



2. Hubbard has now filed this, his third *pro se* motion for postconviction relief. He raises four claims in this latest filing. First, he contends that his arrest for Possession of Drug Paraphernalia was illegal. Second, he argues that the evidence was insufficient to find him guilty of Robbery in the First Degree. Rather, he could only be guilty of Robbery in the Second Degree because he never displayed a deadly weapon during the May 26, 1999 bank robbery. Third, he argues that his conviction for Robbery in the First Degree violates the *Ex Post Facto* Clause of the United States Constitution because his conviction, though sufficient under the statute as amended in 2003, was insufficient under the language of the statute at the time he was convicted. Fourth, he submits that there was not sufficient evidence to support a conviction for Possession of Drug Paraphernalia.

3. 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”).<sup>3</sup> If the procedural requirements of Rule 61 are not met, in order

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

to protect the integrity of the procedural rules, the Court should not consider the merits of a postconviction claim.<sup>4</sup>

4. Rule 61(i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;<sup>5</sup> (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.”<sup>6</sup> Moreover, the procedural bars of (2) and (4) may

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

<sup>5</sup> 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)).

<sup>6</sup> Super. Ct. Crim. R. 61(i)(5).

be overcome if “reconsideration of the claim is warranted in the interest of justice.”<sup>7</sup>

5. Hubbard has failed to overcome the procedural bars to post-conviction relief. Rule 61(i)(1) time bars Hubbard’s claims because this motion was filed nearly six and one half years after his convictions became final on September 5, 2001, which is beyond the three years permitted. Similarly, Hubbard’s arguments that he should have been convicted of Robbery in the Second Degree and that his conviction for Possession of Drug Paraphernalia should be overturned are barred by Rules 61(i)(2) and (3) because he did not raise these claims in previous motions or in his direct appeal to the Supreme Court. Thus, unless Hubbard can establish an exception to the procedural bars, the Court cannot consider his claims.

6. Hubbard has failed to demonstrate a miscarriage of justice or any other colorable claim warranting consideration in the interest of justice. Regarding his first claim, Hubbard merely reargues that the officer’s frisk was illegal. The Supreme Court has previously rejected that claim. Similarly, Hubbard has not demonstrated that this Court should reconsider his conviction for Robbery in the First Degree, rather than the lesser included offense of Robbery in the Second Degree, because he has offered

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<sup>7</sup> *Id.* R. 61(i)(4).

no evidence suggesting that the Supreme Court's decision to affirm resulted in a miscarriage of justice.<sup>8</sup> Hubbard has also failed to demonstrate that this Court should reconsider his conviction for Possession of Drug Paraphernalia. Although Hubbard asserts error in that the prosecutor improperly suggested in her opening statement that he possessed a crack pipe and that the judge gave an improper instruction, neither of these arguments were raised in his direct appeal or in previous postconviction motions, and are thus procedurally barred.<sup>9</sup> More importantly, the detective who frisked Hubbard testified at trial that he immediately recognized the pipe found on Hubbard's person to be used for smoking crack cocaine.<sup>10</sup> Similarly, Angela Benson, a former friend of Hubbard, testified that they had smoked crack cocaine together.<sup>11</sup> Viewing the evidence in the light most favorable to the State, a rational juror had sufficient evidence to conclude that Hubbard knew or intended to possess drug paraphernalia.<sup>12</sup>

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<sup>8</sup> The Court will address his *Ex Post Facto* Clause argument *infra*.

<sup>9</sup> See Super. Ct. Crim. R. 61(i)(3) and (4).

<sup>10</sup> *Hubbard*, 2001 WL 1089664 at \*2.

<sup>11</sup> *Id.*

<sup>12</sup> A person is guilty of Possession of Drug Paraphernalia if the defendant was in actual or constructive possession of drug paraphernalia. 16 *Del. C.* § 4754(b). Here, the evidence at trial supported a conviction for the crime. See *Carter v. State*, 933 A.2d 774, 777 (Del. 2007) (“Where a defendant claims his conviction was based upon insufficient evidence, the standard of review is whether the evidence, viewed in the light most favorable to the

Thus, Hubbard has not demonstrated any miscarriage of justice warranting reconsideration of his convictions.

7. Although Hubbard's claims are procedurally barred, the Court will briefly address Hubbard's *ex post facto* claim. A criminal law violates the Ex Post Facto Clause if: (1) the law addresses events that occurred prior to the law's enactment; and (2) the changed law adversely affects the defendant.<sup>13</sup> When Hubbard was convicted in 2001, a person was guilty of Robbery in the First Degree if he "displayed" what appeared to be a deadly weapon during the commission of the robbery.<sup>14</sup> A threat of a deadly weapon during a robbery, without an objective manifestation, was insufficient.<sup>15</sup> The Delaware Legislature later amended 11 *Del. C.* § 832(a) in 2003 to include threats of a deadly weapon to be sufficient to establish a conviction for Robbery in the First Degree.<sup>16</sup> Thus, the *Ex Post Facto* Clause would only be violated here if (1) Hubbard's conduct was insufficient to sustain a conviction for Robbery in the First Degree in 2001

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State, was sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt.") (citation omitted).

<sup>13</sup> *Bailey v. State*, 588 A.2d 1121, 1124 (Del. 1991) (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

<sup>14</sup> 11 *Del. C.* § 832(a)(2) (amended June 20, 2003).

<sup>15</sup> *See Walton v. State*, 821 A.2d 871, 877 (Del. 2003).

<sup>16</sup> *See State v. Desmond*, 2005 WL 578816, at \*3 n.9 (Del. Super. Ct. Feb. 28, 2005).

but was sufficient in 2003, and (2) the Supreme Court punished him under the 2003 amendments which were implemented after the criminal conduct occurred.<sup>17</sup>

8. Had Hubbard's conviction for Robbery in the First Degree been based solely on his threats of a deadly weapon, which would be sufficient for a conviction under the 2003 amendments but insufficient under the law in 2001, he would be correct that his conviction would violate the *Ex Post Facto* Clause. That is simply not what occurred in this case. In 2001, the Supreme Court determined that there was sufficient evidence to convict Hubbard of Robbery in the First Degree because the evidence established that he displayed what appeared to be a weapon during his robbery.<sup>18</sup> In the end, there was no application of the law *ex post facto* to Hubbard because he was not punished under the 2003 amendments.<sup>19</sup> The Court also notes that Hubbard never contended at trial, on appeal, or in any of his two prior

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<sup>17</sup> A criminal law violates the Ex Post Facto Clause if: (1) the law addresses events that occurred prior to the law's enactment; and (2) the changed law adversely affects the defendant. *Bailey v. State*, 588 A.2d 1121, 1124 (Del. 1991) (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

<sup>18</sup> *See, e.g., State v. Muhammad*, 2004 WL 1965984, at \*4 (Del. Super. Ct. Aug. 25, 2004) (noting that the Supreme Court's decision affirming a defendant's conviction for Robbery in the First Degree before the 2003 amendments was not *ex post facto*).

<sup>19</sup> The Court agrees that it would be easier to convict Hubbard under the law today than it would have been in 2001 because threats of a deadly weapon alone are sufficient for a conviction of Robbery in the First Degree. Hubbard was found guilty, however, under the law as applied in 2001 and *not* under the amended law. As a result, his *ex post facto* argument is unavailing.

postconviction motions that his conviction for Robbery in the First Degree should have been reversed because he did not display a gun. Because the change in the law was not applied to Hubbard, and does not adversely affect him, the *Ex Post Facto* Clause cannot serve as a basis to disturb Hubbard's conviction for Robbery in the First Degree.

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

**IT IS SO ORDERED.**

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Peggy L. Ableman, Judge

Original to Prothonotary