

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Submitted: July 30, 2018
Decided: August 13, 2018

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE SUMMARILY DISMISSED**

Sean P. Lugg, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Kleon J. Puller, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 13th day of August 2018, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. On March 1, 2001, after a three-day trial, a Superior Court jury found Defendant Kleon J. Puller guilty of Attempted Murder in the First Degree, Possession of a Firearm During the Commission of a Felony, and Endangering the Welfare of a Child. Puller was sentenced to life for his attempted murder conviction, five years of incarceration for his possession of a firearm conviction, and one year of probation for endangering the welfare of a child conviction.

2. On February 5, 1999, Puller shot his girlfriend in the head with a .357 Magnum revolver while his five-year-old niece was in the room. Puller admitted to shooting his girlfriend in the face, but claimed it was an accident.¹ He testified that he put the gun to her head in order to scare her but did not realize the gun was loaded. He pulled the trigger after she said, "Go ahead and shoot it." According to Puller, he expected to hear only a "click", but was "in shock" when he heard a "bang."² To disprove Puller's contention, the State relied on eyewitnesses, medical testimony about the nature of his girlfriend's wounds, and a videotape of the crime scene.³ Puller's shot blew off a large part of his girlfriend's face, including both of her eyes. Although the victim survived, she is blind, severely disfigured, and brain damaged.⁴

¹ *Puller v. State*, 2002 WL 529909 (Del.); *Puller v. Pierce et al.*, 2016 WL 2869753, *1 (D.Del.).

² *Puller v. Pierce et al.*, 2016 WL 2869753, *1 (D.Del.).

³ *Puller v. State*, 2002 WL 529909 (Del.); *Puller v. Pierce et al.*, 2016 WL 2869753, *1 (D.Del.).

⁴ *Puller v. State*, 2002 WL 529909 (Del.); *Puller v. Pierce et al.*, 2016 WL 2869753, *1 (D.Del.).

3. Puller appealed, and the Delaware Supreme Court affirmed his convictions and sentences on April 5, 2002.⁵

4. On January 5, 2012, Puller filed a Rule 61 motion for postconviction relief. Counsel was appointed to assist Puller with that Rule 61 motion. On October 1, 2013, Rule 61 counsel filed a motion to withdraw because he concluded that Puller's claims were without merit and he did not find the existence of any other meritorious claims for relief. Puller responded to Rule 61 counsel's motion to withdraw and raised a number of additional claims in further support of his Rule 61 motion.

5. On July 8, 2014, a Superior Court Commissioner issued his Report and Recommendation recommending that Puller's Rule 61 motion be denied and that counsel's motion to withdraw be denied as moot.⁶ On August 21, 2014, the Superior Court found Puller's objections to the Commissioner's Report and Recommendation to be without merit and adopted the Commissioner's Report and Recommendation in its entirety.⁷ The Delaware Supreme Court affirmed that decision on January 30, 2015.⁸

6. Puller raised a number of claims, including a number of ineffective assistance of counsel claims, in his Rule 61 motion.⁹ Those claims included contentions that counsel was ineffective for not requesting a jury instruction that the shooting was accidental; that the jury instructions were improper; and that the State failed to prove all the elements of Attempted Murder in the First Degree.¹⁰

⁵ *Puller v. State*, 2002 WL 529909 (Del.).

⁶ Superior Court Docket No. 81- Commissioner's Report and Recommendation Denying Defendant's Rule 61 Motion.

⁷ *State v. Puller*, 2014 WL 4101616 (Del.Super.).

⁸ *Puller v. State*, 2015 WL 428582 (Del.).

⁹ See, *Puller v. State*, 2015 WL 428582 (Del.) (detailing the claims raised by Puller in his Rule 61 motion).

¹⁰ Superior Court Docket No. 81- Commissioner's Report and Recommendation Denying Defendant's Rule 61 Motion; *Puller v. State*, 2015 WL 428582, * 1-2 (Del.).

7. Trial counsel's Affidavit in response to that Rule 61 motion explained at length the trial strategy. Trial counsel explained that the defense's claim was that Puller was reckless in causing these very serious injuries to his girlfriend by drunkenly pulling the trigger of a gun that he mistakenly thought was unloaded. As such, the defense claimed that Puller was not guilty of Attempted Murder and only guilty of the lesser charge of Assault First Degree.¹¹ The jury was instructed on the lesser-included offense of Assault First Degree.¹²

8. The issue at trial was not whether Puller was the shooter. It was undisputed that he was. The issue was whether the shooting was "reckless" and he should be found guilty of Assault First Degree or "intentional" and he should be found guilty of Attempted Murder in the First Degree.

9. In this case, the jury was given the option of determining whether Puller's actions were "reckless" or "intentional", and the jury determined Puller intentionally attempted to kill the victim.¹³ The jury determined that Puller's conduct was intentional not reckless and they convicted him of Attempted Murder in the First Degree.

10. On April 15, 2015, Puller filed a federal petition for habeas corpus.¹⁴ In that petition, Puller raised twelve ineffective assistance of counsel claims. On May 16, 2016, the federal court denied Carter's petition for habeas relief as time-barred.¹⁵

PULLER'S SUBJECT RULE 61 MOTION

11. On July 23, 2018, Puller filed the subject Rule 61 motion. In his motion, he claims that his First Degree Attempted Murder Conviction should be vacated and he should be

¹¹ Superior Court Docket No. 54- Affidavit of Trial Counsel dated September 19, 2012, at ¶2.

¹² See, March 1, 2001 Trial Transcript, at pgs. 55-57.

¹³ March 1, 2001 Trial Transcript, at pgs. 51-57.

¹⁴ *Puller v. Pierce et al.*, 2016 WL 2869753, *1 (D.Del.).

¹⁵ *Id.*

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. He claims that his actions were “reckless” rather than “intentional.” Puller contends that the “court lacked jurisdiction” to convict him of First Degree Attempted Murder since his conduct was “reckless” rather than “intentional”, and that he can raise this “jurisdictional” claim at any time. Puller also claims that his counsel was ineffective for not requesting a Reckless Endangering jury instruction at trial.

12. Puller cites to *Class v. United States*, 138 S.Ct. 798 (2018), for the proposition that he can raise the constitutionality of his conviction for First Degree Attempted Murder, at any time. In *Class v. United States*, the defendant, who pled guilty to a criminal offense, challenged the constitutionality of the statute for which he was convicted. The federal government contended that by pleading guilty the defendant waived his right to challenge the constitutionality of his conviction. The United States Supreme Court held that the defendant’s guilty plea did not waive his right to appeal his constitutional claims.¹⁶

13. That is not the situation presented herein. Puller did not plead guilty. Puller was found guilty at trial by a Superior Court jury. Puller was not precluded from appealing and raising the constitutionality of any of his claims. Indeed, he filed a direct appeal and thereafter a Rule 61 motion raising whatever claims he deemed appropriate. Having already been afforded a full and fair opportunity to raise whatever claims he deemed appropriate, he is now procedurally barred from re-raising and rehashing those claims at this late juncture.

¹⁶ *Class v. United States*, 138 S.Ct. 798 (2018).

14. Puller must first satisfy the pleading requirements before he is entitled to proceed with this motion. Puller filed the subject Rule 61 motion in 2018, and it is the Rule 61 in effect at the time of the filing of this motion that is applicable.¹⁷

15. The applicable Rule 61 mandates that Puller's motion is to be summarily dismissed unless he establishes: 1) that *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted, or 2) the existence of a *new* rule of constitutional law made retroactive to cases on collateral review rendered his convictions invalid.¹⁸ 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.¹⁹

16. Puller's subject Rule 61 motion should be summarily dismissed. Puller has not pled with particularity that any *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted nor that there is a *new* rule of law that would render his conviction invalid.

17. Puller does not raise anything new or recently discovered. At trial, the issue was whether Puller's conduct was "reckless" or "intentional." He claimed it was reckless, the State argued it was intentional, and the jury found that it was intentional. The jury could have found him guilty of Assault First Degree if it found his conduct was "reckless", and guilty of Attempted Murder in the First Degree if it found his conduct was "intentional." The jury determined Puller intentionally attempted to kill the victim. The jury is the sole

¹⁷ See, *Bunting v. State*, 2015 WL 2147188, frnt. 7 (Del.).

¹⁸ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i) (effective June 4, 2014).

