

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

STATE OF DELAWARE)	
)	
v.)	I.D. No. 0902022095
)	
FRANK L. MERCADANTE)	
)	
Defendant)	

Submitted: July 26, 2011
Decided: August 22, 2011

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

ORDER

Annemarie Hayes, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Frank L. Mercadante, Wilmington, Delaware, *pro se*.

COOCH, R.J.

1. This 22nd day of August 2011, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

2. On September 9, 2009, Defendant pled guilty to Robbery First Degree.¹ In turn, on November 20, 2009, this Court imposed a sentence of ten years at Level V incarceration, to be suspended after five years at Level V incarceration for five years of Level IV supervision, to be suspended after

¹ See Truth-In-Sentencing Guilty Plea Form of Sept. 9, 2009.

six months for three years of Level III supervision.² Defendant did not file a direct appeal of his conviction or sentence.³

3. Defendant now moves for postconviction relief. He raises three grounds for relief: 1) his guilty plea was “coerced” because his trial counsel advised him that he would “undoubtedly be found guilty” of First Degree Robbery if the case proceeded through trial, thereby causing him to accept the plea agreement due to “fear” and without a “full understanding;” 2) he had ineffective assistance of counsel because his trial counsel did not advise him as to “what Delaware law defines as Robbery 1st and what delineates between the various degrees of robbery;” and 3) there was a “suppression of favorable evidence,” but Defendant defined the “favorable evidence” as “the statutes that describe Robbery 1st and 2nd.”⁴ Thus, grounds two and three are effectively the same claim recast in slightly different language.

4. Prior to considering the merits of Defendant’s motion, the Court must first determine if the motion satisfies the procedural requirements of Superior Court Criminal Rule 61.⁵

5. It is manifest on the face of Defendant’s motion that his claims are time barred; pursuant to Superior Court Criminal Rule 61(i)(1):

A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

² Sentence Order of June Nov. 20, 2009.

³ See Superior Court Criminal Docket.

⁴ Def.’s Mot. for Postconviction Relief of July 26, 2011 at 3.

⁵ See, e.g., *Watson v. State*, 602 A.2d 1082 (Del. 1991) (“[T]o preserve the integrity of Delaware’s procedural default rules, this Court will not ordinarily consider the merits of a postconviction relief claim before first determining whether the claim is procedurally barred.”) (citation omitted); *State v. Caldwell*, 2009 WL 3069680 (Del. Super. Ct. 2009) (“Prior to addressing the merits of a postconviction relief claim, the Court must first determine whether the Motion meets the procedural requirements of Rule 61(i).”) (citations omitted).

6. As stated, Defendant was sentenced on November 20, 2009. Given that Defendant did not file a direct appeal, the date of finality of his conviction is controlled by Rule 61(m)(1), which states that, if the defendant does not file a direct appeal, a judgment of conviction is final “30 days after the Superior Court imposes sentence.” Consequently, Defendant’s conviction was final on December 20, 2009. It follows that Rule 61(i)(1) required the instant motion to be filed by December 20, 2010, one year after his judgment of conviction was final.

7. Defendant has not asserted, much less substantiated, that a relevant retroactively applicable right has been newly recognized by the Supreme Court of Delaware or the Supreme Court of the United States, thereby extending the time period in which he may file a motion for postconviction relief.⁶ Instead, Defendant simply raised untimely claims that his guilty plea was coerced, and that, in his view, he was not sufficiently advised as to the distinction between Robbery First Degree and Robbery Second Degree.

8. Likewise, Defendant’s motion does not fall within the “fundamental fairness” exception of Rule 61(i)(5); this is a narrowly construed exception that exempts a defendant’s motion from the procedural bars of Rule 61(i)(1)-(3) if there is 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.”⁷ To trigger this exception, Defendant bears the burden of demonstrating that the Court lacked jurisdiction or a colorable constitutional claim;⁸ Defendant has shown neither condition. Defendant has not shown that the consideration of any of his claims is warranted in the interests of justice, as he has failed to

⁶ Superior Court Criminal Rule 61(i)(1) (providing that if a motion for postconviction relief “asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.”).

⁷ See, e.g., *Younger v. State*, 580 A.2d 552, 555 (Del. 1990) (“The fundamental fairness exception (as set forth in Superior Court Criminal Rule 61(i)(5)) is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.”) (citations omitted).

⁸ *Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991) (citation omitted).

articulate any factual basis to support the contention that “subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.”⁹ Likewise, Defendant has not established any miscarriage of justice due to a constitutional violation; he simply made an unsupported assertion that guilty plea was somehow “coerced” based on his fear of receiving the maximum sentence if convicted at trial and the allegedly deficient information he received regarding the Delaware’s robbery statutes. Defendant’s claims are conclusory and devoid of any factual support. This Court “will not address claims for postconviction relief that are conclusory and unsubstantiated.”¹⁰

9. With respect to Defendant’s claims of ineffective assistance of counsel, this Court finds that Defendant’s conclusory and unsubstantiated claims are properly subject to summary dismissal. The Supreme Court of Delaware has observed that, in connection with a timely first motion for postconviction relief alleging ineffective assistance of counsel, it is the “preferable practice” for this Court to obtain an affidavit from trial counsel addressing the defendant’s claims.¹¹ Nonetheless, the Supreme Court of Delaware has also confirmed that conclusory and unsupported claims of ineffective assistance of counsel are properly summarily dismissed by this Court.¹² In this case Defendant has simply made the conclusory and unsupported claim that his trial counsel was ineffective because trial counsel allegedly did not sufficiently explain the distinction between Robbery First Degree and Robbery Second Degree. Thus, Defendant’s claims of ineffective assistance of counsel may properly be summarily dismissed.

⁹ *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990) (citations omitted).

¹⁰ *State v. Washington*, 2003 WL 21771210, at *2 (Del. Super. Ct. 2003) (citing *Younger*, 580 A.2d at 555).

¹¹ *Horne v. State*, 887 A.2d 973, 975 (Del. 2005) (“Although Rule 61 does not require the Superior Court to obtain trial counsel’s affidavit in response to the defendant’s allegations of ineffective assistance of counsel, we find that to be the preferable practice in a case like this involving a first postconviction motion containing ineffectiveness claims.”).

¹² *Boatswain v. State*, 962 A.2d 256, at *1 (Del. 2008) (“In the absence of any basis for [the defendant’s] claim of ineffective assistance of counsel, we conclude that the Superior Court was correct in summarily dismissing it.”).

10. Finally, even if Defendant's allegations of ineffective assistance of counsel were not conclusory and unsupported, it remains that Defendant's motion is time-barred and not within any exception to the procedural bars of Rule 61. Thus, Defendant's claims of ineffective assistance of counsel may properly be summarily dismissed at this juncture.

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

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services
Robert M. Goff, Jr., Esquire