

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID No. 30100217DI
)	
LIONEL M. WALLEY,)	
)	
Defendant.)	

Submitted: June 21, 2010
Decided: July 15, 2010

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
AND FOR “EXPANSION OF THE RECORD”
SHOULD BE SUMMARILY DISMISSED.**

Steven P. Wood, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Lionel M. Walley, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 15th day of July 2010, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Lionel M. Walley was indicted in February 1991 on charges of Possession of Cocaine with Intent to Deliver, Resisting Arrest and Possession of Drug Paraphernalia. A Superior Court judge sitting without a jury convicted Defendant as charged. Defendant was declared a habitual offender and was sentenced to life imprisonment.¹ On direct appeal, Defendant's convictions were affirmed.²

2. In January 2006, Defendant moved to correct his sentence under Superior Court Criminal Rule 35(a). Defendant contended that he did not have the requisite number of convictions to be sentenced as a habitual offender. Defendant also complained that he had not had a separate hearing on the habitual offender motion. By Order dated June 15, 2006, the Superior Court denied Defendant's motion, and on appeal that decision was affirmed.³

3. In affirming the Superior Court's denial of Defendant's motion to correct his sentence, the Delaware Supreme Court explained that the record reflected that, at the time Defendant was declared a habitual offender, he had been convicted of Possession with Intent to Deliver Cocaine in 1992, Burglary in the Second Degree in 1983 and 1984, and Delivery of Cocaine in 1981. Even if Defendant was correct in his contention that the last conviction should not be counted, the remaining convictions still provided a sufficient basis for Defendant's status as a habitual offender. Therefore, the Delaware Supreme Court concluded that Defendant's contention that the State failed to demonstrate

¹ 11 Del. C. § 4214(b).

² *Walley v. State*, 1993 WL 78221 (Del.Supr.).

³ *Walley v. State*, 2007 WL 135615 (Del.Supr.).

he had been convicted of the requisite number of felonies under the habitual offender statute was without merit.⁴

4. As to Defendant's second claim that the Superior Court failed to hold a separate hearing to determine Defendant's habitual offender status, the Delaware Supreme Court ruled that while Defendant characterized his claim as one arising under Rule 35(a), it was actually a claim that his sentence was imposed in an illegal manner under Rule 35(b). Such a claim was required to be asserted within 90 days of sentencing. Because Defendant did not assert this claim in a timely fashion, it may not be considered at this late date. The Delaware Supreme Court noted that while the Superior Court may consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 Del. C. § 4217, neither exception was applicable to this case. The Delaware Supreme Court therefore found Defendant's second claim to be unavailing.⁵

5. Defendant filed his first motion for postconviction relief in June 2007. Defendant advanced several claims of ineffective assistance of counsel alleging errors at the pre-trial stage, at trial, and at sentencing. The Superior Court denied Defendant's motion finding that the grounds for relief were procedurally barred and without merit.⁶

6. The Superior Court in denying Defendant's motion determined that the motion was untimely under Del.Super.Ct. Crim. R. 61(i)(1), since the motion was filed fourteen years after Defendant's conviction. Moreover, the Superior Court determined that Defendant's claims were also barred by Rule 61(i)(3), since the claims for relief could have been raised in the proceedings leading to the judgment of conviction, but Defendant

⁴ *Id.* at *1.

⁵ *Id.*

⁶ Superior Court Docket No. 43.

failed to raise those claims during that process. The Superior Court further determined that Defendant failed to show cause for relief from the procedural bars and prejudice based on a violation of his rights and therefore his motion was not subject to any exception from the procedural bars. The Superior Court also concluded that even if Defendant's allegations were considered, Defendant's motion lacked merit since he failed to satisfy either prong of the *Strickland*⁷ standard for establishing an ineffective assistance of counsel claim.⁸

7. On appeal, the Delaware Supreme Court affirmed the Superior Court's denial of Defendant's motion for postconviction relief.⁹ The Delaware Supreme Court held that the judgment of the Superior Court should be affirmed on the basis of, and for the reasons set forth in, the Superior Court's well-reasoned decision dated December 31, 2007. The Delaware Supreme Court held that Defendant's motion and the claims therein, coming fourteen years after his convictions became final, were appropriately dismissed as time-barred. On appeal, Defendant had not demonstrated, and the record did not reflect, a basis upon which to excuse the procedural bar.¹⁰

8. On June 9, 2010, Defendant filed another motion for postconviction relief. In the subject motion, Defendant raises three claims. The first and second claims overlap and both seek to challenge Defendant's prior convictions which were used as the basis for Defendant's status as a habitual offender. In the first claim, Defendant seeks an evidentiary hearing to challenge his prior convictions. In the second claim, Defendant

⁷ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)(A two pronged test must be established to prevail on an ineffective assistance of counsel claim. The first prong is that it must be established that counsel performed at a level below an objective standard of reasonableness. The second prong is that it must be established that counsel's deficient performance prejudiced the defense.)

