IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
v.	)	I.D. No. 9804020279
MARY E. HINSON	)	
Defendant.	)	

Submitted: February 7, 2006
Decided: February 10, 2006

On Defendant's "Motion to Vacate 1998 Sentence and Plea to Aggravat[ed] Menacing."
DENIED.

ORDER

This 10th day of February, 2006, upon consideration of Defendant's "Motion to Vacate 1998 Sentence and Plea to Aggravat[ed] Menacing," it appears to the Court that:

1. On August 31, 1998, Defendant pled guilty to Aggravated Menacing in the Superior Court in violation of 11 *Del. C.* § 602. Defendant was immediately sentenced to two years at Level V incarceration, which was suspended for 3 years at Level III probation, then suspended after eighteen months at Level III probation for eighteen months at Level II. The

sentencing order was modified on January 13, 1999, to eliminate Defendant's restitution obligations to the victim. By the terms of the sentencing order, Defendant's probation ended on August 30, 2001. Defendant was not officially discharged from probation until July 3, 2002.

2. Prior to the filing of this motion on October 28, 2005, Defendant was indicted for Murder in the First Degree in July 2005.[1] Under 11 *Del. C.* § 4209(e)(1)(i), Defendant's 1998 conviction for Aggravated Menacing potentially made her eligible for the death penalty as a prior conviction of that violent felony qualifies as one of the enumerated statutory aggravating circumstances.[2] This 1998 conviction was apparently the sole statutory aggravating circumstance that made Defendant eligible for the death penalty, and the State originally advised Defendant and the Court that the State considered this case as possibly warranting its prosecution as a capital case. The trial was set for February 28, 2006. However, the parties arrived at a plea agreement and Defendant pled guilty to Manslaughter and to Possession of a Deadly Weapon During the Commission of a Felony on December 2, 2005. Sentencing is scheduled for March 3, 2006.

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[1] *State v. Hinson*, Del. Super., ID No. 0504015170.

[2] 11 *Del. C.* 4209(e)(1)(i) states, in pertinent part: "(1) In order for a sentence of death to be imposed, the judge must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances…:

> i. The defendant was previously convicted of … a felony involving the use of, or threat of, force or violence upon another person."

3. Defendant claims that her 1998 conviction for Aggravated Menacing should be vacated because she was not advised of her "many rights as required during the plea colloquy."[3] Defendant maintains that although the Court during the "plea colloquy [did] ask her if the plea was entered voluntarily[,] however, [the record] does not reflect the Court asking most of the required colloquy questions under *Brown v. State* [250 A.2d 503 (Del. 1969)]."[4] Finally, Defendant alleges that her "plea and sentence violated her constitutional rights to a fair proceeding when she entered the plea without the knowledge that it could be used as an aggravating factor under 11 *Del. C.* § 4209."[5] Defendant alternatively argues that, if she is not eligible for relief pursuant to Superior Court Criminal Rule 61, she is entitled to relief by way of a writ of error *coram nobis*.

The State argues that Rule 61 is inapplicable to Defendant since she is not "in custody or subject to future custody" from her 1998 conviction, and that relief by writ of error *coram nobis* is not available as that writ has been abolished in Delaware.

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[3] Def.'s Mot. at ¶ 2.

[4] *Id.* at ¶ 11. Defendant also contends that "direct ramifications of the plea that are not articulated in *Brown v. State* are also absent from this record." *Id.* at ¶ 13.

[5] *Id.* at ¶ 17 (citing Del. Const. art. I, § 7; U.S. Const. amend. IV). Defendant's guilty plea to the Manslaughter and Possession of a Deadly Weapon During the Commission of a Felony charges makes the aggravating circumstance issue moot insofar as a prosecution for capital murder is concerned.

4. Although the Defendant has styled the instant motion as a "Motion to Vacate 1998 Sentence and Plea to Aggravat[ed] Menacing," the motion invoked Criminal Rule 61(i)(5) as the basis for the motion. This motion is, therefore, a petition for postconviction relief pursuant to Superior Court Criminal Rule 61.[6]

5. Rule 61 "governs the procedure on an application by a person in custody or subject to future custody under a sentence of this court seeking to set aside a judgment of conviction …"[7] Here, Defendant's probation for the 1998 Aggravated Menacing conviction ended on August 30, 2001, and she was officially discharged from probation on July 3, 2002. Thus, she may not seek Rule 61 relief as she is not "in custody or subject to future custody under a sentence of this court." All courts in Delaware that have considered whether postconviction relief under Rule 61 is potentially available to a person who is not "in custody or subject to future custody" for the challenged sentence have agreed that such relief under Rule 61 is not available.[8] Therefore, Defendant is barred from relief pursuant to Rule 61

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[6] Under the circumstances, the Court did not require Defendant to refile the motion using the prescribed Rule 61 form. Super. Ct. Crim. R. 61(b)(1).

[7] Super. Ct. Crim. R. 61(a)(1).

[8] *See, e.g., Epperson v. State*, 2003 WL 21692751, *1 (Del. Supr.) (affirming Superior Court's denial of postconviction relief where defendant was not in custody or subject to future custody for the underlying offense); *Summers v. State*, 2003 WL 1524104, *1 (Del. Supr.) (same); *Guinn v. State*, 1993 WL 144874, *1 (Del. Supr.) (same); *State v. Davila*,

from her 1998 Aggravated Menacing conviction because she is not "in custody or subject to future custody" for that challenged conviction.

6. Moreover, Rule 61 provides that "a motion for postconviction relief may not be filed more than one year after the judgment of conviction is final…"[9] As Defendant's sentence for Aggravated Menacing became final on August 31, 1998, the date on which she pled guilty and was sentenced for the offense and before amended Rule 61(i)(1) became effective, the three-year time limitation for filing a Rule 61 petition applies to Defendant's 1998 sentence. Defendant filed the instant motion on October 28, 2005, more than seven years after final judgment of her conviction for the challenged offense. Thus, any petition for postconviction relief pursuant to Rule 61 is

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2003 WL 21007093, *2 (Del. Super. Ct.) (denying a petition for postconviction relief where petitioner was not in custody or subject to future custody for the challenged sentence); *State v. Drakes*, 1999 WL 1222689, *1 (Del. Super. Ct.) (same); *State v. Freeman*, 1998 WL 283499, *1 (Del. Super. Ct.) (same); *State v. Greathouse*, 1992 WL 1468861, *1 (Del. Super. Ct.) (same). *See also Fullman v. State*, 2000 WL 140114, *1 (Del. Supr.) (affirming Superior Court's denial of petitioner's request for postconviction relief because, although petitioner was serving a sentence in federal prison at the time, he was not "in custody or subject to custody" for the sentence being challenged); *State v. Beles*, 1997 WL 366899 (Del. Super. Ct.) (holding on appeal that defendant had no standing in the Court of Common Pleas to move for postconviction relief under CCP Crim. R. 61 where he was not "in custody or subject to future custody"); *State v. Ledezma*, 1989 WL 64151, *1 (Del. Super. Ct.) ("Although the State correctly quotes the [Rule 61 custody requirement], that language does not preclude postconviction relief in an extraordinary circumstance by writ of error *coram nobis*."); *see* extended discussion of *Ledezma infra* pp. 7-12.

[9] Super. Ct. Crim. R. 61(i)(1). Effective July 1, 2005, the period within which to bring Rule 61 petitions is changed to a one-year limitation from the previous three-year limitation.

barred based on the three-year time limitation. Relief under Rule 61(i)(5), a possible escape mechanism from the three-year time limitation, is not available.[10]

7. This motion additionally raises the interesting issue of the continuing "vitality," if any, in Delaware of the ancient writ of error *coram nobis* as a vehicle for relief for Defendant in lieu of Rule 61. Defendant invokes this writ in the event that Rule 61 relief is held unavailable to her. With respect to that writ, Blackstone once taught that

> [i]f a judgment … be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the same court by writ or error *coram nobis*, or *quae coram nobis resident*, so called from its being founded on the record and process, which are stated in the writ to remain in the [same] court…[11]

A recent decision of the Delaware Supreme Court has unequivocally held that the writ of error *coram nobis* has been "abolished" in Delaware and that the purported writ of error *coram nobis* before that court on appeal was to be analyzed as a Rule 61 petition for postconviction relief, that rule being the "exclusive remedy for seeking to set aside a final judgment of conviction."[12]

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[10] Super. Ct. Crim. R. 61(i)(5) ("The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was 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.").

[11] William Blackstone, 3 *Commentaries* *407 n.5 (Sharswood ed., 1859). Interestingly, Victor B. Woolley, *Practice in Civil Actions* (1906), apparently makes no mention of the writ of error *coram nobis*.

[12] *Heron v. State*, 2001 WL 58742, *1 (Del. Supr.) (affirming the Superior Court's

The writ of error *coram nobis* was formally abolished in the Superior Court by the adoption in 1947 of Superior Court Civil Rule 60(b), which provides that "[w]rits of coram nobis, coram vobis, and audita querela are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these Rules or by an independent action."[13] Civil Rule 60(b) is made applicable to criminal cases via Superior Court Criminal Rule 57(d).[14] With that structure in place, the Delaware Supreme Court has consistently held:

> [T]he writ of error *coram nobis*, which was an ancient common law writ of error for review of facts only, has been abolished in Delaware and has been supplanted by modern rules of procedure for reopening a judgment. In Delaware, Superior Court Criminal Rule 61 is the exclusive remedy for seeking to set aside a final judgment of conviction.[15]

8. Notwithstanding this seemingly unbending rule of law, 17 years ago

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summary denial of Heron's petition for a writ of error *coram nobis*, which had instead treated Heron's petition as a motion for postconviction relief and barred the petition based on the then-applicable three-year limitations period of Rule 61).

[13] Super. Ct. Civ. R. 60(b) (referring implicitly to Superior Court Criminal Rule 61 as one of "these Rules").

[14] Super. Ct. Crim. R. 57(d) ("In all cases not provided for by rule or administrative order, the court shall regulate its practice in accordance with the applicable Superior Court civil rule or in any lawful manner not inconsistent with these rules or the rules of the Supreme Court.").

[15] *Heron*, at *1 (citing *In re Nicholson*, 1994 WL 35367, *1 (Del. Supr.) ("[The] function [of a writ of error *coram nobis*] has been supplanted by modern rules of procedure which provide the mechanics for reopening a judgment. Accordingly, Delaware has abolished the writ.")). *Cf. Tweed v. Lockton*, 167 A. 703, 705 n.2 (Del. 1933) ("[The] writ [of error *coram nobis*] seems to be almost obsolete in both England and America and has been practically supplanted by the more convenient method of motion, and rule issued pursuant thereto.").

in *State v. Ledezma*, this court did state that the language of Rule 61, which otherwise precludes postconviction relief for petitioners not "in custody or subject to future custody," "does not preclude postconviction relief in an extraordinary circumstance by writ of error *coram nobis*."[16] The "extraordinary circumstance" that the *Ledezma* court concluded existed and warranted relief by writ of error *coram nobis* was the defendant's possible deportation as a result of the conviction challenged by the defendant.[17] In a footnote, the *Ledezma* court set forth a summary of the writ of error *coram nobis* from a federal court of appeals decision:

> The ancient writ of error coram nobis was used to enable a court of first resort to correct its own errors. The writ had its utility at common law in both civil and criminal cases. However, in 1946, Rule 60(b) [of the Federal Rules of Civil Procedure], was amended, abolishing writs of error coram nobis and other common law forms of relief from judgments. Nevertheless, the ancient writ of error coram nobis rose phoenix-like from the ashes of American jurisprudence through the benign intervention of the [United States] Supreme Court in *United States v. Morgan* [346 U.S. 502 (1954)].[18]

Ledezma then set forth a basis grounded in Delaware law for the possible

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[16] *State v. Ledezma*, 1989 WL 64151, *1 (Del. Super. Ct.) (granting postconviction relief by writ of error *coram nobis* where the petitioner, although not "in custody or subject to future custody," was subject to deportation proceedings based on his conviction and holding that although Rule 61 only provided relief to a "'person in custody or subject to future custody under a sentence of this Court[,]' … that language does not preclude postconviction relief in an extraordinary circumstance by writ of error *coram nobis*.").

[17] *Id.*

[18] *Id.* at *1 n.1 (citing *U.S. v. Balistrieri*, 606 F.2d 216, 219 (7th Cir. 1979) *cert denied* 446 U.S. 271 (1980)).

application of a writ of error *coram nobis*:

> The vitality of coram nobis in criminal cases has been acknowledged by the Delaware General Assembly in the current Criminal Code. As stated in 11 *Del. C.* § 210(3), a former prosecution does not bar a subsequent one when '[t]he former prosecution resulted in a judgment of conviction which was held invalid on appeal or in *a subsequent proceeding on a writ of* habeas corpus, *coram nobis or similar process*.'[19]

The *Ledezma* court held that the United States Supreme Court in *Morgan* had "found the authority to provide a postconviction remedy by *coram nobis* [in federal courts] in such a context in the [A]ll [W]rits section of the federal Judicial Code."[20] However, the United States Supreme Court has recently called into question the use of the federal All Writs provision as the vehicle for a writ of error *coram nobis* as well as the writ's general availability in federal criminal proceedings.[21] In *Carlisle v. United States*, a decision rendered 7 years before *Ledezma*, the Court noted that petitioner's *coram nobis* argument "[did] not detain [it] long," as the Court rejected petitioner's argument that the United States District Court had the power through the All

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[19] *Id.* at *1 n.1.

[20] *Id.* at *1. The *Ledezma* court also cited *Morgan* for the proposition that "[t]he U.S. Supreme Court has held that the common law writ of error *coram nobis* remains available to remedy an invalid sentence in extraordinary cases 'under circumstances compelling such action to achieve justice.'" *Id.* (citation omitted). However, the test enunciated in *Morgan* is only applicable to postconviction relief sought in the federal courts. More importantly, however, the Delaware Supreme Court has consistently upheld the elimination of the writ of error *coram nobis* in Delaware.

[21] *Carlisle v. United States*, 517 U.S. 416, 428 (1996) (limiting the availability of the writ of error *coram nobis* where the petitioner brought "before the court factual errors 'material to the validity and regularity of the legal proceeding itself,' such as the defendant's being under age or having died before the verdict").

Writs Act to enter a judgment of acquittal through the writ of error *coram nobis*, where the petitioner did not originally seek a writ of error *coram nobis* nor did the District Court purport to issue such a writ.[22] Instead, the Court held that Federal Rule of Criminal Procedure 29 was the applicable law, and thus, a writ of error *coram nobis* was not available pursuant to the federal All Writs statute.[23] Moreover, the Court, quoting another United States Supreme Court decision from 1947, stated that "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.'"[24]

Just as the *Morgan* court found its authority to grant a writ of error

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[22] *Id.* at 429 (rejecting petitioner's claim that the District Court had authority under the All Writs Acts, 28 U.S.C. § 1651, to order an acquittal through a writ of error *coram nobis*) (quoting *Pennsylvania Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985) ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.")). By way of comparison, in the case at bar, Rule 61 "specifically addresses the particular issue at hand."

[23] *Id.*

[24] *Id.* at 429 (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). Despite this observation by the United States Supreme Court, one leading treatise continues to rely on *Morgan* to state that while the federal courts of appeal have had a difficult time in reaching consensus on some issues regarding *coram nobis*, "[t]he courts are agreed that the writ is available only to address fundamental defects and that relief can only be granted in 'circumstances compelling such action to achieve justice.'" 28 James Wm. Moore et al., Moore's Federal Practice § 672.02(2)(c) (1997). *See also* 3 Charles Alan Wright, Nancy J. King & Susan R. Klein, Federal Practice & Procedure § 592 (3d ed. 2004). Thus, given the presence of apparently conflicting authority and the absence of a clear rule in the federal courts, it seems that the viability of the writ of error *coram nobis* in the federal courts continues to be an unresolved issue.

coram nobis in the federal All Writs statute, the *Ledezma* court found its authority in the analogous Delaware All Writs statute, which grants the Superior Court authority to issue certain writs.[25] Such authority was the instrument with which the *Ledezma* court granted *coram nobis* relief even though the petitioner was not "in custody or subject to future custody."

