

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

STATE OF DELAWARE)	
)	
)	
)	
v.)	I.D. No. 0407020818
)	
ANDREW GUDZELAK,)	
)	
Defendant.)	
)	

Submitted: January 2, 2009
Decided: March 30, 2009

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

ORDER

Donald R. Roberts, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware, Attorney for the State.

Andrew Gudzelak, Wilmington, Delaware, *pro se*.

COOCH, J.

This 30th day of March 2009, upon consideration of Defendant's Second Motion for Postconviction Relief, it appears to the Court that:

1. On September 14, 2005, Defendant pled guilty before the undersigned judge to Rape Fourth Degree. He was subsequently sentenced by a different judge on November 18, 2005 to five years at level 5, suspended after two years for three years at decreasing levels of supervision.

2. Defendant filed his First Motion for Postconviction Relief on July 21, 2006, alleging four grounds for relief: (1) “conflict of interest,” (2) “prosecutorial misconduct & vindictiveness,” (3) “ineffective assistance of counsel,” and (4) “actual innocence.” The Court addressed each claim on the merits (insofar as they related to the entry of the guilty plea) and denied Defendant’s motion as meritless.¹

3. In a separate opinion by the sentencing judge, this Court addressed Defendant’s contention that the sentencing judge had a conflict of interest. However, after careful review of the record, this argument, too, was rejected as meritless.²

4. Defendant filed this *pro se* Second Motion for Postconviction Relief on January 2, 2009. Defendant asserts three grounds for relief: (1) “The defendant’s plea was not knowing, voluntary, intelligent, and voluntary within the scope of Rule 11, *Cole v. State*, and/or 6 *Del. C.* § 1-208,”

¹ *State v. Gudzelak*, 2007 WL 293016 (Del. Super. 2007).

² *State v. Gudzelak*, 2007 WL 687225 (Del. Super. 2007).

(2) “Under Superior Court Rule 44(c) and ABA Model Rules, Judge Jurden had the obligation to recuse herself even when the parties did not object to her sitting on the bench,” and (3) “D.A.G. Roberts repeatedly attempted to incriminate Defendant by unethical means.” This order relates to Defendant’s first and third grounds for requested relief.

5. When considering a motion for postconviction relief, the Court must first apply the procedural bars of Superior Court Criminal Rule 61.³ If a potential bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.⁴ Moreover, if 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, the judge may enter an order for its summary dismissal and cause the movant to be notified.”⁵

6. Rule 61(i)(1) will bar a motion filed more than one year after a final judgment of conviction unless it asserts a retroactively applicable right that

³ *Younger v. State*, 580 A.2d 552, 554 (Del.1990).

⁴ *Id.*

⁵ Super. Ct. Crim. R. 61(d)(4). *See also id.* at 61(b)(2) (providing that a motion for postconviction relief “shall set forth in summary form the facts supporting each of the grounds thus specified”).

is newly recognized after the judgment of conviction is final.⁶ A movant can avoid this procedural bar, however, if under Rule 61(i)(5) the movant can show that the court lacked jurisdiction or makes “a colorable claim that there was a miscarriage of justice because of a constitutional violation.”⁷ This exception, referred to as the “fundamental fairness” exception, is narrow and is applied only in limited circumstances.⁸

7. A judgment of conviction is final “30 days after the Superior Court imposes sentence.”⁹ Defendant's judgment of conviction became final on December 18, 2005, thirty days after Defendant was sentenced. Defendant's motion, filed on January 2, 2009, is clearly outside the applicable one year time limit.

8. In addition, pursuant to Superior Court Criminal Rule 61(i)(4), “any ground for relief that was formerly adjudicated . . . is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.” Defendant can only avoid this procedural bar if he makes a colorable constitutional claim, thereby invoking the fundamental fairness exception of Rule 61(i)(5).

⁶ *Id.* at 61(i)(1).

⁷ *Id.* at 61(i)(5).

⁸ *Younger*, 508 A.2d 555.

⁹ Super. Ct. Crim. R. 61(m)(1).

9. Defendant's claims do not meet the high standard that the fundamental fairness exception requires. A movant must support his or her allegations with "concrete allegations of actual prejudice, or risk summary dismissal."¹⁰ Defendant's motion is conclusory, and Defendant has failed to support his claims with any concrete allegations of actual prejudice.¹¹ Defendant has already alleged in his first motion for postconviction relief that his plea was not entered into voluntarily and that Deputy Attorney General Roberts acted improperly. These issues were addressed on the merits in this Court's order of January 31, 2007 and Defendant has not presented any new evidence warranting consideration pursuant to the fundamental fairness exception of Rule 61(i)(5).

10. For the reasons stated, Defendant's Second Motion for Postconviction Relief is **DENIED**.¹²

IT IS SO ORDERED.

¹⁰ *State v. Chambers*, 2008 WL 4137988, at *1 (Del. Super.) (quoting *State v. Childress*, 2000 WL 1610766, at *1 (Del. Super.)).

¹¹ *Id.* (summarily dismissing the defendant's motion for postconviction relief where he alleged ineffective assistance of counsel because he failed to support his claims with concrete allegations of prejudice).

¹² Defendant also claims that the sentencing judge should have recused herself because he asserts she had previously represented Defendant in a civil matter. Defendant's motion will now be referred to the sentencing judge for any appropriate action on this claim relating to sentencing.

Richard R. Cooch

oc: Prothonotary
cc: Investigative Services