

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN McMILLION,	§	
	§	No. 220, 2004
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in S93-
	§	1206-93-R2.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 9312012871

Submitted: July 30, 2004
Decided: December 6, 2004

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

ORDER

This 6th day of December 2004, upon consideration of the appellant’s opening brief and appendix and the appellee’s motion to affirm, it appears to the Court that:

(1) The appellant, Marvin McMillion, has appealed from the Superior Court’s order of May 11, 2004, that denied his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). The State has moved to affirm the Superior Court’s judgment on the basis that the appeal is without merit. We agree and affirm.

(2) In 1994, McMillion was charged with having committed Attempted Unlawful Sexual Intercourse in the First Degree, Robbery in the First Degree, Burglary in the Second Degree, Unlawful Sexual Penetration in the Third Degree and Criminal Mischief.¹ Following a jury trial in the Superior Court, McMillion was convicted as charged. He was sentenced to fifty-seven years and one day at Level V imprisonment, suspended after forty-one years, for six months at Level IV followed by decreasing levels of probation.

(3) On direct appeal, McMillion alleged that there was insufficient evidence to sustain the conviction for Attempted Unlawful Sexual Intercourse in the First Degree. This Court affirmed the Superior Court's judgment, concluding that there was "ample evidence whereby a jury could rationally infer that McMillion intended to engage in sexual intercourse with the victim."²

(4) In 1997, McMillion filed his first motion for postconviction relief. McMillion raised two issues: insufficient evidence and ineffective assistance of counsel. Applying the procedural bars of Rule 61, the Superior Court denied

¹It appears from the record that two other counts, Burglary in the Third Degree and Theft, were severed by stipulation prior to trial.

²*See McMillion v. State*, 1995 WL 319121 (Del. Supr.) (affirming judgment on direct appeal).

McMillion's insufficient evidence claim as formerly adjudicated.³ The Superior Court denied McMillion's ineffective assistance of counsel claim on its merits. On appeal, this Court affirmed the denial of McMillion's motion.⁴

(5) In May 2004, McMillion filed his second motion for postconviction relief. McMillion again raised insufficient evidence and ineffective assistance of counsel. Moreover, McMillion alleged that he was wrongfully charged with having committed both Attempted Unlawful Sexual Intercourse in the First Degree and Unlawful Sexual Intercourse in the First Degree.⁵ He also alleged that he was wrongfully charged with both Attempted Unlawful Sexual Intercourse in the First Degree and Unlawful Sexual Penetration in the Third Degree.⁶ By order dated May 11, 2004, the Superior

³See Super. Ct. Crim. R. 61(i)(4) (providing that "[a]ny ground for relief that was formerly adjudicated . . . is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.").

⁴See *McMillion v. State*, 1998 WL 67727 (Del. Supr.) (affirming denial of first postconviction motion).

⁵McMillion's contention appears to arise from an entry in the Superior Court docket that his bond was revoked "as to Robbery 1st Degree and Unlawful Sexual Intercourse 1st Degree." *State v. McMillion*, Del. Super., Def. ID No. 9312012871, Dkt. No. 29.

⁶According to McMillion, the two offenses canceled each other out.

Court summarily denied McMillion's second postconviction motion as untimely,⁷ repetitive,⁸ and as formerly adjudicated.⁹ This appeal followed.

(6) In his opening brief on appeal, McMillion does not challenge the Superior Court's decision on his ineffective assistance of counsel claim. Accordingly, the claim is waived and will not be addressed by the Court.¹⁰

(7) Having considered McMillion's claims, as set forth in his opening brief, and the State's motion to affirm, we conclude that the Superior Court did not err when it denied McMillion's second motion for postconviction relief on procedural grounds.¹¹ It is clear that McMillion's motion is time-barred, as it was filed more than three years after the judgment of conviction became final.¹²

⁷See Super. Ct. Crim. R. 61(i)(1) (providing that "[a] motion for postconviction relief may not be filed more than three years after the judgment of conviction is final").

⁸See Super. Ct. Crim. R. 61(i)(2) (providing that "[a]ny ground for relief that was not asserted in a prior postconviction proceeding . . . is thereafter barred, unless consideration of the claim is warranted in the interest of justice.>").

⁹Super. Ct. Crim. R. 61(i)(4).

¹⁰*Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

¹¹See *Hamilton v. State*, 2004 WL 1097703 (Del. Supr.) (citing *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) (providing that the Superior Court must apply the procedural bars of Rule 61 before reaching the merits of the claims)).

¹²Super. Ct. Crim. R. 61(i)(1). McMillion's conviction became final in June 1995, after this Court's issuance of the mandate. *Jackson v. State*, 654 A.2d 829, 832-33 (Del. 1995).

Also, the motion is repetitive¹³ and, as to the insufficient evidence claim, it is formerly adjudicated.¹⁴ McMillion has offered no reason why reconsideration of the formerly adjudicated claim is warranted in the interest of justice.¹⁵ Moreover, McMillion has not overcome the three-year time bar by showing either that the Superior Court lacked jurisdiction or that there was a colorable claim of a miscarriage of justice because of a constitutional violation.¹⁶

(8) It is manifest on the face of McMillion's opening brief that this appeal is without merit. The issues presented on appeal are controlled by settled Delaware law. To the extent that judicial discretion is implicated, there was no abuse of discretion.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹³Super. Ct. Crim. R. 61(i)(2).

¹⁴Super. Ct. Crim. R. 61(i)(4).

¹⁵*Id.*

¹⁶*See* Super. Ct. Crim. R. 61(i)(5) (providing that the bars to relief are inapplicable to a jurisdictional claim or to a colorable claim "of a constitutional violation that undermined the fundamental legality, reliability, integrity of fairness of the proceedings leading to the judgment of conviction.").