SUPERIOR COURT OF THE STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 (302) 856-5257

January 10, 2013

N440 State Mail Eric Russell James T. Vaughn Correctional Center 1181 Paddock Road Smyrna, DE 19977

RE: State of Delaware v. Eric Russell

Defendant ID No. 0801028059

Motion for Post Conviction Relief (R-2)

Dear Mr. Russell:

On December 17, 2012, the defendant filed his second Motion for Post-conviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The Motion is denied for the reasons set forth below.

<u>Background</u>

Following his convictions in 2009 for rape in the first degree, two counts of unlawful sexual contact in the first degree, indecent exposure, offensive touching and endangering the welfare of a child, the defendant was sentenced to life imprisonment on the rape conviction as a habitual offender.

On direct appeal, the defendant attacked the admission of the victim's out-of-court statements to her mother. The statements were admitted pursuant to 11 *Del. C.* § 3507. The defendant also attacked the admission of the victim/declarant's CAC videotaped interview that was admitted into evidence pursuant to 11 *Del. C.* § 3513(b)(i).

On direct appeal, the Supreme Court found the appellate's arguments had not been raised at trial and, in the absence of plain error, the Court declined to consider the above attacks as they were not fairly presented to the trial judge. *Russell v. State*, 5 A.3d 622 (Del. 2010). An expected post-conviction motion was timely filed on February 23, 2011. Because

of the complex legal nature of the defendant's attack on the admission of the CAC interview pursuant to 11 *Del. C.* § 3513(b)(i), this Court appointed counsel to argue these issues. The statement by the child to her mother, admitted pursuant to § 3507, was not attacked in this Rule 61 motion. On December 20, 2011, the Court

denied the defendant's laundry list of ineffective assistance of counsel complaints as well as defendant's attack on the admissibility of the CAC interview under § 3513. State v. Russell, 2011 WL 7404276 (Del. Super.).

The Supreme Court affirmed this Court's denial of the defendant's post-conviction motion finding that, regardless of compliance with § 3513, the CAC interview was admissible under § 3507. Russell v. State, 2012 WL 5417068 (Del.).¹

The Present Complaint

The defendant attacks the performance of all previous counsel, both trial and appellate, as ineffective for failing to object to the CAC interviewer's background testimony. He cites the recent decision in *Richardson v. State*, 43 A.3d 906 (Del. 2012), in which the Supreme Court reversed Mr. Richardson's conviction because the CAC interviewer testified as to her background, training and interviewing techniques in a manner that the Court concluded offered an opinion as to the witness' veracity. The CAC interviewer explained to the jury the RATAC² method of interviewing children and then proceeded to vouch for the interviewee when she stated her interviewing protocol makes "it very obvious when [the children] are being truthful."

In light of Richardson is Mr. Russell entitled to a new trial? The short answer is no.

The first inquiry in any analysis of a post-conviction relief claim is whether the petition meets the procedural requirements of Rule 61. Rule 61(i)(1) provides that any motion for post-conviction relief may not be filed more than one year after the judgment of conviction is final. In this instance, the mandate from the Supreme Court on direct appeal was issued October 12, 2010. Mr. Russell's first post-conviction relief motion alleging ineffective assistance of counsel was timely filed. He lost that round, as summarized above. Now, he has filed a second motion

¹ Of interest is the fact that defendant has not attacked the victim's statements to her mother, admitted under § 3507, in either his first Rule 61 motion or the pending motion.

² R - rapport; A - anatomy, T - touch, A - abuse, and C - closure.

that is time barred. However, Rule 61(i)(1) also provides that a motion for post-conviction relief asserting a "retroactively applicable right" may be filed within one year from a decision recognizing that right.

This Court concludes Richardson did not recognize a retroactively applicable right.

A plurality of the United States Supreme Court held that, as an initial matter, a criminal appellant could not assert an argument based on a new decision in a post-conviction relief motion unless that decision was a "new rule" intended to apply retroactively. Teague v. Lane, 489 U.S. 288 (1989), reh'g denied, 490 U.S. 1031 (1989). In so doing, the Supreme Court noted, "it is 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." Id. at 306 (quoting Mackey v. United States, 401 U.S. 667, 689 (1971)). The Delaware Supreme Court has held that the exception to the procedural time bar provision in Rule 61 applies to a retroactive "right" if and only if the decision creating that "right" satisfies the Teague standard for determining whether a ruling announces a retroactively applicable "rule." Bailey v. State, 588 A.2d 1121, 1127-28 (Del. 1991). The Delaware Supreme Court has also found that a decision issued subsequent to a defendant's conviction "does not create a new rule when it merely applies principles which governed the earlier decision." Id. at 1128 (internal quotation marks and citation omitted). Such is the case here. The case law prohibiting vouching has been in existence for a very long time. It is not a newly recognized rule.

In *Richardson*, the CAC interviewer testified, "I think as far as truthfulness, I think it's very apparent when you talk with a child and go through that whether - I think it's very obvious when they are being truthful." The admission of this testimony was deemed plain and reversible error. The Court held:

[The CAC interviewer's] sole role was to authenticate the videotape. It is settled law that "a witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth." Capano v. State, 781 A.2d 556, 595 (Del. 2001). "[I]mproper vouching includes testimony that directly or indirectly provides an opinion on the veracity of a particular witness." Ibid. (Emphasis in original.)

43 A.3d at 910.

In Mr. Russell's case, the CAC interviewer did review the RATAC protocol, as was common practice at the time. The interviewer also testified he had conducted many interviews with children and that he has conducted interviews that do not result in allegations of abuse.

Both the prosecution and the defense questioned the interviewer on direct and cross examination about the interviewer's purpose or goal "to find the truth." The Court interrupted the examination and reminded all, "that [determination as to credibility] ultimately will be the decision of the jury." (Transcript B-51). The Court's comments were in keeping with the case law cited by the Supreme Court in *Richardson*. It is clear the *Richardson* decision was premised precisely on the existing governing principles the Court applied to this case. As such, the *Richardson* decision did not create a retroactively applicable right.

Nor is Mr. Russell saved by Rule 61(i)(5), which provides for relief from the post-conviction time bar if there has been 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." This exception is applied on a very limited basis. "The fundamental fairness exception is extremely narrow and is only applicable in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal." Bailey, 588 A.2d at 1130 (internal quotation marks and citation omitted). The Court has already concluded Richardson did not create a newly recognized constitutional right.

Furthermore, Mr. Russell ignores the other evidence in support of the guilty verdicts that was presented at trial, including the § 3507 statement the child made to her mother about the sex act committed against her. In addition, the evidence established that Mr. Russell, when confronted with the victim's allegation, immediately fled. The child "touched on" her out-of-court prior statement by testifying on direct that the defendant touched her body with his penis. The Court gave the jury the customary § 3507 instruction directing the jury to exercise caution and carefully consider prior out-of-court statements. The Court interrupted the CAC interviewer's testimony as to the "truthfulness" of the child's statement to emphasize to the jury that they would be making the determination as to truthfulness.

Under these circumstances, the defendant's second Rule 61 motion is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary

cc: Department of Justice