

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

STATE OF DELAWARE	)	
	)	
v.	)	I.D. #0504024696
	)	
LaVINCE M. PATRICK	)	
	)	
Defendant	)	
	)	

Submitted: July 3, 2008  
Decided: August 25, 2008

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

**ORDER**

Paul R. Wallace, Esquire, Chief of Appeals, Department of Justice,  
Wilmington, Delaware, Attorney for the State.

LaVince M. Patrick, Smyrna, Delaware, *pro se*.

COOCH, J.

This 25<sup>th</sup> day of August, 2008, upon consideration of Defendant's  
Motion for Postconviction Relief, it appears to the Court that:

1. On January 23, 2006, Defendant was convicted of Attempted Burglary Second Degree, and Resisting Arrest. The Court declared Defendant a habitual criminal offender, and on March 17, 2006, the Court sentenced Defendant to eight years imprisonment, followed by probation. Defendant appealed to the Delaware Supreme Court, and on April 4, 2007, the Supreme Court affirmed his convictions and sentences.<sup>1</sup>

On August 8, 2007, Defendant moved for postconviction relief, which he subsequently amended to add an averment of ineffective assistance of counsel on his appeal. On August 20, 2007, Defendant filed a “motion for judgment of acquittal.” That motion was denied, but the Court issued an order consolidating the claims brought in both motions, which claims the Court now addresses *in toto*.

2. As grounds for relief Defendant alleges Due Process and Equal Protection violations, as well as ineffective assistance of counsel at both the trial and appellate levels.

As supporting facts for his assertions for violations of Due Process and Equal Protection, Defendant alleges that: 1) he was never contacted or given an opportunity to refute the motion to declare him a habitual criminal offender; 2) trial counsel admonished Defendant for attempting to reargue

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<sup>1</sup> *Patrick v. State*, 2007 WL 773387 (Del. Supr.).

his trial, which “prejudiced trial judge’s [decision]”; and 3) the State sought an indictment after dismissal of a charge at the preliminary hearing, based on Defendant’s past record.

Defendant alleges that his trial counsel was ineffective in that he allegedly: 1) failed to respond to Defendant’s letters or file motions attacking the legality of Defendant’s indictment; 2) failed to present allegedly applicable case law at trial; 3) failed to interview a potential witness or question her non-appearance; 4) failed to secure a preliminary hearing transcript; 5) failed to further question the arresting officer after the trial resumed; 6) suggested that Defendant proceed with a non-jury trial; and 7) failed to attack the habitual criminal petition. He asserts that his counsel on appeal was ineffective in that he allegedly: 1) failed to incorporate a missing witness claim, a mistake of fact claim, or a claim regarding Defendant’s perceived differences in the officer’s preliminary hearing and trial testimony; 2) erroneously conceded that Defendant was guilty of resisting arrest; and 3) failed to argue allegedly applicable case law.

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.<sup>2</sup>

Rule 61(i)(3) provides that “[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred” unless the movant shows “[c]ause for relief from the procedural default and ... [p]rejudice from violation of the movant’s rights.” This Court has held that when a claim is not raised a defendant’s direct appeal to the Delaware Supreme Court, that claim is procedurally barred under Rule 61(i)(3).<sup>3</sup> To overcome this procedural bar, a movant must assert “concrete allegations of actual prejudice” to his or her rights.<sup>4</sup>

Pursuant to Rule 61(i)(5), if a movant alleges a colorable claim of ineffective assistance of counsel that is potentially procedurally barred under Rule 61, then the procedural bars of Rule 61 become inapplicable.<sup>5</sup> “While

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

<sup>3</sup> *State v. Kendall*, 2001 WL 392650, at \*8 (Del. Super.).

<sup>4</sup> *State v. Childress*, 2001 WL 1610766, at \*1 (Del. Super.).

<sup>5</sup> Superior Court Criminal Rule 61(i)(5) provides:

[t]he bars to relief in paragraph (1) ... 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.

[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.”<sup>6</sup>

4. The Court holds that Defendant is procedurally barred by Rule 61(i)(3) from bringing the claims he makes in the instant motion because he failed to assert them on his direct appeal to the Delaware Supreme Court and has not shown that any exception to the procedural bar of Rule 61(i)(3) applies.

A movant must support his or her claims with “concrete allegations of actual prejudice.”<sup>7</sup> Defendant has not done so here, merely supporting his claims with conclusory allegations of prejudice.<sup>8</sup> Thus, Defendant’s grounds for relief alleging violations of Due Process and Equal Protection are procedurally barred under Rule 61(i)(3).

As to Defendant’s claims of ineffective assistance of counsel, Defendant has not asserted any “colorable claim” of ineffective assistance of counsel since he has only speculated that a different result might have

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<sup>6</sup> *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).

<sup>7</sup> *Childress*, 2001 WL 1610766, at \*1.

<sup>8</sup> For example, Defendant states, “Trial Counsel admonished for attempting to reargue trial, this prejudiced trial judges [sic] decision [sic].” Def. Mot. for Postconviction Relief, at 5.

obtained; therefore, this ground for relief is also procedurally barred by Rule 61(i)(3).

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

**IT IS SO ORDERED.**

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Richard R. Cooch

oc: Prothonotary  
cc: Investigative Services  
Paul R. Wallace, Esquire, Chief of Appeals  
LaVince M. Patrick