

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

STATE OF DELAWARE

v.

DERIOUS J. JOHNSON,

Defendant.

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I.D. # 0304007340

Date Submitted: April 22, 2014

Date Decided: July 23, 2014

**ORDER DENYING DERIOUS J. JOHNSON’S MOTION
FOR POSTCONVICTION RELIEF**

This 23rd day of July, 2014, upon consideration of the Motion for Postconviction Relief (the “Rule 61 Motion”) filed by Derious J. Johnson; the facts and legal authorities set forth in the Rule 61 Motion; and, the entire record in this case:

1. On October 21, 2003, a jury found Mr. Johnson guilty of Rape First Degree. The State filed a motion to declare Mr. Johnson a habitual offender pursuant to 11 Del. C. § 4214(b).

2. This Court sentenced Mr. Johnson to life imprisonment on December 5, 2003. Mr. Johnson filed an appeal to the Delaware Supreme Court, arguing the Court erred in allowing the prosecutor to cross-exam Mr. Johnson with respect to his previous felony convictions. The Supreme Court ruled the Court’s error, if any, was not clear error and affirmed Mr. Johnson’s convictions and sentence.¹ The Supreme Court filed its Mandate on August 11, 2004.

3. Mr. Johnson filed his first *pro se* motion for postconviction relief on October 14, 2004.² Mr. Johnson asserted numerous claims, including claims of ineffective assistance of

¹ *Johnson v. State*, No. 616, 2003 (Del. July 20, 2004).

² *State v. Johnson*, Cr. A. No. 0304007340, (“Case”), Docket No. (“#”) 35.

counsel.³ This Court characterized his assertions under the postconviction motion as similar to those made in previous filings.⁴ This Court denied Mr. Johnson’s first motion for postconviction relief on December 21, 2004.⁵

4. Mr. Johnson then filed a second motion for postconviction relief, which was docketed by the Prothonotary on June 21, 2010.⁶ In Mr. Johnson’s second motion, Mr. Johnson asserted four grounds for relief, all alleging ineffective assistance of counsel – “deficient performance,” failure to investigate and interview witnesses, failure to consult an expert and, finally, failure of counsel to “prepare a coherent defense.”

5. This Court referred the second motion for postconviction relief to a commissioner.⁷ The commissioner entered an order of briefing, received an affidavit from trial counsel, a brief from the State and a responsive filing from Mr. Johnson.⁸ On March 8, 2011, the commissioner submitted Commissioner’s Findings of Fact and Recommendations.⁹ The commissioner recommended that Mr. Johnson’s second motion for postconviction be summarily dismissed under Criminal Rule 61(i)(4). Specifically, the commissioner found that Mr. Johnson was attempting to reargue ineffective assistance of counsel on slightly different terms and noted that “[t]he Delaware Supreme Court has held that ‘a defendant is not entitled to have a court re-examine an issue simply

³ *Id.*

⁴ Case at #37.

⁵ Case at #42.

⁶ Case at # 51.

⁷ Case at #53.

⁸ Case at #56, #58, #62 and #63.

⁹ Case at #66.

because the claim is refined or restated.’”¹⁰

6. On February 23, 2012, Mr. Johnson sought relief with this Court under Criminal Rule 35. Mr. Johnson argued that his sentence needed to be modified because the State did not meet its burden under 11 Del. C. § 4214(b). Specifically, Mr. Johnson argued:

On 10/21/2003 Movant Derious J. Johnson was sentenced to life in prison because of being convicted of his 3rd subsequent felony, which moved the State of Delaware to pursue the ‘Habitual offender under 11. Del.C. § 4214(B). Using movants prior (1998) “P.W.I.D.” conviction as one of the predicate felonies needed to declare movant an Habitual offender. However, at movant sentencing the State did not meet there burden of proof. At the sentencing proceeding, the State only offered into evidence a court docket sheet and a indictment of movants prior 1998 conviction case # 9709002535 dated 05/04/98. However, the state failed to present the text of the guilty plea that movant plead guilty to that formed the base of the 1998 conviction.¹¹

Mr. Johnson contended that the State did not provide substantial evidence as necessary under 11 Del. C. § 4214(b) and relied upon *Morales v. State*, 696 A.2d 390 (Del. 1997), and certain Federal holdings, in support of his arguments.¹² On March 7, 2012, this Court denied Mr. Johnson’s request to modify his sentence under Criminal Rule 35, holding that the sentence was appropriate for all the reasons stated a the time of sentencing, that no additional information had been presented to the Court that would warrant a reduction or modification of the sentence AND that the Court’s habitual offender status determination was legally correct.¹³ Mr. Johnson did not appeal the Court’s March 7, 2012 order.

7. Mr. Johnson has also attempted to raise his “lack of substantial evidence” argument directly with the Supreme Court of Delaware. On or about April 26, 2012, Mr. Johnson

¹⁰ Case at #66, at p. 7.

¹¹ Case at #69, at p. 2.

¹² *Id.*

¹³ Case at #70.

petitioned the Supreme Court for a writ of certiorari. In denying the petition, on May 9, 2012, the Supreme Court held:

In this case, Johnson has challenged his sentencing as an habitual offender on *several occasions*. Most recently, Johnson filed a motion for correction of sentence, which the Superior Court denied on March 7, 2012. Johnson did not file an appeal from that ruling. Because Johnson had available a remedy of a direct appeal, he may not now seek to invoke this Court's original jurisdiction through the certiorari process. Because Johnson has failed to meet the threshold requirements for the issuance of a writ of certiorari, we conclude that his petition must be dismissed.¹⁴

8. Now before the Court is the Rule 61 Motion – Mr. Johnson's third request for postconviction relief. In the Rule 61 Motion, Mr. Johnson asserts three grounds for relief under Criminal Rule 61 – procedural errors that amount to constitutional violations, insufficient evidence and ineffective assistance of counsel. While framed differently, Mr. Johnson basically makes the same claims asserted in his first two motions for postconviction relief, his Criminal Rule 35 motion and his petition to the Supreme Court for writ of certiorari.

9. Rule 61(i) establishes four procedural bars to motions for postconviction relief: (1) the motion must be filed within three years of a final judgment of conviction;¹⁵ (2) any grounds for relief which were not asserted previously in any prior postconviction proceeding are barred; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules; and (4) any basis for relief must not have been formerly adjudicated in any proceeding.

¹⁴ *In re Derious J. Johnson*, No. 192, 2012 (Del. May 9, 2012) (emphasis added).

¹⁵ The motion must be filed within three years if the final order of conviction occurred before July 1, 2005, and within one year if the final order of conviction occurred on or after July 1, 2005. *See* Rule 61, annot. *Effect of amendments*. For the purposes of Rule 61, a judgment of conviction becomes final under the following circumstances: "(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review." Super. Ct. Crim. R. 61(m).

10. Because the Rule 61 Motion was filed on or about April 22, 2014, it is time-barred by Rule 61(i)(1), having been filed more than three years after the Supreme Court filed its Mandate.

11. The Rule 61 Motion should also be dismissed because it fails to overcome Rule 61(i)(2) and (3). Rule 61 requires that Mr. Johnson handle all of his concerns at one time rather than continually suggesting new ideas for relief to his sentencing Court as the years go by. Therefore, because Mr. Johnson did not file these complaints at trial, at sentencing, upon his appeal to the Supreme Court, within his first two postconviction motions or within any subsequent documents asking this Court or another to review his trial, his attorney's actions, or his sentence, Mr. Johnson should be barred from suddenly asserting this ground for relief.

12. Furthermore, Mr. Johnson has already asked, on multiple occasions, this Court and the Supreme Court to determine whether his counsel was ineffective and whether his sentence was illegal. This Court did not find counsel ineffective and that decision was already affirmed by the Supreme Court. This Court also found that Mr. Johnson was properly sentenced under 11 Del. C. § 4214(b). Finally, the Supreme Court addressed Mr. Johnson's arguments when it denied his petition for writ of certiorari on May 9, 2012.

13. Rule 61(i)(4), precludes Mr. Johnson from asserting allegations which have already been effectively adjudicated. As noted by the Supreme Court, Mr. Johnson has a history of rehashing arguments. The Rule 61 Motion is no different. He continues to challenge his sentence under 11 Del. C. § 4214(b). Mr. Johnson has done that, according to the Supreme Court, on "several occasions." Mr. Johnson also did that under Criminal Rule 35 and failed to appeal the ruling by this Court. This Court has already resolved the issue for Mr. Johnson. Moreover, the Supreme Court held that Mr. Johnson should have appealed that ruling but failed to do so.

14. It is well-established that Mr. Johnson is entitled to one direct appeal and one

motion for postconviction relief.¹⁶ Were it not for the prohibition of repetitive motions under Rule 61(i)(2), the court would be inundated with repetitive motions from defendants with long sentences, which would create an “unbearable burden” on the Court’s resources.¹⁷ Mr. Johnson had his opportunity to discuss all that he believed was wrong with his counsel’s representation when he filed his first motion, and he has had the opportunity on “several occasions” to challenge his sentencing as a habitual offender. There is nothing in the Rule 61 Motion which could not have been articulated in his first motion or in subsequent requests of this Court and the Supreme Court. The Rule 61 Motion is therefore barred on procedural grounds.

15. Accordingly, for the reasons stated above, this Court summarily dismisses the Rule 61 Motion on procedural grounds.

IT IS ORDERED that Mr. Johnson’s third Motion for Postconviction Relief is **DENIED**.

/s/ Eric M. Davis
Eric M. Davis, Judge

Original to Prothonotary:

cc: Derious J. Johnson (SBI#002)
Kathleen Jennings, Esq.

¹⁶ *State. v. Bass*, 2004 WL 396372 at *1 (Del. Super.), citing *St. v. Riley*, 2003 WL 1989617 at *1 (Del. Super.).

¹⁷ *Bass*, at *1.