⁸ Superior Court Docket No. 43, at pgs. 3-5.

⁹ *Walley v. State*, 2008 WL 5220858 (Del.).

¹⁰ *Id.* at *1.

seeks to contest the validity of the prior convictions. Defendant's third claim is that his sentence should be vacated or reduced in light of the bill passed by the U.S. Congress to eliminate the statutory disparity in sentencing for federal crack and powder cocaine offenses.

9. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.¹¹ If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.¹² Moreover, if it plainly appears from the motion for postconviction relief 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.¹³

10. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within three years of a final order of conviction;¹⁴ (2) any basis for relief must have been asserted previously in a prior postconviction 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. 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

¹¹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹² *Id.*

¹³ Super.Ct.Crim.R. 61(d)(4).

¹⁴ Since this final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005) (amending Super.Ct.Crim.R. 61(i)(1)(May 1, 1996)).

proceedings leading to the judgment of conviction.¹⁵ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”¹⁶

11. In this case, Defendant’s claims are all procedurally barred. Rule 61(i)(1) applies because Defendant filed this motion more than three years after his final order of conviction. Defendant’s final order of conviction was in 1993, and this motion filed on June 9, 2010, was filed over seventeen years later, clearly outside the applicable three-year limit.

12. In addition, Rule 61(i) (4) also precludes this Court’s consideration of the first two claims presented herein, since they have already been formally adjudicated. Defendant’s claims challenging his prior convictions which formed the basis for his habitual offender status were already previously raised and adjudicated in Defendant’s motion for correction of illegal sentence pursuant to Superior Court Criminal Rule 35(a). They are now procedurally barred.

13. To the extent that Defendant has restated or refined his claims, the Superior Court is not required to re-examine any claim that has received “substantive resolution” at an earlier time simply because the claim is now refined, restated or relabeled as an ineffective assistance of counsel contention.¹⁷

14. Moreover, Rules 61(i) (2) and (3) would prevent this Court from considering any additional arguments or claims not previously raised. Defendant had time and opportunity to raise any issue related to his habitual offender status designation in his prior motion and either did so, or neglected to do so. Defendant raises nothing new or

¹⁵ Super.Ct.Crim.R. 61(i)(5).

¹⁶ Super.Ct.Crim.R. 61 (i)(4).

¹⁷ *Johnson v. State*, 1992 WL 183069, *1 (Del.Supr.).

recently discovered related to these contentions. Defendant was aware of, had time to, and the opportunity to raise the issues presented herein in a timely filed motion. Having already been provided with a full and fair opportunity to present any issues desired to be raised, any attempt at this late juncture to raise a new claim is barred.

15. Turning to Defendant's third claim, Defendant is requesting that the court "vacate his status and sentence as a habitual offender and to consider the U.S. Congress Landmark Deal of March 2010 to reduce criminal penalties for crack cocaine and to grant movant at the Delaware State level the chance benefit of this new announcement to be applied to him retroactively in the interest of justice."¹⁸

16. First, whatever attempts by the U.S. Congress to eliminate the disparity in sentencing for federal crack and powder cocaine offenses is irrelevant and inapplicable to Defendant's convictions because Defendant was not charged with, nor convicted of, any federal cocaine offense. Defendant was charged with, and convicted of, cocaine offenses under Delaware's Criminal Code. While disparities in sentencing may exist for defendants charged with federal cocaine offenses, no such distinctions or disparities exist under Delaware's Criminal Code for Delaware State convictions for cocaine offenses.¹⁹

17. Second, the bill that Defendant is seeking some "chance benefit" from, the Fairness in Cocaine Sentencing Act of 2009 (H.R. 3245), which aims to eliminate the crack/powder cocaine sentencing disparity for federal offenses, is at this point just an approved bill by Congress, and does not constitute a new controlling rule of law even for federal offenses.

¹⁸ Defendant's Memorandum in Support of his Rule Motion, at pg. 11.

¹⁹ See, 16 Del. C. § 4716 (b)(4).

18. Even if the federal governments efforts to end the disparities in sentencing for federal crack and powder cocaine offenses did create a newly recognizable retroactive right, that right would not be available and applicable to a defendant, such as Defendant Walley, who has not been sentenced for federal crack offenses. Consequently, even if a new rule has been announced by the federal government, it is not applicable to Defendant Walley who has been convicted of violations of Delaware state cocaine offenses.

19. To add some background to this topic, there are disparities in the federal sentencing guidelines established by the United States Sentencing Commission for federal crack and powder cocaine offenses.²⁰ The federal government is seeking to end the disparity in sentencing for federal crack and powder cocaine offenses. Several bills have been introduced in the 111th Congress to eliminate the statutory disparity in cocaine sentencing.²¹ One such bill, as discussed above, is the bill referred to by Defendant in his memorandum in support of his Rule 61 motion.²² The House Judiciary Subcommittee on Crime, Terrorism and Homeland Security approved a bill, the Fairness in Cocaine Sentencing Act of 2009 (H.R. 3245), which aims to eliminate the crack/powder disparity for federal offenses. The United States Senate is also seeking to reduce the sentencing disparity.²³

20. In May 2007, the United States Sentencing Commission submitted proposed amendments to the sentencing guidelines that reduced some of the disparity between the federal crack/powder offenses. On December 11, 2007, the Sentencing Commission

²⁰ See, for example, 21 U.S.C. § 841(b)(1). See also, U.S.S.G. § 2D1.1(c)(federal sentencing guidelines assignment of offenses to corresponding sentencing levels based on the kind and volume of controlled substances involved in the offense.)

²¹ H.R. 18 (Powder-Crack Cocaine Penalty Equalization Act of 2009), H.R. 265 (Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009), H.R. 3245 (Fairness in Cocaine Sentencing Act of 2009).

²² Defendant's Memorandum in Support of his Rule 61 Motion, at pg. 15.

²³ Crack Sentencing Reform Bill, S. 1789.

unanimously voted to apply the crack amendment retroactively.²⁴ In the wake of the Sentencing Commission's crack cocaine amendment retroactivity decision, the federal courts began considering motions filed by crack offenders to obtain reductions in their federal sentences.²⁵

21. As previously discussed, the federal government's efforts to eliminate a disparity in sentencing for federal crack/powder cocaine offenses does not create a newly recognizable retroactive right which would require a reconsideration of Defendant's sentence for Delaware State cocaine offenses. Defendant's reliance on efforts to correct the disparities for federal violations to his state violations where there are no such disparities is inappropriate, misplaced, and inapplicable.

22. It is also noted that the federal courts that have reconsidered sentences for federal crack offenses, have determined that defendants convicted of crack cocaine offenses but sentenced as career offenders²⁶ cannot benefit from the amended crack cocaine sentencing guidelines.²⁷

²⁴ U.S. Sentencing Commission, *News Release: U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses*, Dec. 11, 2007, available at <http://www.ussc.gov/PRESS/rel121107.htm>.

²⁵ Congressional Research Service-Sentencing Levels for Crack and Powder Cocaine: *Kimbrough v. United States* and the Impact of *United States v. Booker*, by Brian Yeh and Charles Doyle, CRS Report for Congress, March 20, 2009.

²⁶ A defendant is a career offender if (1) the defendant was at least 18 years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S. Sentencing Guidelines § 4B1.1.

²⁷ Congressional Research Service-Sentencing Levels for Crack and Powder Cocaine: *Kimbrough v. United States* and the Impact of *United States v. Booker*, by Brian Yeh and Charles Doyle, CRS Report for Congress, March 20, 2009 at pg. 16 (circuit courts that have considered whether career offenders can benefit from the amended crack cocaine sentencing guidelines have generally ruled that they cannot), citing cases, including: *United States v. Thomas*, 524 F.3d 889 (8th Cir. 2008); *United States v. Sharkey*, 543 F.3d 1236 (10th Cir. 2008); *United States v. Moore*, 541 F.3d 1323 (11th Cir. 2008); *United States v. Caraballo*, 552 F.3d 6 (1st Cir. 2008).

23. Consequently, it appears that even if Defendant was charged with federal offenses (which he was not) and sentenced for those federal violations, Defendant would not be eligible to have his federal sentence reconsidered because he was sentenced as a career offender.

24. Since Defendant's claims are procedurally barred, Defendant must meet one of the exceptions to overcome the bars to relief. In this case, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances."²⁸ The Defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."²⁹ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. It is clear from Defendant's motion that Defendant's claims do not meet the high standard that the fundamental fairness exception requires. The Court does not find that the interests of justice require it to consider these otherwise procedurally barred claims for relief.

25. Since it does not appear that any "expansion of the record" will aid in the resolution of the issues presented herein, Defendant's request to expand the record is denied.

²⁸ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

²⁹ *Id.*

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief and to expand the record should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary