IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC D. RUSSELL,	§	
	§	No. 47, 2013
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for Sussex County
STATE OF DELAWARE,	§	Cr. ID No. 0801028059
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 28, 2013
Decided: July 30, 2013

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices

O R D E R

This 30th day of July 2013, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Eric D. Russell, filed an appeal from the Superior Court's January 10, 2013 order denying his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.[1] We agree and affirm.

(2) The record before us reflects that, in 2009, Russell was found guilty by a Superior Court jury of 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. He was sentenced as a habitual offender to life in prison on the rape conviction[2] and to consecutive Level V terms on the other convictions. This Court affirmed Russell's convictions on direct appeal.[3] This Court also affirmed the Superior Court's denial of his first postconviction motion.[4]

(3) In his appeal from the Superior Court's denial of his second postconviction motion, Russell claims that a) his trial counsel provided ineffective assistance by failing to object to the Child Advocacy Center ("CAC") interviewer vouching for the credibility of the child victim; b) appointed counsel on his first postconviction motion provided ineffective assistance by failing to raise the vouching issue; and c) the trial judge erred by denying the defense motion to explore prior molestation allegations by the complaining witness against two other individuals.

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[1] Supr. Ct. R. 25(a).
[2] Del. Code Ann. tit. 11, §4214(b).
[3] *Russell v. State*, 5 A.3d 622 (Del. 2010).
[4] *Russell v. State*, 2012 WL 5417068 (Del. Nov. 5, 2012).

(4) When considering a motion for postconviction relief pursuant to Rule 61, the Superior Court must first determine whether the defendant has met the procedural requirements of the rule before considering the merits of the motion.[5] In this case, Russell's claims are barred as untimely pursuant to Rule 61(i) (1). Moreover, his first two claims are procedurally barred as formerly adjudicated pursuant to Rule 61(i) (4).

(5) While characterized by Russell as claims of ineffective assistance of counsel, his first two claims are grounded in the same claim he unsuccessfully raised in his first postconviction motion---i.e. that the CAC interview should not have been admitted into evidence. Because that claim was previously adjudicated in his direct appeal and in his first postconviction motion, it is procedurally barred in this proceeding pursuant to Rule 61(i) (4).[6] Russell's third claim of error on the part of the trial judge was not raised below and, therefore, will not be considered in this appeal.[7]

(6) To the extent that Russell attempts to avoid the time and procedural bars by arguing that his claim of impermissible vouching amounts to a "retroactively applicable right" pursuant to Rule 61(i) (1), that attempt must fail. As the Superior Court determined, Russell's reliance on

[5] *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).
[6] Alternatively, to the extent that Russell's claim may be characterized as different from his previous claims, it is procedurally barred as repetitive pursuant to Rule 61(i) (2).
[7] Supr. Ct. R. 8.

Richardson v. State, 43 A.3d 906 (Del. 2012) is misplaced. In *Richardson*, this Court held that the CAC interviewer impermissibly vouched for the veracity of the child victim by stating that her interviewing protocol made it "very obvious when [the children] are being truthful." In Russell's case, the record reflects that both the prosecution and defense questioned the CAC interviewer regarding the goal of finding "the truth." The judge interrupted the examination and reiterated to the jury the long-standing principle that they alone were charged with determining the credibility of the witnesses.[8] Because no "new rule" was enunciated by the Court, no retroactively applicable right was created.

(7) To the extent that Russell relies on Rule 61(i) (5)'s "miscarriage of justice" exception as a means of avoiding the time and procedural bars of Rule 61, that attempt also is unavailing. Rule 61(i) (5) provides that the time bar does not apply 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." In this case, the record does not reflect any constitutional violation that undermined the proceedings leading to Russell's

[8] *Monroe v. State*, 28 A.3d 418, 430 (Del. 2011).

conviction. As such, his claims are subject to the time and procedural bars of Rule 61.

(8) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice