

**SUPERIOR COURT  
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801  
(302) 255-0669

STATE OF DELAWARE

v.

DONALD BASS,

Defendant.

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ID#: 9607012102

Submitted: November 13, 2003  
Decided: February 27, 2004

**ORDER**

**Upon Defendant's Second *Pro Se* Motion for  
Postconviction Relief - *DISMISSED***

Consistent with Superior Court Criminal Rule 61(d)(1), the Prothonotary referred Defendant's second motion for postconviction relief for preliminary consideration. As presented below, it plainly appears from the motion and the record that Defendant is not entitled to relief, and so, the motion is subject to summary dismissal.

This motion is barred under several subsections of Rule 61(I) because

it is too late and repetitive, or otherwise procedurally defaulted. The motion also is meritless.

Defendant's conviction and sentence of life in prison as a habitual offender was affirmed by Delaware's Supreme Court on May 3, 2000. Defendant then filed a timely motion for postconviction relief, which was denied on October 17, 2001. In his first motion, Defendant offered several grounds for relief, including "judicial misconduct," the court's failure to instruct the jury on alibi, the court's decision to grant Defendant's request to represent himself and ineffective assistance of appellate counsel.

Although this second motion rambles, Defendant has refined his claims somewhat. Now, Defendant focuses heavily on the court's decision not to appoint standby counsel after Defendant insisted, against the court's advice, that he be allowed to represent himself at trial. As mentioned, Defendant's claim is not new. He made the same claim, albeit in slightly different words, in his first motion for postconviction relief.

Under the court's rules and case authorities, it is well established that defendants are entitled to one direct appeal and one motion for postconviction relief.<sup>1</sup>

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<sup>1</sup> *State v. Riley*, 2003 WL 1989617, at \*1 (Del. Super.); Super. Ct. Crim. R. 61. See also *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995) (" . . . before a defendant can initiate postconviction relief, he must have exhausted the direct appeal process, if the latter remains available.").

(continued...)

While the law provides ways around the one direct appeal - one postconviction relief format, those ways are limited. They only work in extreme and extraordinary cases. Were it not for Rule 61(I)(2) and (i)(4)'s prohibitions against repetitive motion practice, defendants serving long sentences, such as Mr. Bass, would litigate endlessly. Repetitive litigation is a problem for at least three reasons. First, it places an unbearable burden on the court's limited resources. Other litigants need the court's attention. Second, as time passes it becomes more difficult to pick up a case's threads and decide it properly. Also, the people involved in a case are entitled to repose. In any event, repetitive litigation is against the rules.

Defendant unsuccessfully tries to avoid the bar against repetitive postconviction motions by suggesting that his conviction "may be in flagrant violation of the due process of law and it may not have been conducted in a logical and orderly deductive process." Defendant further claims that he "was deprived of the opportunity to raise this argument on direct appeal, because the Superior Court's records are misleading. . . ." Defendant also alleges that "relitigation is permitted in the interest of justice."

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<sup>1</sup>(...continued)

Cf. *State v. Dickens*, 602 A.2d 95, 98 (Del. Super. Ct. 1989), *aff'd*, 577 A.2d 752 (Del. 1990)(citations omitted)("There is no constitutional obligation for a state to provide postconviction relief after a defendant has failed to secure relief by direct review. . . .").

The court views those claims as an attempt to invoke Rule 61(i)(5), which allows repetitive motion practice concerning “a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the . . . conviction.” To establish a colorable claim, however, Defendant must do more than allege one in conclusory fashion.<sup>2</sup>

On direct appeal, through counsel, Defendant challenged the decisions relating to his insistence on self-representation. Moreover, nothing stopped him from raising any other claims. After his direct appeal, Defendant had an opportunity to seek postconviction relief, which he did, and then he could have taken an appeal from the first motion for postconviction relief’s denial, which he did not. At this point, Defendant must do more than merely reiterate his original claims and offer generalities about injustice.

