

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID No. 0804033000
)
)
 CURTIS N. MERCER,)
)
 Defendant.)
)

Submitted: August 15, 2017
Decided: November 1, 2017

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S THIRD MOTION FOR POSTCONVICTION RELIEF
SHOULD BE SUMMARILY DISMISSED.**

James J. Kriner, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Curtis N. Mercer, Delaware Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 1st day of November 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. On January 16, 2009, Defendant Curtis Mercer was convicted of four counts of Rape in the First Degree, one count of Kidnapping in the First Degree, two counts of Possession of a Deadly Weapon During the Commission of a Felony, one count of Burglary in the First Degree, one count of Tampering with Physical Evidence, one count of Misdemeanor Theft and one count of Terroristic Threatening. On March 6, 2009, Defendant was sentenced to four consecutive life sentences plus nine additional years at Level V.

2. On September 9, 2009, Defendant filed a direct appeal to the Delaware Supreme Court. By Order dated November 25, 2009, the Delaware Supreme Court affirmed the convictions and sentences.¹

3. On July 6, 2010, Defendant filed his first motion for postconviction relief. In that motion Defendant raised a number of ineffective assistance of counsel claims as well as various other claims.

4. Before ruling on Defendant's first motion for postconviction relief, the Court enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter, Defendant filed a response thereto.²

¹ *State v. Mercer*, 2009 WL 4164765 (Del.).

² Superior Court Criminal Rule 61(g)(1).

5. By Order dated December 15, 2010, the Superior Court denied Defendant's motion for postconviction relief.³ The Superior Court found Defendant's contentions, including his ineffective assistance of counsel claims, to be without merit.

6. Defendant appealed the Superior Court's December 15, 2010 Order denying his first motion for postconviction relief to the Delaware Supreme Court. By Order dated July 20, 2011, the Delaware Supreme Court affirmed the Superior Court's denial of Defendant's motion for postconviction relief.⁴

7. On September 9, 2011, Defendant filed a second motion for postconviction relief. In the second motion, Defendant raised two claims of ineffective assistance of counsel. Specifically, Defendant claimed that his counsel was ineffective for failing to seek the suppression of an in-court identification of the Defendant at trial. Defendant also claimed that his counsel was ineffective for failing to "develop and present every issue that held trial error or violated a constitutional right".

8. On October 5, 2011, the undersigned Superior Court Commissioner issued her Report and Recommendation recommending that Defendant's second Rule 61 postconviction motion be denied.⁵ The Commissioner recommended that the motion be dismissed since the claims raised therein were procedurally barred and without merit.⁶

9. By Order dated October 24, 2011, the Superior Court adopted the Commissioner's Report and Recommendation and denied Defendant's second Rule 61 postconviction motion.⁷

³ *State v. Mercer*, 2010 WL 5307842 (Del.Super.).

⁴ *State v. Mercer*, 2011 WL 2927774 (Del.).

⁵ *State v. Mercer*, 2011 WL 4730541 (Del.Super.).

⁶ *Id.*

⁷ Superior Court Docket No. 60- Order dated October 24, 2011 denying Defendant's Rule 61 motion.

DEFENDANT'S THIRD RULE 61 MOTION

10. On August 15, 2017, Defendant filed a third motion for postconviction relief. In the subject motion, Defendant claims that his counsel was ineffective for failing to challenge his alleged illegal seizure at the beginning of the case when he was taken to the police station and questioned. Defendant also claims that the trial court erred when allowing his statement taken during this interrogation to be presented as evidence.

11. In second or subsequent postconviction motions, the motion shall be summarily dismissed unless the defendant establishes: 1) that *new* evidence exists that creates a strong inference that he is actually innocent of the charge for which he was convicted, or 2) the existence of a *new* rule of constitutional law made retroactive to cases on collateral review rendered his convictions invalid.⁸ If it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.⁹

12. Defendant's third Rule 61 motion should be summarily dismissed. Defendant has not pled with particularity that any *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted nor has he even contended that there is a *new* rule of law that would render his conviction invalid.

