

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HOWARD WALSH,

Defendant Below,  
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below,  
Appellee.

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No. 688, 2015

Court Below—Superior Court  
of the State of Delaware

Cr. ID No. 1410004172

Submitted: December 28, 2015

Decided: March 16, 2016

Before **STRINE**, Chief Justice; **VAUGHN**, and **SEITZ**, Justices.

**ORDER**

This 16<sup>th</sup> day of March 2016, upon consideration of the notice to show cause and the appellant’s response, it appears to the Court that:

(1) After a two-day trial, a Superior Court jury convicted the appellant, Howard Walsh, of three counts of Possession of a Firearm by a Person Prohibited and other offenses. The Superior Court sentenced Walsh on November 6, 2015.

(2) On November 10, 2015, Walsh filed a *pro se* motion for postconviction relief under Superior Court Criminal Rule 61 (“Rule 61”). Two

days later, Walsh filed a direct appeal in this Court.<sup>1</sup> Rule 61(b)(4) provides that a motion for postconviction relief cannot be filed until the underlying conviction is final.<sup>2</sup> Under Rule 61(m)(2), when a defendant has filed a direct appeal of a conviction in this Court, the conviction is not final until the Court has issued its decision and mandate.<sup>3</sup>

(3) Rule 61(c)(1) provides that a motion for postconviction relief that does not substantially comply with the requirements of Rule 61(b) shall be returned to the movant if the court so directs.<sup>4</sup> In this case, the Superior Court reviewed Walsh's motion for postconviction relief and concluded that, because Walsh had contemporaneously-filed a direct appeal of the convictions in this Court, the convictions were not final, and the motion was premature. By order dated December 1, 2015, the Superior Court returned the motion for postconviction relief to Walsh, explaining that the motion did not comply with the finality requirements of Rule 61(b)(4).

(4) Walsh filed this appeal from the Superior Court's December 1 order of noncompliance. Upon receipt of the appeal, the Clerk directed Walsh to show

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<sup>1</sup> The Court has taken judicial notice of Walsh's direct appeal proceeding as *Walsh v. State*, No. 612, 2015. The docket reflects that Walsh is proceeding *pro se* on appeal and has filed the opening brief.

<sup>2</sup> See Del. Super. Ct. Crim. R. 61(b)(4) ("A [postconviction] motion may not be filed until the judgment of conviction is final.").

<sup>3</sup> R. 61(m)(2); *Jackson v. State*, 654 A.2d 829, 832-33 (Del. 1995). See Del. Supr. Ct. R. 19 (governing mandate).

<sup>4</sup> R. 61(c)(1).

cause why the appeal should not be dismissed for this Court's lack of jurisdiction to consider an appeal from an interlocutory order in a criminal matter.<sup>5</sup> In response to the Clerk's notice, Walsh contends that he should not have to wait until his direct appeal is decided before seeking postconviction relief. Walsh's contention goes against the plain language of Rule 61(b)(4).<sup>6</sup>

(5) Under the Delaware Constitution only a final judgment may be reviewed by the Court in a criminal case.<sup>7</sup> In this case, the Court concludes that the Superior Court's December 1 order of noncompliance is not a final order and cannot be appealed to this Court.<sup>8</sup> Also, the Court concludes that the Superior Court properly determined that Walsh's direct appeal preempted his motion for postconviction relief and rendered the motion premature under Rule 61(b)(4).<sup>9</sup>

NOW, THEREFORE, IT IS ORDERED, under Supreme Court Rule 29(b), that Walsh's appeal from the order of noncompliance is DISMISSED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.  
Justice

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<sup>5</sup> See Del. Supr. Ct. R. 29(b) (governing involuntary dismissal upon notice of the Court).

<sup>6</sup> *Supra* note 2.

<sup>7</sup> Del. Const. art. IV, § 11; *Rash v. State*, 318 A.2d 603, 604 (Del. 1974).

<sup>8</sup> *Taylor v. State*, 2015 WL 5076795 (Del. Aug. 26, 2015).

<sup>9</sup> *Carter v. State*, 2005 WL 1175938 (Del. May 16, 2005).