

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR KENT COUNTY**

<b>STATE OF DELAWARE</b>	)	
	)	
v.	)	RK08-01-0528-02
	)	Resist. Arrest (F)
<b>EDWARD L. POWELL</b>	)	RK08-06-0254-02
	)	Nonc. w/Con. Bond (F)
Defendant.	)	RK08-06-0255-02
ID. No. 0801005843	)	DUI Liq./Drg. 4 <sup>th</sup> (F)
& 0805023686	)	

**ORDER**

On this 30th day of November, 2011, upon consideration of the Defendant’s Motion for Postconviction Relief, the Commissioner’s Report and Recommendation and the record in this case, it appears that:

1. The defendant, Edward L. Powell, III (“Powell”), pled guilty on December 3, 2008, to one count of Resisting Arrest, 11 *Del. C.* § 1257 (ID No. 0801005843); one count of Driving Under the Influence, 21 *Del. C.* § 4177; and four counts of Noncompliance with Conditional Release, 11 *Del. C.* § 2113 (ID No. 0805023686). The Plea Agreement encompassed the two separate indictments: ID No. 0801005843 and ID No. 0805023686. Powell was also facing four counts of Unlawful Imprisonment Second, two counts of Offensive Touching, one count of Menacing, one count of Disorderly Conduct, one count of Criminal Mischief < \$1,000, four counts of Endangering the Welfare of a Child, one count of Signal Flashing, one count Tampering With a Witness and an additional count of Noncompliance with Conditional Release. In exchange for Powell’s plea, the State entered *nolle prosequis*

on the remaining charges and agreed to a presentence investigation. Prior to sentencing, the State filed a motion to declare Powell an habitual offender pursuant to 11 *Del. C.* § 4214(a). The Court granted the State's motion and sentenced Powell as an habitual offender to a total of four years and four months incarceration with credit for 293 days served, followed by probation.

2. Powell did not appeal his conviction or sentence to the Delaware Supreme Court.

3. Powell filed his first motion for postconviction relief on January 22, 2010.

4. The State voluntarily entered *nolle prosequis* for three of Powell's noncompliance with bond charges, following which the Court resentenced Powell on one count of Resisting Arrest, one count of noncompliance with bond and one count of DUI in June, 2010. The Court subsequently dismissed Powell's first motion for postconviction relief.

5. On October 1, 2010, Powell filed his second postconviction motion.

6. The Court referred this motion to Superior Court Commissioner Andrea M. Freud pursuant to 10 *Del. C.* §512(b) and Superior Court Criminal Rule 61 for proposed finding of facts and conclusions of law.

7. The Commissioner has filed a Report and Recommendation concluding that the Motion for Postconviction Relief should be denied because it is procedurally barred.

8. Defendant has not filed objections to the Report.

**NOW, THEREFORE**, after careful and *de novo* review of, and for reasons stated in, the Commissioner's Report and Recommendation dated September 29,

*State v. Powell*  
*ID No: 0801005843, 0805023686*  
*November 30, 2011*

2011,

**IT IS ORDERED** that the Commissioner's Report and Recommendation is adopted by the Court and the Defendant's Motion for Postconviction Relief is **DENIED**.

/s/ Robert B. Young

J.

RBV/sal

oc: Prothonotary  
cc: The Honorable Andrea M. Freud  
Counsel  
Defendant  
File

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**COMMISSIONER'S REPORT AND RECOMMENDATION**

**Upon Defendant's Second Motion for Postconviction Relief  
Pursuant to Superior Court Criminal Rule 61**

R. David Favata, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Edward L. Powell, *Pro se*.

FREUD, Commissioner  
September 29, 2011

The defendant, Edward L. Powell, III (“Powell”), pled guilty on December 3, 2008, to one count of Resisting Arrest, 11 *Del. C.* § 1257 (ID No. 0801005843); one count of Driving Under the Influence, 21 *Del. C.* § 4177; and four counts of Noncompliance with Conditional Release, 11 *Del. C.* § 2113 (ID No. 0805023686)

*State v. Powell*

ID No.'s 0801005843 & 0805023686

September 29, 2011

The Plea Agreement encompassed the two separate indictments: ID No. 0801005843 and ID No. 0805023686. Powell was also facing four counts of Unlawful Imprisonment Second, two counts of Offensive Touching, one count of Menacing, one count of Disorderly Conduct, one count of Criminal Mischief < \$1,000, four counts of Endangering the Welfare of a Child, one count of Signal Flashing, one count Tampering With a Witness and an additional count of Noncompliance with Conditional Release. In exchange for Powell's plea, the State entered *nolle prosequis* on the remaining charges and agreed to a presentence investigation. Prior to sentencing, the State filed a motion to declare Powell a habitual offender pursuant to 11 *Del. C.* § 4214(a). The Court granted the State's motion and sentenced Powell as a habitual offender to a total of four years and four months incarceration with credit for 293 days served, followed by probation.

Powell did not appeal his conviction or sentence to the Delaware Supreme Court. On January 22, 2010 Powell filed his first motion for postconviction relief in which he raised several claims relating to the noncompliance with bond charges:

Ground One:           Petitioner asserts and contends that he had been incorrectly indicted, as the indictment of July 07, 2008, as to the three counts to be appealed, i.e.; three (3) noncompliance with bond, in alleged violation of Title 11, § 2113 are missing the key component, as it fails to properly allege the needed element so as to justify the charges; to wit, the relevant section of the statute

*State v. Powell*

ID No.'s 0801005843 & 0805023686

September 29, 2011

states that a specific need..., “release” is the key component, which the state fails to allege took place, as it did not, and as is necessary to actually charge for any violation as an offense.

Ground Two: Petitioner contends that he was illegally and improperly (sic) sentenced on the three charges of non-compliance with bond, as the alleged charges in the indictment were in and of themselves defective in nature and in their particular failure to allege and specify the necessary element of the offense needed in order to actually charge, and/or convict the Petitioner; as Petitioner was no ever actually “released” on bond as he is alleged to have been, and to not have complied with; thus making the three charges of noncompliance in the indictment to be invalid, and all of the sentencing on these charges equally invalid, and all of the sentencing on these charges equally invalid.

Ground Three: Petitioner does assert and contend that he is the direct recipient of ineffective assistance of counsel on the part of one Sandra Dean, Esq.; in that she failed to protect petitioner’s rights against both the improper indictment of the three non-compliance with bond not being addressed with a motion to dismiss; as well as not bringing it to the Court’s attention. Further she (Dean) did not resist

*State v. Powell*

ID No.'s 0801005843 & 0805023686

September 29, 2011

the State's attempts and success in having all of the various charges from two (2) different counties consolidated into one venue; as petitioner was repeatedly adamant in requesting separate trials for the alleged charges in each of the counties where they were alleged to have occurred.

In June 2010 the State voluntarily entered *nolle prosequis* for three of Powell's noncompliance with bond charges and the Court resentenced Powell on one count of Resisting Arrest, one count of noncompliance with bond and one count of DUI. The Court subsequently dismissed Powell's first motion for postconviction relief.

On October 1, 2010, Powell filed his second postconviction motion which to the extent it can be deciphered, again appears to raise issue with the noncompliance with bond charges that had previously been dismissed.

Ground one: Ineffective assistance of counsel.

Sentence is illegal as counsel was ineffective by not informing this Defendant of the contextual legal content of Def. legal situation which by time is inapplicable. There is an (interest) of justice exception. The General Assembly properly exercised its legislative authority under state constitution by classifying offences of breach of conditions of release as either misdemeanor or felony based on whether underlying charge on which accused was release was misdemeanor or felony, Del. C Ann.

*State v. Powell*

ID No.'s 0801005843 & 0805023686

September 29, 2011

const. Art 2, 1 See 11 Del C 201 (2,4) the underlying charge was not a felony, it was a misdemeanor, See Dickerson v. State, 2990 WL 1746086 (2009).

Ineffective assistance of counsel cannot be waived State v. Macdonald 2007 WL 21348332. Edward L. Powell III was sentenced on 1-29-2009 so the 2009 WL 1746086 case that is being used to coincide with ineffective assistance of counsel claim is newly recognized after the judgement of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware. Reconsideration is warranted in the interest of justice.

Bars inapplicable 61(i)(1(2) or (3) of this subdivision shall not apply to Powells colorable Sixth Amend. Const. claim of ineffective assistance of counsel. Errors of defendant not having fundamental fairness undermines proceedings creating an unfair procedure pursuant to Plea Agreement.

Ineffective assistance of counsel cannot be waived (State v. Macdonald 2007 WL 21348332[]). 61(B)(2) is inapplicable repetitive excess under Delaware law can be done in the interst of justice when it expands the previous argument o show a violation. There is an interest of justice exception. The factual basis for previous ruling pursuant to plea has changed in such a way that renders the earlier ruling (sentence) fundamentally unjust. Reconsideration is warranted in the interest of justice.

Under Delaware law, this Court must first determine whether Powell has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may



*State v. Powell*

ID No.'s 0801005843 & 0805023686

September 29, 2011

consider the merits of the motion.<sup>1</sup> In this case, the relevant and controlling procedural bar is found in Rule 61(i)(2), which provides that any ground for relief that was not raised in an initial postconviction motion is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.<sup>2</sup> To avoid the bar of Rule 61(i)(2), Powell must show that consideration of his claims are warranted in the “interest of justice.”<sup>3</sup> The interest of justice exception to Rule 61(i)(2) has been narrowly defined to require that the movant “show that the subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.”<sup>4</sup>

In order to overcome the procedural default rules, Powell must demonstrate to the court that the grounds he now raises were unavailable to him at the time he filed his initial motion.<sup>5</sup> All of Powell’s grounds were clearly available to him at the time he filed his initial motion and he has made no viable claim that the consideration of those grounds at this time is warranted in the interest of justice.

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<sup>1</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

<sup>2</sup> Super. Ct. Crim. R. 61(i)(2) and (5).

<sup>3</sup> *Id.*

<sup>4</sup> *State v. Wright*, 653 A.2d 288, 298 (Del. Super. 1994); *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

<sup>5</sup> *See Duhadaway v. State*, 2005 WL 1469365, at \*1 (Del. Jun. 20, 2005); *State v. Watson*, 2004 WL 2828206, at \*2 (Del. Super. Apr. 28, 2004); *State v. Harley*, 1993 WL 59146, at \*1 (Del. Super. Jul. 7, 1993).

*State v. Powell*

ID No.'s 0801005843 & 0805023686

September 29, 2011

Powell makes no attempt to show that there are any subsequent legal developments that have revealed that the trial court lacked authority to convict or punish him. Powell's claims are clearly barred under Rule 61(i)(2).

I find that Powell has failed to overcome the procedural bars and his motion is barred by Rule 61(i)(2) for failing to have raised his claims in his initial Rule 61 motion. Consequently, I recommend that the Court *deny* Powell's motion for postconviction relief as procedurally barred.<sup>6</sup>

/s/Andrea Maybee Freud

Commissioner

AMF/dsc

oc: Prothonotary

cc: Hon. Robert B. Young

R. David Favata, Esq.

Kevin M. Howard, Esq.

Edward L. Powell, *Pro se*

File

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<sup>6</sup> It should be noted that during the pendency of this motion, Powell's prior counsel, who he now claims was ineffective, continued to assist Powell and was successful in gaining his early release from prison. Powell is now serving probation. Additionally Powell's counsel successfully modified the conditions of Powell's probation. It is difficult for the Court to understand, under these circumstances, why Powell has not withdrawn his motion.