

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID No. 0604009582
	)	
JERMAINE HOWARD,	)	
	)	
Defendant.	)	
	)	

Submitted: September 17, 2009  
Decided: October 16, 2009

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT  
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE SUMMARILY DISMISSED.**

Caterina Gatto, Esquire, Deputy Attorney General, Department of Justice, Wilmington,  
Delaware, Attorney for the State.

Jermaine Howard, Howard R. Young Correctional Institute, Wilmington,  
Delaware, *pro se*.

PARKER, Commissioner

This 16th day of October, 2009, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. In 2006, Defendant Jermaine Howard was tried and convicted on drug and traffic offenses and one count of endangering the welfare of a child. He was sentenced to a total of five years at Level V suspended after six months for Level III probation. On direct appeal, the Delaware Supreme Court affirmed the Superior Court's judgment.<sup>1</sup>

2. While on Level III probation, Defendant Howard was charged with probation violations. Following an evidentiary hearing held on November 7, 2008, the Superior Court adjudged Defendant Howard guilty of violation of probation (VOP). The Superior Court sentenced Defendant Howard to two years and six months at Level V suspended after two years for six months at Level III probation.

3. Defendant Howard appealed his VOP decision and sentence, which was affirmed by the Delaware Supreme Court on June 11, 2009.<sup>2</sup>

4. On September 1, 2009, Defendant Howard filed this motion for post conviction relief. Defendant raises three grounds as the basis for the subject motion. The first two grounds are that the search and seizure performed by the police (ground one) and probation officer (ground two) were improper because they lacked a sufficient basis to stop him and search his motel room. The third ground is that the evidence was insufficient to find the defendant in violation of probation.

5. Before addressing the substantive merits of any claim for post conviction relief, the Court must determine whether the defendant has satisfied the procedural requirements of Superior Court Criminal Rule 61. In order to protect the procedural integrity of

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<sup>1</sup> *Howard v. State*, 2007 WL 2310001 (Del. 2007).

<sup>2</sup> *Howard v. State*, 2009 WL 1634884 (Del. 2009).

Delaware's rules, the Court will not consider the merits of a post conviction claim that fails any of Rule 61's procedural requirements.<sup>3</sup> If it plainly appears from the motion for post conviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the court may enter an order for its summary dismissal and cause the movant to be notified.<sup>4</sup>

6. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction; (2) any basis for relief must have been asserted previously in a prior post conviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding.

7. The bars to relief under (1), (2), and (3), however, do 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.<sup>5</sup> Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."<sup>6</sup> The miscarriage of justice exception is a narrow one and has been applied only in limited circumstances.<sup>7</sup> The defendant bears the burden of proving that he has been deprived of a substantial constitutional right.<sup>8</sup>

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<sup>3</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> Super.Ct.Crim.R. 61(d)(4).

<sup>5</sup> Super.Ct.Crim.R. 61(i)(5).

<sup>6</sup> Super. Ct.Crim.R. 61(i)(4).

<sup>7</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>8</sup> *Id.*

8. In this case, all three grounds raised in Defendant's motion for post conviction relief are procedurally barred. Defendant's first two grounds, that the search and seizure performed by the police (ground one) and probation officer (ground two) were improper because they lacked a sufficient basis to stop him and search his motel room, are procedurally barred pursuant to Rule 61(i)(4). These issues have already been formally adjudicated. Defendant contends that this case is controlled by *LeGrande v. State*, 947 A.2d 1103 (Del. 2008), and that in accordance therewith, the search and seizure performed by the police and probation officer was improper.

9. The Delaware Supreme Court, on Defendant's direct appeal, already considered Defendant's contention in this regard and already held that Defendant's reliance on *LeGrande* in this case is misplaced. In *LeGrande*, the Delaware Supreme Court held that the information gleaned from an anonymous tip was insufficient to establish probable cause to search the defendant's apartment because there was no corroboration by independent police work of the tipster's assertion of illegality.<sup>9</sup> In this case, the Delaware Supreme Court already determined that, unlike *LeGrande*, the police detective had conducted an independent investigation into the tipster's assertion that a suspect was selling drugs and that the police detective's investigation yielded evidence that the suspect, Defendant Howard, was attempting to make a drug sale and provided reasonable suspicion to stop Howard and search his hotel room.<sup>10</sup>

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<sup>9</sup> *LeGrande v. State*, 947 A.2d 1103, 1105, 1111 (Del. 2008).

<sup>10</sup> *Howard*, 2009 WL 1634884, \*2.

10. In this case, the Delaware Supreme Court already determined that Defendant Howard's rights were not violated in that the police had reasonable suspicion to stop him and the probation officer had reasonable suspicion to search his motel room.<sup>11</sup>

11. Although Defendant appears to be re-raising the same contentions he previously raised as to the propriety of the search and seizure by the police and probation officer, to the extent these contentions have been recouched somewhat differently, any new contention is now procedurally barred.<sup>12</sup> The Superior Court is not required to re-examine a claim that has received "substantive resolution" at an earlier time simply because the claim is now refined or restated.<sup>13</sup>

12. Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the interests of justice require it to revisit these claims that were previously raised and adjudicated.

13. Turning to Defendant's third claim, that there was insufficient evidence to find the Defendant in violation of probation, this claim is procedurally barred pursuant to the provisions of Rules 61(i)(2) and (3). If Defendant genuinely believed that his insufficient evidence contention had any merit, he was required to raise this contention in prior proceedings. Because this ground was not previously raised on direct appeal as required by the court rules, it is procedurally barred.

14. Even if Defendant's third ground for relief was not procedurally barred, it is without merit. The Superior Court found that there was sufficient evidence to find the Defendant in violation of probation. The Superior Court concluded that the State had established by a preponderance of the evidence that Defendant Howard had used a cell

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<sup>11</sup> *Howard*, 2009 WL 1634884, \*2.

<sup>12</sup> Super.Ct.Crim.R. 61(i)(2) & (i)(3).

<sup>13</sup> *Johnson v. State*, 1992 WL 183069 at \*1 (Del. 1992).

phone in an attempt to set up a drug deal and that the empty containers in Defendant Howard's motel room were drug paraphernalia.<sup>14</sup> The Superior Court did not find Defendant Howard's "story" about someone else handing him a phone just to hold was credible.<sup>15</sup> It was exclusively within the province of the court to determine the guilt or innocence of the Defendant by weighing the evidence and assessing the credibility of witnesses. The Superior Court fulfilled its duty and found sufficient evidence to find the Defendant in violation of probation. Defendant's claim of insufficient evidence is procedurally barred and without merit. Again, Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the interests of justice require it to consider this otherwise procedurally barred claim for relief.

For the reasons stated above, Defendant's Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**

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Commissioner Lynne M. Parker

cc: Prothonotary

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<sup>14</sup> Jermaine Howard Transcript of Contested Violation of Probation Hearing of Nov. 7, 2008, pgs. 40-41.

<sup>15</sup> Id.