

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	I.D. No. 0604000165
)	
v.)	
)	
MARQUEx BARRETT,)	
)	
Defendant.)	

Submitted: October 7, 2014
Decided: January 14, 2015

Motion for Post-Conviction Relief
DENIED

Phyllis Scully, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware,
Attorney for the State.

Marquex Barrett, Wilmington, DE, *pro se.*

This 14th day of January, 2015, upon consideration of the Motion for Postconviction Relief (the “Rule 61 Motion”) filed by Marquex Barrett; the facts and legal authorities set forth in the Rule 61 Motion; and, the entire record in this case:

1. Mr. Barrett was arrested on April 1, 2006 and charged with Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance, Use of a Vehicle for Keeping Controlled Substances, and Driving While License is Suspended, and Violation of Probation. Chris Tease, Esq. (“Trial Counsel”) was assigned as Trial Counsel to represent Mr. Barrett.

2. On July 26, 2006, Mr. Barrett pled guilty to Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance and Violation of Probation. Mr. Barrett was

represented by Trial Counsel when taking the plea. The same day, the Court sentenced Mr. Barrett to 10 years at supervision Level V, suspended after serving 3 years, for 2 years at supervision Level IV, suspended after serving 6 months at supervision Level IV Plummer Center, for 18 months at supervision Level III (the “Sentence”).

3. Mr. Barrett served his time at Level 5. Thereafter, Mr. Barrett was released and was supervised on probation both at Level 4 and Level 3. At some point, the State filed a progress report and sought to have Mr. Barrett found in violation of his probation. The basis of the purported violation was that Mr. Barrett committed new offenses while on probation.

4. When the State *nolle prossed* those new offenses on November 5, 2010, the State withdrew its request to violate Mr. Barrett and, instead, asked this Court to discharge Mr. Barrett from his probation as unimproved. This Court approved the request to discharge Mr. Barrett from probation on November 15, 2010. On November 22, 2010, Mr. Barrett was discharged from probation on the Sentence as unimproved.

5. As of November 22, 2010, Mr. Barrett was no longer in custody under the Sentence. Moreover, Mr. Barrett could not be incarcerated in the future under the Sentence as he had been discharged from probation.

6. On November 2, 2012, this Court sentenced Mr. Barrett on a Drug Dealing charge – I.D. No. 1201014151 (the “Other Conviction”). This Court declared Mr. Barrett to be a habitual offender under 11 *Del. C.* § 4214(a). The sentence on the Other Conviction was for 2 years and 6 months at Level 5 (with credit for 2 days served).

7. On October 8, 2013, Mr. Barrett filed the Rule 61 Motion. The Rule 61 Motion relates to the Sentence imposed by this Court in case I.D. 0604000165. In the Rule 61 Motion, Mr. Barrett seeks relief due to ineffective assistance of Trial Counsel, wanton misconduct by

Trial Counsel for Trial Counsel's alleged failure to file motions on behalf of Mr. Barrett, and Trial Counsel's alleged failure to investigate the stop which led to a coerced plea deal.

8. Superior Court Criminal Rule 61 ("Rule 61") governs motions for postconviction relief. The rule provides:

(a) Scope of rule. (1) Nature of proceeding. This rule governs the procedure on an application *by a person in custody under a sentence of this court* seeking to set aside the judgment of conviction...on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual or legal basis for a collateral attack upon a criminal conviction...A proceeding under this rule shall be known as a postconviction remedy.¹

9. Mr. Barrett cannot pursue the Rule 61 Motion as he is no longer in custody under the Sentence and, therefore, lacks standing under Rule 61. Mr. Barrett completed the Sentence and was discharged from probation on November 22, 2010. Mr. Barrett filed the Rule 61 Motion on October 8, 2013 – almost 3 years after he was no longer in custody or subject to custody under the Sentence.² Accordingly, Mr. Barrett is no longer entitled to relief under Rule 61 with respect to the Sentence.³

10. Even if Mr. Barrett did not lack standing, Mr. Barrett would not prevail on the merits of the Rule 61 Motion.

11. Before addressing the substantive merits of any claim for postconviction relief, the Court must determine whether Mr. Barrett has satisfied the procedural requirements of Rule

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

² On October 8, 2013, Mr. Barrett was in custody with respect to the Other Conviction. However, the Rule 61 Motion specifically relates to Mr. Barrett's claims with respect to I.D. 0604000165 and not I.D. 1201014151.

