

2. Brown was sentenced on January 19, 2007 to imprisonment for a term of seventy-four years, followed by probation with conditions to pay restitution and costs. He filed a timely appeal to the Delaware Supreme Court in which he argued that the prosecutor made improper statements during his closing argument that warranted a reversal of his conviction. Specifically, Brown argued that the prosecutor's statements to the jury, that Brown forced the State to "prove it was him" because of the perpetrator's use of a mask during the crimes, violated his due process rights.¹ The Supreme Court found the prosecutor's statements to be appropriate and affirmed his convictions and sentences.²

3. Brown filed this, his first *pro se* motion for postconviction relief, on January 7, 2008. In this motion, Brown again argues that the prosecutor's statements to "prove it was him" during his closing argument – the same statements he argued on appeal – were inappropriate and violated his right to due process. Brown, however, now attempts to reassert this same contention, by couching the argument in terms of counsel's ineffectiveness for failing to object to these same statements during the prosecutor's closing statement. Similarly, he again argues that there was

¹ *Brown v. State*, 933 A.2d 1249, at *2 (Del. 2007) (Table).

² *Id.* at *2-3.

insufficient evidence to convict him of any of the counts of his indictment because there was no direct or circumstantial evidence linking him to the crimes charged. Although this Court denied his motion to dismiss for lack of sufficient evidence and the Supreme Court affirmed his convictions, Brown recasts this argument as an ineffective assistance of counsel claim, contending that his attorney failed to seek dismissal of the counts of the indictment. As a result of these errors, Brown asks this Court to vacate his convictions and afford him a new trial.

4. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61 (“Rule 61”).³ If the procedural requirements of Rule 61 are not met, in order to protect the integrity of the procedural rules, the Court should not consider the merits of a postconviction claim.⁴ In that case, the Court may summarily dismiss the defendant’s claim “[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief[.]”⁵

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). See also *Bailey v. State*, 588 A.2d 1121, 1127 (Del. Super. Ct. 1991).

⁴ *State v. Gattis*, 1995 WL 790961, at *2 (Del. Super. Ct. Dec. 28, 1995) (citing *Younger*, 580 A.2d at 554).

5. Rule 61(i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;⁶ (2) any basis for relief must have been asserted previously in any prior postconviction proceeding; (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 or cause for relief; and (4) any basis for relief must not have been formerly adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do 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.”⁷ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”⁸

⁵ Super. Ct. Crim. R. 61(d)(4).

⁶ If the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, however, the motion must be filed within one year. *See* Super. Ct. Crim. R. 61(i)(1) (July 1, 2005) (amending Super. Ct. Crim. R. 61(i)(1) (May 1, 1996)).

⁷ Super. Ct. Crim. R. 61(i)(5).

⁸ *Id.* R. 61(i)(4).

6. Brown’s claims are both procedurally barred. Specifically, Rule 61(i)(3) precludes Brown’s argument that there was insufficient evidence to convict him because he failed to assert it in his direct appeal. Additionally, Brown’s “ineffective assistance of counsel” arguments are also barred under Rule 61(i)(4) because the underlying basis for these arguments has been formerly adjudicated, as discussed below. Since Brown’s claims are procedurally barred, he must meet one of the exceptions to overcome the bars to relief.

7. In this case, Brown has failed to overcome any of the procedural bars by showing a “colorable claim that there was a miscarriage of justice” or that “reconsideration of the claim is warranted in the interest of justice.” The “miscarriage of justice” exception 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 a direct appeal.”⁹ These limited circumstances do not apply here. As recognized by Brown himself, a jury finding is entitled to “enormous deference.”¹⁰ “The factual findings of a jury will not be disturbed if there is any competent evidence upon which

⁹ *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-98 (1989)).

¹⁰ *Wilmington Hospitality, LLC v. New Castle County*, 2007 WL 4577578, at *3 (Del. Super. Ct. Dec. 28, 2007) (citing *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997); Del. Const. art. IV, § 11(1)(a)).

the verdict could reasonably be based.”¹¹ The undisputed record contradicts Brown’s claim that there was no direct or circumstantial evidence linking him to the crimes for which he was convicted. At trial, there was testimony from the victims of the robberies, surveillance tapes, testimony from the police, and evidence from a search of his person and home, all of which demonstrated that he was the perpetrator of the crimes. The Court thus finds that the jury had more than sufficient evidence to convict Brown.

8. Moreover, the Court will not permit Brown to recast his insufficient evidence argument – which should have been raised in his appeal – as an ineffective assistance of counsel argument. Brown did not argue on appeal that there was insufficient evidence to support his indictment, nor did he argue that there was insufficient evidence to support his convictions. As a result, the Court finds that his ineffective assistance counsel argument is barred by Rule 61(i)(4) as formerly adjudicated.

9. Similarly, Brown’s argument that his counsel failed to object to the allegedly improper statements made by the prosecutor during his closing statement is barred by Rule 61(i)(4) as formerly adjudicated. The Supreme Court explicitly found no error with the prosecutor’s statement:

¹¹ *Id.* (citing *Gillenardo v. Connor Broad. Del. Co.*, 2002 WL 991110, at *6 (Del. Super. Ct. Apr. 30, 2002)).

In Brown's case, the repeated use of the phrase "prove it was me" was properly used to support an argument that, despite Brown's efforts to conceal his identity by using a mask, the State still had other sufficient independent evidence to "prove it was him." The record also reflects that the prosecutor reminded the jury of the reasonable doubt standard on at least two occasions. Thus, we hold that the prosecutor did not denigrate Brown's due process rights or the reasonable doubt standard by using the phrase "prove it was me" during closing argument.¹²

Since the Supreme Court has already determined that the prosecutor's statements were not inappropriate, Brown's counsel could not have committed any error by failing to object. Brown's argument is thus barred under Rule 61(i)(4) because the Supreme Court already considered, and rejected, the underlying basis of this claim.

10. For all of the foregoing reasons, Brown's motion for postconviction relief is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, J.

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¹² *Brown*, 933 A.2d at *2 (footnotes omitted).