

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK KIRK,	§
	§ No. 293, 2007
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9612002650
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 26, 2007
Decided: December 5, 2007

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 5th day of December 2007, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Mark Kirk, filed an appeal from the Superior Court's May 14, 2007 order denying his fourth motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we affirm.

(2) In 1997, following a Superior Court bench trial, Kirk was found guilty of three counts of Felony Murder in the First Degree, one count of Arson in the First Degree, two counts of Assault in the First Degree, and one

count of Assault in the Third Degree.¹ Kirk was sentenced to a total of 3 terms of life imprisonment plus 23 years. Kirk's convictions and sentences were affirmed by this Court on direct appeal.²

(3) Kirk subsequently filed two unsuccessful postconviction motions pursuant to Rule 61. As a result of Kirk's third postconviction motion, however, his felony murder and first-degree assault convictions were vacated and he was re-sentenced on three convictions of the lesser-included charge of Manslaughter in the First Degree and two convictions of the lesser-included charge of Assault in the Second Degree.³ This Court affirmed the Superior Court's judgment.⁴

(4) In this appeal, Kirk claims that "newly discovered evidence," consisting of a videotape of three failed attempts by a forensic fire investigator to ignite Captain Morgan's Spiced Rum on an electric stovetop burner, proves that he is innocent of the charges against him. As part of his claim, Kirk also contends that the expert forensic testimony presented by the

¹ The State presented evidence that Kirk, intoxicated and in a fit of jealous anger, deliberately poured Captain Morgan's Spiced Rum on an electric stovetop burner, causing a fire in his girlfriend's apartment building that resulted in the deaths of three people and serious injuries to several others.

² *Kirk v. State*, Del. Supr., No. 532, 1997, Berger, J. (Apr. 29, 1999) (*en Banc*).

³ *Williams v. State*, 818 A.2d 906 (Del. 2003) (overruling the interpretation of the felony murder statute relied upon in *Chao v. State*, 604 A.2d 1351 (Del. 1992)).

⁴ *Kirk v. State*, Del. Supr., No. 72, 2005, Steele, C.J. (Dec. 23, 2005).

State at his trial was falsified, the defense forensic expert did not provide credible evidence in his behalf, and his confession was coerced.

(5) Kirk's postconviction claims are time-barred because they were not asserted within three years of the issuance of this Court's mandate affirming his original convictions, nor were they asserted within one year of the issuance of this Court's mandate affirming his latest manslaughter and assault convictions on January 12, 2006.⁵ Moreover, Kirk's claims have previously been asserted and decided either in his direct appeal or in his prior postconviction motions. As such, they are procedurally barred as formerly adjudicated.⁶

(6) Kirk attempts to overcome the time and procedural bars by arguing that his video is "new evidence" that constitutes a colorable claim of 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."⁷ Even assuming that Kirk's argument is cognizable under Rule 61, we, nevertheless, are not persuaded by it.

⁵ The three-year statute of limitations applies to convictions occurring before July 1, 2005 and the one-year statute of limitations applies to convictions occurring on or after July 1, 2005. Super. Ct. Crim. R. 61(i) (1).

⁶ Super. Ct. Crim. R. 61(i) (4).

⁷ Super. Ct. Crim. R. 61(i) (5).

(7) At Kirk's trial, two videotapes were presented---one by the State and the other by the defense. The State's videotape was used to demonstrate that the fire could have started in the manner asserted by the State, while the defense videotape was used to demonstrate that it could not have. While Kirk argues that the defense expert was not as credible as the State's expert, the evidence on how the fire started was, nevertheless, essentially in equipoise. However, there was additional compelling evidence supporting Kirk's guilt, most notably his own confession. There is, thus, no indication that the "newly discovered" videotape would have changed the outcome of the trial, much less that there was a miscarriage of justice due to a constitutional violation. We find no error or abuse of discretion on the part of the Superior Court in denying Kirk's fourth motion for postconviction relief.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely
Justice