

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

STATE OF DELAWARE,)	
)	
v.)	ID# 86001906DI
)	
RICKY A. WHITFIELD,)	
)	
Defendant.)	

Date Submitted: March 20, 2013
Date Decided: June 20, 2013

OPINION

*Upon Consideration of
Defendant's Third Motion for Postconviction Relief: **DENIED***

Steven P. Wood, Deputy Attorney General, Delaware Department of Justice, 820
N. French Street, Wilmington, DE, 19801, Attorney for the State.

Ricky A. Whitfield, *Pro Se*

JURDEN, J.

I. Introduction

Defendant, Ricky A. Whitfield was convicted on October 29, 1986 of Attempted Murder in the First Degree, Kidnapping in the First Degree, two counts of Possession of a Deadly Weapon During Commission of a Felony, and Reckless Endangerment in the First Degree.¹ The Delaware Supreme Court affirmed the judgment of conviction on direct appeal,² and Defendant has since filed two motions for postconviction relief.³ The first motion for postconviction relief alleged ineffective assistance of counsel and failure of the prosecution to disclose exculpatory evidence;⁴ the second, ineffective assistance of counsel and that the victim did not wish to prosecute.⁵ The Superior Court denied both motions, and the Supreme Court affirmed the Superior Court's judgments on appeal.⁶ Here, in his third motion for postconviction relief, Whitfield alleges that the Court lacked jurisdiction and his counsel was ineffective.⁷

II. Lack of Jurisdiction

The Court must first determine whether Superior Court Criminal Rule 61(i) bars consideration of Whitfield's claims before evaluating them on the merits.⁸ Rule 61(i) bars all claims (1) that were not filed in a timely manner, (2) that were "not asserted in a prior postconviction proceeding," (3) that were "not asserted in the proceedings leading to the judgment of conviction," and (4) that were previously adjudicated.⁹ However, there are

¹ Crim. Jury Worksheet, Docket Item ("D.I.") 6.

² *Whitfield v. State*, 548 A.2d 778 (Del. 1988) (TABLE).

³ Mot. for Postconviction Relief, D.I. 27 (first motion); *Whitfield v. State*, 659 A.2d 229, at *1 (Del. 1994) (TABLE) (explaining that the Superior Court treated Defendant's letter of March 10, 1994 as his second motion for postconviction relief).

⁴ Mot. for Postconviction Relief, D.I. 27.

⁵ Order, D.I. 36.

⁶ *State v. Whitfield*, 1990 WL 177589 (Del. Super. Nov. 1, 1990) (denying Defendant's first motion), *aff'd*, 593 A.2d 590 (Del. 1991)(TABLE); Order, D.I. 36 (denying second motion), *aff'd Whitfield v. State*, 659 A.2d 229 (Del. 1994) (TABLE) (deciding that the Superior Court did not err when it ruled on Defendant's letter as a motion for postconviction relief, even though the letter did not meet the form and content requirements of Rule 61 motions).

⁷ Mot. for Postconviction Relief, D.I. 69.

⁸ See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁹ Super. Ct. Crim. R. 61(i).

exceptions. In particular, pursuant to Rule 61(i)(5), failure to file a claim in a timely manner, failure to assert the ground for relief in the proceedings leading to the judgment of conviction, and failure to assert the ground for relief in a prior postconviction motion, will not bar adjudication on the merits when a defendant alleges that the court lacked jurisdiction.¹⁰ Therefore, the only bar to a claim of lack of jurisdiction is prior adjudication. Because this is the first time Defendant has alleged lack of jurisdiction, the claim will be evaluated on its merits.

The Superior Court has jurisdiction “over all crimes, except where jurisdiction is exclusively vested in another court.”¹¹ This jurisdiction “includes the power to issue all process and to conduct such proceedings as may be necessary or appropriate for the complete exercise of such jurisdiction.”¹² As such, the Superior Court may conduct grand jury proceedings.¹³ Defendant states his ground for relief under Rule 61 as: “Court lacked jurisdiction to file improper charges.”¹⁴ To support this assertion, Defendant’s primary argument appears to be that that his due process and equal protection rights were violated when he was indicted on charges of Attempted Murder in the First Degree and Kidnapping in the First Degree, instead of Assault in Second Degree and Kidnapping in the Second Degree.¹⁵ Defendant was indicted on different charges than were brought at his preliminary hearing.¹⁶ However, the prosecutor has discretion to bring more serious charges as long as probable cause exists to believe that the Defendant committed the charged offense.¹⁷ The indictment itself serves as a finding of probable cause that

¹⁰ Super Ct. Crim. R. 61(i)(5).

¹¹ 11 *Del. C.* § 2701(c).

