

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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January 3, 2013

Thomas A. Morgan
SBI# 00189
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: *State of Delaware v. Thomas A. Morgan*, Def. ID# 92S05729DI (R-6)

DATE SUBMITTED: October 23, 2012

Dear Mr. Morgan:

Pending before the Court is the sixth motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61") which Thomas A. Morgan ("defendant") has filed. Some of the arguments defendant advances are not within the scope of a motion for postconviction relief, and consequently, are not considered. The other arguments are procedurally barred. This is my decision denying the pending motion.

In 1993, a jury found defendant guilty of two counts of first degree unlawful sexual intercourse, one count of second degree unlawful sexual contact, and one count of second degree kidnapping. He was sentenced to 36 years of incarceration, suspended after serving 32 years at Level 5 for various levels of probation.

Defendant appealed. His attorney moved to withdraw, pursuant to Supreme Court Rule 26 (c), on the ground he found no meritorious claims to raise on appeal. Although given the opportunity, defendant failed to raise any meritorious claims. The Supreme Court affirmed the judgment of the Superior Court.¹ The mandate was dated May 23, 1994.² This May 23, 1994 date is when the judgment of conviction became final for Rule 61 purposes.³

On November 9, 1994, defendant filed his first motion for postconviction relief. He argued ineffective assistance of counsel. The grounds in support thereof were that his attorney did not allow him a chance to testify; the police interviewed the child witness without the knowledge or consent of the victim's mother; and there was insufficient evidence to support his conviction.

By letter decision dated November 14, 1994, the Superior Court denied the motion, ruling the claims were meritless.⁴ On appeal, defendant raised a single issue, which differed from that argued to the Superior Court: he was denied ineffective assistance of counsel in his direct appeal because his attorney failed to raise any arguable issues for the Supreme Court's review.⁵ The Supreme Court ruled this contention to be meritless in light of that court's previous finding that the record on defendant's "direct appeal was totally devoid of any arguably appealable issues."⁶

On February 3, 1998, defendant filed his second motion for postconviction relief. The

¹*Morgan v. State*, 645 A.2d 569, 1994 WL 202272 (Del. May 5, 1994).

²Docket Entry 65.

³Super. Ct. Crim. R. 61(m)(2).

⁴*State v. Morgan*, Del. Super., Def. ID# 92S05729DI, Lee, J. (Nov. 14, 1994).

⁵*Morgan v. State*, 655 A.2d 308, 1995 WL 57368 (Del. Feb. 9, 1995).

⁶*Id.*, at *1.

grounds he asserted were ineffective assistance of counsel during trial and on appeal; prosecutorial misconduct/suppression of favorable evidence; and abuse of discretion by the trial court. The Superior Court denied the motion as procedurally barred.⁷

On appeal, defendant argued the Superior Court abused its discretion when it generally ruled the motion was procedurally barred.⁸ The Supreme Court explained that all of the claims were procedurally barred and because defendant failed to establish any exceptions to the bars, the Superior Court did not abuse its discretion in summarily disposing of the motion.⁹

On April 20, 2004, defendant filed his third motion for postconviction relief. Defendant asserted the following grounds for relief:

- 1) He was not intelligent enough to understand his *Miranda* rights;
- 2) Ineffective assistance of counsel for numerous reasons;
- 3) Prosecutorial misconduct concerning the phrasing of charges in the indictment;
- 4) Prosecutorial misconduct in not disclosing a tape of the victim;
- 5) Abuse of the trial court's discretion for not granting a continuance;
- 6) Abuse of the trial court's discretion for not holding a hearing "on allegations and voluntariness of permitted [sic] of false allegation's [sic] unreleable [sic] untrustworthig [sic] statement to jury which violated Due process, 14th amendment";
- 7) Evidentiary errors;
- 8) No medical evidence supporting the allegations of sexual abuse and unlawful sexual

⁷*State v. Morgan*, Del. Super., Def. ID# 92S05729DI, Lee, J. (Feb. 9, 1998).

⁸*Morgan v. State*, 710 A.2d 218, 1998 WL 280353 (Del. May 7, 1998).

⁹*Id.* at *2.

intercourse; and

9) Ineffective assistance of counsel.¹⁰

The Superior Court denied the motion, ruling that the claims were procedurally barred and defendant had failed to establish that any of the exceptions to the procedural bars applied.¹¹ The Supreme Court affirmed.¹²

On September 19, 2005, defendant filed a motion which he labeled as one for postconviction relief. However, in actuality, it was a motion for a new trial and the Court treated it as a motion for new trial in denying it.¹³ Due to defendant's incorrect label, this motion was docketed as his fourth postconviction motion. Thus, the docketing reflects the numbers on the subsequent postconviction motions to be one higher than the actual number of postconviction motions filed.