13. Defendant does not raise anything new or recently discovered. Defendant's claims stem from facts known to him prior to, and at, his trial in January 2009. Defendant does not raise any new evidence, let alone new evidence that would create a strong inference that he is actually innocent. Moreover, Defendant does not claim the existence of any new rule of constitutional law that would be applicable to his case. As such,

⁸ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i) (effective June 4, 2014).

⁹ Super.Ct.Crim.R. 61(d)(5).

Defendant has failed to meet the pleading requirements allowing him to proceed with his Rule 61 motion. In accordance with the mandates of Rule 61, Defendant's motion should be summarily dismissed.¹⁰

14. In addition, Defendant's motion also falls short of other procedural requirements. If a procedural bar exists, then the claim is barred and the court should not consider the merits of the claim.¹¹

15. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹² (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances (ie. discovery of new evidence or new rule of constitutional law) warranting a subsequent motion being filed; (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 and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief however do not apply to a claim that the court lacked jurisdiction or to a claim that new evidence exists that movant is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.¹³

16. In the subject action, Rule 61(i)(1) also precludes consideration of the merits of the claims presented herein because Defendant's motion is time-barred. The final order of conviction was in 2009¹⁴, and this motion was filed in August 2017, over 7 1/2 years

¹⁰ Super.Ct.Crim.R. 61(d)(2) & 5; and Rule 61(i).

¹¹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹² Super.Ct.Crim.R. 61(i)(1).

¹³ Super.Ct.Crim.R. 61 (effective June 4, 2014).

¹⁴ Super.Ct.Crim.R. 61(m)(2).

later.¹⁵ This motion was filed well outside the applicable one year limit. Defendant's claims, at this late date, are time-barred.

17. As previously discussed, Rule 61(i)(2) further precludes this court's consideration of Defendant's motion since Defendant has not satisfied the pleading requirements for proceeding with this motion. Defendant has not established that *new* evidence exists creating a strong inference of Defendant's actual innocence or the existence of a *new* rule of constitutional law made retroactive to this case that would render his conviction invalid.

18. Rule 61(i)(3) and Rule 61(i)(4) also prevent this court from considering any claim raised by Defendant at this late date. Either Defendant previously raised the subject claims in some fashion on direct appeal and/or in his previously filed post-conviction motions and the claims are now barred by Rule 61(i)(4) as previously raised and adjudicated, or Defendant failed to timely raise these claims and they are barred by Rule 61(i)(3).

19. There is no question that Defendant was aware of, had time to, and the opportunity to raise the claims presented herein in a timely filed motion. Defendant's subject claims stem from facts known to Defendant at the time of his arrest in 2008 and at the time of trial in January 2009. There was nothing preventing Defendant from timely raising these claims if he truly believed they were of any merit. Defendant does not raise anything new or recently discovered.

20. Defendant has not established any prejudice to his rights and/or cause for relief. Defendant had time and opportunity to raise the issues raised herein in on direct appeal and/or in a timely filed postconviction motion. There is no just reason for Defendant's

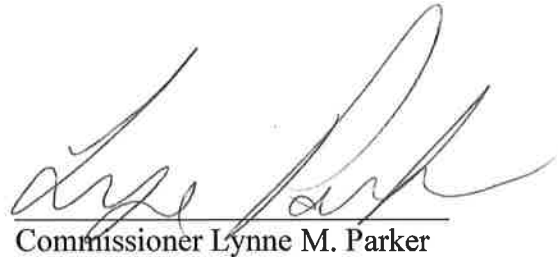
¹⁵ Super.Ct.Crim.R. 61(i)(1).

over 7-year delay in doing so. Having been provided with a full and fair opportunity to present any issue desired to be raised in a timely filed motion, any attempt at this late juncture to raise or re-raise a claim is procedurally barred.

21. Defendant has failed to meet the pleading requirements for proceeding with the subject motion and, therefore, the motion should be summarily dismissed. Defendant's motion is also time barred and otherwise procedurally barred.

For all of the foregoing reasons, Defendant's Third Motion for Postconviction Relief should be summarily dismissed.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc: Prothonotary
Dade D. Werb, Esquire