



This 24th day of October, 2002, upon consideration of the *pro se* Motion for Postconviction Relief filed by Defendant, Jerome E. Clark (“Defendant”), it appears to the Court that:

1. Defendant brings this Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 35 (“Rule 35”). Superior Court Criminal Rule 61 (“Rule 61”), however, is the appropriate basis for relief. Defendant claims that the trial court lacked jurisdiction to convict him of rape and attempted rape because the definition of “rape” under Delaware law at the time of the offense did not include intercourse with the mouth and anus. Defendant argues that the prosecutor should have charged him with sodomy and not rape. Because Defendant’s arguments essentially question the jurisdiction of the trial court in an attempt to set aside his conviction, the Court will examine the motion under Rule 61.<sup>1</sup>

2. Defendant’s conviction resulted from an incident that occurred on November 30, 1985. The victim was delivering newspapers in the early morning, when a man who claimed to have a gun under his jacket accosted her. The man ordered her to drive to a parking lot where he forced her to engage in oral intercourse and then attempted to engage in anal intercourse with her. After the attack, the man

---

<sup>1</sup>DEL. SUPER. CT. CRIM. R. 61(a)(1)(“This rule governs the procedure on an application by a person in custody . . . seeking to set aside a judgment of conviction or a sentence of death on the ground that the court lacked jurisdiction . . . .”).

demanded money and then fled. The police arrested Defendant after finding his wallet and a vial of cocaine in the backseat of the victim's car. A jury found the Defendant guilty of Kidnapping First Degree, Rape First Degree, Attempted Rape First Degree, Robbery First Degree, and Possession of a Narcotic Schedule II Controlled Substance: Cocaine. Defendant appealed, and the Delaware Supreme Court affirmed the conviction and sentence on June 2, 1987, rejecting Defendant's sole argument about the racial composition of the jury.<sup>2</sup>

3. In 1990, the Court denied Defendant's first motion for postconviction relief under Rule 61 in which he challenged various aspects of the jury selection. Defendant wrote a letter to the Court in 1992 in which he raised several issues, including an issue presented here: whether the prosecutor should have charged him with sodomy instead of rape. In its answering letter, the Court stated that Delaware law defined "sexual intercourse" for Rape First Degree as intercourse with the mouth and, therefore, rape was the appropriate charge, not sodomy. The Court treated Defendant's letter as a motion under Rule 35 to amend the sentence and, because of a sentencing error, the Court amended the sentence to allow parole during the first twenty years of his life sentence. Defendant filed his second Rule 61 motion on July 1, 1992. Again, Defendant argued that "rape" did not include oral and anal

---

<sup>2</sup>*Clark v. State*, 527 A.2d 281 (Del. 1987).

intercourse at the time of the offense and that he should have been convicted of sodomy instead of rape. In addition, he asserted ineffective assistance of counsel and double jeopardy claims. The Court denied the second Rule 61 motion on August 25, 1992, because Defendant did not file the motion within the three-year time limit, and the claims of error did not constitute a “miscarriage of justice.”<sup>3</sup> The Supreme Court affirmed.<sup>4</sup>

4. By the Court’s count, this is Defendant’s third Rule 61 motion. Before addressing the merits, the Court must first determine whether Defendant’s motion passes the procedural filters of Rule 61.<sup>5</sup> To protect the integrity of the procedural rules, the Court will not address the substantive aspects of the claims if Defendant’s claims are procedurally barred.<sup>6</sup> Rule 61(i) imposes four procedural imperatives: 1) the motion must be filed within three years of a final conviction; 2) any basis for relief must have been asserted previously in a postconviction proceeding; 3) any basis for relief must have been asserted at trial or on direct appeal as required by court rules; and 4) any basis of relief must not have been formerly adjudicated in any

---

<sup>3</sup>*State v. Clark*, 1992 WL 1364296 (Del. Super.).

<sup>4</sup>*Clark v. State*, 616 A.2d 1213 (Del. 1992).

