

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 9612002650
)	
)	
MARK A. KIRK,)	
)	
Defendant.)	

Submitted: February 16, 2015
Decided: April 21, 2015

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF (FIFTH)
SHOULD BE SUMMARILY DISMISSED.**

Delaware Department of Justice, 820 N. French St. 7th Floor, Criminal Division,
Wilmington, Delaware, 19801, Attorneys for the State.

MANNING, Commissioner

This 21st day of April, 2015, upon consideration of defendant Mark A. Kirk's fifth Motion for Postconviction Relief, the Court finds the following:

FACTS AND PROCEDURAL HISTORY

Kirk was convicted of three counts of murder in 1997 and sentenced to life in prison. Subsequent motions and appeals by Kirk resulted in him being resentenced to three counts of manslaughter and various assault charges, to a total of 46 years of incarceration. The facts leading to his convictions have been recited numerous times by this Court and the Delaware Supreme Court, and do not need repeating here. Kirk has previously filed four separate motions for postconviction relief, with some success. The present motion before the Court is Kirk's fifth with the Superior Court. Kirk's most recent motion for postconviction relief was in 2007.¹

DEFENDANT'S RULE 61 MOTION

Kirk's claim for postconviction relief is that he has "new evidence not presented at trial" that will exonerate him. This "newly discovered evidence" is a video created by forensic fire investigator John Lentini that depicts three failed attempts to ignite a fire on an electric stove using 70-proof Captain Morgan's Rum.² Kirk also makes various accusatory allegations regarding the competence of his trial counsel, competence of the defense expert who testified at trial and of the State Fire Marshal's investigation of the fire and reenactment. Finally, Kirk challenges this Court to have the "moral fiber" to give him the chance to present his "new evidence" and prove "beyond any shadow of a doubt I didn't start [the] fire."

¹ See *State v. Kirk*, 2007 WL 1446671 (Del. Super. 2007) (Summarily dismissing Kirk's Rule 61 claims), *aff'd*, *Kirk v. State*, 940 A.2d 945, 2007 WL 4260174 (Del. 2007).

² A copy of this video was provided to the Court with the 2007 motion and is still in the Court's file. According to the label on the disk, the video was created on July 6, 2006, by Applied Technical Services, Inc.

Kirk asserts that with the most recent amendment of Superior Court Criminal Rule 61, on June 4, 2014, he should be allowed to present his “new evidence” pursuant to Rule 61(d)(2)(i). The newly amended Rule 61(d) states as follows:

(d) Preliminary consideration.

(1) First postconviction motion. -- A first postconviction motion shall be presented promptly to the judge who accepted a plea of guilty or nolo contendere or presided at trial in the proceedings leading to the judgment under attack. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge in accordance with the procedure of the court for assignment of its work. The judge shall promptly examine the motion and contents of the files relating to the judgment under attack.

(2) Second or subsequent postconviction motions. -- A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted after a trial and the motion either:

(i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or

(ii) 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 or death sentence invalid.

LEGAL STANDARD

To prevail on an ineffective assistance of counsel claim, a defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.³ The first prong requires that a defendant show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires that the defendant show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.⁴

³ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

⁴ *Id.*

When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.⁵

Mere allegations of ineffectiveness will not suffice; a defendant must make and substantiate concrete allegations of actual prejudice.⁶ An error by defense counsel, even if professionally unreasonable, does not warrant setting aside a judgment of conviction if the error had no effect on the judgment.⁷ Finally, and of most applicability here, a reviewing court need not consider the merits of a Rule 61 motion if the motion is procedurally barred.⁸

LEGAL ANALYSIS

Kirk's claim is time-barred under Superior Court Criminal Rule 61(i)(1) because this *fifth* motion was not filed within one year of the date the conviction became final. Kirk seeks to avoid this bar to relief by relying on Rule 61(i)(5), which states that the procedural bars are inapplicable "to a claim [that] satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of the rule." As noted above, one such pleading is that "new evidence" was discovered "that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted." While Rule 61(d)(2)(i) may be newly amended, the right to seek a new trial based on newly discovered evidence has existed under Superior Court Criminal Rule 33 since 1953.

⁵ *Id.* at 697.

⁶ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁷ *Strickland*, 466 U.S. at 691.

⁸ *Younge*, 580 A.2d at 554.

Nonetheless, the Achilles' heel of Kirk's argument is simply that the evidence he proffers is not "new." In fact, Kirk made the exact same argument and presented the exact same video evidence to this Court in his 2007 motion for postconviction relief. Kirk's claim was examined and subsequently denied, both procedurally, and on its merits.⁹ As such, Kirk cannot avail himself of Rule 61(i)(5) and his claim is procedurally barred under Rule 61(i)(4) as previously adjudicated.

Because Kirk's argument is procedurally barred, the Court need not consider the merits of his argument a second time.¹⁰

For the foregoing reasons, Kirk's Motion should be **SUMMARILY DISMISSED.**

IT IS SO RECOMMENDED.

/s/ Bradley V. Manning
BRADLEY V. MANNING,
Commissioner

oc: Prothonotary
cc: Defendant

⁹ See *State v. Kirk*, 2007 WL 1446671, at *4 (Del. Super. 2007) (Holding that the Lentini video is not likely to change the result of the trial, could have been discovered before trial, and is merely cumulative and impeaching).

¹⁰ *Younger*, 580 A.2d at 554.