¹² 11 *Del. C.* § 2701(e).

¹³ *See Petition of Jessup*, 136 A.2d 207, 539 (Del. Super. 1957).

¹⁴ Mot. for Postconviction Relief, D.I. 69, 3.

¹⁵ Mem. of Law, D.I. 70, 2-3.

¹⁶ *Compare* Ex. E, D.I. 70, *with* Ex. F, D.I. 70.

¹⁷ *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

provides the Superior Court with subject matter jurisdiction.¹⁸ Accordingly, Defendant's claim lacks merit.

Defendant alleges that his indictment on more serious charges than were brought at his preliminary hearing was "arbitrary and capricious."¹⁹ It would violate due process if the prosecution was selectively enforcing offenses based on "an unjustifiable standard such as race, religion, or other arbitrary classification,"²⁰ but Defendant does not explain how his indictment was actually arbitrary or how such a due process violation substantiates a claim of lack of jurisdiction.

Defendant also alleges that Attempted Murder in the First Degree and Kidnapping in the First Degree were "improperly filed under Rules 6(d)(e)(h)(l)[sic], 7(e), 9(b)(2), and 10(a),"²¹ but it is unclear how the cited Rules support a claim of lack of jurisdiction. Superior Court Criminal Rule 6(d) addresses who may be present during grand jury proceedings; Rule 6(e), recording and disclosure of grand jury proceedings. Rules 6(h) and 6(l) do not exist. Rule 9(b)(2) deals with the form of a summons, and Rule 10(a) addresses procedures for arraignments. Defendant provides little, if any, explanation of how these rules were violated and their relevance to the Court's jurisdiction. He specifically alleges that the prosecutor had undue influence upon the Grand Jury's decision to indict him by "filing under Rule 6(h)(l) and arraigning [Defendant] under Rule 10(a),"²² but this claim makes little sense because Rule 6(h)(l) does not exist,²³ and a

¹⁸ *Brokenbrough v. State*, 651 A.2d 787, at *1 (Del. 1994) (TABLE) (citing *Joy v. Superior Court*, 298 A.2d 315, 316 (Del. 1972)).

¹⁹ Mem. of Law.

²⁰ *Bordenkircher*, 434 at 364 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

²¹ Mem. of Law, D.I. 70, 1.

²² *Id.* at 2.

²³ It appears from Defendant's Memorandum of Law, D.I. 70, that he intends "Rule 6(h)(l)" to mean Superior Court Criminal Rule 6(h)(l). Although Rule 6 concerns grand juries, it only contains sections (a) through (g), so the cited Rule does not exist. The Superior Court Civil Rules also do not contain a Rule 6(h)(l), and the Federal Rules of Criminal Procedure Rule 6(h) concerns dismissal of a juror. The Federal Rules contain no Rule 6(h)(1) or Rule 6(l).

violation of Rule 10(a) arraignment procedures could not have any effect on the grand jury's decision because arraignment occurs after the grand jury proceedings.

To the extent that Defendant's claims address the alleged jurisdictional issue, they have no merit. To the extent that Defendant's claims are actually claims that he was denied due process and equal protection, these claims are barred by Rule 61(i). Rule 61(i)(1) requires all claims to be filed within a year²⁴ of when the judgment of conviction is final.²⁵ Defendant's judgment of conviction was final more than twenty years ago. Therefore, Defendant's claims are barred under Rule 61(i)(1). Additionally, Rule 61(i)(2) bars the due process and equal protection claims because the ground for relief was not asserted in either of his first two motions for postconviction relief,²⁶ and consideration is not "warranted in the interest of justice."²⁷ Similarly, the claims are barred by Rule 61(i)(3) because Defendant did not allege due process and equal protection violations in the proceedings leading to judgment of conviction.²⁸ Finally, Rule 61(i)(5) cannot provide petitioner with relief from the bars of Rule 61(i)(1), (2), and (3) because Defendant has not made a "colorable" claim of a constitutional violation resulting in a miscarriage of justice. Rule 61(i)(5)'s "[f]undamental fairness exception. . . is a narrow one and has been applied only in limited circumstances."²⁹ Defendant's assertions involving the fact that he was indicted on more serious charges than were originally brought against him afford no basis for relief.

²⁴ When Whitfield was convicted, Rule 61(i)(1) allowed for three years to file a motion for postconviction relief.

²⁵ A judgment of conviction is final for the purposes of Rule 61, if the defendant files a direct appeal, "when the Supreme Court issues a mandate or order finally determining the case on direct review." Super. Ct. Crim. R. 61(m). The Delaware Supreme Court affirmed Defendant's conviction on September 8, 1988. *Whitfield*, 548 A.2d 778.

