

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT L. CARROLL,	§
	§ No. 569, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 91002197DI
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 21, 2006  
Decided: June 28, 2006

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

**ORDER**

This 28th 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, Robert L. Carroll, filed an appeal from the Superior Court’s November 2, 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) The record reflects that, in June 1990, seventy-six year-old Eileen Gardner was raped at her home on South Franklin Street in Wilmington, Delaware. She fell asleep while watching television with her front door open. At about midnight, she saw a man standing in the room

with her. He struck her in the face several times, forced a pillow over her face, and raped her. After the man left, Mrs. Gardner ran to the house of a neighbor. The police were called and Mrs. Gardner was taken to the hospital for treatment. She was unable to provide a description of her assailant to police. About a week after the attack, Robert Carroll was arrested in an unrelated incident and unexpectedly confessed to the rape. An FBI agent testified that, based upon microscopic examination, a hair found at the scene was consistent with Carroll's hair.

(3) In March 1991, a Superior Court jury found Carroll guilty of Burglary in the First Degree, Attempted Murder in the First Degree, and Unlawful Sexual Intercourse in the First Degree. He was sentenced to two terms of life imprisonment plus thirty years. This Court affirmed Carroll's convictions and sentences on direct appeal.<sup>1</sup>

(4) In May 1995, attorneys from the Innocence Project filed a motion to conduct DNA testing on hairs contained in the original rape kit. DNA testing done in 1999 revealed that the hairs tested were from a female and did not definitively confirm the presence or absence of male DNA. In August 2002, a new attorney representing Carroll filed a motion to have

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<sup>1</sup> *Carroll v. State*, Del. Supr., No. 198, 1991, Horsey, J. (May 27, 1992).

additional material from the rape kit subjected to DNA testing.<sup>2</sup> That testing, which was performed in 2003 by the Medical Examiner, found that Carroll's blood DNA sample was consistent with a sperm DNA sample from the rape kit. A private laboratory confirmed the conclusions of the Medical Examiner. On the basis of those results, the Superior Court denied Carroll's motion for a new trial.<sup>3</sup> Carroll's appeal from that decision was dismissed as untimely.<sup>4</sup>

(5) In this appeal, Carroll claims that the Superior Court should have granted his untimely motion for postconviction relief<sup>5</sup> because he has demonstrated a colorable claim of a miscarriage of justice because of a constitutional violation.<sup>6</sup> Specifically, Carroll argues that: a) the 1999 testing of the hair established his actual innocence; b) at trial, the prosecution failed to disclose this exculpatory evidence to the defense; and c) his trial counsel provided ineffective assistance by not raising the issue of the prosecution's failure to disclose the exculpatory evidence. Carroll also claims that the Superior Court's 2004 denial of his motion for a new trial was erroneous and that Del. Code Ann. tit. 11, § 4504 is unconstitutional.

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<sup>2</sup> Del. Code Ann. tit. 11, § 4504(a) (providing for post-conviction DNA testing to demonstrate a person's actual innocence).

<sup>3</sup> Del. Code Ann. tit. 11, § 4504(b) (governing motions for new trial based upon DNA evidence not available at trial).

<sup>4</sup> *Carroll v. State*, Del. Supr., No. 261, 2004, Steele, C.J. (Aug. 12, 2004).

<sup>5</sup> Super. Ct. Crim. R. 61(i) (1).

<sup>6</sup> Super. Ct. Crim. R. 61(i) (5).

(6) Carroll has not succeeded in demonstrating the existence of a constitutional violation in this case. The record reflects that the analyst who conducted the testing on the hair presented testimony at Carroll's trial about the testing that was conducted. This is not a situation where the prosecution's failure to disclose exculpatory evidence resulted in prejudice to the defendant's case because of the expert's unavailability to present testimony at trial that was favorable to the defendant.<sup>7</sup> For this reason we find Carroll's first three claims, all of which are based upon the testing done in 1999, to be without merit.

(7) Carroll's next claim is that the Superior Court's 2004 decision denying his motion for a new trial was erroneous on the ground that the Superior Court did not consider whether the results of the blood test performed in 2003 would have been admissible at trial. Carroll attempted to appeal the Superior Court's 2004 decision, but this Court dismissed his appeal as untimely. Carroll may not attempt to raise issues in this appeal that should have been raised in a timely appeal from the Superior Court's 2004 decision.<sup>8</sup>

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<sup>7</sup> *Ayers v. State*, 436 A.2d 800, 803 (Del. 1981) (holding that the prosecution's delay in having physical evidence tested resulted in the unavailability of testimony about exculpatory test results at trial and a violation of the defendant's right to a fair trial).

<sup>8</sup> *Davis v. State*, Del. Supr., No. 219, 1995, Veasey, C.J. (July 17, 1995). We note that the Superior Court's decision does not reflect any basis for reversal in any case.

(8) Carroll's final claim is that Del. Code Ann. tit. 11, § 4504 is unconstitutional. Carroll did not raise that issue in his first postconviction motion. It is, therefore, barred in this proceeding.<sup>9</sup> Moreover, we do not find that Carroll has demonstrated a colorable claim of a miscarriage of justice because of a constitutional violation, which would excuse the procedural bar.<sup>10</sup>

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

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>9</sup> Super. Ct. Crim. R. 61(i) (2).

<sup>10</sup> Super. Ct. Crim. R. 61(i) (5).