

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DESMOND TORRENCE,	§	
	§	No. 170, 2010
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	ID No. 0205014445
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: June 10, 2010
Decided: August 4, 2010

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

ORDER

This 4th day of August 2010, it appears to the Court that:

(1) Defendant-below Desmond Torrence (“Torrence”) appeals from the Superior Court’s decision denying his motion for postconviction relief. Torrence contends that this Court’s decision in *Allen v. State*¹ created a new rule that should be retroactively applied. He further contends that *Allen*, if retroactively applied, overcomes the procedural bars of Rule 61 in the interests of justice. After review, we affirm the Superior Court’s judgment denying Torrence’s motion for postconviction relief because we conclude that his claim is procedurally barred.

¹ 970 A.2d 203 (Del. 2009).

(2) In 2003, Torrence was convicted of felony murder, first degree robbery, conspiracy second degree, and two weapons charges. Torrence's two co-defendants, Stephen Kattes and Ernest Cooper, pled guilty to robbery first degree, possession of a firearm during the commission of a felony and conspiracy second degree. This Court affirmed Torrence's convictions on direct appeal.² The Superior Court denied Torrence's first motion for postconviction relief on October 2, 2008.

(3) In February 2009, this Court issued a decision in the case of *Allen v. State*.³ In that decision, which reconciled prior case law, we held that when the State proceeds on a theory of accomplice liability for criminal offenses that are divided into degrees, the jury is required to make an individualized determination regarding both a defendant's mental state and his culpability for any aggravating fact or circumstance.⁴ Torrence then filed a second motion for postconviction relief, arguing the jury instructions in his case were defective based upon *Allen*.

(4) On February 1, 2010, the Superior Court Commissioner issued a Report and Recommendation finding that Torrence's motion for postconviction relief should be dismissed, which the Superior Court adopted on February 23, 2010. The Superior Court held that although *Allen* was retroactively applicable, it

² *Torrence v. State*, 2005 WL 2923501 (Del. Nov. 2, 2005).

³ 970 A.2d 203 (Del. 2009).

⁴ *Id.* at 213.

was not relevant to the facts of Torrence’s case. Accordingly, the Superior Court held that Torrence’s motion for postconviction relief could not overcome the procedural bars of Rule 61. This appeal followed.

(5) We review the Superior Court’s denial of a motion for postconviction relief for abuse of discretion.⁵ Before addressing the substantive merits of any postconviction claim on appeal, this Court must first consider the procedural bars of Superior Court Criminal Rule 61.⁶ 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.⁷ Rule 61(i)(2) prohibits the filing of repetitive motions for postconviction relief.⁸ Rule 61(i)(3) bars a defendant from raising a ground for postconviction relief that was not raised in the proceedings leading to conviction.⁹ Torrence’s motion for postconviction relief is procedurally barred because it was filed more than three years after the judgment of conviction was final, was his

⁵ *Richardson v. State*, --- A.2d ----, 2010 WL 2722690, at *2 (Del. July 9, 2010) (citing *Gattis v. State*, 955 A.2d 1276, 1280-81 (Del. 2008)).

⁶ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁷ Super. Ct. Crim. R. 61(i)(1) (“Time limitation. -- A motion for postconviction relief may not be filed more than one year 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 one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.”)

⁸ Super. Ct. Crim. R. 61(i)(2) (“Repetitive motion. -- Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.”)

⁹ Super. Ct. Crim. R. 61(i)(3) (“Procedural default. -- Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows (A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights.”)

second motion for postconviction relief, and set forth a ground for relief not asserted in the proceedings leading to the judgment of conviction.

(6) Torrence contends that this Court's decision in *Allen v. State* mandates reversal of his convictions because the trial court failed to properly instruct the jury pursuant to 11 *Del. C.* §274.¹⁰ The Superior Court held that if *Allen* was applicable to the facts of this case, it would suspend Rule 61's procedural bars to Torrence's motion for postconviction relief. Ultimately, the Superior Court concluded that *Allen* is inapplicable to Torrence's case as well as charges like homicide "where the differing offenses are distinguishable by the respective mental states."

(7) In *Richardson v. State*,¹¹ this Court held that *Allen* was not retroactively applicable because it did not constitute a new rule and is not implicit in the concept of ordered liberty.¹² Because *Allen* is not retroactively applicable, Torrence's postconviction claim based on the holding in that case is procedurally barred. Although we reject the Superior Court's conclusion that *Allen* could be retroactively applied, we nonetheless affirm the Superior Court's judgment denying Torrence's postconviction claim on the independent and alternative

¹⁰ 11 *Del. C.* §274 provides that, when two or more people are criminally liable for an offense that is divided into degrees, "each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance."

¹¹ --- A.2d ---, 2010 WL 2722690, at *1, 3-4 (Del. July 9, 2010).

¹² *Id.* at *4.

ground that this claim is procedurally barred and Torrence failed to overcome the procedural hurdles.¹³

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

BY THE COURT:

/s/Henry duPont Ridgely
Justice

¹³ *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995).