

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

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. 0608011014
	)	
TERRELL A. GEE	)	
	)	
Defendant	)	

Submitted: January 24, 2011  
Decided: February 23, 2011

Upon Defendant's Second Motion for Postconviction Relief.  
**SUMMARILY DISMISSED.**

**ORDER**

Diane C. Walsh, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, Attorney for the State.

Terrell A. Gee, Wilmington, Delaware, *pro se*.

COOCH, R.J.

1. This 23rd day of February 2011, upon consideration of Defendant's second motion for postconviction relief, it appears to the Court that:
  
2. Following a jury trial in March 2007, Defendant was convicted of three counts of Rape Second Degree.<sup>1</sup> The alleged victim was Defendant's minor cousin, who resided with Defendant and other family members.<sup>2</sup> On

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<sup>1</sup> *State v. Gee*, 2009 WL 3720165 (Del. Super. Ct. 2009)

<sup>2</sup> *Id.*

June 22, 2007, Defendant was sentenced to forty-eight years of Level V incarceration, suspended after thirty years of Level V incarceration.<sup>3</sup> Each count of rape entailed a ten year mandatory minimum sentence.<sup>4</sup>

3. On direct appeal, Defendant's conviction and sentence were affirmed by the Supreme Court of Delaware.<sup>5</sup> Defendant's appellate counsel filed a motion to withdraw pursuant to Supreme Court Rule 26(c), asserting that, after careful examination of the record, there were no arguably appealable issues.<sup>6</sup> The Supreme Court found that Defendant's appeal was "wholly without merit and devoid of any arguably appealable issue."<sup>7</sup> Thus, Defendant's conviction was affirmed and appellate counsel's motion to withdraw was mooted.<sup>8</sup>

4. Defendant's first motion for postconviction relief, filed *pro se* in June 2009, was denied by this Court.<sup>9</sup> Thereafter, the Supreme Court of Delaware affirmed this Court's denial of Defendant's first motion for postconviction relief.<sup>10</sup>

5. In his first motion for postconviction relief, Defendant alleged ineffective assistance of trial counsel, claiming that trial counsel failed to perform basic functions, including failure to: 1) adequately confer with Defendant; 2) seek proper discovery; 3) investigate the crime; 4) interview necessary and important witnesses; and 5) object to discriminatory treatment of jurors by the State, in violation of *Batson v. Kentucky*.<sup>11</sup> Defendant's trial counsel filed a "particularly detailed" affidavit denying Defendant's

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<sup>3</sup> Sentencing Worksheet of June 22, 2007.

<sup>4</sup> *Id.* At his final case review, Defendant rejected a plea offer which would have required him to plead guilty to one count of Rape Second Degree.

<sup>5</sup> *Gee v. State*, 950 A.2d 658 (Del. 2008). On direct appeal, Defendant argued that the Superior Court lacked jurisdiction over the instant charges because he was never properly indicted, and that trial counsel was ineffective for failing to file a motion for judgment of acquittal. *Id.*

<sup>6</sup> *Id.* at \*1.

<sup>7</sup> *Id.*

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

<sup>9</sup> *State v. Gee*, 2009 WL 3720165 (Del. Super. Ct. 2009).

<sup>10</sup> *Gee v. State*, 5 A.3d 630 (Del. 2010).

<sup>11</sup> *Id.*

allegations.<sup>12</sup> This Court found that “there is no evidence that counsel's conduct fell below any objective standard of reasonableness as required by *Strickland* or any evidence of a *Batson* violation.”<sup>13</sup> Consequently, this motion was denied.

6. Defendant’s instant motion for postconviction for relief, again filed *pro se*, alleges “Newly Discovered Evidence” and “Ineffective Assistance of Counsel.”<sup>14</sup> The substance of Defendant’s motion seems to be that the victim reported an incident of sexual abuse on July 18, 2006, a date on which he was incarcerated and could not have perpetrated the offense.<sup>15</sup> It is not clear why Defendant claims this evidence is “newly discovered,” other than his conclusory assertion that “[b]ecause he did not have the resources to do it himself, [Defendant] was not able to use this evidence in trial, as a result it is newly discovered.”<sup>16</sup> Defendant further asserts that it was “highly suspect that the alleged victim was never examined by a medical unit” and “there was very much uncertainty in the alleged victim statement and testimony [sic].”<sup>17</sup> Ultimately, however, Defendant’s motion can be reduced to another claim of ineffective assistance of counsel:

Add all these elements together, [Defendant] would have had a very strong defense and this was more than enough evidence to establish reasonable doubt. But counsel did not effectively utilize any of these things as a result, he was constitutionally ineffective [sic].<sup>18</sup>

7. The merits of a motion for postconviction relief will not be considered if the alleged grounds for relief are procedurally barred.<sup>19</sup> Instead, if it “plainly appears from the motion for postconviction relief and

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Def’s Mot. for Postconviction Relief of Jan. 24, 2011 at 3.

<sup>15</sup> Def.’s Memorandum in Support of Postconviction Relief Motion at 4.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *See, e.g., Watson v. State*, 602 A.2d 1082 (Del. 1991) (“[T]o preserve the integrity of Delaware’s procedural default rules, this Court will not ordinarily consider the merits of a postconviction relief claim before first determining whether the claim is procedurally barred.”) (citation omitted).

the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified.”<sup>20</sup> This Court has not requested an affidavit from Defendant’s trial counsel.<sup>21</sup>

8. Superior Court Criminal Rule 61(i)(1) bars a motion for postconviction relief filed more than one year after a final judgment of conviction, unless the motion asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final. A judgment of conviction is final, *inter alia*, “when the Supreme Court [of Delaware] issues a mandate or order finally determining the case on direct review.”<sup>22</sup> Defendant’s judgment of conviction became final in 2008, when the Supreme Court affirmed Defendant’s convictions and sentence on direct review. Thus, Defendant’s motion, filed on January 24, 2011, is outside the one year time limitation.

9. Rule 61(i)(2) provides that “[a]ny 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.”

10. Rule 61(i)(3) bars 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.”

11. Finally, Rule 61(i)(4), bars relief on any ground “that was formerly adjudicated, whether in the proceedings leading to the judgment of

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<sup>20</sup> Superior Court Criminal Rule 61(d)(4).

<sup>21</sup> Superior Court Criminal Rule 61 does not require that this Court obtain an affidavit from trial counsel, although it is the “preferable practice” in cases involving a defendant’s first postconviction motion. *Horne v. State*, 887 A.2d 973, 975 (Del. 2005). This Court ordered trial counsel to submit an affidavit responding to defendant’s allegations of ineffective assistance of counsel in connection with Defendant’s first motion for postconviction relief. *See infra* text accompanying note 27.

<sup>22</sup> Superior Court Criminal Rule 61(m)(2).

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.”

12. Rule 61(i)(5) provides relief from the procedural bars of Rules 61(i)(1)-(3). By the terms of Rule 61(i)(5), the procedural bars contained in Rules 61(i)(1)-(3) 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.”

The relief provided by Rule 61(i)(5) is known as the “fundamental fairness” exception; this exception is “extremely narrow and is only applicable ‘in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.’”<sup>23</sup> Thus, Defendant bears the burden of demonstrating that the Court lacked jurisdiction or a colorable constitutional claim in order to trigger the “extremely narrow”<sup>24</sup> exception of Rule 61(i)(5) and avoid the procedural bars of Rules 61(i)(1)-(3).

13. As indicated above, Defendant’s constitutional claim is that he was denied the effective assistance of counsel based on counsel’s alleged failure to investigate a potential inconsistency in the victim’s account of a date on which Defendant allegedly sexually assaulted her.<sup>25</sup> Defendant states:

During an interview, the alleged victim advised the police that on July 18, 2006, she was sexually abused by [Defendant]. However, according to the records from the Detention Center, [Defendant] was incarcerated on the specific day the victim claimed to be raped. This line of investigation was of critical importance and it was one any reasonable attorney would have pursued but for whatever reason [Defendant’s] counsel did not. It would have been more than appropriate for counsel to investigate these records, [Defendant’s probation officer] and the staff members from the

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<sup>23</sup> *Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991) (citation omitted).

<sup>24</sup> *Id.*

<sup>25</sup> Def.’s Memorandum in Support of Postconviction Relief Motion at 4.

Detection Center. There appears to be significant conflict between the victim's date and the records from the Detention Center.<sup>26</sup>

14. These allegations are contrary to trial counsel's affidavit, filed in connection with Defendant's first motion for postconviction relief, in which trial counsel stated that there was sufficient pretrial investigation, and "witnesses were interviewed and counsel was prepared for trial."<sup>27</sup> Moreover, Defendant's contentions are merely unsupported and conclusory claims of newly discovered evidence; this claim of newly discovered evidence appears to be a pretext for Defendant to recast his claims of ineffective assistance of counsel.<sup>28</sup>

Finally, even if taken as true, Defendant's assertions that the date of the offense reported by the victim is in conflict with a date on which he was incarcerated, that it is "highly suspect" that the victim was not examined by a medical unit, and that "there was very much uncertainty" in the victim's statement and testimony would be merely cumulative and impeaching. That is, these issues would be used solely to impeach the credibility of the victim herein; none of Defendant's contentions have independent evidentiary value. To warrant a new trial,<sup>29</sup> newly discovered evidence: 1) "must be of such a nature that it would have probably changed the result if presented to the jury;" 2) "have been newly discovered; *i.e.*, it must have been discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence;" 3) "must not be merely cumulative or impeaching."<sup>30</sup>

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<sup>26</sup> *Id.* at 4-5. In his Affidavit, Defendant's trial counsel noted that he did not interview Defendant's probation officer as he did not learn of her identity until Defendant's initial Motion for Postconviction Relief was filed. Affidavit of Kester I.H. Crosse, Esquire ¶ 16.

<sup>27</sup> Affidavit of Kester I.H. Crosse, Esquire ¶ 15.

<sup>28</sup> Further, a motion for a new trial based on newly discovered evidence should be brought pursuant to Superior Court Criminal Rule 33, rather than Superior Court Criminal Rule 61. Rule 33 provides: "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." As stated, Defendant's conviction became final in 2008, when the Supreme Court of Delaware affirmed his convictions. Any Rule 33 motion is also time-barred.

<sup>29</sup> As noted, such relief should properly be sought under Rule 33, rather than Rule 61. *See supra* note 28.

<sup>30</sup> *Lloyd v. State*, 534 A.2d 1262 (Del. 1987) (citation omitted).

There is nothing to suggest that a purported conflict on the date of one reported incident of sexual abuse would “probably have changed the result,” particularly in light of the numerous counts of Rape charged and convicted herein. Likewise, Defendant does not set forth why this alleged disparity in dates is now capable of being discovered, but was not able to be discovered prior to trial with the exercise of due diligence. Lastly, as stated, this evidence would simply go to impeach the credibility of the victim, and would be cumulative with whatever impeachment evidence was presented at trial. Consequently, Defendant’s claim of newly discovered evidence is without merit.

15. All of Defendant’s contentions regarding trial counsel’s alleged failure to investigate exculpatory evidence or properly impeach the victim’s testimony have been previously adjudicated in Defendant’s first motion for postconviction relief. Therefore, these claims are squarely within the procedural bar of Rule 61(i)(4), which precludes relief on any ground “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.”

16. These claims are also time barred pursuant to Rule 61(i)(1), as they are brought more than one year after Defendant’s conviction became final. Defendant has not shown that the consideration of any of his claims is warranted in the interests of justice, as he has failed to articulate any factual basis to support the contention that “subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.”<sup>31</sup> Likewise, Defendant has not adduced any facts which might implicate the “fundamental fairness” exception of Rule 61(i)(5); this “extremely narrow” exception applies only ‘in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.’<sup>32</sup> To trigger this exception, Defendant bears the burden of demonstrating that the Court lacked jurisdiction or a colorable constitutional claim;<sup>33</sup> Defendant has shown neither condition.

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<sup>31</sup> *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990) (citations omitted).

<sup>32</sup> *Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991) (citation omitted).

<sup>33</sup> *See id.*

17. Therefore, for the reasons stated above, Defendant's second motion for postconviction relief is **SUMMARILY DISMISSED**.

**IT IS SO ORDERED.**

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Richard R. Cooch, R.J.

oc: Prothonotary  
cc: Investigative Services  
Kester I.H. Crosse, Esquire