<sup>5</sup>*See Mason v. State*, 1999 Del. LEXIS 62, at \*2 (Del. Supr.) (“It is well-settled that the Superior Court and this Court must address the procedural requirements of Rule 61 before considering the merits of the motion.”).

<sup>6</sup>*Id.* at \*3.

proceeding.<sup>7</sup> Under Rule 61(i)(5), a defendant may avoid these procedural imperatives if the claim is jurisdictional or is a “colorable claim that there was a miscarriage of justice because of a constitutional violation.”<sup>8</sup>

5. Defendant has failed to satisfy the procedural requirements to bring the instant motion. Clearly, Defendant’s motion exceeds the three-year time limit, which began in 1987 after the Supreme Court affirmed his conviction.<sup>9</sup> In addition, the motion is procedurally barred under Rule 61(i)(2) because the two arguments that Defendant raises here were not asserted in his first Rule 61 motion in 1990.<sup>10</sup> Nevertheless, Rule 61(i)(2) states that Defendant may bring this motion if its disposition would serve the “interest[s] of justice.” Delaware case law has interpreted the “interest of justice” exception narrowly, only allowing further consideration of the

---

<sup>7</sup>DEL. SUPER. CT. CRIM. R. 61(i)(1)-(4).

<sup>8</sup>DEL. SUPER. CT. CRIM. R. 61.

<sup>9</sup>*See Jackson v. State*, 654 A.2d 829, 832 (Del. 1995)(stating that if defendant makes a direct appeal of his conviction, then Rule 61's time limitation begins to run after appellate review).

<sup>10</sup>Clark did not present the two current arguments in his first motion for postconviction relief, but he did make these arguments in his subsequent motions for postconviction relief. (D.I. 26). *State v. Harley*, 1994 Del. LEXIS 272 (Del. Super.) addressed similar facts. Harley’s first motion for postconviction relief did not include the claims made in his second and third motions. *Id.* at \*1-2. The court held that the second motion was procedurally barred by Rule 61(i)(2). *Id.* at \*2. In deciding the third motion, the court stated: “[e]ach of defendant’s grounds for relief are procedurally barred by Rule 61(i)(2) which provides that if the grounds asserted in a postconviction relief motion were available at the time defendant filed his first postconviction motion, yet were not raised, they are procedurally barred. . . .” *Id.* at \*4. Like *Harley*, Defendant had to assert the two current arguments in his first Rule 61 motion to overcome Rule 61(i)(2), despite the fact that he asserted these claims in his second motion.

claims to “allege or establish that the Superior Court lacked the authority to convict or punish [the defendant].”<sup>11</sup> As discussed below, Defendant has not demonstrated that the Court lacked the authority to convict him.

6. Rule 61(i)(3) also precludes consideration of Defendant’s claims. The Court may not address Defendant’s arguments if they were not presented in “proceedings leading to the judgment of conviction, as required by the rules of this court,” unless Defendant shows “cause from the relief of the procedural default” and “prejudice [to Defendant] from the violation of [Defendant’s] rights.”<sup>12</sup> The Court can find no indication that Defendant raised the claim *sub judice* at trial or on direct appeal, nor has Defendant shown cause for relief and prejudice from a violation of his rights. Consequently, these claims are barred under Rule 61(i)(3).<sup>13</sup>

7. In the alternative, Defendant’s motion violates the last procedural prerequisite under Rule 61. Rule 61(i)(4) bars consideration of any claim that has been “formerly adjudicated” unless to address the claim again would serve the “interest[s] of justice.”<sup>14</sup> Like Rule 61(i)(2), the “interest of justice” exception is

---

<sup>11</sup>*State v. Kirk*, 2001 WL 755942, at \*2 (Del. Super.)(citations omitted).

<sup>12</sup>DEL. SUPER. CT. CRIM. R. 61(i)(3).

