

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.) Cr. ID No. 9811012529
)
DEVON GARNER,)
)
 Defendant.)

Submitted: May 20, 2014
Decided: August 22, 2014

*Upon Consideration of Defendant's Motion
For Postconviction Relief, **DENIED.***

OPINION

Morgan T. Zurn, Deputy Attorney General, Department of Justice, Carvel State Office Building, 820 North French Street, Wilmington, Delaware, Attorney for the State.

Devon Garner, James T. Vaughn Correctional Center, Smyrna, Delaware 19977, *pro se.*

MEDINILLA, J.

FACTUAL AND PROCEDURAL HISTORY

On November 23, 1998, Devon Garner (“Defendant”) fired four shots at Luis Mercado in an area considered an open-air drug market in Wilmington, Delaware. Mercado, a rival drug dealer, survived the shots, and positively identified Defendant as the shooter.

On February 1, 2000, Defendant was convicted after a jury trial of Attempted Murder in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony, Conspiracy in the First Degree, Conspiracy in the Second Degree, and Reckless Endangering in the First Degree, in violation of 11 *Del. C.* §§ 531, 636, 1447A, 513(1), and 604, respectively. The conviction was affirmed by the Supreme Court of Delaware on August 7, 2001. Defendant filed his first Motion for Postconviction Relief, *pro se*, on August 4, 2004. This Court denied the Motion on May 3, 2005. Defendant appealed, and the Supreme Court of Delaware affirmed the decision on November 22, 2005.

This is Defendant’s second Motion for Postconviction Relief filed on September 19, 2013. The State filed a Response on April 24, 2013. Defendant filed a Reply on May 20, 2014. For the reasons stated below, Defendant’s Motion for Postconviction Relief is **DENIED**.

DISCUSSION

Defendant seeks relief pursuant to Rule 61 based on his claim that he was deprived of his right to counsel in his first Motion for Postconviction Relief.

The most glaring deficiency in Defendant's claim is that his challenge regarding his first postconviction proceeding is not a cognizable claim under Rule 61. Rule 61(a) describes the "Nature of Proceedings" of Rule 61 as "an application by a person in custody or subject to future custody under a sentence of this court seeking to set aside a judgment of *conviction* . . ." ¹ Defendant's argument is inherently defective because it focuses entirely on his *postconviction* proceedings, not his actual conviction. ²

Even if Defendant's claim was cognizable, it is procedurally barred by Rule 61(i). ³ Rule 61(i) imposes four procedural imperatives: (1) the motion must be filed within three years of a final order of conviction; (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and

¹ Del. Super. Ct. Crim. R. 61(a) (emphasis added).

² *Floyd v. State*, 612 A.2d 158 (Del. 1992) ("post-conviction relief cannot be used, in the first instance, to attack a previous post-conviction relief proceeding.").

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) ("[p]rior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether Defendant has met the procedural requirements of Superior Court Criminal Rule 61").

(4) any basis for relief must not have been formally adjudicated in any proceeding.⁴

Defendant's claim is time-barred by Rule 61(i)(1) because it was filed more than three years after his conviction became final on August 10, 2001. Since the claim is entirely based Defendant's right to counsel in his first postconviction proceeding, it is also barred by Rule 61(i)(2) and (3).

Defendant argues that the Rule 61(i) procedural bars can be overcome in this case because Defendant's claim falls within the exception set out in Rule 61(i)(5):

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.

The "miscarriage of justice" or "fundamental fairness" exception contained in Rule 61(i)(5) is "[a] *narrow one* and has been *applied only in limited circumstances*, such as when the right relied upon has been recognized for the first time after a direct appeal."⁵ This exception may also apply to a claim of mistaken waiver of fundamental constitutional rights, such as rights to trial, counsel,

⁴ Del. Super. Ct. Crim. R. 61(i).

⁵ *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989)) (emphasis added).

confrontation, the opportunity to present evidence, protection from self-incrimination and appeal.⁶ Accordingly, when a petitioner puts forth a colorable claim of mistaken waiver of constitutional rights, Rule 61(i)(5) is available to him.⁷

Defendant argues that there was a miscarriage of justice in his prior postconviction proceeding because he was constitutionally entitled to counsel. Defendant's claim fails because there is no constitutional right to appointed counsel in postconviction proceedings.⁸ Nor is there a statutory right to counsel in this context. Although Rule 61(e) allows for appointment of counsel in all first postconviction proceedings, that rule was adopted May 6, 2013 and is not retroactive.⁹ Finally, there is nothing in the record to show that Defendant requested counsel in his first Motion for Postconviction Relief.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

⁶ *Webster v. State*, 604 A.2d 1364, 1366 (Del.1992).

⁷ *Id.*

⁸ *Roten v. State*, 80 A.3d 961 (Del. 2013) (“[c]ontrary to [defendant’s] contention, *Martinez* does not hold that there is a federal constitutional right to counsel in first postconviction proceedings.”); *see Martinez v. Ryan*, 132 S. Ct. 1309, 1311 (2012) (“[g]iven that the precise question here is whether ineffective assistance in an initial-review collateral proceeding on an ineffective-assistance-at-trial claim may provide cause for a procedural default in a federal habeas proceeding, this is not the case to resolve the question left open in *Coleman*: whether a prisoner has a constitutional right to effective counsel in initial-review collateral proceedings.”).

⁹ *Id.*

/s/ Vivian L. Medinilla
Judge Vivian L. Medinilla

cc: Prothonotary