²⁶ See Mot. for Postconviction Relief, D.I. 27 (raising ineffective assistance of counsel and failure to disclose exculpatory evidence); Order, D.I. 36 (explaining Defendant's claims of ineffective assistance and victim's desire not to prosecute).

²⁷ Super. Ct. Crim. R. 61(i)(2).

²⁸ The only ground for relief Defendant asserted on direct appeal was improper jury instructions. *Whitfield*, 548 A.2d at *2.

²⁹ *Younger*, 580 A.2d at 555.

III. Ineffective Assistance of Counsel

Rule 61(i)(1) bars all claims filed more than “one year after the judgment of conviction is final,” unless the motion “asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final,” then the petitioner has “one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court” to file a motion.³⁰ Defendant’s conviction was affirmed on direct appeal more than two decades ago.³¹ The only exceptions to the one year time bar are assertion of a retroactively applicable right and making a “colorable claim that there was a miscarriage of justice because of a constitutional violation.”³²

Defendant premises his ineffective assistance of counsel claims, at least in part, on the United States Supreme Court’s decision in *Martinez v. Ryan*.³³ Defendant correctly identifies *Martinez* as an equitable ruling, but incorrectly states that the Court in *Martinez* “announced that a defendant/prisoner is entitled to the effective assistance of counsel in the initial-review collateral proceeding.”³⁴ *Martinez* did not recognize a retroactively applicable constitutional right to the assistance of counsel in collateral proceedings.³⁵ The Court held only that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial” in federal habeas proceedings.³⁶ This decision was explicitly equitable, not constitutional.³⁷ Because *Martinez*

³⁰ Super. Ct. Crim. R. 61(i)(1).

³¹ *Whitfield*, 548 A.2d at *3.

³² Super. Ct. Crim. R. 61(i)(1); Super. Ct. Crim. R. 61(i)(5).

³³ 132 S.Ct 1309 (2012).

³⁴ Mem. of Law, D.I. 70, 3.

³⁵ See *State v. Smith*, 2012 WL 5577827, at *1 (Del. Super. June 14, 2012) (explaining that *Martinez* does not recognize a constitutional right to the effective assistance of counsel on a first motion for postconviction relief), *aff’d* 53 A.3d 303 (Del. Sept. 6, 2012) (TABLE); *State v. Travis*, 2013 WL 1196332, at *1-3 (Del. Super. Mar. 25, 2013).

³⁶ *Martinez*, 132 S.Ct. at 1315.

³⁷ *Id.* at 1318.

did not recognize a retroactively applicable constitutional right, Whitfield cannot avoid the time bar under the retroactively applicable right provision of Rule 61(i)(1).

In order to gain relief from the time bar, Defendant must therefore establish 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 judgment of conviction.”³⁸ Defendant alleges that this Court failed to appoint counsel under Rule 61(e)(1) on his first motion for postconviction relief, where Defendant raised claims of ineffective assistance of counsel.³⁹ Additionally, Defendant alleges that because counsel was not appointed, he was unable to effectively raise a claim that his indictment was defective.⁴⁰ These allegations fail to make a colorable claim of a constitutional violation because Defendant had no constitutional right to appointed counsel in collateral review proceedings,⁴¹ and under the Superior Court Criminal Rules appointment of counsel was discretionary, not mandatory.⁴² Because Defendant cannot establish a colorable claim that there was a miscarriage of justice, the ineffective assistance of counsel claim is time barred.

³⁸ Super. Ct. Crim. R. 61(i)(5).

³⁹ Mem. of Law, D.I. 70, 4.

⁴⁰ *Id.*

⁴¹ *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (explaining that there is no right to counsel in collateral proceedings).

⁴² Super. Ct. Crim. R. 61(e)(1) (1990) (“The court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown, but not otherwise.”). This rule has recently been amended to require appointment of counsel for indigent defendant’s first motion for postconviction relief, but the change applies only after May 6, 2013. Super. Ct. Crim. R. 61(e).

IV. Conclusion

Defendant's lack of jurisdiction claim and his ineffective assistance of counsel claim lack merit, and therefore Defendant's motion for postconviction relief is **DENIED**.⁴³

IS IT SO ORDERED.

Jan R. Jurden, Judge

⁴³ Defendant's motion includes requests for preparation of transcripts, Rule 61(d)(3), appointment of counsel, Rule 61(f), expansion of record, Rule 61(g), and for an evidentiary hearing, Rule 61(h). These requests may be granted at the Court's discretion. *See* Super. Ct. Crim. R. 61. As with Defendant's primary claim, these subsidiary motions have no merit. They are also denied.