As mentioned, this motion focuses heavily on the court’s not having appointed standby counsel. Assuming for present purposes that the decision not to appoint standby counsel was wrong, that mistake would not have amounted to “a miscarriage of justice because of a constitutional violation.” Much less would the error have undermined the fundamental legality, reliability, integrity or fairness of

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<sup>2</sup> See, e.g., *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)(court will not consider claims made by conclusory statements in postconviction relief motions).

Defendant's trial.

It is beyond reasonable dispute that criminal defendants, including Mr. Bass, do not have a constitutional right to standby counsel.<sup>3</sup> At most, Delaware's Supreme Court has expressed a preference that standby counsel be appointed, when appropriate. Therefore, continuing to assume that the decision not to appoint standby counsel was wrong, that decision was an abuse of discretion, at worst.<sup>4</sup> Logically, the rule cannot be otherwise. The need for standby counsel is occasioned by Defendant's decision to reject counsel. If counsel's help had truly been important to Defendant, he would not have declined it. In any event, as the cases rejecting the right to standby counsel hold, the constitutional concern is that those who wish to be represented by attorneys in criminal cases shall have them, and those who wish to represent themselves shall be allowed to do that.<sup>5</sup>

Finally, for the last time, the court will remind Defendant that it tried to dissuade him and cautioned him that if he persisted the court would not be

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<sup>3</sup> *Bass v. State*, 760 A.2d 162 (Del. 2000)(defendants have no "right" to standby counsel). Cf. *Hicks v. State*, 434 A.2d 377, 381 (Del. 1981)("Delaware courts have in the past followed the practice of appointing standby counsel for a defendant who elects to proceed *pro se*.").

<sup>4</sup> *Bass v. State*, 760 A.2d 162 (Del. 2000)(citing *Hicks* 434 A.2d at 381).

<sup>5</sup> *Stigars v. State*, 674 A.2d 477, 480 (Del. 1996)(citations omitted)("It is for the defendant alone to decide 'whether in his particular case counsel is to his advantage.'").

sympathetic when the predictable happened. But on the day of trial, Defendant was no more interested in having standby counsel than the court was interested in appointing one. In Defendant's own words:

DEFENDANT: Your Honor, I clearly understand that if [court-appointed counsel] don't sit by as co-counsel, I have no problem with that. I understand that if he doesn't stand as co-counsel I won't be able to go back on appeal as ineffective assistance of counsel.

Defendant's reason for rejecting co-counsel was that he was completely unimpressed by his court-appointed lawyer. Again, the court recalls Defendant's words:

I know that I possess here today what it takes to win, and also that I am an innocent man. I have no problem with dealing with this court or this jury. So at this time, I would like to go *pro se*.

Notwithstanding what he says now, Defendant was clarion. He wanted to go it alone.

To address Defendant's claim that he was entitled to standby counsel, the court has assumed that its decision not to appoint standby counsel was wrong and an abuse of discretion. But actually, the decision was correct, under the circumstances. Moreover, the fact that Defendant would not listen to the court, coupled with Defendant's later claim that his appellate counsel was ineffective, tends to show that Defendant would not have taken standby counsel's advice anyway.

Perhaps, Defendant finally appreciates that his insistence on self-representation was another of the several bad decisions he made leading to his predicament. Either way, Defendant has no one to blame but himself for where he is.

Any shortcoming in the way Defendant's case was presented to the jury is attributable directly to him alone. The court is satisfied that it plainly appears from the second motion for postconviction relief and the record of prior proceedings that Defendant is not entitled to relief.<sup>6</sup>

For the foregoing reasons, Defendant's second motion for postconviction relief is summarily ***DISMISSED***.<sup>7</sup> The Prothonotary shall notify Defendant.<sup>8</sup>

**IT IS SO ORDERED.**

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Judge

oc: Prothonotary (Criminal Division)  
pc: Paul Wallace, Deputy Attorney General  
Anthony Figliola, Esquire  
Donald Bass, *Pro Se* Defendant

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<sup>6</sup> Super. Ct. Crim. R. 61(d)(4).

<sup>7</sup> Id.

<sup>8</sup> Id.