<sup>13</sup>*See Deputy v. State*, 2000 Del. LEXIS 99, at \*4 (Del. Supr.)(finding a claim that the defendant was convicted of a nonexistent crime, “could have been asserted in his direct appeal” and is procedurally barred under Rule 61(i)(3)).

<sup>14</sup>DEL. SUPER. CT. CRIM. R. 61(i)(4).

narrow; it applies only if the defendant shows that “subsequent legal developments have revealed that the trial court lacked the authority to convict.”<sup>15</sup> Defendant raised his two arguments about the rape and sodomy statutes in his second Rule 61 motion. In denying the second motion, the Court held that the time limitation in Rule 61(i)(1) barred these arguments.<sup>16</sup> Therefore, Defendant’s claims in this motion have been formerly adjudicated in Defendant’s second Rule 61 motion.<sup>17</sup> And, like his default under Rule 61(i)(2), Defendant has not shown that the “interest of justice” exception is applicable.

8. Finally, the Court must address whether Defendant fits under the two Rule 61(i)(5) exceptions: a jurisdictional claim and a “colorable claim that there was a miscarriage of justice because of a constitutional violation.” At first glance, Defendant makes a jurisdictional claim that seemingly avoids the Rule 61 procedural bars. According to *Harden v. State*,<sup>18</sup> however, Defendant cannot avoid the procedural bars if his jurisdictional claims are “baseless.”<sup>19</sup> The defendant in *Harden*

---

<sup>15</sup>*Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

<sup>16</sup>*Clark*, 1992 WL 1364296, at\*1.

<sup>17</sup>*See Harley*, 1994 Del. LEXIS 272, at \*4 (concluding that the third postconviction motion was “formerly adjudicated” under Rule 61(i)(4) because in the second postconviction motion, the court held that the claim was procedurally barred).

<sup>18</sup>2001 Del. LEXIS 292 (Del. Supr.).

<sup>19</sup>*Id.* at \*3.

argued that the prosecutor erred in charging him with certain sex crimes in the Superior Court, instead of incest in the Family Court.<sup>20</sup> The court decided that the defendant could not avoid the procedural requirements of Rule 61 because his jurisdictional claim had no merit: “[t]o the extent Harden seeks to avoid the procedural bar by characterizing his claims as ‘jurisdictional,’ that effort is unavailing because the claims are baseless.”<sup>21</sup> Here, Defendant’s jurisdictional claims also have no merit, as discussed below.

9. Defendant first contends that the 1985 Delaware rape statute did not include intercourse with the mouth and anus. The Rape First Degree statute in effect in 1985 read:

A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and:

...

(2) The victim was not the defendant’s voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact.<sup>22</sup>

“Sexual intercourse” is defined as “any act of coitus between male and female and includes intercourse with the mouth or anus.”<sup>23</sup> Clearly, this language indicates that

---

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>DEL. CODE ANN. tit. 11, § 764 (1979). No changes occurred in this statute after 1979 and before the 1986 major amendment.

<sup>23</sup>*Id.* at § 773.



intercourse with the mouth and anus is encompassed within Delaware's 1985 Rape First Degree statute.

10. Defendant's second argument that the prosecutor should have charged him with sodomy is also not supported by Delaware law. The applicable statute in 1985 defined sodomy as "deviate sexual intercourse."<sup>24</sup> "Deviate sexual intercourse" was defined as "intercourse between persons of the same sex."<sup>25</sup> Defendant and the victim were not of the same sex. Accordingly, Defendant's convictions of rape and attempted rape were appropriate.

11. Because Defendant's arguments are without merit, Defendant fails to demonstrate a jurisdictional claim or a "colorable claim that there was a miscarriage of justice" under Rule 61(i)(5). Therefore, Defendant's motion is procedurally barred by Rule 61.

Based on the foregoing, Defendant's motion is summarily **DISMISSED** pursuant to Rule 61(d)(4).

**IT IS SO ORDERED.**

---

Judge Joseph R. Slights, III

---

<sup>24</sup>*Id.* at § 766.

<sup>25</sup>*Id.* at § 773.