

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|--------------------------------|
| GERRON LINDSEY, | § |
| | § |
| Defendant Below- | § No. 65, 2004 |
| Appellant, | § |
| | § |
| v. | § Court Below—Superior Court |
| | § of the State of Delaware, |
| STATE OF DELAWARE, | § in and for New Castle County |
| | § Cr.A. No. IN00-08-2081 |
| Plaintiff Below- | § Cr. ID 002019767 |
| Appellee. | § |

Submitted: April 29, 2004

Decided: June 7, 2004

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

ORDER

This 7th day of June 2004, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record below, it appears to the Court that:

(1) The defendant-appellant, Gerron Lindsey, filed this appeal from the Superior Court's denial of his second motion for postconviction relief. The State has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of Lindsey's opening brief that the appeal is without merit. We agree and affirm.

(2) The record reflects that Lindsey pled guilty but mentally ill in June 2002 to one count of first degree murder. In exchange for his guilty

plea, the State agreed not to seek the death penalty and also agreed to dismiss numerous other charges, including another first degree murder charge and charges for attempted murder, robbery and weapon offenses. The Superior Court sentenced Lindsey to life imprisonment. Lindsey filed a petition for postconviction relief in August 2002. The Superior Court denied the motion, and this Court affirmed on appeal.¹ Lindsey filed a second petition for postconviction relief, which the Superior Court denied. This appeal followed.

(3) In his opening brief on appeal, Lindsey raises claims of ineffective assistance of counsel. Lindsey asserts that his trial counsel was ineffective for failing to investigate several aspects of his case prior to the entry of his guilty plea. Lindsey acknowledges that he did not raise these claims previously. He argues, however, that consideration of his claims is warranted in the interest of justice. The State, on the other hand, asserts that Rule 61(i)(2)² required Lindsey to raise his claims of ineffective assistance of counsel in his first postconviction motion and that Lindsey has failed to

¹ *Lindsey v. State*, Del. Supr., No. 531, 2002, Steele, J. (Jan. 7, 2003).

² Superior Court Criminal Rule 61(i)(2) provides: “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.”

establish any exception under Rule 61(i)(5)³ to overcome the procedural bar of Rule 61(i)(2).

(4) We agree. In general, Rule 61(i)(2) requires a petitioner to raise all available grounds for relief in a first postconviction petition. Claims that are not raised in a petitioner's first postconviction motion will be deemed waived unless the petitioner can establish that consideration of the claim is warranted in the interest of justice or there is a colorable claim of a constitutional violation that undermined the fundamental fairness of the proceedings leading to the final judgment.⁴ These exceptions are narrow and have been applied only in limited circumstances.⁵

(5) Lindsey argues that he has established a colorable claim that, because of his attorney's ineffectiveness, he was denied his constitutional right to counsel. To establish a claim of ineffective assistance, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable

³ Superior Court Criminal Rule 61(i)(5) provides: "The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall 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."

⁴ *Younger v. State*, 580 A.2d 552, 554-55 (Del. 1990).

⁵ *Id.* at 555.

probability that the outcome of the proceeding would have been different.⁶ In the context of a guilty plea, the petitioner must establish that, but for counsel's errors, he would not have pled guilty but would have insisted on going to trial.⁷ Although Lindsey contends that his attorney erred in this case, he does not even attempt to establish the necessary element of prejudice.⁸ Under the circumstances, we do not find that consideration of Lindsey's claims of ineffective assistance are warranted in the interest of justice or under the fundamental fairness exception of Rule 61(i)(5).

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

BY THE COURT:

/s/ Carolyn Berger
Justice

⁶ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁷ *Albury v. State*, 551 A.2d 53, 60 (Del. 1988) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

⁸ *See id.*