

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIEN WILKINSON,	§
	§ No. 331, 2012
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0806022824
Plaintiff Below-	§
Appellee.	§

Submitted: October 19, 2012
Decided: December 17, 2012

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

ORDER

This 17th day of December 2012, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Damien Wilkinson, filed this appeal from the Superior Court's denial of his second motion for postconviction relief. Wilkinson raises one issue in his opening brief on appeal. We find no merit to the appeal. Accordingly, we affirm the judgment below.

(2) The record reflects that, in February 2009, a Superior Court jury convicted Wilkinson of two counts of first degree rape. The victim was Wilkinson's four-year-old niece. The Superior Court sentenced Wilkinson to fifty-five years at Level V incarceration, to be suspended after serving fifty years in

prison for decreasing levels of supervision. This Court affirmed Wilkinson's convictions and sentence on direct appeal.¹ Wilkinson filed his first motion for postconviction relief on January 14, 2010. The Superior Court denied this motion on April 29, 2010. Wilkinson filed an appeal to this Court, which he later dismissed voluntarily.

(3) On February 18, 2011, Wilkinson filed his second motion for postconviction relief. In that motion, Wilkinson asserted that his trial counsel was ineffective because: (i) he failed request a bill of particulars; (ii) he failed to investigate alibi witnesses; (iii) he failed to file a motion for reargument on direct appeal; (iv) he allowed the Superior Court to admit the victim's statement as affirmative evidence without cross-examining the victim; and (v) his counsel's cumulative errors cause Wilkinson great harm and prejudice. Wilkinson's motion was referred to a Superior Court Commissioner, who requested an affidavit from Wilkinson's trial and scheduled the matter for full briefing. The Commissioner submitted findings of fact on January 12, 2012 and recommended that Wilkinson's motion be denied because it was procedurally barred. After conducting a de novo review, the Superior Court adopted the Commissioner's findings and recommendations and denied Wilkinson's motion on May 21, 2012. This appeal followed.

¹ *Wilkinson v. State*, 2009 WL 2917800 (Del. Sept. 14, 2009).

(4) In his opening brief on appeal, Wilkinson's sole argument is that his trial counsel had a drinking problem and was ineffective for failing to investigate alibi witnesses. To the extent Wilkinson raised additional issues in the postconviction motion he filed in the Superior Court, those claims are deemed to be waived due to Wilkinson's failure to brief them on appeal.²

(5) The Superior Court carefully reviewed Wilkinson's motion and found that it was both untimely³ and repetitive⁴ and that Wilkinson had failed to overcome the procedural bars because his claims of ineffective assistance of counsel had no substantive merit.⁵

(6) After careful consideration of the parties' respective positions on appeal, we hold that the Superior Court's rejection of Wilkinson's claim of ineffective assistance of counsel based on counsel's failure to investigate should be affirmed for the reasons set forth in the Commissioner's well-reasoned decision

² *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

³ Del. Super. Ct. Crim. R. 61(i)(1) (2012). Rule 61(i)(i) requires that any claim for postconviction relief be filed within one year following a defendant's conviction. In this case, this Court issued the mandate finalizing Wilkinson's conviction on direct appeal on September 30, 2009. Wilkinson did not file his second motion for postconviction relief until February 18, 2011, outside of the one-year time limit.

⁴ Del. Super. Ct. Crim. R. 61(i)(2) (2012). Rule 61(i)(2) bars consideration of any claim for relief that was not asserted in a prior postconviction motion. In his first postconviction motion, Wilkinson's only argument was that his trial counsel was ineffective for failing to challenge the indictment prior to trial and on direct appeal.

⁵ Del. Super. Ct. Crim. R. 61(i)(5) (2012). Rule 61(i)(5) provides that the procedural bars of Rule 61(i)(1)-(3) do not apply, *inter alia*, to a colorable claim of a miscarriage of justice due to a constitutional violation that undermined the fundamental fairness of the trial or direct appeal.

dated January 3, 2012, which was adopted by the Superior Court on May 21, 2012. The Superior Court did not err in finding that Wilkinson's claim was procedurally barred and that Wilkinson had failed to overcome the procedural hurdles.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice