

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

July 2, 2009

Kashawn D. Weston
SBI#
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State of Delaware v. Kashawn D. Weston, Def. ID# 0301003687 (R-2)

DATE SUBMITTED: April 24, 2009

Dear Mr. Weston:

Pending before the Court is the second motion for postconviction relief which defendant Kashawn D. Weston (“defendant”) has filed pursuant to Superior Court Criminal Rule 61. This is the Court’s decision denying the motion.

On June 11, 2003, after a three day trial, a jury convicted defendant of the charges of possession of a firearm during the commission of a felony; possession of a firearm by a person prohibited (4 counts); maintaining a dwelling for keeping controlled substances; tampering with physical evidence; conspiracy in the second degree; possession of cocaine; endangering the welfare of a child; and possession of drug paraphernalia (2 counts). After being sentenced thereon, defendant raised several issues on appeal to the Supreme Court. He did not, however, appeal the issue of the

sufficiency of the evidence with regard to the convictions for possession of a firearm during the commission of a felony. *Weston v. State*, Del. Supr., No. 433, 2003, Berger, J. (July 2, 2004) at 3 n.

1. The Supreme Court affirmed the judgments of the Superior Court. *Weston v. State, supra*. The Supreme Court's mandate is dated July 20, 2004.

On June 30, 2005, defendant filed his first motion for postconviction relief. In that motion, he asserted ineffective assistance of counsel. He did not raise an issue as to the sufficiency of the evidence with regard to the convictions for possession of a firearm during the commission of a felony. This Court denied that first motion for postconviction relief, and the Supreme Court affirmed that decision. *State v. Weston*, Del. Super., Def. ID# 0301003687, Stokes, J. (Jan. 23, 2006), *aff'd*, Del. Supr., No. 96, 2006, Berger, J. (Jan. 11, 2007).

On April 22, 2009, defendant filed his second motion for postconviction relief. In that motion, he argues that the decision of *State v. Contee*, Del. Super., Def. ID# 0805041121, Young, J. (Dec. 23, 2008), has created a retroactively applicable, newly recognized right as to the issue of the sufficiency of the evidence regarding his convictions for possession of a firearm during the commission of a felony. Unless defendant's argument is correct, his motion is procedurally barred pursuant to Superior Court Criminal Rule (i).¹

¹The 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

Defendant is incorrect. The issue of whether the State of Delaware has established a sufficient nexus between a weapon seized and the underlying drug felony has long been recognized. *Kornbluth v. State*, 580 A.2d 556 (Del. 1990); *Lewis v. State*, 577 A.2d 753 (Del. 1990); *Gardner v. State*, 567 A.2d 404 (Del. 1989). The resolution of the issue is fact-intensive. *Id.*² Thus, the case of *State v. Contee*, *supra*, did not create a newly recognized, retroactively applicable right. Consequently, defendant's argument is barred because it is untimely, it was not asserted in a prior postconviction proceeding, and it was not asserted in the proceedings leading to the judgment of conviction. Super. Ct. Crim. R. 61(i)(1), (2), and (3). Defendant has not advanced any arguments as to why those bars are not applicable except for the legally meritless "newly-recognized right" argument. Thus, defendant's claim fails.

For the foregoing reasons, defendant's motion is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

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- (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.

²The factual scenario of defendant's case is very close to that in the case of *Lewis v. State*, *supra*. It is not at all similar to the facts of the case of *State v. Contee*, *supra*.

cc: Prothonotary's Office
Peggy J. Marshall, Esquire
John F. Brady, Esquire