

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.)
) Cr. ID. No. 9902004516
 KLEON PULLER,)
)
 Defendant.)

Submitted: August 27, 2018
Decided: October 31, 2018

Upon Commissioner’s Report and Recommendation
That Defendant’s Motion for Postconviction Relief
Should Be Denied

ADOPTED

ORDER

This 31st day of October, 2018, the Court has considered the Commissioner’s Findings of Fact and Recommendations, Defendant’s Motion for Postconviction Relief, Defendant’s Objections to the Commissioner’s Findings of Fact and Recommendations, and the relevant proceedings below.

On July 23, 2018, Defendant Kleon Puller filed a *pro se* motion for postconviction relief. The motion was referred to a Superior Court Commissioner in accordance with 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of fact and conclusions of law. The Commissioner issued the

Findings of Fact and Recommendations on July 30, 2018. The Commissioner recommended that Defendant's Motion for Postconviction Relief be denied.

“Within ten days after filing of a Commissioner's proposed findings of fact and recommendations . . . any party may serve and file written objections.”¹ Defendant Puller filed written objections on August 21, 2018. Upon review, the Court finds Defendant's objections to be without merit.

In Defendant's Rule 61 motion, he claims that his First Degree Attempted Murder Conviction should be vacated and he should be found guilty of Assault First Degree or Reckless Endangering instead. Puller claims that he did not have the requisite intent to be found guilty of First Degree Attempted Murder because his actions were “reckless,” not “intentional.” Puller also claims that his counsel was ineffective for not requesting a Reckless Endangering jury instruction at trial.

This is Puller's second motion for postconviction relief. “A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted after a trial and the motion either: (i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or

¹ Super. Ct. Crim. R. 62(a)(5)(ii).

(ii) pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.”² “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.”³

Puller does not raise anything new or recently discovered. At trial, the issue was whether Puller’s conduct was “reckless” or “intentional.” Puller contended that his actions were “reckless” but the jury found his actions to be “intentional.” The jury was provided with an instruction for Assault First Degree, a lesser included offense to Attempted Murder in the First Degree, thus permitting the jury to conclude that his conduct was reckless. Puller now contends an additional instruction for Reckless Endangering should have been given. However, even if this instruction had been given, the jury determined that Puller’s actions were intentional and therefore would not have convicted him of any other lesser-included “reckless” offense.

² Super. Ct. Crim. R. 61(d)(2).

³ Super. Ct. Crim. R. 61(d)(5).

In Puller's first Rule 61 motion, Puller contested the sufficiency of the jury instructions, contended that his conduct should have been deemed "reckless" and not "intentional," and argued that his counsel was ineffective for a litany of reasons. The Superior Court held, and the Delaware Supreme Court affirmed, that Puller's claims were without merit. Therefore, Puller has failed to meet the pleading requirements allowing him to proceed with this Rule 61 motion. In accordance with the mandates of Rule 61, Puller's Rule 61 motion must be summarily dismissed.

Further, Puller's motion is procedurally barred. If a procedural bar exists, the claim is barred and the Court will not consider the merits of the claim. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;⁴ (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances (*i.e.* discovery of new evidence or new rule of constitutional law) warranting a subsequent motion; (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 and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief however do not apply to a claim that the court lacked jurisdiction or to a claim that new evidence exists that movant

⁴ Super. Ct. Crim. R. 61(i)(1).

is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.⁵

Puller's instant motion is time-barred. The final order of conviction was in 2002,⁶ and this motion was filed in July 2018, about 16 years later.⁷ Puller's claims, at this late date, are time-barred.

Puller has not established any prejudice to his rights and/or cause for relief. Puller had time and opportunity to raise any issue on direct appeal and in a timely-filed postconviction motion. Having been provided with a full and fair opportunity to present any issue in a timely filed motion, any attempt at this time to raise a claim is procedurally barred.

⁵ Super. Ct. Crim. R. 61 (effective June 4, 2014).

⁶ Super. Ct. Crim. R. 61(m)(2).

⁷ Super. Ct. Crim. R. 61(i)(1).

The Court holds that the Commissioner's Findings of Fact and Recommendations dated July 10, 2014, should be adopted for the reasons set forth therein. The Commissioner's findings are not clearly erroneous, are not contrary to law, and are not an abuse of discretion.⁸

THEREFORE, after careful and *de novo* review of the record in this action, the Court hereby **adopts the Commissioner's Findings of Fact and Recommendations in its entirety. Defendant's Motion for Postconviction Relief is hereby DENIED.**

IT IS SO ORDERED.

The Honorable Mary M. Johnston

⁸ Super. Ct. Crim. R. 62(a)(4)(iv).