³ *Ruiz v. State*, 956 A.2d 643 (Table), 2008 WL 1961187, at *2 (Del. May 7, 2008) (citing *Pumphrey v. State*, No. 580, 2006, 2007 WL 3087405, at *1 (Del. October 23, 2007)) (A person loses standing to seek postconviction relief under Rule 61 where the defendant is not in custody or subject to future custody for the underlying offense or challenged sentence.); see also *Pumphrey v. State*, No. 580, 2006, 2007 WL 3087405, at *1 (Del. October 23, 2007); *Epperson v. State*, 829 A.2d 935 (Table), 2003 WL 21692751, at *1 (Del. July 18, 2003); *Summers v. State*, 818 A.2d 971 (Table), 2003 WL 1524102, at *1 (Del. March 20, 2003); *State of Delaware v. Absher, et al.*, 2014 WL 7010788, at *1 (Del. Super. Ct. December 3, 2014).

61.⁴ Rule 61(i) establishes four procedural bars to postconviction relief: (1) a motion for postconviction relief may not be filed more than one year after the judgment of conviction is final; (2) any ground for relief not asserted in a prior postconviction proceeding is barred; (3) any ground for relief not asserted in the proceedings leading to the judgment of conviction is barred; and (4) any ground for relief previously adjudicated in any proceeding is barred.⁵ The procedural bars contained in Rule 61(i)(1-4) may be rescinded only if there is a means by which to do so in the applicable subsection of Rule 61.⁶ Absent such relief, Rule 61(i)(5) provides additional reprieve from the procedural bars described in Rule 61(i)(1-3).⁷ Under Rule 61 (i)(5), “[t]he 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 claims 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.⁸ Claims alleging ineffective assistance of counsel meet the “fundamental fairness” and “miscarriage of justice” exceptions of Rule 61(i)(5).⁹

12. If the Court did not hold that Mr. Barrett lacked standing, the Court would find that Mr. Barrett’s Rule 61 Motion is not otherwise procedurally barred. While the Rule 61 Motion was filed more than a year after the judgment of conviction was final, it made claims of ineffective assistance of counsel which meet the “fundamental fairness” and “miscarriage of justice” exceptions of Rule 61(i)(5).

⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁵ Super. Ct. Crim. R. 61(i).

⁶ *State v. MacDonald*, 2007 WL 1378332 *4 (Del. Super. Ct., May 9, 2007).

⁷ *Id.*

⁸ Super. Ct. Crim. R.61(i)(5).

⁹ *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

13. To prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defendant.¹⁰ To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness."¹¹ To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹² In the context of an ineffective assistance claim regarding a decision to plead guilty, the movant must show that "there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and insisted on going to trial."¹³

14. After filing his motion, Mr. Barrett was appointed Rule 61 postconviction counsel ("Rule 61 Counsel").¹⁴ Rule 61 Counsel was asked to inform the Court whether Mr. Barrett's Rule 61 Motion presented substantial grounds for relief, or whether an amended postconviction motion would present substantial grounds for relief, and whether the Court should issue an order directing Trial Counsel to respond to any allegations regarding ineffective assistance of counsel.¹⁵

15. Rule 61 Counsel examined Mr. Barrett's grounds for relief, and determined that she was unable to ethically advocate them. After a thorough review of the record, Rule 61 Counsel was also unaware of any other meritorious postconviction claims. As such, Rule 61 Counsel filed a Motion to Withdraw as Counsel and Memorandum in Support of the Motion to Withdraw as Counsel. On September 18, 2014 the Court granted Rule 61 Counsel's Motion to

¹⁰ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹¹ *Id.* at 688.

