

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FREDERICK W. SMITH, JR.,	§
	§ No. 6, 2006
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 93007368DI
	§
Plaintiff Below-	§
Appellee.	§

Submitted: March 31, 2006

Decided: June 13, 2006

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

ORDER

This 13th day of June 2006, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Frederick W. Smith, Jr., filed an appeal from the Superior Court’s December 19, 2005 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In November 1993, a Superior Court jury found Smith guilty of two counts of Unlawful Sexual Intercourse in the Second Degree, Unlawful Sexual Penetration in the Third Degree, and Assault in the Third Degree. He was sentenced to a total of 32 years of Level V incarceration, followed by

probation. This Court affirmed Smith's convictions and sentences on direct appeal.¹ The record reflects that this is Smith's eighth motion for postconviction relief.

(3) The Superior Court correctly denied Smith's motion. Not only was the motion untimely,² it was procedurally barred.³ Moreover, Smith's attempt to avoid the procedural bars by claiming a double jeopardy violation is unavailing.⁴ Smith argues that his convictions of second-degree unlawful sexual intercourse and third-degree assault constitute a violation of double jeopardy because both charges contain the element of infliction of physical injury upon the victim.⁵ However, the record reflects that a physical altercation occurred between Smith and the victim prior to the sexual offense. Because there was independent evidence supporting each of these charges, no double jeopardy violation occurred.⁶

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹ *Smith v. State*, 669 A.2d 1 (Del. 1995).

² Super. Ct. Crim. R. 61(i) (1).

³ Super. Ct. Crim. R. 61(i) (2), (3) and (4).

⁴ Super. Ct. Crim. R. 61(i) (5).

⁵ Del. Code Ann. tit. 11, §§ 774, 611.

⁶ *Spencer v. State*, 868 A.2d 821, 823 (Del. 2005); *Whitfield v. State*, 867 A.2d 168, 171 (Del. 2004).