¹⁹ Super.Ct.Crim.R. 61(d)(5).

judge of the credibility of the witnesses and responsible for resolving conflicts in the testimony.²⁰

18. Puller's subject Rule 61 motion does nothing more than rehash the facts of this case and reassert Puller's position that his conduct was "reckless" rather than "intentional." In essence, Puller's claims raised herein is that the jury should have accepted his testimony that his conduct was reckless, rather than the testimony of the eyewitnesses and other evidence offered by the State that his conduct was intentional. It is important to emphasize that the jury considered the evidence, deliberated, and concluded that Puller's conduct was "intentional" not "reckless". There was sufficient evidence for the jury to find Puller's conduct was "intentional", and it did so find. The jury has spoken. Puller was properly convicted of Attempted Murder in the First Degree and this matter is at an end.

19. The jury rejected Puller's claim that his conduct was "reckless". The jury was provided with a jury instruction of Assault First Degree, a lesser included offense to Attempted Murder in the First Degree, if the jury found his conduct to be reckless. Puller now contends an additional reckless jury instruction, Reckless Endangering, should have been given. Even if another reckless instruction had been requested and given, the jury having determined that Puller acted intentionally, would not have convicted him of any other lesser-included reckless instruction.

20. Puller raises nothing new or recently discovered. In his prior Rule 61 motion, Puller already contested the sufficiency of the jury instructions, already raised that his conduct should have been deemed "reckless" and not "intentional, and that his counsel was ineffective for a litany of reasons. The Superior Court already held, and the Delaware

²⁰ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980)

Supreme Court already affirmed, that Puller's claims were without merit. As such, 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 should be summarily dismissed.²¹

21. Puller's motion also falls short of other procedural requirements that must be met in order to proceed with the merits of this motion. If a procedural bar exists, then the claim is barred and the court should not consider the merits of the claim.²²

22. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;²³ (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances (ie. discovery of new evidence or new rule of constitutional law) warranting a subsequent motion being filed; (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 is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.²⁴

23. In the subject action, Puller's motion is time-barred. The final order of conviction was in 2002,²⁵ and this motion was filed in July 2018, about 16 years later.²⁶ This motion

²¹ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i).

²² *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

²³ Super.Ct.Crim.R. 61(i)(1).

²⁴ Super.Ct.Crim.R. 61 (effective June 4, 2014).

²⁵ Super.Ct.Crim.R. 61(m)(2).

²⁶ Super.Ct.Crim.R. 61(i)(1).

was filed well outside the applicable one year limit. Puller's claims, at this late date, are time-barred.

24. As previously discussed, Rule 61(i)(2) further precludes this court's consideration of Puller's motion since Puller has not satisfied the pleading requirements for proceeding with this motion. Puller has not established that *new* evidence exists creating a strong inference of Carter's actual innocence or the existence of a *new* rule of constitutional law made retroactive to this case that would render his conviction invalid.

25 Rule 61(i)(4) also precludes Puller's claims raised herein since the claims have already been raised and adjudicated in Puller's previous Rule 61 motion. Puller's claims, which have already been raised and resolved cannot now be re-stated, refined and re-raised in order to again seek review.²⁷

26. Rule 61(i)(3) also prevents this court from considering any claim raised by Puller at this late date that had not previously been raised. Puller was aware of, had time to, and the opportunity to raise the claims presented herein a timely filed motion. Puller does not raise anything new or recently discovered.

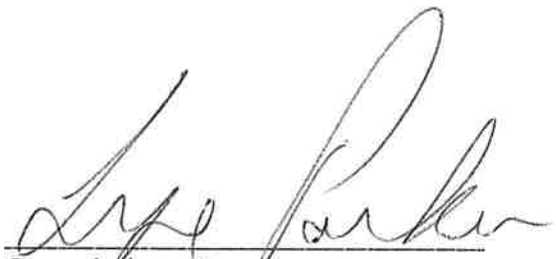
27. Puller has not established any prejudice to his rights and/or cause for relief. Puller had time and opportunity to raise any issue raised herein in on direct appeal and/or in a timely filed postconviction motion. There is no just reason for Puller's 16-year delay in doing so. Having been provided with a full and fair opportunity to present any issue desired to be raised in a timely filed motion, any attempt at this late juncture to raise, re-raise or re-couch a claim is procedurally barred.

²⁷ *Johnson v. State*, 1992 WL 183069, at *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

28. Puller has failed to meet the pleading requirements for proceeding with the subject motion and, therefore, this motion should be summarily dismissed. Puller's motion is procedurally barred.

For all of the foregoing reasons, Puller's Motion for Postconviction Relief should be summarily dismissed.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc: Prothonotary
Robert M. Goff, Jr., Esquire