The *Ledezma* court also noted the continuing supposed "vitality" of the writ of error *coram nobis* in criminal cases in part because of the General Assembly's enactment in 1973 of 11 *Del. C.* § 210(3).[26] However, § 210(3) refers only in the most general way to *coram nobis* as a potential manner by which a defendant's prior conviction anywhere may be invalidated. Section 210(3) can reasonably be read, insofar as "habeas corpus, coram nobis or similar process" is involved, to mean that a Delaware court will respect the decision of another jurisdiction (where the writ of error *coram nobis* is, unlike in Delaware, available) that had invalidated a conviction by "habeas

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[25] *Ledezma*, at *1. *See* 10 *Del. C.* § 562:

> The Superior Court may frame and issue all remedial writs, including writs of habeas corpus and certiorari, or other process, necessary for bringing the actions in that Court to trial and for carrying the judgments of the Court into execution. All writs shall be granted of course and shall be in such form and returnable at such time as may be prescribed by the rules of the Court, or otherwise as the particular case may require.

[26] 11 *Del. C.* § 210(3): "A prosecution is not a bar within the meaning of §§ 207, 208 and 209 of this title under any of the following circumstances:

> (3) The former prosecution resulted in a judgment of conviction which was held invalid on appeal or in a subsequent proceeding on a writ of habeas corpus, coram nobis or similar process."

corpus, coram nobis or similar process."[27] And, presumably, the General Assembly, in its enactment of § 210(3) into law in 1973, was aware of Superior Court Civil Rule 60(b) that had abolished the writ of error *coram nobis* in the Superior Court. There is no indication in the plain language of § 210(3) that the writ of error *coram nobis* is available in Delaware to vacate a previous conviction; rather, section 210(3) applies only to bars to a subsequent Delaware prosecution as set forth in Sections 207, 208 and 209. Finally, to the extent that any authority of § 210(3) enabling petitioner to maintain a viable writ of error *coram nobis* conflicts with Rule 60(b), the rule will prevail.[28]

Notably, Delaware Supreme Court cases such as *Guinn*, *Fullman*, and *Heron* stating the abolition of the writ of error *coram nobis* were all decided after *Ledezma*. This Court holds that *Ledezma* has been implicitly overruled by those cases.

Defendant contends that *Ledezma* is "precisely on point with Defendant's case."[29] The State argues that *Ledezma* was wrongly decided

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[27] *See also* Commentary to § 210(3) (1973) ("[I]f the defendant succeeds in having the former proceeding held invalid by means of habeas corpus or coram nobis, a reprosecution should not be barred.").

[28] 10 *Del. C.* § 561(d) ("Any inconsistency or conflict between any rule promulgated under the authority of this section or prior law, and any provisions of this Code or other statute of this State dealing with practice or procedure in the Superior Court, shall be resolved in favor of such rule of court.").

and that *Heron* is the "controlling authority."[30]

This court declines to follow *Ledezma* and thus does not reach the issue of whether the alleged deficiencies in Defendant's 1998 guilty plea colloquy constitute an "extraordinary circumstance" warranting potential *coram nobis* relief since the writ of error *coram nobis* is now extinct in Delaware. Relief is not otherwise available under Rule 61.

9. For the foregoing reasons, Defendant's "Motion to Vacate 1998 Sentence and Plea to Aggravat[ed] Menacing" is **DENIED.**

IT IS SO ORDERED.

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oc: Prothonotary (ID Nos. 9804020279 & 0504015170)

cc: Christina M. Showalter, Esquire, Deputy Attorney General
Jossette D. Manning, Esquire, Deputy Attorney General
David J. J. Facciolo, Esquire, Assistant Public Defender
Kathryn B. Lunger, Esquire, Assistant Public Defender

[29] Letter to the Court from David J. J. Facciolo, Esq. & Kathryn B. Lunger, Esq., at 1 (Feb. 7, 2006).

[30] Letter to the Court from Christina M. Showalter, Esq., at 1 (Feb.7, 2006).