

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

v.

ROBERT MILLER,

Defendant.

)
)
)
)
)
)
)

I.D. No. 1412002671

Submitted: September 25, 2017

Decided: September 27, 2017

Upon Defendant's Motion for Postconviction Relief,
SUMMARILY DISMISSED.

ORDER

Robert Miller, *pro se*, Wilmington, DE.

Renee Hrivnak, Esquire, Deputy Attorney General, Department of Justice, 820 N.
French St., Wilmington, Delaware, Attorneys for the State.

WHARTON, J.

This 27th day of October, 2017, upon consideration of Defendant's second Motion for Postconviction Relief and the record in this matter, it appears to the Court that:

1. Defendant Robert Miller ("Miller") was indicted by the Grand Jury on a single count of Assault Second Degree. On June 9, 2015, Miller pled guilty to that charge. In exchange, the State dropped a charge of Offensive Touching in the Court of Common Pleas and agreed to cap its sentencing recommendation of unsuspended incarceration at three years. On December 5, 2015, the Court sentenced Miller to eight years of incarceration pursuant to 11 *Del. C.* § 4204(k), followed by six months at Level IV pursuant to 11 *Del. C.* § 4204(l).

2. Miller appealed his conviction to the Delaware Supreme Court. That court entered an Order affirming his conviction on May 18, 2016. A motion for postconviction relief ("the first motion") pursuant to Superior Court Criminal Rule 61, Miller's first, was timely filed on December 14, 2015. The first motion raised a single issue of ineffective assistance of counsel and did not request appointment of counsel. On June 7, 2016, the Court directed Ross A. Flockerzie, Esquire, Miller's trial/plea attorney, to submit an affidavit responding to Miller's allegations, which Mr. Flockerzie did on July 6, 2016. The State responded on October 14, 2016.

3. In his first motion, Miller claimed that: (1) counsel failed to obtain hospital records of the victim that would have shown her injuries were old, despite being asked to obtain them; (2) counsel never responded to voice mail messages; (3)

counsel only discussed taking the plea with Miller; and (4) after sentencing, Miller asked counsel about an appeal without response.¹ This Court denied the motion on October 18, 2016.² Miller did not file a timely appeal of that decision.³

4. Miller now has filed this Motion for Postconviction Relief (“Motion”), his second, on September 25, 2017.⁴ In it, he incorrectly represents that the basis of his conviction was the finding of a judge in a non-jury trial, when, in fact, Miller entered a guilty plea.⁵ He raises a single claim for relief – that there is newly discovered evidence that the victim’s wounds were old, occurring in 2009 -2010, and that she was seen for these injuries at the Wilmington Hospital.⁶

5. Before addressing the merits of a defendant’s motion for postconviction relief, the Court must first apply the procedural bars of Superior Court Criminal Rule 61(i).⁷ If a procedural bar exists, then the Court will not consider the merits of the postconviction claim.⁸

6. Under Delaware Superior Court Rules of Criminal Procedure, a motion for postconviction relief can be barred for time limitations, successive motions, procedural defaults, and former adjudications. A motion exceeds time limitations if

¹ Mot. for Postconviction Relief, D.I. 16.

² *State v. Miller*, 2016 WL 2094170 (Del. Super. 2017).

³ D.I. 31.

⁴ Mot. for Postconviction Relief, D.I. 32.

⁵ *Id.*, at ¶ 6.

⁶ *Id.*, at 3.

⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ *Id.*

it is filed more than one year after the conviction becomes final or if it asserts a newly recognized, retroactively applied right more than one year after it was first recognized.⁹ A second or subsequent motion is considered successive and therefore barred and subject to summary dismissal unless the movant was convicted after a trial and “pleads with particularity that new evidence exists that the movant is actually innocent” or “pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant’s case and renders the conviction ... invalid.”¹⁰ Grounds for relief “not asserted in the proceedings leading to the judgment of conviction” are barred as procedurally defaulted unless the movant can show “cause for relief” and “prejudice from [the] violation.”¹¹ Grounds for relief formerly adjudicated in the case, including “proceedings leading to the judgment of conviction, in an appeal, in a post-conviction proceeding, or in a federal habeas corpus hearing” are barred.¹²

7. Summary dismissal is appropriate if it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief.¹³

⁹ Super. Ct. Crim. R. 61(i)(1).

¹⁰ Super. Ct. Crim. R. 61(i)(2); Super. Ct. Crim. R. 61(d)(2).

¹¹ Super. Ct. Crim. R. 61(i)(3).

¹² Super. Ct. Crim. R. 61(i)(4).

¹³ Super. Ct. Crim. R. 61(d)(5).

8. In applying the procedural bars of Rule 61(i), it appears that the motion is untimely, successive, and subject to procedural default since it asserts grounds for relief that were not raised in Miller's previous appeal or postconviction relief motion. The Supreme Court affirmed his conviction and sentence on May 18, 2016. This is his second postconviction relief motion and was filed on September 25, 2017. While he alluded to the victim's injuries being old in his first postconviction relief motion, he did so only in the context of his ineffective assistance of counsel claim and not as newly discovered evidence. In order to overcome these procedural bars Miller must satisfy the pleading requirements of Rule 61(2)(i) or (2)(ii)¹⁴ by pleading "with particularity that new evidence exists that creates a strong inference that the movant is actually innocent"¹⁵ or by pleading "with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction ...invalid."¹⁶ Miller attempts to satisfy this requirement by characterizing his claim that the victim's injuries were old as newly discovered evidence. This attempt fails because he made the same allegation in his first postconviction relief motion in the context of his ineffective assistance of counsel claim.¹⁷ Further, because Miller was not convicted at trial, but, rather,

¹⁴ Super Ct. Crim. R. 61(i)(5).

¹⁵ Super. Ct. Crim. R. 61(d)(2)(i).

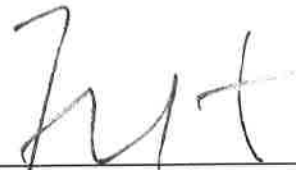
¹⁶ Super. Ct. Crim. R. 61(d)(2)(ii).

¹⁷ *Miller*, at *1.

entered a guilty plea, Rule 61(d)(2) requires that this successive motion be summarily dismissed.

Therefore, Defendant's Motion for Postconviction Relief is **SUMMARILY DISMISSED.**

IT IS SO ORDERED.



Ferris W. Wharton, J.

oc: Prothonotary
cc: Investigative Services