

**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: July 6, 2015
Decided: October 21, 2015

**MEMORANDUM OPINION AND ORDER WITH RESPECT TO DEFENDANT
GERALD A. WILMER’S NINTH MOTION FOR POSTCONVICTION RELIEF**

Gerald A. Wilmer, SBI #00218977, 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 eight claims for postconviction relief under Rule 61 of the Superior Court Rules of Criminal Procedure (“Criminal Rule 61”), all of which were denied by this Court. The Court denied Mr. Wilmer’s eighth Motion for Postconviction Relief (the “Eighth Motion”) on January 31, 2014. The Supreme Court of Delaware affirmed this Court’s decision as to Mr. Wilmer’s Eighth Motion on June 27, 2014. Most recently, on October, 16, 2014, Mr. Wilmer sought relief under Criminal Rule 35 (the “Criminal Rule 35 Motion”) and asked the Court to modify and/or otherwise reduce his sentence.

The Court denied the Criminal Rule 35 Motion on January 15, 2015, and the Supreme Court affirmed that decision on June 16, 2015.

2. The motion now before the Court is Mr. Wilmer's *NINTH* Motion for Postconviction Relief (the "Ninth Motion")¹ with respect to criminal case number 9603002509. Mr. Wilmer filed his Ninth Motion on July 6, 2015. In the Ninth Motion -- and in the accompanying memorandum of law filed in support of the Ninth Motion, Mr. Wilmer contends he is entitled to postconviction relief for the following reason -- "Newly Discovered Evidence" that purportedly divested this Court of its jurisdiction and his counsel's failure to file a direct appeal on the issue of "Newly Discovered Evidence."

3. The Court has reviewed the Ninth Motion and accompanying exhibits. Mr. Wilmer is not arguing that there is newly discovered evidence that somehow demonstrates actual innocence. Instead, Mr. Wilmer argues that "invalid" indictments were used under Evidence Rule 404(b) to show that Mr. Wilmer had the requisite intent to commit the crimes for which he was convicted and his appellate counsel failed, despite instruction, to appeal this point. So, in reality, Mr. Wilmer is once again seeking relief under Criminal Rule 61 based, in part, on a claim of ineffective assistance of counsel. Mr. Wilmer then argues that the procedural bars under Criminal Rule 61 do not apply because the Court's decision at trial to allow the use of evidence under Evidence Rule 404(b) somehow divested the Court of jurisdiction.

4. Superior Court Criminal Rule 61 governs motions for postconviction remedy. Criminal Rule 61(d), in part, provides:

(d) Preliminary consideration.

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, April 19, 2010, April 25, 2013 and October 16, 2013.

(2) Second or subsequent postconviction motions. A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted after trial and the motion either:

(i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or

(ii) pleads with particularity that a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.²

5. This is Mr. Wilmer's *NINTH* motion under Criminal Rule 61. The Ninth Motion does not plead with particularity the existence of new evidence, or that a new rule of constitutional law, made retroactive, applies here. Instead, Mr. Wilmer makes conclusory claims that the Court lacked jurisdiction due to the use of certain evidence under Evidence Rule 404(b) at trial. Mr. Wilmer provides no legal or factual authority that supports his contention that an alleged misapplication of Evidence Rule 404(b) divests this Court of its jurisdiction. Mr. Wilmer also contends that his appellate counsel was ineffective because that counsel did not raise the issue on appeal. Mr. Wilmer has, on more than one occasion, argued the ineffective assistance of counsel theory. Mr. Wilmer has made that claim with respect to his trial counsel, his appellate counsel and, most recently, in his eighth motion under Criminal Rule 61 where he complains about his Criminal Rule 61 counsel.

6. Criminal Rule 61(i) establishes two procedural bars to motions for postconviction relief that are relevant here: (1) the motion must be filed within one year of a final judgment of conviction;³ and, (2) any motion for postconviction relief must satisfy Criminal Rule 61(d)(2).⁴

² Super. Ct. R. Crim. P. 61(d)(2).

³ Super. Ct. R. Crim. P. 61(i)(1).

⁴ Super. Ct. R. Crim. P. 61(i)(2).

7. The Court summarily dismisses the Ninth Rule 61 Motion for two reasons. First, the Ninth Motion is time barred by Criminal Rule 61(i)(1). The Supreme Court issued the Mandate on March 6, 1998. Mr. Wilmer filed the Ninth Motion on July 17, 2015. As such, the Ninth Motion was not filed within one year of a final judgment of conviction. Second, the Ninth Rule 61 Motion is procedurally barred for failing to satisfy Criminal Rule 61(d)(2).

8. As stated above, the Court has found no legal or factual support for Mr. Wilmer's argument that this Court was not a court of competent jurisdiction because it purportedly misapplied Evidence Rule 404(b). In a matter involving Criminal Rule 61(i)(1), Mr. Wilmer carries the burden to prove that the Court lacked jurisdiction.⁵ Here, the Court finds that Mr. Wilmer has failed to carry that burden.

9. For the reasons set forth above, Mr. Wilmer's Motion for Postconviction Relief is **SUMMARILY DISMISSED**, as it plainly appears from the Ninth Motion and the record that Mr. Wilmer is not entitled to relief.

IT IS SO ORDERED.

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

⁵ See, e.g., *Brown v. State*, 879 A.2d 602 (table), 2005 WL 1950213, at *1 (Del. 2005) (“Although [Criminal] Rule 61(i)(1) permits the trial court to review an untimely claim challenging the court’s jurisdiction, the burden is still on the defendant to prove the court’s lack of jurisdiction.”)