

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WARD T. EVANS,	§
	§
Defendant Below-	§ No. 657, 2007
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID 88K01678DI
Plaintiff Below-	§
Appellee.	§

Submitted: April 25, 2008

Decided: July 14, 2008

Before **STEELE**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

ORDER

This 14th day of July 2008, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The appellant, Ward T. Evans, filed this appeal from the Superior Court's denial of his motion for postconviction relief. The Superior Court held that Evans' claims were procedurally barred by Superior Court Criminal Rule 61(i)(1)-(3). We agree and affirm.

(2) The record reflects that a Superior Court jury convicted Evans in 1982 of first degree rape. This Court affirmed his conviction on direct

appeal.¹ Thereafter, Evans filed multiple, unsuccessful postconviction petitions, asserting various grounds for relief. In his latest petition, Evans asserted that the prosecutor had engaged in misconduct at his 1982 trial by: (i) knowingly presenting perjured testimony to the jury; and (ii) telling the jurors to use their “God given common sense” in evaluating the facts of the case. The Superior Court denied Evans’ motion on the alternative grounds that it was time-barred,² repetitive,³ and otherwise procedurally barred by Rule 61(i)(3). This appeal followed.

(3) In his opening brief on appeal, Evans raises the same two issues he raised below. He also raises two additional issues. First, he contends that the procedural bars of Superior Court Criminal Rule 61(i) are unconstitutional. Second, Evans attempts to reargue this Court’s 2005 decision, which held that Evans is ineligible for conditional release.⁴ Because the latter claim was not raised in the Superior Court, we will not consider the issue in this appeal in the absence of plain error.⁵

(4) Similarly, Evans did not raise his constitutional challenge to the Superior Court in the first instance. Accordingly, Evans has the burden of

¹ *Evans v. State*, Del. Supr., No. 190, 1983, Horsey, J. (June 21, 1984).

² Del. Super. Ct. Crim. R. 61(i)(1).

³ Del. Super. Ct. Crim. R. 61(i)(2).

⁴ *Evans v. State*, 872 A.2d 539, 553-58 (Del. 2005).

⁵ See Del. Supr. Ct. R. 8 (2008).

establishing plain error.⁶ Evans' argument is that the procedural bars of Rule 61(i) violate the "open courts" clause of Article I, section 9 of the Delaware Constitution by denying him a remedy. We find no merit to this position. The procedural bars of Rule 61(i) are not absolute and may be overcome as expressly provided for in the Rule itself.⁷ That Evans' particular claims are insufficient to overcome these procedural hurdles does not render Rule 61(i) unconstitutional. Accordingly, we find no plain error.

(5) Having concluded that the procedural bars of Rule 61(i) are constitutional, we find it manifest that Evans' postconviction motion, which was filed more than twenty years after his conviction, clearly was untimely and repetitive. Evans failed to overcome these procedural hurdles.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

⁶ *Johnson v. State*, 813 A.2d 161, 165 (Del. 2001).

⁷ *Boyer v. State*, 562 A.2d 1186, 1188 (Del. 1989).