

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH M. SMITH,	§	
	§	No. 224, 2011
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. 9712014022
Appellee.	§	

Submitted: June 15, 2011

Decided: September 13, 2011

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

ORDER

This 13th day of September 2011, upon consideration of the appellant's opening brief and the appellee's motion to affirm, it appears to the Court that:

(1) In 1998, the appellant, Kenneth M. Smith, was convicted of Robbery in the First Degree and was sentenced as an habitual offender to life imprisonment. On direct appeal, this Court affirmed the judgment of the Superior Court.¹ In the

¹ *Smith v. State*, 1999 WL 734717 (Del. Supr.).

past ten years, the Court has affirmed the Superior Court's denial of Smith's first two motions for postconviction relief² and two motions for correction of sentence.³

(2) This is Smith's appeal from the Superior Court's denial of his third motion for postconviction relief. After careful consideration of Smith's opening brief and the State's motion to affirm, the Court has concluded that the Superior Court's judgment should be affirmed on the basis of the court's order dated April 11, 2011 that adopted a commissioner's report dated March 30, 2011.⁴ The Superior Court did not err when determining that Smith's third motion for postconviction relief was procedurally barred, and that Smith offered no reason to excuse the procedural defaults.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² See *Smith v. State*, 2000 WL 1887933 (affirming denial of first postconviction motion); *Smith v. State*, 2004 WL 2154301 (Del. Supr.) (affirming denial of second postconviction motion).

³ See *Smith v. State*, 2008 WL 4166650 (Del. Supr.) (affirming denial of first sentence correction motion); *Smith v. State*, 2009 WL 1740749 (Del. Supr.) (affirming denial of second sentence correction motion).

⁴ See *State v. Smith*, Del. Super., Cr. ID No. 9712014022, (April 11, 2011) (order) (denying third postconviction motion) (attached as Exhibit A).

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

STATE OF DELAWARE)	
)	
v.)	I.D. No. 9712014022
)	
KENNETH M. SMITH,)	
)	
Defendant.)	

ORDER

This 11th day of April, 2011, upon consideration of Defendant's Motion for Postconviction Relief, the Commissioner's Report and Recommendation and the record in this case:

- 1) The Court referred this Motion to Superior Court Commissioner Lynne M. Parker pursuant to 10 Del.C. §512(b) and Superior Court Rule 62 for proposed findings of facts and conclusions of law.
- 2) The Commissioner has filed a Report and Recommendation that the Court deny defendant's Motion for Postconviction Relief.
- 3) Defendant has filed a Response to the Report.

NOW THEREFORE, after careful and *de novo* review of the record in this action, and consideration of defendant's response to the Commissioner's Report, and for reasons stated in the Commissioner's Report and Recommendations of March 30, 2011,

IT IS ORDERED that the Commissioner's Report, including its recommendation, is adopted by the Court. Defendant's Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.



PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary:
cc: Commissioner Lynne M. Parker
State's Attorney
Kenneth M. Smith
Investigative Services

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

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID No. 9712014022
)
 KENNETH M. SMITH,)
)
 Defendant.)

Submitted: March 9, 2011
Decided: March 30, 2011

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

Paul R. Wallace, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Kenneth M. Smith, Delaware Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 30th day of March 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On June 3, 1998, a Superior Court jury convicted Defendant Kenneth M. Smith of Robbery in the First Degree based on an incident at Value City, a discount department store. At sentencing, Defendant was found to be a habitual offender pursuant to 11 *Del. C.* § 4214(b) and sentenced to life in prison. Defendant's conviction and sentence were affirmed on appeal.¹ On September 27, 1999, the Delaware Supreme Court issued its mandate to the Superior Court directing the affirmance of Defendant's conviction and sentence.²

2. Thereafter, Defendant filed unsuccessful motions for Rule 61 postconviction relief,³ an unsuccessful petition for federal habeas corpus relief,⁴ and two unsuccessful motions for correction of sentence.⁵

3. On March 3, 2011, over 10 years after the Delaware Supreme Court issued its mandate affirming Defendant's conviction and sentence, Defendant filed the subject motion for postconviction relief. In the subject motion, Defendant raises two grounds for relief. First, Defendant contends that the trial court lacked authority to continue punishing him for first degree robbery based on subsequent legal developments that occurred after Defendant's direct appeal and post-conviction motion. Second, Defendant

¹ *Smith v. State*, 1999 WL 734717 (Del. 1999).

² Superior Court Docket No. 35.

³ Defendant's first motion for postconviction relief was denied by *State v. Smith*, 2000 WL 33726919 (Del. Super. 2000), *affirmed*, *Smith v. State*, 2000 WL 1887933 (Del. 2000); Defendant's second motion for postconviction relief was denied by *State v. Smith*, 2004 WL 1551513 (Del. Super. 2004), *affirmed*, *Smith v. State*, 2004 WL 2154301 (Del. 2004).

⁴ *Smith v. Carroll and Danberg*, 2006 WL 2085423 (D. Del. 2006).

⁵ *Smith v. State*, 2008 WL 4166650 (Del. 2008) (affirming denial of motion for correction of sentence); *Smith v. State*, 2009 WL 1740749 (Del. 2009) (affirming denial of motion for correction of sentence).

claims that he was denied effective assistance of counsel at sentencing and that Defendant should not have been sentenced as a habitual offender.

4. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.⁶ If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.⁷ Moreover, if it plainly appears from the motion for postconviction relief 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.⁸

5. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within three years of a final order of conviction;⁹ (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 violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.¹⁰ Moreover, the procedural bars of

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

⁷ *Id.*

⁸ Super.Ct.Crim.R. 61(d)(4).

⁹ 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).

¹⁰ Super.Ct.Crim.R. 61(i)(5).

(2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."¹¹

6. In this case, Defendant's claims are procedurally barred. Defendant's claims are time-barred, repetitive, previously adjudicated, and without merit.

7. Rule 61(i)(1) applies because Defendant filed this motion more than three years after his final order of conviction. Defendant's final order of conviction was in 1999, and this motion filed in March 2011, was filed over 10 years later, clearly outside the applicable three-year limit.

8. As to Defendant's first claim, he contends that the trial court lacked authority to continue punishing him for first degree robbery based on subsequent legal developments that occurred after Defendant's direct appeal and post-conviction motion. The subsequent legal developments to which he is referring were cases decided in 2002 and 2003, and which were the subject of his second motion for postconviction relief filed in 2004. Defendant was required to raise any alleged newly recognized retroactive right within one year of his entitlement to that new right.¹² Defendant did, in fact, raise the new subsequent legal developments in his second motion for postconviction relief, filed in 2004, at which time it received full, thorough and careful consideration.¹³ At this late date, the applicable one year period for raising any alleged "newly" recognized right has long since elapsed and is now time barred.

¹¹ Super.Ct.Crim.R. 61(i)(4).

¹² See, Super Ct.Crim.R. 61(i)(1).

¹³ See, *State v. Smith*, 2004 WL 1551513 (Del.Super. 2004), *affirmed*, *Smith v. State*, 2004 WL 2154301 (Del. 2004).

9. Moreover, under the court rules and case authorities, it is well established that defendants are entitled to one direct appeal and one motion for postconviction relief.¹⁴ While the law provides ways around the one direct appeal-one postconviction relief format, those ways are limited. They only work in extreme and extraordinary cases. Were it not for Rule 61(i) prohibitions against repetitive motion practice, defendants serving lengthy prison sentences, such as Mr. Smith, could litigate endlessly.
10. In addition to being time-barred, Rule 61(i) (4) also precludes the Court's consideration of Defendant's claims presented herein. Both of the claims presented herein were already raised, thoroughly and fully considered, and fully adjudicated in Defendant's prior postconviction proceedings.
11. Defendant raised his first claim, that the trial court lacked authority to continue punishing him for first degree robbery based on subsequent legal developments that occurred after Defendant's direct appeal and post-conviction motion, in his second postconviction relief motion filed in 2004. Specifically, in Defendant's second motion for postconviction relief, Defendant contended that the Delaware Supreme Court's decisions in *Walton v. State*,¹⁵ and *Word v. State*¹⁶ and the court's decision *State v. McKamey*,¹⁷ required that his conviction of Robbery First Degree be set aside and reduced to Robbery Second Degree. Defendant seeks to rehash and re-raise this same claim in the subject motion.
12. The Superior Court fully, thoroughly and carefully considered Defendant's claim in his second motion for postconviction relief and in a comprehensive opinion denied

¹⁴ *State v. Bass*, 2004 WL 396372 (Del.Super.), *aff'd*, 2004 WL 1535769 (Del.).

