

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. Henley Graves  
Resident Judge

SUSSEX COUNTY COURTHOUSE  
THE CIRCLE  
P.O. BOX 746  
GEORGETOWN, DE 19947  
(302) 856-5257

May 11, 2004

N440  
Marvin J. McMillion  
Delaware Correctional Center  
1181 Paddock Road  
Smyrna, DE 19977

**RE: Defendant ID No. 9312012871(R-2)**

Dear Mr. McMillion:

On May 5, 2004, the Court received a Motion for Postconviction Relief. For the reasons stated below, it is denied.

Following a jury trial, you were sentenced on September 9, 1994 on the charges of attempted unlawful sexual intercourse in the 1<sup>st</sup> degree, robbery in the 1<sup>st</sup> degree, burglary in the 2<sup>nd</sup> degree, unlawful sexual penetration in the 3<sup>rd</sup> degree, and criminal mischief. You received a sentence of 41 years imprisonment, to be followed by probation.

On direct appeal, the sole issue was the sufficiency of the evidence as to the attempted unlawful sexual intercourse offense. Your conviction was affirmed. McMillion v. State, Del. Supr., No. 378, 1994, Veasey, C. J. (May 19, 1995) (ORDER).

Subsequently, you filed a Motion for Postconviction Relief on August 26, 1997, together with a 32-page Memorandum of Law in support of your application. In your first postconviction application, grounds alleged were ineffective assistance of counsel, denial of the right to confront witnesses, and denial of a fair trial. By this Court's decision of October 24, 1997, your Motion for Postconviction Relief was denied. State v. McMillion, Del. Super. Ct., Cr.A. Nos. S93-12-0695, 0694, 0693, 0696, 0698, Graves, J. (Oct. 24, 1997) (ORDER). This was subsequently affirmed by the Delaware Supreme Court. McMillion v. State, 1998 WL 67727 (Del. Supr.).

In the present Motion for Postconviction Relief, the Defendant alleges that it was wrong for him to be charged with the attempt to commit unlawful sexual intercourse and to be charged with the offense itself of unlawful sexual intercourse. He alleges that only one of these crimes could occur and therefore one is a "non-existent crime".

Marvin J. McMillion  
Page 2  
May 11, 2004

The Defendant is apparently factually mistaken in this claim because the State only charged him with attempted unlawful sexual intercourse. The instructions to the jury set forth the crime of unlawful sexual intercourse in the 1<sup>st</sup> degree so that the jury will understand same in its determination of whether or not the defendant attempted to commit that crime. Perhaps this is the basis of the defendant's mistaken belief.

The Defendant also alleges that the Court applied an improper standard because of the "non-existent crime".

Finally, the Defendant alleges that there was ineffective assistance of counsel.

The Defendant's present Motion for Postconviction Relief is procedurally barred and must be dismissed. This present application comes approximately nine (9) years following the Delaware Supreme Court's affirmance of his conviction on direct appeal. Pursuant to Rule 61(i)(1), applications for postconviction relief must be made within three years of the date of the mandate affirming his conviction.

It is also procedurally barred under Rule 61(i)(2) in that it is a repetitive Motion. Defendant raises no viable claim that this Court lacked jurisdiction or 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 his conviction.

The claim concerning ineffective assistance of counsel is procedurally barred under Rule 61(i)(4) in that the Defendant has made a claim of ineffective assistance of counsel previously which has been adjudicated.

Defendant's Motion for Postconviction Relief is denied.

**IT IS SO ORDERED.**

Yours very truly,

T. Henley Graves

THG:baj  
cc: Prothonotary  
Department of Justice