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

STATE OF DELAWARE,)	
V.)	Cr. ID No. 9603002509
GERALD A. WILMER,)	
Defendant.)	
)	

Submitted: April 23, 2013 Decided: August 2, 2013

MEMORANDUM OPINION AND ORDER

Gerald A. Wilmer, SBI #00, James T. Vaughn Correctional Center, Smyrna, Delaware. Kathleen M. Jennings, Esquire, Delaware Department of Justice, Wilmington, Delaware.

DAVIS, J.

- 1. Mr. Wilmer was convicted of Unlawful Sexual Intercourse First Degree after a trial by jury on July 24, 1997. On September 12, 1997, Mr. Wilmer was sentenced to 30 years at Level V, suspended after 25 years. The Supreme Court of Delaware affirmed Mr. Wilmer's conviction on March 6, 1998. Mr. Wilmer has since filed six claims for postconviction relief under Superior Court Criminal Rule 61, all of which were denied by this Court.
- 2. Mr. Wilmer filed his seventh Motion for Postconviction Relief on April 23, 2013 (the "Seventh Motion"). In the Seventh Motion, Mr. Wilmer contends he is entitled to

¹ Mr. Wilmer submitted prior applications for postconviction relief on March 6, 2001, May 14, 2002, April 19, 2006, September 6, 2007, November 12, 2008, and April 19, 2010.

postconviction relief for the following reasons: (1) ineffective assistance of counsel; (2) abuse of judicial discretion; and (3) prosecutorial misconduct.

- 3. The Seventh Motion's "factual" predicate is that, after dismissing certain counts of the indictment, the Court admitted evidence related to those counts under Delaware Rule of Evidence 404(b). Mr. Wilmer "couches" his arguments as prejudicial severance but, in essence, what Mr. Wilmer argues is that he derived no benefit from dismissal of three counts of the indictment because Rule 404(b) was utilized to admit evidence of those charges.
- 4. Mr. Wilmer argues that his trial counsel should have objected to admission of the evidence on grounds that use of the evidence constituted double jeopardy. By not making such an objection, Mr. Wilmer contends the jurors were unfairly influenced and, thus, he was substantially prejudiced by his counsel's purported ineffective assistance.
- 5. The Seventh Motion also uses this factual predicate to argue that his conviction is based upon "prosecutorial misconduct." Mr. Wilmer contends the State should have been prevented from using evidence related to the dismissed charge at trial under the doctrine of collateral estoppels doctrine of issue preclusion applied against the State because Mr. Wilmer successfully had the three charges dismissed. Mr. Wilmer argues the use of this evidence subjected him to double jeopardy and is thus a violation of his Fourteenth and Fifth Amendment rights to due process.
- 6. Finally, Mr. Wilmer contends the Court's decision to admit certain evidence under Rule 404(b) created "strong prejudice" to Mr. Wilmer and constituted an abuse of discretion.
- Superior Court Criminal Rule 61 governs motions for postconviction remedy.
 Before addressing the substantive merits of any claim for postconviction relief, the Court must

determine whether the defendant has satisfied the procedural requirements of Superior Court Criminal Rule 61 ("Rule 61").² Rule 61(i) pertains to bars to relief. Under Rule 61(i)(1), "[a] motion for postconviction relief may not be filed more than one year after the judgment of conviction is final." Under Rule 61(i)(2) any ground not asserted in a prior postconviction proceeding is barred "unless consideration of the claim is warranted in the interest of justice." A defect under Rule 61(i)(1) or (2) will not bar a movant's "claim that the court lacked jurisdiction or . . . 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." Finally, Under Rule 61(i)(4), any ground for relief that was formerly adjudicated in the proceedings leading to conviction, postconviction proceedings, or a habeas corpus proceeding "is thereafter barred unless reconsideration of the claim is warranted in the interests of justice." "[T]he interest of justice has been narrowly defined to require that the movant show that the trial court lacked authority to convict or punish him."

- 8. Mr. Wilmer's Motion is procedurally barred as untimely under Rule 61(i)(1), as it was filed more than one year nearly 16 years after his conviction became final. Mr. Wilmer asserts no newly recognized rights that could overcome the time limitation of Rule 61(i)(1).
- 9. Mr. Wilmer's Motion is also procedurally barred by Rule 61(i)(2) as a repetitive motion, because Mr. Wilmer has based prior motions for postconviction relief upon the same grounds as he bases the present Motion. A review of the record shows that Mr. Wilmer has

² Younger v. State, 580 A.2d 552, 554 (Del. 1990). See also Bailey v. State, 588 A.2d 1121, 1127 (Del. 1991); State v. Mayfield, 2003 WL 21267422, at *2 (Del. Super. Ct. June 2, 2003).

³ Del. Super. Crim. R. 61(i)(1).

⁴ *Id.* R. 61(i)(2).

⁵ *Id.* R. 61(i)(5).

⁶ *Id.* R. 61(i)(4).

⁷ State v. Wright, 653 A.2d 288, 298 (Del. Super. 1994).

asserted ineffective assistance of counsel claims in at least five of his prior motions for postconviction relief, and abuse of judicial and prosecutorial misconduct each in at least one prior motion. Mr. Wilmer should have asserted any grounds for relief upon those bases in his prior motions for postconviction relief.

10. Finally, Mr. Wilmer's claims are barred by Rule 61(i)(4) which prohibits relitigation of issues previously decided in proceedings for postconviction relief. Mr. Wilmer does not contend that this Court lacked the authority to convict or punish him, and this Court nonetheless finds no cause in the interest of justice to consider Mr. Wilmer's claims despite that they are procedurally barred.

11. Mr. Wilmer's Motion for Postconviction Relief is **SUMMARILY DISMISSED**, as it plainly appears from the Motion and the record that Mr. Wilmer is not entitled relief.

IT IS SO ORDERED.

Eric M. Davis
Judge