On March 14, 2006, defendant filed what was, in actuality, his fourth motion for postconviction relief. The grounds he asserted were as follows:

1) Trial counsel failed to preserve and assert errors;

2) Trial counsel failed to object to a Rule 16 violation: the tape of the victim's interview was not given to the defense until the time of the trial;

3) Trial counsel failed to communicate with defendant: he failed to keep defendant apprised of the status of the case, never visited defendant before the trial and did not write defendant during the pretrial period;

¹⁰*State v. Morgan*, 2004 WL 1732282 (Del. Super. July 27, 2004).

¹¹*Id.*

¹²*Morgan v. State*, 865 A.2d 522, 2005 WL 53272 (Del. Jan. 7, 2005).

¹³*State v. Morgan*, Del. Super., Def. ID# 92S05729DI, Stokes, J. (Dec. 7, 2005).

4) Trial counsel failed to preserve and assert errors or to investigate and make a record suitable for review on appeal of the possible affect on defendant's right to a fair trial;

5) Trial counsel's failure to properly investigate impaired his ability to properly evaluate a plea offer in contrast to the likelihood of success at trial;

6) Trial counsel failed to properly investigate the existence of potentially favorable defense witnesses;

7) Trial counsel failed to object to and appeal what defendant labels to be an inadmissible and inflammatory statement;

8) Trial counsel's unfamiliarity with the case meant trial counsel was unable and unprepared to make strategic decisions regarding the admissibility of letters;

9) Trial counsel's strategy was unreasonable;

10) Trial counsel should have objected to, and pursued upon appeal, the sufficiency of the evidence regarding the crime of kidnapping, particularly with regard to the restraint element;

11) Trial counsel was ineffective in questioning a detective about his opinion regarding the veracity of the victim's testimony; and

12) Trial counsel failed to file a motion to suppress defendant's confessions.

This Court denied the motion, ruling the various grounds were procedurally barred and defendant had failed to establish exceptions to those bars.¹⁴ The Supreme Court affirmed.¹⁵ In addition, the Supreme Court ruled:

¹⁴*State v. Morgan*, 2006 WL 1454812 (Del. Super. May 25, 2006).

¹⁵*Morgan v. State*, 909 A.2d 595, 2006 WL 2787497 (Del. Sept. 26, 2006).

Moreover on appeal, this Court concludes that consideration of Morgan’s claims is not warranted in the interest of justice, on the basis that the Superior Court lacked jurisdiction, or on the basis of a constitutional violation.¹⁶

On November 8, 2007, defendant filed his fifth motion for postconviction relief. The ground asserted was “that the evidence did not support a kidnapping conviction in that the restraint ‘was only incidental to the commission of the underlying offense and not a separate offence [sic].’”¹⁷ The Superior Court ruled the argument was procedurally barred and no exception to the bars existed which would allow the Court to consider the argument.¹⁸ The Supreme Court affirmed this decision.¹⁹

On March 29, 2012, the Superior Court denied defendant’s motion for a sentence reduction.²⁰

On appeal, defendant raised two claims he did not raise in the Superior Court:

1) his sentence should be overturned because of various constitutional violations that allegedly occurred during his trial, and 2) his sentence should be overturned because the Department of Correction’s procedures under 11 *Del. C.* § 4217 are discriminatory and unconstitutional.²¹ The Supreme Court affirmed the decision of the Superior Court, rejecting defendant’s contention of error.²² The Supreme Court then stated:

¹⁶*Id.* at *1.

¹⁷*State v. Morgan*, 2007 WL 4576766, *1 (Del. Super. Dec. 14, 2007).

¹⁸*Id.*

¹⁹*Morgan v. State*, 945 A.2d 1167, 2008 WL 727035 (Del. March 19, 2008).

²⁰Docket Entry 164.

²¹*Morgan v. State*, 49 A.3d 1193, 2012 WL 3115539, * 1 (Del. July 31, 2012).

²²*Id.*

(6) Because Morgan's second two claims were not raised in the Superior Court, they will be reviewed only if justice requires it. Constitutional claims of the type raised by Morgan are not properly brought in an appeal of a denial of a motion for sentence modification, but, rather, are properly brought in conjunction with a motion for postconviction relief filed in the Superior Court in the first instance. We, therefore, decline to consider Morgan's constitutional claims in this proceeding. [Footnote and citation omitted.]²³

The statute, 11 *Del. C.* § 4217, is important to the pending motion. Therein, it is provided:

§ 4217. Jurisdiction over sentence retained.

1. (a) In any case where the trial court has imposed an aggregate sentence of incarceration at Level V in excess of 1 year, the court shall retain jurisdiction to modify the sentence to reduce the level of custody or time to be served under the provisions of this section.

(b) The court may modify the sentence solely on the basis of an application filed by the Department of Correction for good cause shown which certifies that the release of the defendant shall not constitute a substantial risk to the community or the defendant's ownself.

(c) Good cause under this section shall include, but not be limited to, rehabilitation of the offender, serious medical illness or infirmity of the offender and prison overcrowding.

(d) (1) Any application filed by the Department of Correction under this section shall be filed with the Board of Parole. The Board of Parole shall have the authority to promulgate reasonable regulations concerning the form and content of said applications. The Board of Parole may require the Department of Correction to provide it with any information in the possession of the Department reasonably necessary for the Board to assess such applications.

(2) Following the receipt of any application for modification filed by the Department of Corrections which conforms with any regulations and requirements of the Board of Parole promulgated pursuant to paragraph (1) of this subsection, the Board of Parole shall hold a hearing under the provisions of § 4350(a) of this title for the purpose of making a recommendation to the trial court as to the approval or disapproval of the application. This hearing shall not be held unless written notice of the hearing is provided to the Attorney General's office at least 30 days prior to scheduled hearing date. A copy of the

²³*Id.*

Department of Correction's application for modification shall be provided to the Attorney General's office along with written notice of the hearing date.

(3) Following the hearing described in paragraph (2) of this subsection, the Board of Parole may reject an application for modification if it determines that the defendant constitutes a substantial risk to the community, or if it determines that the application is not based on good cause. Notwithstanding any provisions of this section to the contrary, any application rejected pursuant to this paragraph shall not be forwarded to the Superior Court, and any offender who is the subject of such rejected application shall not be the subject of a subsequent application for modification for at least 1 year, except in the case of serious medical illness or infirmity of said offender.

(4) Only in those cases where the Board by a majority vote recommends a modification of the sentence shall the application be submitted to the Court for consideration.

(e) Upon receipt of the recommendation of the Board of Parole, the court may in its discretion grant or deny the application for modification of sentence. The court may request additional information, but need not hold further hearings on the application. The Court shall not act upon the application without first providing the Attorney General's office with a reasonable period of time to be heard on the matter. Should the Court deny the application because of a determination that the defendant constitutes a substantial risk to the community, or because it determines that the application lacks good cause, the defendant who is the subject of the denied application shall not be the subject of a subsequent application for modification for at least 1 year, except in the case of serious medical illness or infirmity of the defendant.

(f) Notwithstanding any provision of this section to the contrary, in the case of any offender who is serving a sentence of incarceration at Level V imposed pursuant to a conviction for any crime, the Court may order that said offender shall be ineligible for sentence modification pursuant to this section until a specified portion of said Level V sentence has been served, except that no offender who is serving a sentence of incarceration at Level V imposed pursuant to a conviction for a violent felony in Title 11 shall be eligible for sentence modification pursuant to this section until the offender has served at least one-half of the originally imposed Level V sentence, and no offender who is serving a statutory mandatory term of incarceration at Level V imposed pursuant to a conviction for any offense set forth in Title 11 shall be eligible for sentence modification pursuant to this section during the mandatory portion of said sentence. Nothing in this paragraph shall preclude a sentence modification pursuant to this section which is based solely upon serious medical illness or

infirmity of the offender.

(g) Nothing contained in this section shall be construed to limit the court's ability to modify a sentence within the scope of the trial court's duly promulgated rules.

(h) For purposes of this section, "rehabilitation" is defined as the process of restoring an individual to a useful and constructive place in society especially through some form of vocational, correctional, or therapeutic retraining.

Defendant now has filed his sixth motion for postconviction relief.

It appears defendant is of the belief that the Supreme Court's statement in *Morgan v. State*, 49 A.3d 1193, 2012 WL 3115539, * 1 (Del. July 31, 2012), that he should set forth his arguments in a postconviction proceeding means the Superior Court must consider them. That is not the case. Instead, what the Supreme Court was saying is that the claims were not correctly before it and defendant had to raise them first in the Superior Court.

Rule 61(a)(1) specifies the scope of the rule. Its pertinent parts provide:

(a) *Scope of rule.* (1) Nature of proceeding. This rule governs the procedure on an application by a person in custody ... under a sentence of this court seeking to set aside a judgment of conviction ... on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction....

If an argument does not fall within the Rule's scope, the Court does not consider it.²⁴

Defendant has advanced several arguments which may not be brought pursuant to Rule 61 because he is not seeking to set aside the judgment of conviction.

In Arguments I and III, defendant attacks the constitutionality of 11 *Del. C.* § 4217.²⁵ He argues, in Arguments I and III, that the Department of Correction's alleged refusal to consider a

²⁴*State v. Rust*, 2011 WL 7645596 (Del. Super. Sept. 29, 2011).

²⁵Motion for Post Conviction Relief, Docket Entry 176, at 4-5; 8.

convicted sex offender for early release pursuant to 11 *Del. C.* § 4217 violates various constitutional rights. In Argument III, he asserts that the Department of Correction's requirement that an inmate have a GED or high school diploma before being considered for a sentence reduction violates the Americans with Disabilities Act.²⁶ He also argues that the existence of this statute prohibits him from seeking a sentence modification "pro se".²⁷

Even though the Supreme Court's statement in *Morgan v. State*, 49 A.3d 1193, 2012 WL 3115539, * 1 (Del. July 31, 2012), possibly may be read to indicate that defendant could file an attack on 11 *Del. C.* § 4217 in a postconviction relief motion, he may not. Defendant is not seeking to set aside his judgment of conviction. Instead, he is attacking a statute which allows for a reduction of his sentence. This statutory attack is not within the scope of a Rule 61 motion and the Court will not consider it. It is inappropriate for this Court to render advice to defendant as to the correct legal course to pursue in order to attack the constitutionality of 11 *Del. C.* § 4217. However, it may not be pursued within the context of this criminal case of *State v. Morgan*, Def. ID# 92S05729DI. Any future filings attacking 11 *Del. C.* § 4217 within this criminal case shall be summarily dismissed.

In Argument III, defendant incorrectly argues that this Court will not accept *pro se* motions for reduction of a sentence pursuant to Superior Court Criminal Rule 35(b) and it requires only attorneys to file those motions. That contention is not within the scope of Rule 61 since it does not seek to set aside the judgment of conviction. Furthermore, the contention is factually wrong.

In Argument I, defendant contends that the Superior Court acted with a closed mind when

²⁶Motion for Post Conviction Relief, Docket Entry 176 at 8.

²⁷*Id.*

it denied defendant's previous motions seeking a modification of his sentence. That argument, also, is not one which may be pursued on a motion for postconviction relief because it is not an attack on the judgment of conviction but instead, is an attack on the Court's considerations of his motions for sentence reduction. This legally frivolous argument fails, also.

The Court now turns to the arguments which are appropriately brought pursuant to Rule 61. However, the Court first must consider the procedural posture of each argument and if the arguments are procedurally barred, the Court does not consider the merits of the argument.

The version of Superior Court Criminal Rule 61(i) applicable to defendant's case provides as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or 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 judgment of conviction.

In Argument II, defendant generally asserts that his sentence should be overturned due to the constitutional and statutory violations that allegedly occurred. In the body of the argument, he cites to trial counsel's failure to assert errors on appeal. This argument is procedurally barred as untimely, repetitive, and previously adjudicated. Furthermore, the Supreme Court has specifically found that this argument does not establish an exception to the procedural bars.²⁸ Defendant makes other allegations of ineffective assistance of counsel in the second argument regarding a witness who was unavailable and a tape recording. The argument is unintelligible and the Court denies it for that reason. Defendant further argues the Court and defense counsel erred when they protected defendant by keeping certain information out of the proceedings which would most likely have been unfairly prejudicial to him.²⁹ This argument is procedurally barred because it is untimely and because defendant should have raised it previously. Because the argument defies logic, defendant cannot cite to any exception to the procedural bars which would allow the Court to consider this argument.

In Argument IV, defendant asserts that trial counsel was ineffective. The only claim which is specifically advanced is that trial counsel should have sought a mistrial. Again, this claim is procedurally barred as time-barred and repetitive. Defendant does not, in any manner, attempt to overcome the procedural bars.

Defendant's fifth argument is that the sentence should be overturned and remanded due to prosecutorial misconduct during the trial. This argument, also, is procedurally barred because it is time-barred, repetitive, and previously adjudicated. Defendant has failed to establish that any

²⁸*Morgan v. State*, 909 A.2d 595, 2006 WL 2787497 (Del. Sept. 26, 2006). *See pages 4-6, supra* (setting forth details of the arguments, procedural history and rulings).

²⁹Motion for Post Conviction Relief, Docket Entry 176 at 7.

exceptions to the bars would apply. The argument fails.

For the foregoing reasons, the Court denies defendant's motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office
Attorney General's Office
Office of the Public Defender