

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	I.D. # 0403012959
)	
MARCUS J. JOHNSON,)	
)	
Defendant)	
)	

Submitted: February 29, 2008
Decided: May 23, 2008

Upon Defendant's Third Motion for Postconviction Relief.
DENIED.

ORDER

Shawn E. Martyniak, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Marcus J. Johnson, Smyrna, Delaware, *pro se*.

COOCH, J.

This 23rd day of May, 2008, upon consideration of Defendant's third motion for postconviction relief, it appears to the Court that:

1. On October 5, 2005, a jury found Marcus J. Johnson ("Defendant") guilty of Trafficking in Cocaine; Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance ("PWIDC"); Use of a Vehicle for

Keeping a Controlled Substance; Possession of Drug Paraphernalia; Driving While License is Suspended and/or Revoked; and Displaying an Expired Temporary Registration Plate. On May 19, 2006, this Court sentenced Defendant to three years at Level V on the PWIDC charge, to two years at Level V on the Trafficking charge, and probation on the remaining charges. The Supreme Court affirmed his conviction on December 22, 2006.¹

Defendant filed his first *pro se* motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”) on January 16, 2007. He subsequently amended the motion on January 22, and amended it again on January 29. Defendant then alleged four grounds for relief: 1) insufficient evidence to sustain his conviction; 2) improper references to Defendant’s decision not to testify; 3) ineffective assistance of counsel; and 4) double jeopardy. This Court denied the motion on July 5, 2007, holding that: 1) there was sufficient evidence to sustain Defendant’s conviction; 2) the State did not prejudicially utilize Defendant’s silence to create an inference of guilt; 3) Defendant’s assertions of ineffective counsel were either impermissibly conclusory or substantively without merit; and 4) Defendant’s double jeopardy claim was not a collateral attack on his

¹ *Johnson v. State*, 2006 WL 3759403, at *1 (Del. Supr.) (finding “no merit” to Defendant’s appeal).

judgment, but rather a request for a modification of sentence, and thus an inappropriate argument to be raised in a motion for postconviction relief.

Defendant filed a motion for reargument, which this Court denied on July 23, 2007. The Defendant appealed from this ruling to the Delaware Supreme Court on July 27, 2007.

However, before the Supreme Court had acted on his July 27, 2007 appeal, on September 5, 2007, Defendant filed a second *pro se* motion for postconviction relief. This Court summarily dismissed the “second” motion as premature, pursuant to Superior Court Rule 61(a)(4), due to Defendant’s pending appeal.

On October 24, 2007, the Supreme Court affirmed this Court’s decision to deny reargument on Defendant’s first motion for postconviction relief.²

2. On December 27, 2007, Defendant filed his third motion for postconviction relief, *pro se*, which is now before the Court. Defendant again alleges a double jeopardy violation. Defendant asserts that a violation of the double jeopardy prohibitions of the United States Constitution and Delaware Constitution resulted when, after the State entered a *nolle prosequi* on a charge of Possession of Cocaine and Conspiracy in the Second Degree

² *Johnson v. State*, 2007 WL 3119657, at *1 (Del.) (holding that it was “manifest on the face of [Defendant’s] opening brief that the appeal is without merit”).

(which, Defendant also contends, eliminated consideration of the evidence relating to the Possession charge in connection with the remaining charges), the State pursued the remaining charges of Trafficking Cocaine and PWIDC. Defendant has also again claimed ineffective assistance of counsel, arguing that his defense counsel was ineffective in failing to move for judgment of acquittal after the State, at trial, entered the *nolle prosequi* charge for Possession of Cocaine, and for not having requested a jury instruction that the jury could not find that Defendant could not have been found to possess cocaine once the charges of Conspiracy in the Second Degree and Possession of Cocaine were dismissed.

The State contends that Defendant's claims are procedurally barred by Superior Court Criminal Rule 61(i)(2), addressing repetitive motions, since Defendant has filed a previous motion for postconviction relief, wherein he did not raise the grounds he now raises. The State further contends that Defendant's motion is substantively meritless, since the underlying claim of a double jeopardy violation is without merit.

3. Before addressing the merits of any claim raised in a motion seeking postconviction relief, the Court must first apply the rules governing the procedural requirements of Superior Court Criminal Rule 61.³

Rule 61(i)(2) provides that “[a]ny ground for relief that was not asserted in a prior postconviction proceeding ... is thereafter barred, unless consideration of the claim is warranted in the interest of justice.” The interest of justice exception has been narrowly defined to require that the movant show that the trial court lacked the authority to convict or punish him.⁴

The procedural bars of Rule 61 may also potentially be overcome under Rule 61(i)(5), which provides that the procedural bars to relief

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 to the judgment of conviction.

“While [a] ‘colorable claim’ does not necessarily require a conclusive showing of trial error, mere ‘speculation’ that a different result might have obtained certainly does not satisfy the requirement.”⁵ Colorable claims of ineffective assistance of counsel fall under the Rule 61(i)(5) exceptions to the procedural bars of Rule 61.

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

⁴ *State v. Wright*, 653 A.2d 288 (Del. Super. Ct. 1994).

⁵ *State v. Getz*, 1994 WL 465543, at *11 (Del. Super.) (finding no exception under Rule 61(i)(5) to the procedural bars of Rule 61).

4. The Court holds that Defendant's claims are procedurally barred by Superior Court Criminal Rule 61(i)(2), since Defendant has not shown that "consideration of the claim[s] is warranted in the interest of justice," or any "colorable claim that there was a miscarriage of justice." Defendant's double jeopardy claim (and related ineffective assistance of counsel claim) is without merit. The Double Jeopardy Clauses of the United States Constitution and the Delaware Constitutions protect a criminal defendant against multiple punishments or successive prosecutions for the same offense; the Clauses "do not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution."⁶ Since Defendant's underlying argument is without merit, Defendant cannot show that further consideration of his claim is warranted in the interest of justice, or that he has a colorable claim that there was a miscarriage of justice.

⁶ *Ohio v. Johnson*, 467 U.S. 493, 500 (1984) (holding that the double jeopardy clause did not prevent the state from continuing its prosecution of the defendant on murder and aggravated robbery charges after the defendant pleaded guilty, over the state's objection, to involuntary manslaughter and theft charges).

5. For the reasons stated, Defendant's Third Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Shawn E. Martyniak, Esquire, Deputy Attorney General
Marcus J. Johnson