IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID# 9607008127
	)	
WILLIAM D. TOLSON,	)	
	)	
Defendant.	)	

Submitted: October 22, 2000
Decided: January 10, 2001

On Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

This 10th day of January, 2001, upon consideration of Defendant's Motion for Postconviction Relief and the State's Response, it appears to this Court that:

1. William D. Tolson (Defendant), has filed this *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 and the State has filed a timely Response. No Reply was filed by Defendant. For the reasons stated below, Defendant's Motion for Postconviction Relief is **DENIED.**

2. On August 5, 1996 Defendant was indicted on charges of Burglary Second Degree (11 *Del. C.* §825) and Robbery Second Degree (11 *Del. C.* §831). After a jury trial on March 25, 1997 Defendant was convicted of both charges and

sentenced as a Habitual Offender pursuant to 11 *Del. C.* §4214(a). Defendant was sentenced by this Court to eight years at level 5 for Burglary Second Degree and five years at level 5 for Robbery Second Degree. Thereafter, Defendant filed a Notice of Appeal with the Delaware Supreme Court.[1] In that appeal, Defendant did not contest his convictions. Defendant merely challenged his sentence as a Habitual Offender[2] alleging that the State presented insufficient evidence to find that Defendant had been convicted of three predicate felonies, as 11 *Del. C.* § 4214(a) requires.[3]

On appeal the Supreme Court affirmed Defendant's sentencing in its Order dated April 9, 1998.[4] Thereafter, on May 10, 2000, Defendant filed this *pro se* Motion for Postconviction Relief in the Superior Court.

Defendant's Motion essentially alleges ineffective assistance of counsel and

---

[1] John H. McDonald, Esq., Defendant's trial counsel filed the Notice of Appeal and litigated the case in the Supreme Court on behalf of Defendant.

[2] *Tolson v. State*, Del. Supr., No. 264, 1997, Holland, J. (April 9, 1998)(ORDER) at 1.

[3] *Tolson supra* at 2.

[4] *Tolson supra.*

judicial abuse of discretion with respect to Defendant's sentencing by this Court. Specifically, Defendant claims: (1) "ineffective assistance of counsel"; "ineffective assistance of appellate counsel"; and (3) "[the] court abused its discretion when it declared the defendant, to be an [sic] habitual offender on the robbery second degree offense."[5] The State's Response asserts that Defendant's first and third grounds for postconviction relief are procedurally barred pursuant to Super. Ct. Crim. R. 61(i)(3), since Defendant did not raise these claims in his previous appeal. Additionally, the State asserts that Defendant's attempt to circumvent the procedural bar of Rule 61, by claiming ineffective assistance of counsel, is baseless.[6]

[5] Defendant's Motion at 3.

[6] State's Response to Defendant's Motion at 3.

3. When considering a Motion for Postconviction Relief, the Court must first apply the procedural bars of Rule 61(i) before considering the merits of the individual claims.[7] To protect the integrity of the procedural rules, ordinarily the Court should not consider the merits of a postconviction claim where a procedural bar exists.[8] Under Rule 61(i)(3), any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the Rules of Superior Court, is thereafter barred unless the movant shows both (1) cause for relief from the procedural default and (2) prejudice from violation of the movant's rights. A showing of cause is not satisfied by showing merely that a claim was not timely raised; a movant must show "some external impediment" which prevented him from raising the claim.[9] To show prejudice, a movant must show a "substantial likelihood" that if the issue had been raised on appeal, the outcome would have been different.[10]

---

[7] *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)); *see also Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Flamer v. State*, Del. Supr., 585 A.2d 736, 745 (1990).

[8] *State v. Gattis*, Del. Super., Cr. A. No. IN90-05-1017, Barron, J. (Dec.28, 1995) (*citing Younger v. State*, Del Supr., 580 A.2d at 554; *Saunders v. State*, Del. Supr., No. 185, 1994, Walsh, J. (Jan. 13, 1995)(ORDER); *Hicks v. State*, Del. Supr., No. 417, 1991, Walsh, J. (May 5, 1992) (ORDER)).

[9] *Younger*, 580 A.2d at 556 (*citing Murray v. Carrier*, 477 U.S. 478, 492 (1986)).

[10] *Flamer*, 585 A.2d at 748.

This Court finds that these claims are procedurally barred pursuant to Rule 61(i)(3). Notwithstanding the procedural bar of Rule 61(i)(3) as to the third ground for relief, Defendant's ineffective assistance of counsel claims are not subject to the procedural bar of Rule 61(i)(3) based on a movant's failure to raise the claim for the first time on direct appeal from conviction because this type of claim cannot be raised to the Delaware Supreme Court for the first time on appeal.[11] Thus, the Court will address Defendant's allegations of ineffective assistance of counsel.

[11] Del. Supr. Ct. R. 8; *see Wright v. State*, Del. Supr., 513 A.2d 1310, 1315 (1986); *State v. Brittingham*, Del. Super., Cr. A. No. IN91-01-1009-R1, Barron, J. (Dec. 29, 1994)(ORDER) at 3.

4. When a movant alleges a colorable claim of ineffective assistance of counsel, which is potentially procedurally barred under Super. Ct. Crim. R. 61(i)(3), the bar will be inapplicable pursuant to R. 61(i)(5) because a claim of ineffective assistance of counsel is "a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceeding."[12] Proof of an ineffective assistance of counsel claim "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[13]

[12] Super. Ct. Crim. R. 61(i)(5).

[13] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A claim of ineffective assistance of counsel is governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A movant must show both "that counsel's representation fell below an objective standard of reasonableness," and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[14] Since the movant must prove both prongs in order to succeed on an ineffectiveness claim, the failure to prove either will render the claim unsuccessful, and the court need not go on to address the remaining prong. A movant must prove his allegations by a preponderance of the evidence.[15]

Defendant argues that his attorney "fail[ed] to advise the movant that he had a right [to] appeal his sentence or to review the issues that movant may have raised on appeal [and] this failure amounted to ineffective assistance of appellant counsel."[16] At the outset, this Court finds that Defendant's allegation does not rise to the level of an ineffective assistance of counsel claim. Furthermore, this allegation is otherwise factually incorrect and wholly without merit. Defendant's attorney did file an appeal with the Supreme Court of Delaware. The Supreme

---

[14] *Albury v. State*, Del. Supr., 551 A.2d 53,58 (1988) (quoting *Strickland v. Washington*, 466 at 688, 694.

[15] *State v. Wright*, Del. Super., 653 A.2d 288, 294 (1994).

[16] Defendant's Motion at 5.

Court considered Defendant's appeal and affirmed Defendant's sentence by the Superior Court. Therefore, Defendant's claim of ineffective assistance of counsel because counsel did not did not advise movant he had a right to appeal his sentence is entirely without merit and is otherwise incorrect.

5. Super. Ct. Crim. R. 61(i)(4) provides that "[a]ny ground for relief 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."[17] In order to invoke the "interest of justice provision of Rule 61(i)(4) to obtain relitigation of a previously resolved claim, a movant must show that subsequent legal developments have revealed that the trial court lacked authority to convict or punish the defendant."[18]

[17] Super. Ct. Crim. R. 61(i)(4).

[18] *Flamer*, 585 at 746 (*cited in Slater v. State*, Del. Supr., No. 164, 1994 Berger, J. (Mar. 1, 1995) (ORDER) at 3.

Defendant's assertion that his attorney failed to object to the State's "Motion to Declare Defendant a Habitual Offender" fails for two reasons. First, Defendant filed a direct appeal to the Delaware Supreme Court asserting he was incorrectly declared a Habitual Offender. After consideration of Defendant's appeal, the Supreme Court affirmed this Court's sentencing of Defendant as a Habitual Offender.[19] Because Defendant previously raised this argument on direct appeal to the Supreme Court, it is barred pursuant to Super. Ct. Crim. R. 61(i)(4). To the extent Defendant claims this argument was not raised on direct appeal to the Supreme Court, the Court finds the claim is procedurally barred pursuant to Super. Ct. Crim. R. 61(i)(3). Although Defendant's assertion on appeal stated that the State did not set forth substantial evidence to declare Defendant a Habitual Offender, Defendant's third ground for relief in this Motion for Postconviction Relief is essentially the same argument. Thus, it is procedurally barred pursuant to Rule 61(i)(4).

Additionally, the "interest of justice" exception contained in Rule 61(i)(4) does not apply to Defendant's situation as Defendant has not asserted that subsequent legal developments have revealed that the trial court lacked authority to convict or punish him. Defendant merely reiterates that he should not have been

[19] *Tolson v. State*, Del. Supr., No. 264, 1997, Holland, J. (April 9, 1998)(ORDER) at 1.

sentenced as a Habitual Offender for the Robbery Second Degree charge.

8. The Court's sentencing of Defendant as a Habitual Offender was proper pursuant to 11 *Del. C.* §4214(a).[20] In addition to the plain language of the statute, support for this conclusion can be found in Defendant's trial attorney's affidavit. Defendant's attorney stated that "Defendant was not sentenced for his status as [a] habitual offender but for the two violent felonies for of which he was convicted, and since [a] habitual offender may be sentenced as such for each crime, it follows that Defendant did not suffer any prejudice stemming from [Defense counsel's] claimed ineffectiveness.[21] As previously noted, this Court sentenced Defendant to eight years at level 5 for Burglary Second Degree and six years at level 5 for Robbery Second Degree. Upon the State's Motion, this Court granted the Motion to have the Defendant declared a Habitual Offender. Pursuant to that Order, Defendant was not separately sentenced for his status as an Habitual Offender in addition to the underlying charges. Thus, this ground for postconviction relief, to the extent it is not procedurally barred by Super. Ct. Crim.

[20] 11 *Del. C.* §4214(a) states in pertinent part that "Any person who has been 3 times convicted of a felony, . . . and who shall thereafter be convicted of a subsequent felony of this State is declared to be an [sic] habitual criminal, and the court in which such fourth or subsequent conviction is had, in imposing sentence, may in its discretion, impose a sentence of up to life imprisonment upon the person so convicted."

[21] Affidavit of John H. McDonald, Esquire, Assistant Public Defender at ¶ 7.

R. 61(i)(4), is otherwise entirely without merit.

9. For the reasons stated above, Defendant's Motion for Postconviction Relief is **DENIED.**

IT IS SO ORDERED.

_____

cc: Original to Prothonotary
Steven P. Wood, Esquire, Deputy Attorney General
William D. Tolson
Investigative Services
John H. McDonald, Esquire