

postconviction relief, Israel alleged ineffective assistance of counsel on the part of his trial lawyer, Edward F. Eaton. To support his motion, Israel made five claims of ineffective assistance of counsel: (1) that Mr. Eaton failed to move to sever the claims before trial; (2) that he failed to object to the prosecutor's opening statement and closing argument; (3) that he failed to object to certain hearsay testimony; (4) that he failed to object to the jury instructions; and (5) that he failed to object to an incorrect sentence. This Court denied Israel's first motion for postconviction relief on the grounds that the motion was time barred pursuant to Superior Court Criminal Rule 61(i)(1).² In denying his motion, this Court held that Israel had not "demonstrated a 'constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings' which would render the time bar inapplicable. Super. Ct. Crim. R. 61(i)(5)."³ Further, this Court found that "[i]n an attempt to overcome the time bar and invoke the fundamental fairness exception, [Israel] allege[d] [that] he received ineffective assistance of counsel in violation of his Sixth Amendment right." This Court's decision was affirmed by the Delaware Supreme Court.

² *State v. Israel*, 1996 Del. Super. LEXIS 87 *4-5 (Del. Super.) affirmed *Israel v. State*, 682 A.2d 626 (Del. 1996) (Table).

³ *Israel*, 1996 Del. Super. LEXIS 87 *5.

Israel had also filed a motion for modification of sentence in November 1998. This Court notes that Israel's 1996 motion for postconviction relief contained a claim that Mr. Eaton had not objected to an incorrect sentence. Israel argued that Mr. Eaton should have objected to the 20 year mandatory portion of his life sentence for the Rape conviction. In denying Israel's motion, this Court held that "[s]ince [Israel] was convicted and sentenced prior to July 9, 1986, his sentence was not affected by the amendment. [Citation omitted]. Thus, the sentence was properly imposed and Mr. Eaton was under no duty to object to sentencing on the basis of an amendment which had not yet come into existence."⁴

2. Israel argues two grounds for postconviction relief in his current motion. Israel's first argument is that he was "entitled to a jury instruction of the lesser included offense for burglary first degree and attempt[ed] burglary second degree."⁵ His second argument is that the prosecutor knowingly "presented false evidence in the form of [a] police officer testifying falsely regarding shoeprints evidence."⁶ Both of these arguments were essentially argued in previous court proceedings and have only been reframed by Israel in order to avoid the procedural bars of Superior Court Criminal Rule 61(i)(1) and (i)(4). Rule 61(i)(1) bars

⁴ *State v. Israel*, Del. Super., ID No. 85002615DI, Cooch, J. (Jan. 6, 1999) (Let. Op.).

⁵ Defendant's Memorandum of Law in Support of Rule 61 Motion for Postconviction Relief at 6 (hereinafter "Def's Memo. at _").

⁶ Def's Memo. at 15.

postconviction relief to a petitioner who files a motion more than three years after the judgment of conviction becomes final, and (i)(4) bars relief for any ground that was formerly adjudicated in the proceedings leading up to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding.

Israel argues that he was entitled to a jury instruction for the lesser included offense of burglary first degree and attempted burglary second degree because the State “failed to meet it[s] burden of specifying the particular felony intent [and] failed to specify a felony intent existed at the time of the breaking and entering.”⁷ He asserts that he was entitled to the jury instruction because “it is clearly apparent on the face of the record, there was no evidence to support the felonious intent required by law for the charge [of] burglary first degree.”⁸

Israel’s second argument is that the “prosecutor knowingly presented false testimony”⁹ when she allowed a police expert witness to testify that the shoe prints found at the scene of one of the crimes were from “an athletic type-shoe, a sneaker-type shoe.”¹⁰ Israel argues that this was false testimony because an FBI report sent to the New Castle County Police Chief stated that “the shoe print lifts

⁷ Def’s Memo. at 9.

⁸ Def’s Memo. at 9.

⁹ Defendant’s Motion for Postconviction Relief at 3 (hereinafter “Def’s Mot. at _”).

¹⁰ Def’s Memo at 15.

are too limited to determine the shoe sole design, manufacturer or brand name of the shoe making these shoe prints.”¹¹

3. Before addressing the merits of any claim raised in a motion seeking postconviction relief, the Court must first apply the rules governing the procedural requirements of Super. Ct. Crim. R. 61.¹² 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.”¹³

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.”¹⁴ “The interest of justice [exception under Rule 61(i)(4)]

¹¹ Def’s Memo at 15.

¹²*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)).

¹³ Super. Ct. Crim. R. 61(i)(1).

¹⁴ Super. Ct. Crim. R. 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.”¹⁵

However, the procedural bars of Rule 61(i) 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 fairness” exception in Superior Court Criminal Rule 61(i)(5), however, is narrow and is applied only in limited circumstances.¹⁶

Superior Court Criminal Rule 61(d)(4) provides that if it “plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified.”¹⁷

4. Israel has filed this motion eighteen years after the judgment of conviction had become final. Therefore, pursuant to Rule 61(i)(1), Israel’s motion for postconviction relief is summarily dismissed as being time barred. Israel made

¹⁵ *State v. Wright*, Del. Super., 653 A.2d 288, 298 (1994) (citing *Flamer v. State*, Del. Supr., 585 A.2d 736, 746 (1990)).

¹⁶ *Younger*, 580 A.2d at 555.

¹⁷ Super. Ct. Crim. R. 61(d)(4)

a claim in his direct appeal of his conviction to the Delaware Supreme Court that there was insufficient evidence to support a guilty verdict for his conviction of burglary first degree and attempted burglary second degree, which is similar to the claim he makes now that he was entitled to a jury instruction for criminal trespass because there was not sufficient evidence to support the charges of burglary first degree and attempted burglary second degree.¹⁸ In his direct appeal, Israel also made a claim that the trial court abused its discretion in ruling that a police witness was qualified as a shoe expert, which is in essence, the same claim as his argument that the prosecutor knowingly used false testimony of the police.

The Court holds that the claims offered in the second motion for postconviction relief have already been presented by Israel in previous proceedings. Israel has attempted to attack the sufficiency of the evidence supporting his burglary conviction a second time by framing the issue as an error of law question.¹⁹ He has also attempted to attack the legitimacy of the police expert witness's testimony again by framing the question as *Brady* violation and prosecutorial misconduct question.²⁰ While these two new questions are not exactly the same as the claims raised in the prior proceedings, this Court finds that

¹⁸ *Israel*, 514 A.2d 413 at 413.

¹⁹ In his direct appeal, Israel attacked the sufficiency of the evidence supporting his burglary convictions because there was not enough evidence to find that he was armed with a knife.

²⁰ Israel attacked the introduction of the police expert witness's testimony on the grounds that he was not qualified to be admitted as an expert.

they encompass the same subject matter that has been decided and this motion for postconviction relief is nothing more than an attempt by Israel to avoid the time bar of Rule 61(i)(1).

5. Additionally, the claims in Israel’s second motion for postconviction relief are without merit and do not reach the exception under Rule 61(i)(5).²¹

Israel’s first claim, in which he argues that the State “failed to meet it[s] burden of specifying the particular felony intent [and] failed to specify a felony intent existed at the time of the breaking and entering,” thereby entitling him to a jury instruction on the lesser included offense of criminal trespass, is based on a repealed version of the Delaware State Criminal Code. Israel has relied on *Lewis v. State*, which holds that “[a]n indictment for burglary is required to specify the particular felony the defendant intended to commit following his breaking and entering . . . and that felonious intent must exist at the time of the breaking and entering.”²² However, *Lewis* was decided under the former burglary statute, 11 *Del. C.* § 392, which required the indictment to specify the particular felony the defendant intended to commit.²³ Section 392 was revised in 1974 and became 11 *Del. C.* § 826, which no

²¹ Rule 61(i)(5), 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.”

²² *Lewis v. State*, 251 A.2d 197, 198 (Del. 1969) citing *State v. Minnick*, Del., 168 A.2d 93 (Del. 1960).

²³ 11 *Del. C.* § 392 at Comment, 1970 Cumulative Pocket Part (1970).

longer required the State to prove felonious intent.²⁴ Instead, § 826 reads that the State must only prove that the defendant intended to commit a crime, without reference to a specific level of crime. The jury found Israel guilty of the crime of theft in connection with the burglary charges and that the Delaware Supreme Court affirmed that verdict, therefore the State met its burden and Israel's claim is summarily dismissed. Rule 61(i)(5) does not grant Israel relief because Israel has misread the applicable statute, 11 *Del. C.* § 826, and has not shown 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."

Israel's second claim, that the "prosecutor knowingly presented false testimony,"²⁵ when she allowed a police expert witness to testify that the shoe prints found at the scene of one of the crimes were from "an athletic type-shoe, a sneaker-type shoe," is also without merit. Israel relies on the FBI report that stated, in summary, that the shoe prints recovered at one the crime scenes were too

²⁴ In *Delaware Criminal Code: With Commentary 1973*, the editors explain that "[b]ecause burglary was [historically] a capital offense, judges and juries took a highly technical view of the crime. [Citation omitted]. Therefore the old law contained many refinements upon the requirements of breaking and entering. [Citation omitted]. An intent to commit a felony, existing prior to the breaking and entry, was an element of the offense." (Commentary § 824). The pre-1955 revised Code still contained a severe penalty for burglary first degree. The pre-1955 revision, § 401 Burglary at night with intent to murder or rape, provided for a fine not less than \$500, whipped with not less than 10 nor more than 40 lashes, and imprisoned not less than 3 nor more than 25 years.

²⁵ Defendant's Motion for Postconviction Relief at 3 (hereinafter "Def's Mot. at _").

indistinct to be used to identify the “sole design, manufacturer or brand name of the shoe making these shoe prints.” Israel’s argument is as follows: if the FBI stated that the prints could not be used to make a positive identification, then the police witness lied when the witness said the prints were made by “an athletic type-shoe, a sneaker-type shoe” and that the prosecutor knew of the lie. However, the witness’s statement is not at odds with the FBI report. The witness did not try and identify “sole design, manufacturer or brand name” of the shoe that made the prints; instead, he stated his expert opinion, for which he was qualified, that the print was made by a sneaker or athletic shoe as opposed to another type of shoe.

The prosecutor in closing specifically stated that:

“[t]he shoe prints, [as stated by] Mr. Eaton, were not matched to [Israel’s] shoes. Well, it was not testified to that they were compared to his shoes and they were not his shoes. All they simply said was there was a partial print . . . but there was just not enough material for them to be able to make a comparison. They needed more than that to be able to make a comparison. They needed more than that to be able to make a match and they just didn’t have it. And we are not going to come in here and say there was evidence that wasn’t, that there was a shoe print identification.”

There is no evidence in the record to sustain Israel’s claim that the “prosecutor knowingly presented false testimony.” Rule 61(i)(5) does not grant Israel relief because Israel has failed to show any evidence of a “colorable claim that there was a miscarriage of justice because of a constitutional violation [a *Brady* violation or misconduct by the prosecutor] that undermined the fundamental legality,

reliability, integrity or fairness of the proceedings leading to the judgement of conviction.”

For the foregoing reasons, Defendant’s Motion for Postconviction Relief is

SUMMARILY DENIED.

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
cc: Steven P. Wood, Esquire
Edward F. Eaton, Esquire
Investigative Services