¹⁵ *Walton v. State*, 821 A.2d 871 (Del. 2003).

¹⁶ *Word v. State*, 801 A.2d 927 (Del. 2002).

¹⁷ *State v. McKamey*, 2003 WL 22852614 (Del.Super. 2003).

Defendant's claim.¹⁸ On appeal, the Delaware Supreme Court affirmed the Superior Court's "well-reasoned decision".¹⁹ Defendant again raised the same claim in his petition for federal habeas corpus relief.²⁰ After careful consideration and a thorough review, the United States District Court denied Defendant's petition.²¹

13. Defendant does not raise anything new and/or recently discovered that was not already raised in his prior postconviction relief motion. Consequently, the first claim which Defendant raises in the subject motion has already been raised and adjudicated in a prior postconviction proceeding and is now barred by Rule 61(i)(4).

14. Turning to Defendant's second claim, Defendant contends that he was denied effective assistance of counsel at sentencing and that he should not have been sentenced as a habitual offender. Defendant first raised this claim in his first motion for postconviction relief filed in 2000. In that motion, Defendant raised "numerous challenges to the life sentence imposed upon [him] based on [his] status as a habitual offender pursuant to 11 *Del. C.* § 4214(b)."²² Included among the numerous challenges to Defendant's sentence was his contention that he was denied effective assistance of counsel at sentencing.²³ After fully, thoroughly and carefully considering Defendant's challenge to his sentence, the Superior Court concluded that Defendant's "challenges to [his] status as a habitual offender and to [his] sentence are without merit."²⁴ On appeal, the Delaware Supreme Court concluded that Defendant's claim that he was improperly

¹⁸ *State v. Smith*, 2004 WL 1551513 (Del. Super. 2004).

¹⁹ *Smith v. State*, 2004 WL 2154301 (Del. 2004).

²⁰ *Smith v. Carroll and Danberg*, 2006 WL 2085423 (D.Del. 2006).

²¹ *Id.*

²² *State v. Smith*, 2000 WL 33726919, at *2 (Del. Super. 2000).

²³ *Id.* at *2-3.

²⁴ *Id.*

sentenced as a habitual offender and his claim that he was afforded ineffective assistance of counsel when he was sentenced as an habitual offender were without merit.²⁵

15. Defendant again unsuccessfully challenged his sentence in subsequent motions filed in 2008²⁶ and 2009²⁷.

16. Defendant in the subject motion raises nothing new and/or recently discovered and seeks only to rehash the same claims previously raised and adjudicated in prior postconviction proceedings. Defendant's subject motion is procedurally barred by Rule 61(i)(4).

17. 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.²⁸

18. Rules 61(i) (2) and (3) would prevent this Court from considering any additional arguments or claims not previously raised. Defendant could have included anything he so desired in his prior Rule 61 motions. Defendant raises nothing new or recently discovered.

19. Defendant had time and opportunity to raise any issue in his prior postconviction proceedings and either did so, or neglected to do so. 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 a new claim is barred.

20. Since Defendant's claims are procedurally barred, Defendant must meet one of the exceptions to overcome the bars to relief. In this case, Defendant has failed to

²⁵ *Smith v. State*, 2000 WL 1887933 (Del. 2000).

²⁶ *Smith v. State*, 2008 WL 4166650 (Del. 2008)(denial of motion for correction of sentence).

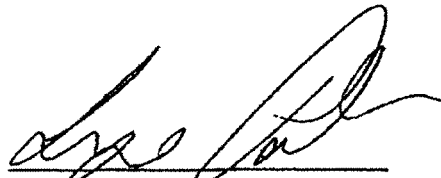
²⁷ *Smith v. State*, 2009 WL 1740749 (Del. 2009)(denial of motion for correction of sentence).

²⁸ *Johnson v. State*, 1992 WL 183069, *1 (Del. Supr.).

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."²⁹ The Defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."³⁰ 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 claims do 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 claims for relief.

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

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc: Prothonotary

²⁹ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

³⁰ *Id.*