.²⁷

The record before the Court, including Defendant Johnson's own statements, undermines his claims in the subject post conviction motion.

29. The Truth-In Sentencing Form and plea colloquy reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the charges on which he was sentenced. Defendant has not met his burden of showing that he should not be bound by his prior representations under oath. The record reveals no basis to permit the withdrawal of Defendant's guilty plea.

30. Since Defendant's plea was entered voluntarily, intelligently and knowingly, Defendant waived his right to challenge any alleged errors or defects occurring prior to the entry of his plea, even those of constitutional proportions.²⁸ All of Defendant's claims that he seeks to raise in his postconviction motion regarding defects, errors, misconduct and deficiencies prior to the entry of the plea, were waived when Defendant knowingly, freely and intelligently entered his plea.

31. Defendant's contention that his trial counsel altered the plea and sentencing transcript is simply conclusory, frivolous and without merit. An Official Court Reporter of the Superior Court included a certification that the transcript was an accurate transcription of the proceedings.²⁹ It appears that Defendant may also be contending that his trial counsel altered the plea agreement and/or the Truth-In Sentencing Guilty Plea Form. The Plea Agreement and Truth-In Sentencing Guilty Plea Form do not appear to

²⁷ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *State v. Harden*, 1998 WL 735879, at *5 (Del.Super.); *State v. Stuart*, 2008 WL 4868658, at *3 (Del.Super. 2008).

²⁸ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *Modjica v. State*, 2009 WL 2426675 (Del. 2009); *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2004).

²⁹ See, October 5, 2000 Guilty Plea and Sentencing Transcript, last page.

be altered in any respect, and even if someone had altered their own copy of the document, the Court's copy would not have been altered. Quite frankly, Defendant's trial counsel had nothing to do with the transcription of the proceedings and it is simply frivolous to contend that he somehow altered the plea colloquy transcript, the plea agreement, or the Truth-In Sentencing Guilty Plea Form. It is noted that Defendant does not merely contend that defense counsel altered a word or two of the transcript. No, indeed. Defendant alleges that many of his admissions and representations did not occur and was somehow fabricated by defense counsel in an effort to cover up a miscarriage of justice.³⁰ This frankly is a ridiculous contention. Had the Court not been satisfied that Defendant's plea was entered into voluntarily, knowingly and intelligently, the plea would have never been accepted. There is simply no evidence to support Defendant's contention in this regard.³¹

32. 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 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."³² The Defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."³³ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. It is

³⁰ See, Defendant's Amendment to his Rule 61 Motion filed on February 10, 2011, along with his accompanying Affidavit.

³¹ See, *Mullin v. State*, 2007 WL 1850908 (Del.Supr.)(when there is no evidence to support a claim that the court reporter did not accurately transcribe the proceeding, the claim should be denied.)

³² *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

³³ *Id.*

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.

33. Defendant's request for an evidentiary hearing is hereby denied. Having carefully considered the Defendant's motion and the evidentiary record, it does not appear that an evidentiary hearing will aid in the resolution of the issues presented herein.

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

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
Timothy J. Weiler, Esquire