

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
Plaintiff,)
)
) Cr. ID No. 0610004197A
)
RAHIM SMITH, a/k/a)
ALEEM ABDUL-WAHHAB,)
)
Defendant.)
)

Submitted: July 30, 2019
Decided: October 15, 2019

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE SUMMARILY DISMISSED
AND
MOTION FOR APPOINTMENT OF COUNSEL SHOULD BE
DENIED
AND MOTION FOR AN EVIDENTIARY HEARING SHOULD BE
DENIED**

Stacey Cohee, Esquire, Deputy Attorney General, Department of Justice,
Dover, Delaware, Attorney for the State.

Rahim A. Smith, Sussex Correctional Institution, Georgetown, Delaware,
pro se.

PARKER, Commissioner

This 15th day of October 2019, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND, FACTS AND PROCEDURAL HISTORY

1. In May 2007, a Superior Court jury found Defendant Rahim Smith guilty of three counts each of second degree rape and third degree unlawful sexual contact. In July 2007, Smith was sentenced to a total period of seventy-eight years at Level V incarceration, to be suspended after serving thirty-five years, for decreasing levels of probation.
2. On direct appeal, on August 28, 2008, the Delaware Supreme Court affirmed Smith's conviction and sentence.¹
3. The facts, as set forth by the Delaware Supreme Court on Smith's direct appeal, are that in April 2006, Smith, his wife and three children moved in with Lisa Flowers.² Smith and Flowers were not related, but Flowers, who had known Smith since he was a teenager, thought of him as a nephew. Flowers' disabled adult son, Ben, also lived with her.³

¹ *Smith v. State*, 2008 WL 39990859 (Del.).

² This Court will use the same pseudonyms used by the Delaware Supreme Court on Smith's direct appeal in order to identify the victim and his mother.

³ *Smith v. State*, 2008 WL 39990859, *1 (Del.).

4. Ben suffers from cerebral palsy. He is confined to his bed and wheelchair. He has a severe speech impediment and is emotionally delayed.⁴

5. In August 2006, Flowers went to visit her newborn grandson for a week. She could not locate a handicap-accessible van to accommodate Ben, so she left him at home in the care of Smith, as well as her sister, Pat, and her friend, Charlotte, both of whom also lived with her.⁵

6. Ben, through the aid of an interpreter, testified at trial that while his mother was away Smith sexually assaulted him multiple times. Ben did not immediately tell anyone about the assaults because Smith had threatened to assault him again if he told anyone. Several weeks later, Ben told his mother what happened. Flowers then reported the assaults to the police.⁶

7. Smith presented an alibi defense at trial. He testified in his own defense and denied the allegations. Smith's mistress also testified at trial and stated that Smith was with her at all times when the assaults were alleged to have occurred.⁷

8. The jury convicted Smith on all counts.⁸

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

9. On September 14, 2015, Smith filed a motion for modification of sentence that was denied by the Superior Court on September 17, 2015.⁹

SMITH'S RULE 61 MOTION

10. On July 15, 2019, Smith filed the subject Rule 61 motion. Smith raises three claims all stemming from the 2007 trial. Specifically, Smith claims that:

1) his trial counsel was ineffective for failing to object to the use of an uncertified translator at trial;

2) his trial counsel was ineffective for failing to object to the improper admission of the victim's videotaped Section 3507 statement at trial; and

3) his trial counsel was ineffective for failing to object to, and failing to request a mistrial, for allowing the testimony of an alleged bad act at trial.

11. Smith also sought the appointment of counsel and requested an evidentiary hearing in connection with his Rule 61 motion.

12. Smith filed the subject Rule 61 motion in 2019, and it is the Rule 61 in effect at the time of the filing of this motion that is applicable.¹⁰

⁹ See, Superior Court Docket Nos. 62 & 63.

¹⁰ See, *Bunting v. State*, 2015 WL 2147188, ftnt. 7 (Del.).

13. Since Smith's motion falls short of the procedural requirements that must be met in order to proceed with the merits of his claims, his motion should be summarily dismissed and the merits of Smith's claims should not be considered.¹¹

14. Although the merits of Smith's claims should not be considered since his claims are procedurally barred, it is noted for the sake of completeness that his claims are, in fact, meritless.

15. Smith's first two claims are that an uncertified translator was used at trial and during the victim's videotaped pre-trial statement. In this case, the victim had a severe speech impediment due to his cerebral palsy. The victim spoke English but had a severe speech impediment. Because of this severe speech impediment, the victim's mother accompanied the victim when he gave his videotaped pre-trial statement and helped with the translation so that the victim could be understood.

16. At trial, defense counsel objected to the State's request to have his mother act as his "interpreter". The trial court allowed the victim to testify at trial with the aid of an "interpreter" as an accommodation for the victim's disability. Due to defense counsel's objection that the victim's mother not be allowed to act as his interpreter, the State instead located an expert in speech

¹¹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

pathology who was familiar with the victim and his speech patterns having worked with the victim for six years when he was a student. There was no objection to the use of this individual serving as the victim's "interpreter" at trial.

17. At trial, defense counsel was afforded the opportunity to conduct a complete cross-examination of the victim.

18. In the subject Rule 61 motion, Smith complains of the use of the victim's mother as his interpreter during his videotaped Section 3507 statement and the use of the speech pathologist who was familiar with the victim's speech patterns as his interpreter at trial. Smith complains that a "certified" interpreter should have been used.

19. In this case, the victim spoke English. He did not need a translator to translate a foreign language into English so that the jury could understand what he saying. Here, the victim needed someone familiar with his particular speech patterns to repeat what he was saying so that he could be understood by those unfamiliar with his speech in light of his severe speech impediment. The pool of eligible "interpreters" was limited to only those individuals personally familiar with the victim's speech patterns. This court is unaware of the existence of any such certification that could be obtained that certifies that a person is familiar with another particular individual's speech patterns.

20. On direct appeal, the Delaware Supreme Court found no error in the use of the interpreter at trial to accommodate Ben's disability under the facts and circumstances of this case.¹²

21. Smith's first two claims are without merit.

22. Smith's third claim raised in this Rule 61 motion was that his counsel was ineffective for failing to object to, and/or failing to request a mistrial, for allowing the testimony of an alleged bad act at trial. As to this claim, the trial court asked defense counsel if he wanted the court to give a curative instruction regarding the improper reference at trial to the alleged bad act.¹³

Defense counsel declined the curative instruction advising the court that he preferred instead to let it go rather than call attention to it.¹⁴

23. The trial court noted that the comment at issue appeared to be insignificant and agreed with defense counsel's decision to let it go rather than call attention to it. Specifically, the trial court stated: "I would also note that although the transcript is fairly clear, when read back the witness was speaking quickly, and it's not clear to me at all that that comment, as fleeting as it was, registered with anyone. I was watching the jury at that time and no one reacted in any particular manner. So under the totality of the

¹² *Smith v. State*, 2008 WL 39990859, *1-2 (Del.).

¹³ May 17, 2007 Trial Transcript, at pg. C-114.

¹⁴ May 17, 2007 Trial Transcript, at pg. C-114.

circumstances, I do think it would be unduly prejudicial to draw attention to that one very quick and ambiguous comment.”¹⁵

24. It does not appear that trial counsel’s strategic decision not to call attention to “one very quick and ambiguous comment” by a witness was deficient in any regard or that Smith suffered any actual prejudice as a result of trial counsel’s performance.¹⁶ This claim, like the first two, is also without merit.

25. Smith’s claims are, however, procedurally barred and should be dismissed without consideration of their merits.

26. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹⁷ (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances (ie. discovery of *new* evidence or *new* rule of constitutional law) warranting a subsequent motion being filed; (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 and cause

¹⁵ May 17, 2007 Trial Transcript, at pgs. C-114- C115.

¹⁶ See, *Strickland v. Washington*, 466 U.S. 668, 694 (1984)(in order to establish ineffectiveness of trial counsel, defendant must prove that trial counsel’s performance was deficient and that defendant suffered actual prejudice as a result thereof; See also, *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁷ Super.Ct.Crim.R. 61(i)(1).

for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief however do not apply to a claim that the court lacked jurisdiction or to a claim that *new* evidence exists that movant is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.¹⁸

27. In the subject action, Smith's motion is time-barred. In order to be timely filed, a Rule 61 motion must be filed within one year of a final order of conviction.¹⁹ In this case, the final order of conviction was in 2008,²⁰ and this motion was filed in July 2019, over eleven years later, well outside the applicable one-year limit. Smith's claims, at this late date, are time-barred.

28. Rule 61(i)(2) and Rule 61(i)(5) further preclude this court's consideration of Smith's motion since Smith has not satisfied the pleading requirements for proceeding with this motion. Since Smith's Rule 61 motion was not timely filed, in order to overcome the procedural hurdles, Smith must establish: 1) that *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted, or 2) the

¹⁸ Super.Ct.Crim.R. 61.

¹⁹ Super.Ct.Crim.R. 61(i)(1).

²⁰ Super.Ct.Crim.R. 61(m)(2).

existence of a *new* rule of constitutional law made retroactive to this case that would render his convictions invalid.

29. Smith has not made any such showing in this case. Smith has not pled with particularity that any *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he pled guilty.

30. In fact, Smith does not raise anything new or recently discovered. All of Smith's claims stem from facts known to him at the time of his trial in 2007. In the subject motion, Smith complains of the alleged shortcomings of counsel at trial, which was held in 2007, over 12 years prior to the filing of this motion. Smith does not raise any new evidence, let alone any *new* evidence that would create a strong inference that he is actually innocent. Moreover, Smith does not claim the existence of any *new* rule of constitutional law that would be applicable to his case. As such, Smith has failed to meet the procedural requirements allowing him to proceed with his Rule 61 motion. Smith's motion should be summarily dismissed.

31. Rule 61(i)(4) also precludes Smith's claims raised herein to the extent that those claims were raised and adjudicated on direct appeal. In the subject motion, Smith claims that his trial counsel was ineffective for failing to object to the use of an "uncertified translator" at trial, and for allowing the admission of his videotaped Section 3507 statement at trial when the victim's mother, an

“uncertified translator” helped translate the victim’s statements during the interview.

32. On direct appeal, the Delaware Supreme Court found no error in the use of the interpreter at trial in order to accommodate Ben’s disability under the facts and circumstances of this case.²¹

33. To the extent Smith is re-raising, re-stating or re-couching claims previously raised on direct appeal in this untimely Rule 61 motion, any such claims are procedurally barred as previously adjudicated.²²

34. Rule 61(i)(3) further prevents this court from considering any claim raised by Smith at this late date that had not previously been raised. Smith was aware of, had time to, and the opportunity to raise the claims presented herein in a timely filed motion. Smith’s claims raised in the subject motion stem from facts known to him at the time of his trial in 2007, twelve years before he filed his Rule 61 motion.

35. Smith has not established any prejudice to his rights and/or cause for relief. Smith had time and opportunity to raise any issue raised herein in a timely filed postconviction motion. There is no just reason for Smith’s lengthy delay in doing so. Having been provided with a full and fair opportunity to

²¹ *Smith v. State*, 2008 WL 39990859, *1-2 (Del.).

²² *Johnson v. State*, 1992 WL 183069, at *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

present any issue desired to be raised in a timely filed motion, any attempt at this late juncture to raise, re-raise or re-couch a claim is procedurally barred.

36. The claims raised in Smith's motion are time-barred and otherwise procedurally barred.

REQUEST FOR COUNSEL IS DENIED

37. Smith's request for the appointment of counsel is denied. In cases like this, where the Rule 61 motion is untimely filed, counsel is to be appointed only in certain limited exceptional situations.²³

38. Having fully, thoroughly and carefully considered Smith's motion and the evidentiary record, none of the exceptional circumstances giving rise to the entitlement to the appointment of counsel exist in this case.²⁴ Since Smith has failed to overcome the procedural hurdles warranting the appointment of counsel in this untimely postconviction motion, the appointment of counsel is denied.

EVIDENTIARY HEARING IS DENIED.

39. Smith's request for an evidentiary hearing is denied. Following a full, comprehensive and thorough review of the evidentiary record, Smith's claims were either reasonably discounted as not supported by the record or not

²³ Super.Ct.Crim.R. 61(e)(2) & (4).

²⁴ Super.Ct.Crim.R. 61(e)(4).

material to a determination of Smith's claims. It does not appear that an evidentiary hearing will aid in the resolution of this motion and is denied.

For all of the foregoing reasons, Smith's motion for postconviction relief should be **SUMMARILY DISMISSED**, his request for the appointment of counsel should be **DENIED**, and his request for an evidentiary hearing should be **DENIED**.

IT IS SO RECOMMENDED.


Commissioner Lynne M. Parker

cc: Prothonotary
John P. Daniello, Esquire