

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

STATE OF DELAWARE)	
)	
v.)	I.D. No. 9904015635
)	
KENNETH JOHNSON)	
)	
Defendant)	

Submitted: March 27, 2011
Decided: April 7, 2011

Upon Defendant's Third Motion for Postconviction Relief.
SUMMARILY DISMISSED.

ORDER

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

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

COOCH, R.J.

1. This 7th day of April 2011, upon consideration of Defendant's third motion for postconviction relief, it appears to the Court that:

2. On October 5, 2000, Kenneth Johnson ("Defendant") pled guilty to three counts of Robbery First Degree.¹ Defendant's first motion for postconviction relief was filed on February 25, 2002; in this motion,

¹ Transcript of Guilty Plea and Sentencing of Oct. 5, 2000.

Defendant alleged two grounds of ineffective assistance of counsel.² Defendant's trial counsel filed an affidavit denying Defendant's allegations; this Court found that Defendant's motion did not satisfy the standard articulated in *Strickland v. Washington*, and, consequently, the motion was denied.³

3. Defendant's second motion for postconviction relief was filed on January 20, 2010; among other things, Defendant again alleged ineffective assistance of counsel and sought to withdraw his guilty plea.⁴ This Court summarily dismissed Defendant's second motion for postconviction relief, holding that all of Defendant's claims were procedurally barred.⁵ This Court's summary dismissal of Defendant's second motion for postconviction relief was affirmed by the Supreme Court of Delaware.⁶

4. Defendant's third motion for postconviction relief, filed January 21, 2011, again alleges that his plea was invalid based on ineffective assistance of counsel, a "due process violation," and newly discovered evidence.⁷

² *State v. Johnson*, 2002 WL 31045232 (Del. Super. Ct. 2002).

³ *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

⁴ See Def.'s Mot. for Postconviction Relief of Jan. 20, 2010 at 3 ("Defendant argues that he was denied his right to effective assistance of counsel, due to counsel faulty advice about law governing the nature and elements of the charges, in which render the defendant to a improper plea colloquy, and subjected him to a double jeopardy clause.") (errors in original). Defendant also filed a February 2, 2010 amendment to this motion, alleging that trial counsel's failure to file for dismissal of the indictment based on the State's failure to bring him to trial within 180 days was a violation of the Interstate Detainers Act.

⁵ *State v. Johnson*, Del. Super., I.D. No. 9904015635, Cooch, R.J. (Mar. 24, 2010) (ORDER). To the extent that Defendant raised new grounds for relief based on the Interstate Agreement on Detainers Act, this Court found that Defendant did not present a colorable claim, because Defendant's allegations were belied by a September 26, 2000 letter from trial counsel addressing Defendant's concerns about this issue. *Id.* at 4-5. In short, this Court found that "Defendant voluntarily accepted his plea after proper legal advice from counsel and has failed to adequately demonstrate a 'miscarriage of justice.'" *Id.* at 5.

⁶ *Johnson v. State*, 2 A.3d 74 (Del. 2010) ("The Superior Court did not err in denying appellant's second motion for postconviction relief because the motion was time-barred, repetitive, and formerly adjudicated, and appellant failed to overcome these procedural hurdles.").

⁷ Def.'s Mot for Postconviction Relief of Jan 21, 2011 at 3

5. The instant motion was referred to Court Commissioner Lynne M. Parker for proposed findings and recommendation pursuant to 10 Del. C. § 512(b) and Superior Court Criminal Rule 62(a)(5).

6. The Commissioner determined that the claims contained in Defendant's motion were time-barred, repetitive, conclusory and without merit.⁸ The Commissioner further determined that Defendant failed to overcome any of the applicable procedural bars. Specifically, Defendant did not demonstrate 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," as required by Rule 61(i)(5), nor did he demonstrate that reconsideration of his claims is warranted in the "interests of justice, as contemplated in Rules 61(i)(2) and (i)(4)."⁹ Defendant likewise did not show cause for relief his procedural default and prejudice from violation of his rights, the requirements for relief from the procedural bar of Rule 61(i)(3).¹⁰ Consequently, the Commissioner recommended that this Court deny Defendant's third motion for postconviction relief as both time and procedurally barred. A copy of the Commissioner's report dated March 3, 2011 is attached.

7. In response to the Commissioner's report, Defendant filed a "Motion for Rebuttal."¹¹ The "Motion for Rebuttal" alleges that it was "abundantly clear that [he had] raise[d] a colorable claim that there was a miscarriage of justice" and that "[i]t's clear that [the Commissioner] is avoiding to address [sic] the miscarriage of justice that occurred."¹² Defendant then reiterates all of his previous ineffective assistance of counsel claims.¹³

⁸ *State v. Johnson*, Del. Super., I.D. No. 9904015635, Parker, C. (Mar. 3, 2011) (Report and Recommendation).

⁹ *Id.* at 10-11.

¹⁰ *Id.*

¹¹ Pursuant to Rule 62(a)(5)(ii), the State was given ten days in which to respond to Defendant's motion; the State did not file a response to Defendant's motion.

¹² Def.'s Mar. 17, 2011 Motion for Rebuttal.

¹³ *Id.*

8. The procedure for appealing the Commissioner's factual findings and recommendations is set forth in Rule 62(a)(5)(ii), which states:

Within 10 days after filing of a Commissioner's proposed findings of fact and recommendations under subparagraph (5), any party may serve and file written objections to the Commissioner's order which set forth with particularity the basis for the objections. The written objections shall be entitled "Appeal from Commissioner's Findings of Fact and Recommendations." A copy of the written objections shall be served on the other party, or the other party's attorney, if the other party is represented. The other party shall then have 10 days from service upon that party of the written objections to file and serve a written response to the written objections.

9. This Court "shall make a *de novo* determination" of any findings of fact or recommendations to which an objection is made.¹⁴ This Court may accept, reject, or modify, in whole or in part, the Commissioner's findings of fact and recommendations.¹⁵

10. As stated, the Commissioner's report was filed March 3, 2011; Defendant's "Motion for Rebuttal" is dated March 15, and was filed with the Prothonotary on March 17, dates that are 12 and 14 days after March 3, respectively. Thus, Defendant's motion is untimely, pursuant to Rule 62(a)(5)(ii). Moreover, Defendant's motion is captioned a "Motion for Rebuttal," rather than the prescribed caption of "Appeal from Commissioner's Findings of Fact and Recommendations." Under Rule 62(b), these defects may subject Defendant's motion to dismissal.¹⁶

11. Although Defendant's untimely and improperly captioned motion is susceptible to dismissal, in the exercise of its discretion, this Court has considered Defendant's motion and undertaken a *de novo* review of those findings and recommendations to which Defendant has objected.

¹⁴ Super. Ct. Crim. Rule 62(a)(5)(iv).

¹⁵ *Id.*

¹⁶ "A party seeking reconsideration of an order of a Commissioner under subparagraph (4) or appealing the findings of fact and recommendations of a Commissioner under subparagraph (5) who fails to comply with the provisions of this rule may be subject to dismissal of said motion for reconsideration or appeal."

12. Having conducted a *de novo* review of the record, this Court adopts the well-reasoned Commissioner's Report and Recommendation, with the procedural revision that Defendant's motion shall be summarily dismissed, pursuant to Rule 61(d)(4),¹⁷ rather than denied on its merits.

13. Therefore, for the reasons stated above, Defendant's third motion for postconviction relief is **SUMMARILY DISMISSED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services

¹⁷ "If it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified."