

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE E. CROPPER,	§
	§
Defendant Below-	§ No. 402, 2004
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr.A. No. IN96-02-0924 and
	§ -0925
Plaintiff Below-	§ Cr. ID 9601010152
Appellee.	§

Submitted: February 18, 2005

Decided: April 11, 2005

Before **HOLLAND**, **BERGER**, and **JACOBS**, Justices.

ORDER

This 11th day of April 2005, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The appellant Dwayne Cropper filed this appeal from the Superior Court's denial of his second motion for postconviction relief. Because we find that Cropper's second postconviction motion is both untimely and repetitive, we do not reach the merits of Cropper's claims on appeal. Accordingly, we affirm the Superior Court's denial of Cropper's petition, albeit on the independent and alternative grounds that Cropper's motion is procedurally barred by the provisions of Superior Court Criminal Rule 61(i)(1) and Rule 61(i)(2).

(2) The record reflects that Cropper was convicted in February 1999 of attempted first degree murder and possession of a deadly weapon during the commission of a felony. The Superior Court sentenced him as an habitual offender to 35 years in prison followed by 10 years of decreasing levels of supervision. This Court affirmed Cropper's convictions and sentence on direct appeal.¹ The mandate in Cropper's direct appeal was issued on February 8, 2000. In January 2001, Cropper filed a motion for postconviction relief, alleging several claims of ineffective assistance of counsel. The Superior Court denied his motion, and this Court affirmed that judgment on appeal.²

(3) Cropper, represented by counsel, filed his second motion for postconviction relief on July 19, 2004. Cropper contended that the habitual offender statute, pursuant to which he was sentenced, constituted cruel and unusual punishment under the Eighth Amendment of the federal Constitution. Cropper further asserted that his prior counsel was ineffective for failing to raise this argument previously. The Superior Court reviewed the merits of Cropper's claims and found them to be frivolous. This appeal followed.

¹ *Cropper v. State*, 2000 WL 139992 (Del. Jan. 21, 2000).

² *Cropper v. State*, 2001 WL 1636542 (Del. Dec. 10, 2001).

(4) Notwithstanding the Superior Court’s ruling on the merits of Cropper’s claims, this Court first will apply the rules governing the procedural requirements of Rule 61 before giving consideration to the merits of any underlying claims for postconviction relief.³ Rule 61(i)(1) requires that a petition for postconviction relief be filed within three years after a conviction becomes final.⁴ In this case, Cropper’s postconviction motion should have been filed by February 2003, at the latest. It was not filed until July 2004. Accordingly, consideration of Cropper’s untimely motion is barred unless it asserts a newly recognized, retroactively applicable right⁵ or unless it asserts either a claim that the trial court lacked jurisdiction or a colorable claim of a miscarriage of justice due to a constitutional violation.⁶

(5) Furthermore, Rule 61(i)(2) provides that any ground for relief that was not asserted in a previous postconviction proceeding is thereafter

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

⁴ DEL. SUPER. CT. CRIM. R. 61(i)(1).

⁵ Rule 61(i)(1) provides: “A motion for postconviction relief may not be filed more than three years 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 three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.”

⁶ Rule 61(i)(5) provides: “The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall 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.”

barred unless consideration of the claim is warranted in the interest of justice.⁷ This is Cropper's second petition for postconviction relief, the first having been denied in 2001. Accordingly, in addition to being untimely, Cropper's second petition for postconviction relief is repetitive.

(6) Unless Cropper can overcome the procedural hurdles of Rule 61(i)(1) and Rule 61(i)(2), consideration of the merits of his claims is prohibited. Cropper argues there is a colorable claim in his case of a constitutional violation because the Superior Court did not conduct a proportionality review before sentencing him as an habitual offender. Thus, Cropper argues, the Superior Court may have violated the Eighth Amendment prohibition against cruel and unusual punishment as interpreted by this Court in *Crosby v. State*.⁸

(7) The proportionality review set forth in *Crosby*, however, is only required if a threshold comparison of the crime committed and the sentence imposed leads to an inference of "gross disproportionality."⁹ That is certainly not Cropper's case. Unlike Crosby, who was sentenced to life in prison as an habitual offender following convictions for second degree

⁷ Rule 61(i)(2) states: "Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice."

⁸ *Crosby v. State*, 824 A.2d 894, (Del. 2003).

⁹ *Id.* at 908.

forgery and criminal impersonation, Cropper was convicted of attempted first degree murder and possession of a deadly weapon following the brutal, repeated stabbing of his wife, which left her permanently disabled. For his brutal crime, Cropper was sentenced to 45 years in prison, to be suspended after serving 35 years, which may be further reduced by good time credit. Given the brutality of his crime and his proven recidivism, there is nothing to suggest that Cropper's habitual offender sentence is grossly disproportionate to his crime. Accordingly, we find no colorable claim of a constitutional violation in Cropper's case. His postconviction claims, therefore, are procedurally barred.¹⁰

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

BY THE COURT:

/s/ Carolyn Berger
Justice

¹⁰ DEL. SUPER. CT. CRIM. R. 61(i)(1), (2).