

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT W. DRAKE, III,	§
	§
Defendant Below-	§ No. 45, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN94-08-0736
Plaintiff Below-	§ IN94-08-0751
Appellee.	§

Submitted: November 30, 2001

Decided: February 4, 2002

Before **VEASEY**, Chief Justice, **HOLLAND** and **BERGER**, Justices

ORDER

This 4th day of February 2002, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Albert W. Drake, III, filed an appeal from the December 29, 2000 order of the Superior Court denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we **AFFIRM**.

(2) In his appeal, Drake claims that: a) the Superior Court abused its discretion by failing to review his jurisdictional and due process claims, summarily rejecting his ineffective assistance of counsel claim, denying his

claim of prosecutorial vindictiveness, relying on false facts and refusing to appoint counsel; b) the Superior Court committed legal error in its interpretation of the Delaware rape statute¹; c) his prosecution for rape in the Superior Court rather than for incest in the Family Court violated his equal protection rights; and d) his daughter's statement about abuse to a Catholic nun should have been ruled inadmissible on the basis of religious privilege.²

(3) In September 1993 and August 1994, Drake was indicted on multiple counts of various sex offenses involving his two daughters. In October 1994, Drake pleaded guilty to one count of Unlawful Sexual Intercourse in the First Degree and one count of Unlawful Sexual Contact in the Second Degree. Prior to sentencing, Drake moved to withdraw his guilty plea.³ The Superior Court denied the motion by order dated November 1, 1995. Drake was subsequently sentenced to 27 years

¹DEL. CODE ANN. tit. 11, § 761(h) (1993).

²Drake also claims that, after granting two motions for extensions of time pursuant to Supreme Court Rule 15(b), this Court improperly ruled he would receive no further extensions. We deem this claim to be an untimely motion for reargument of that ruling. The docket reflects that this Court granted two motions by Drake for extensions of time, affording him an additional four months in which to file his opening brief. The motion for reargument is untimely and without merit and is denied.

³SUPER. CT. CRIM. R. 32(d).

incarceration at Level V, to be suspended after 15 years for decreasing levels of supervision. Drake's convictions and sentences were affirmed by this Court.⁴

(4) To the extent Drake's claims are based upon the contention that his guilty plea was defective, any such claim is barred as formerly adjudicated.⁵ To the extent Drake's claims are based upon alleged defects in the proceedings occurring prior to his conviction, any such claim is foreclosed by the entry of his voluntary and intelligent guilty plea.⁶ To the extent Drake's claims were previously determined by this Court in his direct appeal, any such claim is barred.⁷ To the extent Drake asserts new claims not previously asserted in his direct appeal, any such claim is procedurally defaulted.⁸

(4) Drake's claims of abuse of discretion on the part of the Superior Court are without merit. We have carefully reviewed the record in this case and it reflects clearly that the Superior Court seriously

⁴*Drake v. State*, Del. Supr., No. 490, 1995, Walsh, J. (June 13, 1996).

⁵*Id.*; SUPER. CT. CRIM. R. 61(i) (4).

⁶*Id.*; *Downer v. State*, 543 A.2d 309, 312-13 (Del. 1988).

⁷SUPER. CT. CRIM. R. 61(i) (4).

⁸SUPER. CT. CRIM. R. 61(i) (3).

considered each and every claim before it and clearly set forth its rationale as to each and every such claim. Moreover, the Superior Court properly exercised its discretion by declining to appoint counsel for purposes of Drake's postconviction motion.⁹

(5) To the extent this Court did not previously decide Drake's second and third claims in his direct appeal, those claims are without merit. The Superior Court was correct in its application of the language of the Delaware rape statute. Moreover, the State properly exercised its discretion to prosecute Drake under the rape statute in Superior Court rather than under the incest statute in Family Court.¹⁰

(6) Drake's final claim is not properly before us since it was not raised in the Superior Court in the first instance.¹¹ Any review of this claim is foreclosed by Drake's voluntary and intelligent guilty plea in any case.¹²

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

⁹SUPER. CT. CRIM. R. 61(e).

¹⁰*Albury v. State*, 551 A.2d 53, 61-62 (Del. 1988).

¹¹SUPR. CT. R. 8.

¹²*Drake v. State*, Del. Supr., No. 490, 1995, Walsh, J. (June 13, 1996).

BY THE COURT:

/s/ Randy J. Holland
Justice