

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BEN ROTEN,	§	
	§	No. 438, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0401005180
Appellee.	§	

Submitted: October 10, 2011
Decided: December 28, 2011

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

O R D E R

This 28th day of December 2011, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Ben Roten, filed this appeal from the Superior Court’s denial of his second motion for postconviction relief. The appellee, State of Delaware, has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of Roten’s opening brief that the appeal is without merit.¹

¹ Del. Supr. Ct. R. 25(a).

(2) In March 2004, Roten was indicted on charges of Kidnapping in the First Degree, Attempted Murder in the First Degree, Aggravated Menacing, Possession of a Deadly Weapon During the Commission of a Felony, Resisting Arrest, and Failure to Submit to Photos and Fingerprints. In August 2004, Roten pled guilty to Assault in the First Degree as a lesser-included offense of Attempted Murder and Aggravated Menacing.

(3) Prior to his sentencing on September 24, 2004, Roten filed a *pro se* motion to withdraw his guilty plea. The Superior Court denied the motion and sentenced Roten. On appeal from the denial of Roten's motion to withdraw his guilty plea, this Court affirmed the Superior Court's judgment.²

(4) In his first motion for postconviction relief, filed in February 2006, Roten alleged that his guilty plea was involuntary due to ineffective assistance of counsel. By order dated May 18, 2006, the Superior Court denied Roten's claims as procedurally barred under Superior Court Criminal Rule 61 ("Rule 61") or as without merit.³ On appeal, this Court affirmed the Superior Court's judgment.⁴

² *Roten v. State*, 2005 WL 2254202 (Del. Supr.).

³ *State v. Roten*, 2006 WL 1360513 (Del. Super.).

⁴ *Roten v. State*, 2007 WL 773389 (Del. Supr.).

(5) In his second motion for postconviction relief, filed in June 2011, Roten alleged that his guilty plea violated double jeopardy. By order dated June 25, 2011, the Superior Court denied the motion on the bases that the double jeopardy claim was waived and was without merit.⁵ This appeal followed.

(6) On appeal, the Court agrees that Roten's second postconviction motion is without merit for the reasons stated by the Superior Court. As determined by the Superior Court, Roten waived his double jeopardy claim when he pled guilty to Assault in the First Degree and Aggravated Menacing.⁶ Moreover, the Superior Court record supports the court's determination that the assault and menacing convictions were based on different and distinct conduct and were thus separately punishable.⁷

(7) When reviewing the Superior Court's denial of postconviction relief, this Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.⁸ In this case, Roten's second

⁵ *State v. Roten*, 2011 WL 3116938 (Del. Super.).

⁶ *See Benge v. State*, 945 A.2d 1099, 1201 (Del. 2008) (providing that “[u]nder Delaware law, a voluntary guilty plea constitutes a waiver of any alleged errors or defects occurring prior to the entry of the plea, including a multiplicity defect.”).

⁷ *See Bowers v. State*, 2007 WL 2359553 (Del. Supr.) (citing *Feddiman v. State*, 558 A.2d 278, 287-88 (Del. 1989)).

⁸ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

postconviction motion is barred as untimely under Rule 61(i)(1)⁹ and as repetitive under Rule 61(i)(2).¹⁰ Having carefully considered the parties positions on appeal and the Superior Court record, the Court concludes that Roten cannot demonstrate that his untimely and repetitive postconviction motion warrants further consideration “in the interest of justice”¹¹ or because of “a miscarriage of justice.”¹²

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/ Carolyn Berger
Justice

⁹ See Del. Super. Ct. Crim. R. 61(i)(1) (barring claim filed more than three years after judgment is final) (amended 2005 to reduce filing period to one year).

¹⁰ See Del. Super. Ct. Crim. R. 61(i)(2) (barring “[a]ny ground for relief that was not asserted in a prior postconviction proceeding”).

¹¹ *Id.* (barring claims unless consideration is warranted in the interest of justice).

¹² See Del. Super. Ct. Crim. R. 61(i)(5) (providing that the procedural bars of (i)(1) and (i)(2) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation).