

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

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|---------------------|---|-----------------------|
| STATE OF DELAWARE, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Cr. ID No. 9709002535 |
| |) | |
| DERIOUS J. JOHNSON, |) | |
| |) | |
| Defendant. |) | |
| |) | |

Submitted: November 20, 2012
Decided: February 5, 2013

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF SHOULD BE
SUMMARILY DISMISSED.**

Brian J. Robertson, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Derious J. Johnson, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 5th day of February 2013, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. In September 1997, Defendant Derious J. Johnson, 17 years old at the time, was arrested on several drug charges. Following an amenability hearing in the Family Court, the case was transferred to the Superior Court where Defendant eventually pled guilty to one charge of Possession with Intent to Deliver Heroin. In May 1998, Defendant was sentenced to the boot camp diversion program, twice found in violation of probation, and his sentence was discharged as unimproved in March 2001.¹
2. Defendant did not file a direct appeal from his guilty plea or sentence.
3. In December 1999, Defendant, who by then was an adult, was arrested on robbery and weapons charges. In January 2001, Defendant pled guilty to Robbery in the First Degree and was sentenced.²
4. In October 2003, Defendant was convicted of Rape in the First Degree and on December 5, 2003, Defendant was sentenced to life in prison as a habitual offender.³
5. Following Defendant's sentence in December 2003 to life imprisonment as a habitual offender, Defendant started filing a number of postconviction motions. In these motions, Defendant sought to invalidate his Superior Court conviction in the subject 1998 drug case. The subject 1998 drug conviction was one of the felony convictions used to establish Defendant's habitual offender status following his conviction in October 2003 of Rape in the First Degree.

¹ Superior Court Docket No. 18.

² Criminal ID No. 9912018785.

³ Criminal ID No. 0304007340.

6. Defendant has filed a number of postconviction motions arguing, without success, that his Superior Court conviction in this 1998 case was invalid due to flaws in the underlying Family Court amenability hearing of December 15, 1997.⁴

7. Specifically, Defendant contended in his prior postconviction motions, that he was never provided with an amenability hearing,⁵ that he was not afforded counsel during his amenability hearing,⁶ and that his due process and constitutional rights were otherwise violated due to flaws in his amenability hearing.⁷ All of Defendant's prior claims that the amenability hearing was not properly conducted and/or that his due process and constitutional rights were violated due to flaws in the amenability hearing have already been carefully considered and thereafter denied.⁸

8. Indeed, in denying a prior postconviction motion wherein Defendant contended that the amenability hearing related to this 1998 drug case was flawed, the Delaware Supreme Court recognized:

For the past several years, Johnson has argued, without success, that his Superior Court conviction in his 1998 case

⁴*In the Matter of the Petition of Derious J. Johnson*, 2012 WL 1655713 (Del.); Superior Court Docket No. 44, *aff'd*, *Johnson v. State*, 2011 WL 5137190 (Del.); *State v. Johnson*, 2009 WL 3069583 (Del.Super.), *aff'd*, *Johnson v. State*, 2009 WL 4639333 (Del.); *Johnson v. State*, 2009 WL 1763264 (Del.); *Johnson v. State*, 2008 WL 4978291 (Del.).

⁵ *Johnson v. State*, 2009 WL 1763264 (Del.) (Defendant Johnson challenges his conviction in the 1998 case on the basis that he was not given an amenability hearing.).

⁶ See, Docket No. 21- Defendant's Petition for a Writ of Habeas Corpus, at pg. 7 (Family Court did not have a proper amenability hearing because Defendant's due process rights were violated including his right to counsel); Docket No. 28- Defendant's Request for Reargument, at pg. 2 (Defendant's constitutional rights were violated when Defendant was not afforded counsel at his amenability hearing); Docket No. 32- Defendant's Rule 61 motion, at pg. 2 (Defendant was not given a fair due process hearing concerning an amenability hearing).

⁷ *In the Matter of the Petition of Derious J. Johnson*, 2012 WL 1655713 (Del.); Superior Court Docket No. 44, *aff'd*, *Johnson v. State*, 2011 WL 5137190 (Del.); *State v. Johnson*, 2009 WL 3069583 (Del.Super.), *aff'd*, *Johnson v. State*, 2009 WL 4639333 (Del.); *Johnson v. State*, 2009 WL 1763264 (Del.); *Johnson v. State*, 2008 WL 4978291 (Del.).

⁸ *In the Matter of the Petition of Derious J. Johnson*, 2012 WL 1655713 (Del.); Superior Court Docket No. 44, *aff'd*, *Johnson v. State*, 2011 WL 5137190 (Del.); *State v. Johnson*, 2009 WL 3069583 (Del.Super.), *aff'd*, *Johnson v. State*, 2009 WL 4639333 (Del.); *Johnson v. State*, 2009 WL 1763264 (Del.); *Johnson v. State*, 2008 WL 4978291 (Del.).

was invalid due to flaws in the underlying Family Court amenability proceeding.⁹

9. On October 10, 2012, Defendant filed the subject Motion for Postconviction Relief. In the subject motion, Defendant again contends that the amenability hearing was flawed in that he was not afforded counsel.

10. When considering a Rule 61 motion for postconviction relief, if it plainly appears from the motion that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.¹⁰

11. The subject motion for postconviction relief should be summarily dismissed for the reasons discussed below.

12. First, Defendant lacks standing to pursue a motion for postconviction relief in this case at this late date because he was discharged from his sentence in 2001 and thus is no longer “in custody or subject to future custody” under the sentence for which postconviction relief is being sought.¹¹

13. In a prior postconviction motion filed in 2009 in this case, the Superior Court already ruled that “[D]efendant’s sentence in this matter has been completed as the probation was discharged as a result of the defendant’s other conviction and he is no longer serving this sentence. As such, any modification requested by the defendant

⁹ *Johnson v. State*, 2011 WL 5137190, at *1 (Del.).

¹⁰ Super.Ct.Crim.R. 61(d)(4).

¹¹ Super.Ct.Crim.R. 61(a)(1); *Ruiz v. State*, 2008 WL 1961187, at *2 (Del. 2008)(a person loses standing to seek postconviction relief under Rule 61 where the defendant is not in custody or subject to future custody for the underlying offense or challenged sentence.); *State v. Hinson*, 2006 WL 337031, at *2 (Del.Super.)(“All courts in Delaware that have considered whether postconviction relief under Rule 61 is potentially available to a person who is not ‘in custody or subject to future custody’ for the challenged sentence have agreed that such relief under Rule 61 is not available.”).

would be meaningless and would have no bearing upon his present incarceration in ID No. 0304007340 which is the life sentence imposed by the Court.”¹²

14. When a defendant is not in custody or subject to future custody for the underlying offense or challenged sentence, the defendant lacks standing to seek Rule 61 relief and the Rule 61 motion should be summarily dismissed without reaching the substantive claims.¹³ Defendant lacks standing to seek Rule 61 relief in this case because he was discharged in 2001 from his sentence for which postconviction relief is being sought and, therefore, his motion should be summarily dismissed.

15. In addition to Defendant lacking standing to pursue this postconviction motion, Defendant’s motion is also procedurally barred. When a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.¹⁴

16. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within three years of a final order of conviction;¹⁵ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do 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

¹² *State v. Johnson*, 2009 WL 3069583, at *1 (Del.Super.), *aff’d*, 2009 WL 4639333 (Del.).

¹³ *Id.*

¹⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁵ Since the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.¹⁶ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”¹⁷

17. The subject motion is procedurally barred pursuant to Superior Court Criminal Rule 61(i). Rule 61(i)(1) applies because Defendant filed this motion more than three years after his final order of conviction.¹⁸ Therefore this motion is untimely. Defendant’s final order of conviction was in 1998, and this motion filed in 2012, was filed about 14 years later, clearly outside the applicable three-year limit.

18. In addition to being time-barred, Rule 61(i)(4) also precludes the court’s consideration of Defendant’s claim. The claim presented herein was already raised and adjudicated in Defendant’s prior postconviction relief motions and was already determined to be without merit. As discussed above, Defendant has already claimed that he did not have an amenability hearing, that he was not afforded counsel during his amenability hearing, and that his amenability hearing was otherwise flawed. Defendant’s contentions were already considered, adjudicated and denied.

19. To the extent that Defendant has restated or refined any of his claims, the Superior Court is not required to re-examine any claim that has received “substantive resolution” at an earlier time simply because the claim is now refined or restated.¹⁹

¹⁶ Super.Ct.Crim.R. 61(i)(5).

¹⁷ Super.Ct.Crim.R. 61(i)(4).

¹⁸ Super.Ct.Crim.R. 61(i)(1). If the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. *See*, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005) (amending Super.Ct.Crim.R. 61 (i)(1) (May 1, 1996).

¹⁹ *Johnson v. State*, 1992 WL 183069, *1 (Del.Supr.).

20. Moreover, Rules 61(i) (2) and (3) would prevent this Court from considering any additional argument or claim not previously raised. Defendant could have included anything he so desired in a timely filed direct appeal and/or a timely filed Rule 61 motion. Defendant raises nothing new or recently discovered and, to the extent that he failed to do so, there was nothing preventing him from raising this claim in a timely filed motion. Having already been provided with a full and fair opportunity to present any issues desired to be raised, any attempt at this late juncture to raise, re-raise, or re-couch a claim is procedurally barred.

21. Finally, although procedurally barred, Defendant's claim is also without merit. Following the December 15, 1997 amenability hearing the charges were transferred to the Superior Court. While the charges were pending in the Family Court, the public defender's office was appointed to represent Defendant in the Family Court proceedings.²⁰ The Family Court records reflect that the State provided Jay Edinger, Esquire from the public defender's office with the Rule 16 discovery to which Defendant was entitled while the charges remained pending in the Family Court.²¹

22. At this late date, it is difficult to determine the identity of the specific attorney from the public defender's office that represented the Defendant at his amenability hearing on December 15, 1997. The hearing was held over 14 years ago and the Family

²⁰ See, Juvenile Bail/Detention Disposition Order dated September 4, 1997, attached to Superior Court Docket No. 53 as Exhibit D; the Family Court records relating to this case were filed in the Superior Court on January 23, 1998, and the September 4, 1997 Order reflecting the appointment of the public defender's office to represent Defendant is attached at page 15.

²¹ See, notice of service of Rule 16 discovery dated September 30, 1997 from Deputy Attorney General advising that discovery was served on Jay Edinger, Esquire from the Public Defender's Office. This notice of service was attached to the Family Court records filed in the Superior Court on January 23, 1998, at page 12.

Court records that would identify the specific attorney are no longer available.²² However, Defendant was represented by the public defender's office in the Family Court and the public defender's office would have represented Defendant at all Family Court proceedings, including the amenability hearing.

23. After the charges were transferred to the Superior Court, the public defender's office continued to represent Defendant in the Superior Court. If the amenability hearing had not been conducted properly, the public defender representing Defendant in the Superior Court would have raised whatever issues he deemed appropriate. There were no timely challenges, by counsel and/or by Defendant, to the amenability hearing. There were no challenges to the amenability hearing at any time while the charges remained pending in the Superior Court, after Defendant accepted a plea to the charges in 1998, during the appeal period following Defendant's conviction on the charges, nor at any point in time when Defendant was serving his sentence until the sentence was discharged in 2001. The amenability hearing was properly conducted. This claim lacks merit and should be summarily dismissed.

24. Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances."²³ The Defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."²⁴

²² The amenability hearing, held on December 15, 1997, occurred over a decade ago and the Family Court has advised that at this late date many of the records are no longer available. See, *Shockley v. State*, 2013 WL 167005, at *2 (Del.) (a postconviction motion is properly determined to be procedurally barred when defendant raises claims that occurred decades ago and the court records are no longer available).

²³ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

²⁴ *Id.*

The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. It is clear from Defendant's motion that Defendant's claim does not meet the high standard that the fundamental fairness exception requires. The Court does not find that the interests of justice require it to consider these otherwise procedurally barred claim for relief.

For all of the foregoing reasons, Defendant's Motions for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary