

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

June 23, 2009

George Johnson
SBI #
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Johnson, Def. ID# 9806010948 (R-2)

DATE SUBMITTED: April 23, 2009

Dear Mr. Johnson:

Pending before the Court is the second motion for postconviction relief which defendant George Johnson ("defendant") has filed pursuant to Superior Court Criminal Rule 61. This is my decision denying the motion.

FACTS

On July 13, 1998, defendant was indicted on charges of attempted murder in the first degree; possession of a firearm during the commission of a felony, in violation of 11 Del. C. § 1447A(a); possession of a deadly weapon by a juvenile; and conspiracy in the first degree. It was alleged that the offenses all occurred on June 16, 1998. At the time of the offenses, defendant,

whose date of birth is February 17, 1982, was sixteen years old. This Court had original jurisdiction over the case on the basis of the possession of a deadly weapon during the commission of a felony charge pursuant to what was then 11 *Del. C.* § 1447A(e).¹ *Accord State v. Anderson*, 697 A.2d 379 (Del. 1997).

Because defendant fled, he was not captured and returned on the Superior Court Criminal Rule 9 Warrant until May 11, 1999. Defendant was then seventeen years old.

The State of Delaware ("the State") nolle prossed the charges of possession of a deadly weapon by a juvenile and conspiracy in the first degree. Defendant went to trial in September, 1999, on the remaining two charges and a jury found him guilty as charged.

Defendant took an appeal from the conviction, and on appeal, he raised the following two issues: 1) the trial court abused its discretion in denying him a continuance to secure alibi witnesses, and 2) the trial court erred in permitting the State to present evidence concerning the nature and extent of the victim's injuries. The Supreme Court ruled against defendant on both arguments and affirmed the judgment of the Superior Court. *Johnson v. State*, Del. Supr., No. 569, 1999, Walsh, J. (September 20, 2000).

In 2002, defendant filed his first motion for postconviction relief. He argued that his rights to due process were violated when the Superior Court denied his request for a continuance

¹When defendant was arrested, tried and convicted, 11 *Del. C.* § 1447A(e), provided:

Every person charged under this section over the age of 15 years shall be tried as an adult, notwithstanding any contrary provisions or statutes governing the Family Court or any other state law.

69 *Del. Laws*, ch. 229 (1994); 70 *Del. Laws*, ch. 186 (1995); 70 *Del. Laws*, ch. 596, § 7 (1996). This section has since been redesignated as 11 *Del. C.* § 1447A(f) due to the addition of a new subsection (d). 73 *Del. Laws*, ch. 107 (2001).

to locate three alibi witnesses and when the Superior Court admitted evidence of the nature and extent of the victim's injuries. He further claimed ineffective assistance of counsel when trial counsel failed to contact three alibi witnesses. Finally, he argued that the amenability process was violated when the Superior Court did not transfer his case to Family Court.

The Court denied the first motion for postconviction relief. *State v. Johnson*, Del. Super., Def. ID# 9806010948, Stokes, J. (December 20, 2002). It ruled the first two grounds were procedurally barred because they had been adjudicated formerly and defendant failed to advance any reason why reconsideration of the claims was warranted in the interest of justice; defendant failed to substantiate his ineffective assistance of counsel claim because he did not offer the name of the witnesses or set forth to what they would testify, and alternatively, defendant did not attempt to establish the outcome of the case would have been different if those witnesses had been located; and finally, because this Court had original jurisdiction over the matter, there was no basis to raise a jurisdictional issue. *Id.*

Defendant did not appeal.

On April 21, 2009, defendant filed his second motion for postconviction relief. He advances three grounds.

First, he argues that the Superior Court lacked authority and jurisdiction to try and convict him. Defendant argues that an amenability hearing had to be held in the Family Court before the Superior Court could exercise jurisdiction over the case. The jurisdictional argument, if it were valid, would fit within subsection (5)'s jurisdictional exception to the procedural bars

of Rule 61(i).²

Defendant's jurisdictional argument is legally meritless. The cases he cites to support his argument, *Marine v. State*, 607 A.2d 1185 (Del. 1992) and *Hughes v. State*, 653 A.2d 241 (Del. 1994), are inapplicable.

The charge of possession of a deadly weapon during the commission of a felony must be tried in Superior Court. 11 *Del. C.* § 1447A(e) (1998); *State v. Anderson*, 697 A.2d. The Superior Court had original jurisdiction over that charge. *Id.* There was no right to an

²The applicable version of Superior Court Criminal Rule 61(i) provided as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than three years 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 three years 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 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.

amenability hearing on this charge. *Id.* Pursuant to 10 *Del. C.* § 921(16),³ the other charges against defendant came within Superior Court’s original jurisdiction. Thus, defendant’s jurisdictional argument is meritless and this claim fails.

Defendant’s second argument is that the Court erred in admitting into evidence his juvenile history in violation of 10 *Del. C.* § 1009(i)⁴ and in not performing an analysis pursuant to *Getz v. State*, 538 A.2d 726 (Del. 1988). Defendant’s final argument is that the prosecutor committed prosecutorial misconduct by using the term “red herrings” during his closing and rebuttal arguments. These arguments are time-barred pursuant to Superior Court Criminal Rule 61(i)(1) and procedurally barred pursuant to Superior Court Criminal Rule 61(i)(2) and (3). Defendant has made no attempt to overcome the procedural bars. Thus, I deny these two grounds for relief, also.

For the foregoing reasons, defendant’s second motion for postconviction relief is denied.

IT IS SO ORDERED.

³In 10 *Del. C.* § 921(16), it was provided as follows:

Notwithstanding any provision of this title to the contrary, charges of delinquency based upon an alleged violation of any provision of Title 11, 16, or 21 of this Code which would otherwise be within the original civil jurisdiction of Family Court shall instead be within the original criminal jurisdiction of Superior Court if said charges may be joined properly with a felony pending against the same child in Superior Court, as determined pursuant to the relevant rules of the Superior Court.

⁴The version of this statute in effect at the time of defendant’s trial provided as follows:

Neither the adjudication nor any evidence given in any case shall be admissible against such child in any future civil or criminal proceeding in any court for any purpose other than a presentence investigation ordered by this or any other court.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Attorney General's Office
A. Dean Betts, Esquire