¹² *Id.* at 691.

¹³ *Somerville v. State*, 703 A.2d 629 (Del. 1997).

¹⁴ Super. Ct. Crim. R. 61(e).

¹⁵ *State v. Barrett*, I.D. No. 0604000165, Order (Del. Super. Ct. July 10, 2014).

Withdraw. The Court then held a status hearing with Mr. Barrett to determine whether he still wanted to pursue the Rule 61 Motion. Mr. Barrett confirmed to the Court that he wanted to proceed *pro se* on the Rule 61 Motion.

16. Mr. Barrett's first ground for postconviction relief asserts ineffective assistance of counsel for Trial Counsel's failure to investigate the police stop and the quantity of drugs found in the car. Pursuant to the Crime Report, which Trial Counsel had access to, the arresting officer observed through binoculars Mr. Barrett standing on the side of the street. Mr. Barrett was approached on three separate occasions by individuals. When these individuals approached, Mr. Barrett would retrieve a plastic bag from his nearby parked car, break off a piece of something in the bag, hand the broken-off item to the individuals, then accept some cash payment from them, whereupon the individuals would walk away. On each of the three occasions the transaction was identical. After the third transaction, police approached Mr. Barrett and placed him into custody. The police suspected that he was selling drugs. In plain view in the driver-side window of Mr. Barrett's car was the clear plastic bag that police had previously observed. The substance inside the bag field tested positive as crack cocaine. During a search incident to arrest, police also found just under \$300 in cash on Mr. Barrett. Mr. Barrett was advised of his Miranda rights and freely spoke with police, admitting that he was selling drugs to pay off his child support arrears. The police observation described in the Crime Report was sufficient to create reasonable suspicion to stop Mr. Barrett.

17. Mr. Barrett offers no factual basis in support of his allegation that the drugs seized by the police were not of the quantity purported. Therefore, investigation beyond that which was conducted by Trial Counsel was unwarranted. Moreover, Mr. Barrett's plea colloquy and his signing of the Guilty Plea Form make clear that he was waiving his trial rights, including the

right to confront the witnesses against him and to challenge the evidence against him, which includes the legality of the stop and the quantity of drugs discovered.¹⁶ Moreover, during Mr. Barrett's guilty plea colloquy, Mr. Barrett explicitly indicated that he was satisfied with Trial Counsel's representation.

18. Mr. Barrett's second ground for postconviction relief is wanton misconduct by Trial Counsel for Trial Counsel's alleged failure to file motions on behalf of Mr. Barrett. Specifically, Mr. Barrett asserts that Trial Counsel did not file a motion to suppress the evidence of drugs found in the car, based on an illegal stop. As mentioned above, there is no evidentiary basis for this claim, as the observations of the police were sufficient to create reasonable suspicion to stop Mr. Barrett. Moreover, the drugs were found in plain view in a clear plastic bag during the arrest.

19. Defendant's third and final ground for postconviction relief is "work product which lead to coerced plea." Specifically Mr. Barrett asserts that he should never have been charged with any crime because the amount of drugs found in the vehicle was supposedly below the required statutory minimum. There is no evidentiary basis to suggest that the drugs seized from the vehicle were erroneously or fraudulently reported by the police. Additionally, during his plea colloquy Mr. Barrett denied any coercion in his acceptance of the plea agreement.

¹⁶ *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).

20. Notwithstanding the fact that Mr. Barrett lacks standing to pursue the Rule 61 Motion, the Rule 61 Motion also fails on its merits.

For the foregoing reasons **IT IS ORDERED** that Mr. Barrett's Motion for Postconviction Relief is **DENIED**

/s/ *Eric M. Davis*

Eric M. Davis

Judge