

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
V.)
)
IZZY WHITEHURST,)
)
Defendant.)

I.D.: 1110014096

Submitted: November 18, 2021
Decided: January 12, 2022

ORDER

This Order is directed to a motion filed by the Defendant to correct an allegedly illegal sentence pursuant to Rule 35(a) of the Delaware Rules of Criminal Procedure. The motion is denied for the reasons that follow.

1. Defendant was convicted after a jury trial on a host of charges stemming from an armed robbery in a hotel room occupied by the victim. The curious may read a synopsis of the case as crafted by the Supreme Court in its affirmance of the conviction on direct appeal.¹

2. Ever since the Supreme Court’s affirmance, Defendant has been challenging his conviction with various pleadings. He first sought a writ of *certiorari* in the U.S. Supreme Court. That petition was denied.² He next filed a

¹ *Whitehurst v. State*, 83 A.3d 362 (Del. 2013).
² *Whitehurst v. Delaware*, 572 U.S. 1152 (2014).

Rule 61 motion in Superior Court. That motion was denied,³ and its denial was affirmed.⁴ Then he filed a federal *habeas* petition. That petition was denied,⁵ and its appeal was refused.⁶

3. Further bids for post-conviction review would be procedurally barred as successive under both Delaware and federal law. So Defendant's latest motion seeks to avoid the procedural bars. Although stylized as a motion for correction of an illegal sentence, Defendant's motion is not about his sentence. Instead, it attacks some jury instructions in an effort to prompt yet another review of Defendant's underlying convictions.

4. The argument is that in the midst of various instructions concerning attempted murder, assault 1st degree, and burglary 1st degree, the judge incorrectly referenced attempted burglary 1st degree instead of attempted murder 1st degree.⁷ From this linguistic slip up, Defendant argues he was convicted of attempted

³ *State v. Whitehurst*, 2016 WL 1424502 (Del. Super. Ct. Mar. 31, 2016).

⁴ *Whitehurst v. State*, 2016 WL 6803774 (Del. Nov. 16, 2016).

⁵ *Whitehurst v. May*, 2021 WL 951214 (D. Del. Mar. 12, 2021),

⁶ *Whitehurst v. Warden*, 2021 WL 4203493 (3d. Cir. June 23, 2021).

⁷ If this is what the judge actually said, and not simply a misprint by the stenographer, it was at worst a misstatement and in context obviously so. The transcript says: "The defendant is charged in Count I with attempted burglary in the first degree in violation of Title 11 Section 531 of the Delaware Code. Count I reads as follows . . ." The judge then recounted the attempted murder charge in Count I, concluding that "in order . . . to understand the crime of murder in the first degree, you must understand the elements of murder in the first degree, since that is the crime which the defendant is charged with having committed." Trial Tr. at 127.

burglary 1st degree (even though not charged with it) and not attempted murder (which is true, although he was convicted of the lesser included offense of assault 1st degree).

5. Perhaps this disputation would be worthy of a more searching inquiry if it were not so obviously inappropriate for consideration under Rule 35. Rule 35 is not a substitute for Rule 61.⁸ Unlike Rule 61, “Rule 35 does not permit vacating a conviction, but is limited to applications for either modifications or corrections of sentences.”⁹ By consequence, a defendant cannot simply “chang[e] the number” 61 to 35 and then launch generalized, procedurally barred strikes on his conviction or the proceedings that led to it.¹⁰

⁸ See, e.g., *State v. Lewis*, 797 A.2d 1198, 1200–02 (Del. 2002).

⁹ *Baltazar v. State*, 2015 WL 257334, at *1 (Del. Jan. 20, 2015).

¹⁰ *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998). E.g., *Wehde v. State*, 2015 WL 5276752, at *3 (Del. Sept. 9, 2015) (“A proceeding under Rule 35 presumes a valid conviction. Rule 35 is not a means for Wehde to attack the legality of his convictions or to raise allegations of error in the proceedings before the imposition of sentence.” (citation omitted)); *Weber v. State*, 2015 WL 2329160, at *2 (Del. May 12, 2015) (“Rule 35(a) is not a proper vehicle for a defendant to obtain review of alleged errors occurring at trial.” (internal quotation marks omitted)); *Buchanan v. State*, 2013 WL 5918802, at *1 (Del. Nov. 1, 2013) (“The purpose of [Rule 35(a)] is to permit correction of an illegal sentence, *not* to reexamine errors occurring at trial or prior to the imposition of sentence.”); *Wilmer v State*, 2011 WL 1413305, at *1 (Del. Apr. 12, 2011) (“Rule 35(a) is not a proper vehicle for re-asserting Rule 61 postconviction claims.”); *Webb v. State*, 2007 WL 2810994, at *1 (Del. Sept. 28, 2007) (“Webb previously raised [his] argument in an unsuccessful postconviction petition under Rule 61. Webb cannot seek to relitigate this same issue simply by filing . . . a motion for correction of illegal sentence under Rule 35(a).” (citations omitted)); *Ward v. State*, 2006 WL 1343639, at *1 (Del. May 15, 2006) (“Because

6. Defendant had, and pursued, multiple opportunities to challenge his conviction. Those efforts failed. On Rule 35(a) review, the only relevant inquiries are whether Defendant's sentence is illegal or was imposed illegally. It is not and was not. Accordingly, his motion is **DENIED**.

IT IS SO ORDERED.



Charles E. Butler, Resident Judge

Ward's . . . claims would require a review of his entire trial proceedings, as opposed to merely his sentences, no relief is available to him under Rule 35(a)”).