

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	
)	ID #91009844DI
CHRISTOPHER DESMOND,)	
)	
Defendant.)	

Submitted: January 27, 2004
Decided: April 7, 2004

On Defendant's Fourth *Pro Se* Motion for Postconviction Relief.

SUMMARILY DISMISSED.

ORDER

This 7th day of April, 2004, upon Defendant's fourth motion for postconviction relief, titled "Petition to Vacate," filed by Christopher Desmond ("Defendant"), it appears to the Court that:

Defendant raises two grounds for postconviction relief: 1) a claim of "fundamental error-fraud" in that there was alleged improper influencing a juror to vote for a conviction and 2) denial of his constitutional right to self representation.¹

Defendant's claim that he was denied his constitutional right to self-representation was previously ruled upon by this Court in Defendant's first motion

¹ Defendant's Motion at 1.

for postconviction relief (*State v. Desmond*, ID ##91009844DI, 1995 WL 717628 (Del. Super. Nov. 16, 1995), aff'd, Del. Supr., No. 487, 1995, Berger, J. (Mar. 8, 1996) (ORDER)), in his second motion for postconviction relief (*State v. Desmond*, Del. Super., ID #91009844DI, Cooch, J. (Dec. 4, 2000), aff'd, Del. Supr., No. 5, 2001, Berger, J. (Mar. 8, 2001) (ORDER)) and again in his third motion for postconviction relief (*State v. Desmond*, Del. Super., ID #91009844DI, Cooch, J. (November 27, 2002), aff'd, Del. Supr., No. 692, 2002, Holland, J. (March 20, 2003)). The claim of improper influencing a juror was previously denied by this Court in Defendant's third motion for postconviction relief and the ruling was affirmed by the Supreme Court.² In an effort to avoid those earlier rulings, Defendant has now recast his argument in light of the fundamental constitutional violation exception and the "miscarriage of justice" exception contained in Superior Court Criminal Rule 61(i)(5)³ and also a violation of the Delaware Lawyers Rules of Professional Conduct, 3.8(b)(c)(d).⁴

Before addressing the merits of any claim raised in a motion seeking postconviction relief, the Court must first apply the rules governing the procedural

² *State v. Desmond*, Del. Super., ID #91009844DI, Cooch, J. (November 27, 2002), aff'd, Del. Supr., No. 692, 2002, Holland, J. (March 20, 2003).

³ In Defendant's third *pro se* motions for postconviction relief, he tried to avoid the former adjudication bar of Rule 61(i)(4) by arguing the "fundamental fairness" exception contained in Rule 61(i)(5).

⁴ The Rule of Professional Responsibility cited by Defendant relates to the responsibilities of prosecutors to assure defendant's constitutional rights over the prosecutor's duty to seek convictions. This claim is apparently another attempt by Defendant to avoid Rule 61(i)(4).

requirements of Super. Ct. Crim. R. 61.⁵ Rule 61(i)(1) provides that “[a] motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.”⁶

Rule 61(i)(2) provides that “[a]ny ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.”⁷ The Supreme Court has held that a defendant must raise all ground “to support his appeal that are raised previously” or those grounds will be deemed waived and will not be addressed by the Supreme Court on the appeal.⁸

Rule 61(i)(3) states that “[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this

⁵*Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

⁶ Super. Ct. Crim. R. 61(i)(1).

⁷ Super. Ct. Crim. R. 61(i)(2).

⁸ *Slade v. State*, 818 A.2d 970 (Del. 2003) (holding that to the extent a post conviction relief defendant has not argued other grounds to support his appeal that are raised previously, those grounds are deemed waived and will not be addressed by the Supreme Court on the appeal).

court, is thereafter barred, unless the movant shows (A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights.”⁹

Rule 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.”¹⁰ “The interest of justice [exception under Rule 61(i)(4)] has been narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish him.”¹¹

However, the procedural bar of Rule 61(i)(1) may potentially be overcome by Rule 61(i)(5), which provides that “[t]he bars to relief in paragraph (1) . . . shall not apply to a claim that the court lacked jurisdiction or to 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 judgement of conviction.”

The fundamental constitutional violation exception and the “miscarriage of justice” exception contained within Rule 61(i)(5) do not apply here because

⁹ Super. Ct. Crim. R. 61(i)(3).

¹⁰ Super. Ct. Crim. R. 61(i)(4).

¹¹ *State v. Wright*, Del. Super., 653 A.2d 288, 298 (1994) (citing *Flamer v. State*, Del. Supr., 585 A.2d 736, 746 (1990)).

Defendant's claims are procedurally barred under the "former adjudication" bar of Superior Court Criminal Rule 61(i)(4) and Defendant does not qualify for the "interest of justice" exception to that rule; that exception has been "narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish him." State v. Wright, 653 A.2d 288, 298 (Del. Super. Ct. 1994) (citing Flamer v. State, 585 A.2d 736, 746 (Del. 1990)).

Defendant filed this motion for postconviction relief on the grounds of "fundamental error-fraud" and denial of his constitutional right to self representation on January 27, 2004, almost 10 years after the judgment of his convictions became final. Therefore, it appears to the Court that Defendant's present motion is procedurally barred pursuant to Super. Ct. Crim. R. 61(i)(1).¹²

To the extent that Defendant argues that the prosecutor violated the Delaware Lawyers Rules of Professional Conduct and that this claim has not formerly been adjudicated by this Court, the claim is barred by Rule 61(i)(2). Defendant has engaged in a pattern of reasserting past claims by couching the claims in slightly different language in an attempt to preserve the appearance that the claim has not been previously adjudicated and is not procedurally barred by Rule 61(i). The claims in each of his motions for postconviction are substantively

¹² The Supreme Court of Delaware completed its review of Defendant's case in 1994. *See Jackson v. State*, Del. Supr., 654 A.2d 829, 830-831 (1995) (holding that "the better reasoned approach supports resolving the ambiguity [of when the three year period begins to run] in favor of the extended period [I]f a defendant takes a direct

the same but the grounds change; however, Defendant has waived those grounds that have not been raised previously in connection with his previously raised claims such as his claim that the prosecutor violated the Delaware Lawyers Rules of Professional Conduct.

Because (1) Defendant has made claims that have previously been ruled upon, (2) the motion was filed 10 years after the conviction became final, (3) the motion contains grounds for relief not asserted in prior postconviction proceedings, (4) and because Defendant cannot demonstrate exception to the procedural bars of Superior Court Criminal Rule 61(i), his fourth *pro se* motion for postconviction relief is **SUMMARILY DISMISSED** pursuant to Rule 61(d)(4).

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
xc: Steven P. Wood, Esquire, Deputy Attorney General
Christopher Desmond
Investigative Services

appeal of his conviction, the three year period under Rule 61(i)(1) begins to run upon completion of that review.”¹²

