

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEORGE KISER,	§	
	§	No. 663, 2006
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	and for Kent County in Cr.
	§	ID No. 9709000684.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.		

Submitted: March 2, 2007

Decided: May 9, 2007

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

ORDER

This 9th day of May 2007, 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:

(1) The appellant, George Kiser, has appealed the Superior Court's order of November 22, 2006, that summarily denied his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The appellee, State of Delaware, has moved to affirm the Superior Court's judgment on the basis that the appeal is without merit.¹ We agree and affirm.

¹Del. Supr. Ct. R. 25(a) (2007).

(2) Kiser was indicted for selling crack cocaine to undercover police officers during the summer of 1997. At the conclusion of a two-day jury trial in April 1999, Kiser was convicted of four counts of Delivery of Cocaine and two counts of Conspiracy in the Second Degree. The Superior Court sentenced Kiser to sixty years of mandatory imprisonment followed by four years of probation. By order dated October 26, 2000, this Court affirmed the conviction and sentence.²

(3) At trial, Kiser's defense counsel ("trial counsel") presented a defense of mistaken identity. The trial transcript reflects that trial counsel cross-examined the prosecution's sole witness, an undercover state police detective, with photographs of Kiser and other males, several of whom were Kiser's relatives. Trial counsel also presented several defense witnesses who testified about Kiser's appearance during the summer of 1997.

(4) In April 2002, Kiser, with the assistance of new counsel, filed a motion for postconviction relief. Kiser alleged that he was deprived of the effective assistance of counsel when trial counsel failed to adequately develop his mistaken identity defense.

(5) The Superior Court referred the postconviction motion to a Commissioner. After briefing, the Commissioner filed a report

²*Kiser v. State*, 2000 WL 1626992 (Del. Supr).

recommending the dismissal of Kiser's motion on the basis that Kiser had not demonstrated prejudice arising from the alleged shortcomings of his defense. By order dated October 4, 2002, the Superior Court adopted the Commissioner's Report and Recommendation and dismissed Kiser's postconviction motion.³ On appeal, this Court affirmed the Superior Court's judgment.⁴

(6) On November 20, 2006, Kiser filed a *pro se* motion for postconviction relief. Kiser again alleged ineffective assistance of counsel, contending that trial counsel had failed to review crucial defense evidence that Kiser made available to him before trial, namely an additional photograph of a male relative and the testimony of Kiser's mother. By order dated November 22, 2006, the Superior Court summarily dismissed Kiser's motion as untimely

³*State v. Kiser*, 2002WL31236301 (Del. Super. Ct.).

⁴*Kiser v. State*, 2003 WL 1572122 (Del. Supr.).

(Rule 61(i)(1),⁵ repetitive (Rule 61(i)(2), and without prejudice (Rule 61(i)(3)).⁷ This appeal followed.

(7) When considering a motion for postconviction relief under Rule 61, the Superior Court must apply the procedural requirements of the rule before reaching the merits of the claims.⁸ Likewise, on appeal this Court will not consider the merit of a postconviction claim unless the Superior Court improperly applied the procedural requirements of Rule 61.⁹

(8) Kiser has not demonstrated that the Superior Court misapplied the procedural bars of Rule 61, and the record does not reflect a basis upon which to apply an exception to those bars.¹⁰ The Court also concludes that

⁵See Del. Super. Ct. Crim. R. 61(i)(1) (2004) (providing in pertinent part that a motion for postconviction relief may not be filed more than three years after the judgment of conviction is final).

⁶See Del. Super. Ct. Crim. R. 61(i)(2) (2007) (providing that any 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).

⁷See Del. Super. Ct. Crim. R. 61(i)(3) (2007) (providing that any ground for relief that was not asserted is barred unless the movant demonstrates cause for relief from the procedural default and prejudice as a result of the violation of the movant's rights).

⁸See *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 requirements of Rule 61 before reaching the merits of the claims)).

⁹*Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁰See Del. Super. Ct. Crim. R. 61(i)(5) (2007) (providing in pertinent part that the procedural bars of Rule 61(i)(1), (2) and (3) shall not apply 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

Kiser has not demonstrated why his ineffective assistance of counsel claim should be reconsidered in the interest of justice.¹¹ Under Rule 61(i)(4), a postconviction movant is not entitled to have a court reexamine a claim that has been previously adjudicated “simply because the claim is refined or restated.”¹²

(9) It is manifest on the face of the opening brief that this appeal is without merit. The issues on appeal are controlled by settled Delaware law, and there was no abuse of discretion by the Superior Court.

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

BY THE COURT:

/s/ Carolyn Berger
Justice

judgment of conviction).

¹¹See Del. Super. Ct. Crim. R. 61(i)(4) (2007) (providing that any ground for relief that was formerly adjudicated is barred unless reconsideration of the claim is warranted in the interest of justice).

¹²*Collingwood v. State*, 2000 WL 1177630 (Del. Supr.) (citing *Skinner v. State*, 607 A.2d 1170, 1172 (1992) (quoting *Riley v. State*, 585 A.2d 719, 721 (1990))).