

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

STATE OF DELAWARE,)	
)	
v.)	I.D. # 0311010209
)	
)	
GERARDO GARDUNO,)	
)	
Defendant.)	

Date Submitted: May 4, 2009
Date Decided: May 14, 2009

OPINION

Defendant's Motion for Postconviction Relief
DENIED.

I. INTRODUCTION

The defendant collaterally attacks his convictions on Attempted Rape Second Degree and Sexual Solicitation of a Child. He claims, among other things, that a constitutional violation and newly discovered evidence require this Court to grant a new trial. For the reasons set forth below, his claims are **SUMMARILY DISMISSED**.

II. BACKGROUND

On June 15, 2004, Defendant Gerardo Garduno (“Garduno”) pled guilty to one count of Attempted Rape Second Degree and one count of Sexual Solicitation of a Child.¹ He was sentenced to a mandatory ten years at Level V for the Attempted Rape charge and an additional year at Level V for the Sexual Solicitation of a Child charge followed by six months at Level IV and a year probation at Level III.² Garduno did not file an appeal.

On November 2, 2004 and again on November 16, 2007, Garduno filed a *pro se* motion for modification of sentence.³ Those motions were denied by the Court.⁴ On March 11, 2008, he filed a motion for

¹ Plea Agreement, Docket Item (“D.I.”) 10.

² Sentence Order, D.I. 20.

³ Motion for Modification of Sentence, D.I. 21, 23.

⁴ Order, D.I. 22, 24.

reargument.⁵ That motion was also denied by the Court.⁶ On August 27, 2008, Garduno filed the instant postconviction motion.⁷

Discussion

Garduno makes two claims for postconviction relief. First, he claims that exculpatory DNA evidence surfaced after his plea and was never provided to defense counsel. Second, he claims that his rights were violated because he was unable to speak to the Mexican Consulate which caused him to enter into a guilty plea without informed consent.

Before addressing the merits of a postconviction relief claim, the Court must first determine whether the claims pass through the procedural filters of Rule 61.⁸ To protect the integrity of the procedural rules, the Court will not address the substantive aspects of the claims if a defendant's claims are procedurally barred. Rule 61(i) provides:

- (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court;
- (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by

⁵ Motion for Reargument, D.I. 25.

⁶ Order, D.I. 26.

⁷ Def. Mot. for Postconviction Relief, D.I. 27.

⁸ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) (“The first inquiry in any analysis of a post-conviction relief claim is whether the petition meets the procedural requirements of Rule 61.”) *See also Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice;

(3) Procedural default. Any 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

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights;

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice;

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision 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 leading to the judgment of conviction.

Garduno did not file a direct appeal therefore his conviction became final on October 24, 2004. As a result, his postconviction motion is time barred under Rule 61(i)(1).⁹ In order to survive procedural default, Garduno's claims must fall within the "miscarriage of justice" exception under Rule 61(i)(5).¹⁰ Garduno fails to make the requisite showing to survive under this exception.

⁹ Super. Ct. Crim. R. 61(i)(1).

¹⁰ Super. Ct. Crim. R. 61(i)(5).

Garduno first claims that he is entitled to postconviction relief because newly discovered evidence proves his innocence. He claims that after he was sentenced and imprisoned, the State released DNA results establishing his innocence. He offers no evidence to support his claim. In its Response, the State claims that it is not aware of the existence of a DNA Analysis Report and that it has recently been advised by the DNA Unit in the Office of the Chief Medical Examiner that this case does not exist in any of its databases.¹¹ Because Garduno fails to provide the Court with any evidence to substantiate his claim and in light of the State's representation to the contrary, he is unable to substantiate his claim in order to survive procedural default. Accordingly, his claim is **SUMMARILY DISMISSED**.

Garduno's second claim fares no better. He claims that the police denied him the chance to talk to the Mexican Consulate. He further claims that the detective advised him to plead guilty and that if he did so, he would be deported back to Mexico. Garduno explains that he does not understand English and therefore he was susceptible to manipulation by the detective. This claim is procedurally barred under Rule 61(i)(3) because Garduno failed to raise it during the proceedings lead to his final judgment of

¹¹ State's Response, D.I. 30.

conviction.¹² Garduno states that he spoke with the Mexican Consulate prior to sentencing. Therefore he is unable to rely on a language barrier as cause for his failure to bring this claim to the Court's attention at sentencing or on appeal. Furthermore, in his affidavit, defense counsel states that a Spanish interpreter was utilized for all court appearances and during counsel's interview with Garduno.¹³ Because Garduno fails to establish cause and prejudice for his failure to bring this claim in the proceedings leading to the judgment of conviction, it is procedurally barred.

Garduno's claim does not prevail under Rule 61(i)(5). Delaware does not recognize a defendant's right to contact his consul under the Vienna Convention on Consular Rights as a Constitutional right. "Although treaty rights are guaranteed by the Supremacy Clause [of the United States Constitution], the clause does not elevate a treaty right to a constitutional right as described in Subsection (i)(5) of Rule 61."¹⁴ Because Garduno is unable to circumvent the procedural bars via Rule 61(i)(5), this claim is procedurally barred and thus **SUMMARILY DISMISSED**.

¹² Super. Ct. Crim. R. 61(i)(3)

¹³ Def. Counsel Aff., D.I. 32.

¹⁴ *Vasquez*, 2001 WL 209867 at 2; *see also State v. Marks*, 2002 WL 841057 at 2 (Del. Super. 2002)(citing *Breard v. Greene*, 523 U.S. 371, 377 (1988)(stating that "it is extremely doubtful that the violation [of the V.C.C.R.] should result in the overturning of a final judgment of conviction without some showing that the violation had a n effect on the trial.")).

Garduno sets forth a smorgasbord of claims at the end of his motion. Specifically, he claims “suppression or failure to disclose evidence, denial of the right to counsel, conviction based on prejudice testimony, ineffective assistance of counsel, legal sufficiency [sic] of the evidence, use of an involuntary or coerced confession, jury misconduct or bias, failure to enter a guilty plea, double jeopardy, improper identification and the imposition of an illegal sentence or violation of constitutional rights.”¹⁵ A movant must support his or her assertions with “concrete allegations of actual prejudice, or risk summary dismissal.”¹⁶ This proposition applies to all grounds for relief, including claims of ineffective assistance of counsel.¹⁷ Garduno’s claims are completely conclusory, and he has failed to support his claim of ineffective assistance of counsel with concrete allegations of deficient representation or actual prejudice.¹⁸ For these reasons his claims are **SUMMARILY DISMISSED.**

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.

¹⁵ D.I. 27.

¹⁶ *State v. Chambers*, 2008 WL 4137988 (Del. Super., Aug. 25, 2008), citing *State v. Childress*, 2000 WL 1610766, at *1 (Del. Super., Sept. 19, 2000).

¹⁷ *Id.* citing *State v. Robbins*, 1996 WL 769219, at *1 (Del. Super., Dec. 18, 1996).

¹⁸ See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)(holding that to prevail on a claim of ineffective assistance of counsel, movant must show that counsel performed at a level below an objective standard of reasonableness and the deficient performance prejudiced the defense.)