

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID. No. 9510005876
)
)
)
 MARIANO CHECO,)
)
 Defendant.)

Submitted: December 2, 2015
Decided: December 8, 2015

**COMMISSIONER’S REPORT AND RECOMMENDATION ON
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF**

Joseph Grubb, Esquire, Delaware Department of Justice, 820 N. French St. 7th Floor, Criminal Division, Wilmington, Delaware, 19801, Attorney for the State.

Mariano Checo, *pro se*.

MANNING, Commissioner

(1) This 8th day of December, 2015, upon consideration of defendant Mariano Checo's motion for postconviction relief ("Motion"), I find the following:

(2) On April 16, 1996, Checo pled guilty to one count of Tampering with Physical Evidence.¹ Checo was sentenced to 1 year at Level 5, suspended immediately for 1 year at Level 2 probation, plus costs. Checo completed this sentence and was successfully discharged from probation.²

(3) Checo's case was closed by the Superior Court on December 22, 1997.³

(4) Checo, apparently now facing deportation proceedings, filed a first *pro se* motion for postconviction relief in this case on November 17, 2015.

(5) Pursuant to Superior Court Rule 132, Checo's Motion was referred to the undersigned commissioner on December 2, 2015.

(6) Checo's claims for postconviction relief, in his own words, are as follows:

Ground One: Ineffective assistance of Counsel. Trial Counsel was ineffective in failing to inform Mr. Checo of the collateral consequences of taking a plea. Due to the pleas and sentence, Checo is now in removal Proceedings.

Ground Two: Violation of 5th and 6th Amendments of U.S. Constitution. At the time of the plea Mr. Checo did not speak English. Therefore, his attorney acted as both his attorney and his interpreter, violating Mr. Checo's 5th and 6th Amendment rights.

Ground Three: Invalid plea and plea colloquy. The plea was invalid as Mr. Checo's attorney acted as both his attorney and interpreter. The colloquy conducted by the court does not meet the necessary requirements it is unknown whether Mr. Checo understood the plea and colloquy with the court.⁴

¹ D.I. #7-9.

² D.I. #112.

³ *Id.*

⁴ It is unclear to me if Mr. Checo is now able to speak and write in English. However, it appears that he is considering that his motion was handwritten in English and signed by him personally.

(7) Even if all of Checo's factual allegations are true, Checo lacks standing under Superior Court Criminal Rule 61(a)(1) to seek postconviction relief at this point in time.⁵ It is undisputed that Checo was successfully discharged from probation on December 22, 1997, and his case closed. Thus, Checo is no longer a "person in custody under a sentence of this court" as required by Rule 61(a)(1) to confer standing.⁶

(8) Additionally, a motion for postconviction relief must be filed within one year of the date the conviction becomes final.⁷ Checo's motion was filed 19 years after the date of his conviction. Thus, it is untimely and procedurally barred under Rule 61(i)(1).

(9) Checo's argument that his counsel was ineffective for not advising him of possible deportation consequences at the time of his guilty plea is also without merit. Had Checo's guilty plea been entered after 2010 however, that might not be the case. The United States Supreme Court, in *Padilla v. Kentucky*, established a new right recognizing that it is ineffective assistance of counsel if an attorney fails to inform a defendant of the risk of deportation.⁸ *Padilla*, however, did not hold that its ruling established a retroactive right.

⁵ Rule 61. Postconviction remedy. (a) Scope of rule. -- (1) Nature of proceeding. -- This rule governs the procedure on an application by a person in custody under a sentence of this court seeking to set aside the judgment of conviction or a sentence of death on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction or a capital sentence. A proceeding under this rule shall be known as a postconviction proceeding.

⁶ See *Ruiz v. State*, 2011 WL 2651093 (Del. July 6, 2011) (Affirming that a defendant no longer under a sentence of the Superior Court lacks standing to seek postconviction relief).

⁷ Rule 61(i) Bars to relief. -- (1) Time limitation. -- A motion for postconviction relief may not be filed more than one year 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 one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

⁸ 559 U.S. 356 (2010).

(10) Checo's Motion fails at the outset for two reasons: (1) he lacks standing to bring it, and (2) it is procedurally barred. Therefore, I recommend that the Court summarily dismiss the Motion under Rule 61(d)(5).⁹

For the foregoing reasons, Checo's Motion should be Denied.

IT IS SO RECOMMENDED.

/s/ Bradley V. Manning
BRADLEY V. MANNING,
Commissioner

oc: Prothonotary
cc: Defendant

⁹ Rule 61(d)(5) Summary dismissal. -- If it plainly appears from the motion for postconviction relief and 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.
(e) Appointment of counsel and withdrawal of