

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

STATE OF DELAWARE)	
)	
Plaintiff,)	
)	
v.)	ID No. 0804022489
)	
KENNETH E. FINK,)	
)	
Defendant.)	

Submitted: May 5, 2010
Decided: July 30, 2010

MEMORANDUM OPINION

Richard G. Andrews, Esquire, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Kenneth E. Fink, *pro se*.

In December, 2008 Defendant Fink pled guilty to one count of Unlawfully Dealing in Child Pornography, and shortly thereafter was sentenced to a term of imprisonment. He has now filed a Rule 61 motion challenging his conviction arising from his guilty plea. He asserts three grounds for this challenge: (1) the State did not advise his lawyer of a Delaware Supreme Court opinion which Fink believes would have been helpful to him; (2) the State failed to “prove” each element of the offense; and (3) his conviction violated his constitutional right to be free from double jeopardy. The Court believes there is no merit to Fink’s arguments. Nonetheless it will not reach the substantive issues because Fink’s arguments are procedurally barred.

Procedural History

This matter arises from Fink’s second conviction for child pornography offenses. His first conviction arose out of a Department of Justice investigation of Fink, who was then a member of the Delaware Bar,¹ for theft of client funds. As part of that investigation the State obtained a search warrant permitting the seizure of, among other things, two computers and related devices located in Fink’s home. Thereafter the police obtained

¹ Fink was later disbarred.

another warrant permitting them to search Fink's computers. They found more than 190 images of child pornography during the ensuing search.

Fink was charged with various child pornography offenses and tried before a jury which convicted him of 15 counts of Unlawfully Dealing in Child Pornography (in violation of 11 *Del. C.* §1109) and 15 counts of Possession of Child Pornography (11 *Del. C.* §1111). He was sentenced to prison followed by a lengthy probation. Fink's conviction was affirmed on direct appeal, and Fink's later Rule 61 motion in this court as well as his federal petition for a writ of habeas corpus were unavailing.

Turning to the instant matter, Fink was arrested a short while after his release from prison when child pornography was again found on his computer. He was soon indicted by the grand jury on ten counts of Unlawfully Dealing in Material Depicting a Child Engaged in a Prohibited Sexual Act in violation of 11 *Del. C.* §1109(4). Each count carried with it the potential for a minimum of two years and a maximum of 25 years imprisonment. In December, 2008 Fink pled guilty to one count, and the State entered a nolle prosequi to the remaining nine counts. He was sentenced to a term of imprisonment, followed by probation.

Fink filed the instant Rule 61 motion along with a supporting memorandum to which the State responded. The matter was referred to a

Court Commissioner who found that Fink's motion was procedurally barred and recommended denial of Fink's application. Fink objected to the Commissioner's Report and Recommendation. The Court agrees with the Commissioner that Fink is not entitled to any relief.

Analysis

Fink brings his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. That rule contains procedural bars which are intended to promote finality to criminal litigation and to relieve this Court from the burden of repetitive motions which, more often than not, are lacking in substantive merit.² Needless to say consideration of the substantive merits of motions which are procedurally barred would defeat the purposes of those bars. Accordingly, the Delaware Supreme Court requires this Court to first determine whether the defendant's arguments are procedurally barred and to reach the merits of an argument if, and only if, the court first determines it is not barred.

Fink's arguments are barred because he failed to raise them before he entered his guilty plea. Not surprisingly, Fink now seeks refuge in two narrow exceptions to the applicable bar, but neither affords him any help. The exceptions do not apply because Fink cannot show cause for his failure

² Super. Ct. Crim. R. 61(i)(1)-(4).

to timely raise them and, in light of his guilty plea, he cannot show a colorable constitutional error which resulted in a miscarriage of justice.

A. *Defendant's substantive arguments*

As mentioned earlier, Defendant advances three substantive theories in support of his motion for postconviction relief.

1. Defendant argues that the State failed to bring to his attention the Delaware Supreme Court's opinion in *State v. Dittie*.³ He contends that had he known about *Dittie* he would have sought dismissal of the Unlawfully Dealing in Child Pornography charges against him in favor of the less serious charges of Possession of Child Pornography. Fink analogizes the purported failure of the State to bring *Dittie* to his attorney's attention to the concealment of exculpatory evidence.
2. Fink's second argument is related to his first. He argues that the State could not prove every element of the charges against him. According to Fink, *Dittie* engrafts onto the statute defining Unlawful Dealing in Child Pornography a requirement that the State prove that Fink intended there to

³ 1987 WL 37890 (Del. Supr.).

be a two-party transaction involving the pornography. He claims the State could not prove this element of the offense.

3. Finally Defendant asserts that he was subjected to double jeopardy because possession of child pornography on a computer constitutes both the crime of unlawful dealing and the separate crime of possession. He argues that the constitution prohibits him from being placed in jeopardy for two separate crimes for the same act.

B. *The procedural bars in Rule 61*

Rule 61 contains four primary procedural bars. First, it bars claims for postconviction relief filed more than one year after the conviction becomes final; second, in instances in which the defendant has filed more than one motion for postconviction relief, it bars claims not presented in the earlier motions; third it bars claims which were available to the defendant and which were not presented in a timely fashion in the proceedings leading to the defendant's conviction; and fourth, in the criminal law equivalent of *res judicata*, the rule bars consideration of claims previously presented and decided in the case.⁴ Each of these procedural bars has at least one exception which is peculiar to that bar. In addition, there is an overarching

⁴ Super. Ct. Crim. R. 61(i)(1)-(4).

exception—sometimes referred to as the “miscarriage of justice” exception—applicable to all of the procedural bars except the *res judicata* bar.

Fink’s claims are barred by the provision in Rule 61(i)(3) which precludes this court from considering claims available to the defendant but which were not raised during the proceedings leading to the adjudication of his guilt. That provision provides

Any ground for relief 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.⁵

The purpose of this rule is to prevent a criminal defendant, either by neglect or design, from withholding arguments for use, if need be, until after his or her conviction. It is undisputed that Fink’s arguments were not presented when he entered his guilty plea, and therefore, are procedurally barred unless he can find refuge in either of two exceptions to this bar.

The first exception requires Fink to demonstrate both “cause” and “prejudice” under Rule 61(i)(3). In order to show “cause,” a movant must show “some external impediment” which prevented him from raising the

⁵ *Id.* at 61(i)(3).

claim.⁶ If the movant fails to demonstrate cause, the Court need not consider the prejudice prong.⁷

Fink argues that cause for his failure to cite *Dittie* exists because the State did not disclose the existence of that opinion to him. He analogizes the *Dittie* opinion to exculpatory evidence and theorizes that under *Brady v. Maryland*⁸ and its progeny the State was obligated to disclose the opinion to him. This argument fails for either of two reasons. First, there is no known authority holding that a publicly available judicial opinion constitutes “evidence” within the meaning of *Brady*.⁹ Second, *Dittie* appears on both the Lexis and Westlaw¹⁰ services and therefore was equally available to the State and Fink.¹¹ Consequently the purported failure State not bring *Dittie* to Fink’s attention cannot constitute a *Brady* violation.¹² Therefore, Fink fails to establish cause and his *Dittie* claims are bared by Rule 61(i)(3).

Furthermore, Fink’s arguments based on *Dittie* do not warrant consideration under Rule 61(i)(5). Subpart (5) of Rule 61(i) provides:

⁶ *Younger v. State*, 580 A.2d 552, 556 (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)).

⁷ *State v. Eley*, 2002 WL 337996 (Del. Super.).

⁸ 373 U.S. 83 (1963).

⁹ Fink cites no such authority.

¹⁰ 1987 Del. LEXIS 1178; 1987 WL 37890 (Del. Supr.).

¹¹ Fink does not claim ineffective assistance of counsel; rather he states that he had some of the best criminal defense lawyers available.

¹² See *Flonery v. State*, 893 A.2d 507, 532 (Del. 2006) (stating that *Brady* does not require the government to provide defendants with evidence they could otherwise obtain by exercising reasonable diligence).

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 the conviction.¹³

Fink attempts to invoke this exception by equating the State's failure to make him aware of *Dittie* to a *Brady* violation. However, as stated above, there is no basis for this analogy.

Fink also argues that under *Dittie* there was a due process violation because the State failed to prove all of the elements of the offense. He theorizes that the State could not prove that he intended to engage in a two-party transaction involving the child pornography in his possession. Assuming for the sake of argument that this is an element of the offense,¹⁴ his argument is foreclosed by Fink's guilty plea. Fink cites cases which hold that a guilty plea will not bar a claim that there is a constitutional deficiency apparent from the indictment.¹⁵ However, as Fink acknowledges, these cases do not apply when it is necessary for the court to go beyond the

¹³ Super. Ct. Crim. R. 61(i)(5).

¹⁴ Because of Fink's procedural default, the Court does not reach the issue whether this is, in fact, an element of the offense.

¹⁵ Def. Mot. for Postconviction Relief, at 6-8 (citing *Menna v. N.Y.*, 423 U.S. 61 (1975); *Blackledge v. Perry*, 417 U.S. 21 (1974); *U.S. v. Pickett*, 941 F.2d 411 (6th Cir. 1991); *Mack v. U.S.*, 853 F.2d 585 (8th Cir. 1988); *U.S. v. Hovey*, 674 F. Supp. 161 (D. Del. 1987)).

indictment.¹⁶ In Fink's case, it would be necessary for the Court to go outside of the indictment in order to determine whether Fink engaged in a two-party transaction involving the child pornography in his possession. Consequently, Fink's guilty plea precludes review of this claim. Both Fink's *Dittie* claims are therefore barred and the Court will not consider them under Rule 61(i)(5).

Turning briefly to Fink's double jeopardy claims, it is again undisputed that those were not presented when Fink entered his plea. Fink does not even make a pretense of showing cause for his failure to timely raise this ground. It too is therefore procedurally barred by Rule 61(i)(3).

In addition, this claim does not warrant consideration under Rule 61(i)(5) because it is not a colorable constitutional claim. Fink contends that his single act could have resulted in a finding of guilt under both 11 *Del. C.* §1109 (Unlawfully Dealing in Child Pornography) and 11 *Del. C.* §1111 (Possession of Child Pornography). The theoretical merit of this argument is of no moment here because Fink was only indicted under §1109 and therefore never subjected to the possibility of double jeopardy under his theory.

¹⁶ Def. Mot. for Postconviction Relief at 7 (citing *U.S. v. Broce*, 488 U.S. 563, 576 (1989)).

Accordingly, the Court hereby accepts the Commissioner's report and recommendation and Defendant's motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

John A. Parkins, Jr.

cc: Prothonotary