

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH E. FINK,	§	
	§	No. 552, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0804022489
Appellee.	§	

Submitted: January 14, 2011
Decided: April 7, 2011

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 7th day of April 2011, upon consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) The appellant, Kenneth E. Fink, filed an appeal from the Superior Court’s July 30, 2010 denial¹ of his motion for postconviction relief as procedurally barred pursuant to Superior Court Criminal Rule 61(i) (“Rule 61(i)”)². We have determined that there is no merit to the appeal and affirm for the reasons stated by the Superior Court.

¹ *State v. Fink*, 2010 WL 2991579 (Del. Super.).

² *See* Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to relief).

(2) On May 27, 2008, Fink was indicted on ten counts of Unlawfully Dealing in Child Pornography.³ On December 8, 2008, Fink pled guilty to one count of Unlawfully Dealing in Child Pornography, and the State entered a *nolle prosequi* on the remaining nine counts. On February 13, 2009, the Superior Court sentenced Fink to ten years at Level V suspended after three years and six months for terms at Levels IV and III. Fink did not appeal his conviction and sentence.

(3) On February 17, 2010, Fink filed a motion for postconviction relief. Fink's motion was referred to a Commissioner for a recommendation. By report and recommendation dated April 19, 2010, the Commissioner recommended that the motion be summarily dismissed.

(4) Fink filed an appeal from the Commissioner's report and recommendation. Fink contended that the report failed to address a "jurisdictional" claim, *i.e.*, that the indictment against him for "dealing" in child pornography was illegal because the State was aware that it could prove only "possession" of child pornography.⁴ According to Fink, the illegal indictment rendered his guilty plea "unknowing," and he was entitled to relief.

³ Del. Code Ann. tit. 11, § 1109(4) (2007).

⁴ Compare Del. Code Ann. tit. 11, § 1109(4) (2007) (amended July 2008) (providing that a person is guilty of Unlawfully Dealing in Child Pornography when "[t]he person, by means of a computer, intentionally compiles, enters, accesses, transmits, receives, exchanges, disseminates, stores, makes prints, reproduces or otherwise possesses any photograph, image, file, data or other visual depiction of a child engaging in a prohibited sexual act") with Del. Code Ann. tit. 11, § 1111(1) (providing that a person is guilty of Possession of Child Pornography when "[t]he person knowingly possesses any visual depiction of a child engaging in a prohibited sexual act").

(5) By memorandum opinion dated July 30, 2010, the Superior Court accepted the Commissioner's April 19, 2010 report and recommendation and denied Fink's postconviction motion. The Superior Court determined that Fink's postconviction claims were procedurally barred, under Rule 61(i)(3), for his failure to show that he was prevented from raising the claims prior to entering his guilty plea.⁵ The court further determined that the claims were without merit and thus did not warrant review under Rule 61(i)(5).⁶

(6) The Court has carefully considered the parties' positions on appeal and has concluded that the denial of Fink's postconviction motion should be affirmed on the basis of the Superior Court's decision holding that Fink's claims were subject to the procedural bar of Rule 61(i)(3) without exception.⁷ The Court expressly finds no support in the record for Fink's conclusory claim that the May 27, 2008 indictment, which charged him with ten counts of Unlawfully Dealing in Child Pornography, was illegal on its face. If Fink wanted to contest whether he committed the crime of dealing in child pornography, he was free to do so at trial.⁸ Instead, he accepted a generous plea bargain that allowed him to plead guilty to

⁵ See Del. Super. Ct. Crim. R. 61(i)(3) (barring a claim not previously raised absent cause for relief from the procedural fault and prejudice).

⁶ See Del. Super. Ct. Crim. R. 61(i)(5) (providing that otherwise applicable procedural bars shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation).

⁷ *State v. Fink*, 2010 WL 2991579 (Del. Super.).

⁸ E.g., *Panuski v. State*, 2010 WL 3398945 (Del. Supr.) (affirming Superior Court denial of defendant's post-plea "motion to downgrade counts" on basis that defendant had "no right to choose the crime he prefers" (citing *Albury v. State*, 551 A.2d 53, 61 (Del. 1988))).

only one of the ten counts against him.⁹ Stated another way, by pleading guilty to the charge of Unlawfully Dealing in Child Pornography, Fink is foreclosed from challenging the sufficiency of the State's evidence on that charge.¹⁰

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁹ *Id.*

¹⁰ *Hartman v. State*, 2007 WL 38401 (Del. Supr.) (citing *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003)).