

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT J. SMITH,	§
	§
Defendant Below-	§ No. 655, 2007
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0401021784
Plaintiff Below-	§
Appellee.	§

Submitted: May 14, 2008
Decided: August 4, 2008

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 4th day of August 2008, upon consideration of appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, Albert Smith, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. The State of Delaware has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Smith's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that Smith pled guilty in February 2005 to one count each of first degree robbery and second degree assault (as a lesser included offense of attempted murder), and two counts each of possession of a firearm

during the commission of a felony and second degree conspiracy. The Superior Court sentenced Smith on these charges to twenty-five years at Level V imprisonment to be suspended after serving twenty-one years for probation.¹ On appeal, Smith's counsel filed a no merit brief pursuant to Supreme Court Rule 26(c). Despite being given the opportunity to do so, Smith raised no arguments for the Court to consider on appeal. His convictions and sentences were affirmed.² In July 2007, Smith filed a motion for postconviction relief, claiming that his guilty plea was involuntary and that the Superior Court erred in failing to grant, or even address, the motion to withdraw his guilty plea, which he filed *pro se* prior to his June 2005 sentencing. The Superior Court denied Smith's motion on its merits. This appeal followed.

(3) Notwithstanding the Superior Court's ruling on the merits of Smith's motion, this Court first will apply the rules governing the procedural requirements of Rule 61 before giving consideration to the merits of any underlying claim for postconviction relief.³ Rule 61(i)(1), as amended in 2005, requires that a petition

¹ The Superior Court's sentencing order also sentenced Smith on unrelated criminal charges, including attempted murder, for which Smith was charged under a separate indictment and found guilty following a jury trial. This Court affirmed those convictions and sentences in a separate appeal. *Smith v. State*, 902 A.2d 1119 (Del. 2006).

² *Smith v. State*, 2006 WL 1725610 (Del. June 21, 2006).

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1980) (citing *Harris v. Reed*, 489 U.S. 255 (1989)).

for postconviction relief be filed within one year after a conviction becomes final.⁴ For purposes of Rule 61(i)(1), a conviction that is appealed becomes final upon this Court's issuance of the mandate on appeal.⁵ The mandate in Smith's direct appeal issued on July 7, 2006. Smith did not file his petition for postconviction relief until July 17, 2007. Accordingly, the petition was untimely.

(4) Moreover, Smith had the opportunity to challenge the voluntariness of his guilty plea in the course of his direct appeal to this Court. Smith, however, failed to raise any issues for the Court's consideration on direct appeal. Smith asserts no cause for this procedural default. Accordingly, we find Smith's claim barred by Rule 61(i)(3), in addition to being untimely under Rule 61(i)(1). We find no colorable claim of a miscarriage of justice sufficient to overcome these procedural bars.⁶

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁴ Del. Super. Ct. Crim. R. 61(i)(1) (2008) (as amended on July 1, 2005 to apply to all convictions becoming final after the effective date).

⁵ Del. Super. Ct. Crim. R. 61(m)(2) (2008).

⁶ See Del. Super. Ct. Crim. R. 61(i)(5) (holding that the procedural bars to Rule 61 relief do not apply to any claim that the court lacked jurisdiction or to any colorable claim that there was a miscarriage of justice).