

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

STATE OF DELAWARE,	)	
	)	
v.	)	ID#: 0701008832
	)	
CARLOS CHARRIEZ,	)	
Defendant.	)	

Submitted: November 10, 2008  
Decided: February 10, 2009

**ORDER**

**Upon Defendant's First Motion for Postconviction Relief – *DENIED***

1. On September 10, 2007, Defendant pleaded guilty to one count of Rape Second Degree. The victim was a child in his care. During the colloquy, Defendant repeatedly admitted his actual guilt. His only hesitation concerned his mistaken belief that the victim was 16.

2. On November 2, 2007, Defendant was sentenced to twenty years at Level V, suspended after fifteen years, followed by decreasing levels of probation. Defendant did not file a direct appeal.

3. Defendant filed his first motion for postconviction relief on May 28,

2008. The motion was timely and properly referred for preliminary review.<sup>1</sup> Upon preliminary review, and to stymie another a snap confession of error by the Attorney General,<sup>2</sup> the court ordered the State to respond. Consistent with Rule 61(d), the order gave Defendant leave to reply.

4. On October 9, 2008, the State submitted a helpful response, correctly asserting that Defendant's motion was procedurally barred under Superior Court Criminal Rule 61(i)(3) and 61(i)(4), and generally lacked merit. Defendant did not reply.

5. Defendant's motion presents three grounds for relief: (1) suppression of favorable evidence, (2) due process violation for failure to indict within 45 days, and (3) ineffective assistance of counsel. Specifically, Defendant claims his trial counsel was ineffective for coercing Defendant into waiving his preliminary hearing, failing to explain the purpose of the preliminary hearing, and for failing to file a motion to suppress.

6. Before the court may consider a Rule 61 motion's merits, it must

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<sup>1</sup> Super. Ct. Crim. R. 61(d).

<sup>2</sup> See, e.g., *Webb v. State*, 888 A.2d 233 (Del. 2005) (TABLE) (ORDER) (Attorney General decides not to argue violation of Rule 61(d)(1) was harmless where motion was filed seven years after conviction and Rule 61(i)(1) bar obviously applicable); *Floyd v. State*, 907 A.2d 145 (Del. 2006) (TABLE) (ORDER) (Attorney General decides not to argue that court may correct untimely appeal problem through Rule 61, notwithstanding *Middlebrook v. State*, 815 A.2d 739, 743 (Del. 2003)).

address the procedural bars enumerated in Rule 61(i).<sup>3</sup> A Rule 61 motion that cannot overcome the procedural bars, absent an exception, must be denied.<sup>4</sup>

7. Rule 61(i) enumerates four procedural bars: (1) the motion was not filed within one year after final conviction, (2) a previous motion was filed and the grounds now asserted were not asserted in that motion, (3) the grounds for relief were not presented before or during trial, or on direct appeal, and (4) the grounds for relief have been formerly adjudicated in a previous proceeding. Under Rule 61(i)(5), the bars of Rule 61(i)(1)-(3) will not apply if a defendant presents “a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice.” Further, a defendant can avoid the Rule 61(i)(3) procedural default by showing cause for relief from the procedural bar, and prejudice from a violation of rights.<sup>5</sup>

8. Because Defendant failed to present his first two claims during the plea colloquy, or on direct appeal, those claims are procedurally barred under 61(i)(3). Further, Defendant fails to show cause and prejudice to overcome the bar. Preliminary hearings are commonly waived and, besides, the indictment trumped the preliminary hearing.

9. Moreover, Defendant’s late indictment claim is also barred under

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<sup>3</sup> See Super. Ct. Crim. R. 61(i); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> See *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

<sup>5</sup> Super. Ct. Crim. R. 61(i)(3)(A)-(B).

61(i)(4) because it was litigated before Defendant's guilty plea. On March 13, 2007, Defense counsel filed a motion to dismiss for failure to prosecute. The State indicted on March 19, 2007 and Defendant's motion was denied as moot on March 26, 2007. Therefore, that claim was previously presented to, and handled by, the court before Defendant's guilty plea.

10. As to Defendant's ineffectiveness assistance of counsel claims, Defendant has waived his right to bring them because he knowingly, voluntarily, and intelligently pleaded guilty. "[A] voluntary guilty plea constitutes a waiver of any alleged errors or defects occurring prior to the entry of the plea."<sup>6</sup>

11. At least twice during the plea colloquy, the court warned Defendant that it would be virtually impossible to back out of the plea once it was accepted. Further, the court specifically asked if Defendant was satisfied with his attorney, and he was. If Defendant felt his attorney failed to properly represent him, he should have presented that issue in open court before he pleaded guilty. Because Defendant's ineffective assistance of counsel claims address matters before the plea, those claims were waived.

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<sup>6</sup> *Johnson v. State*, 2008 WL 4830853 (Del. Nov. 7, 2008).

12. For the foregoing reasons, Defendant's motion for postconviction relief is **DENIED**.

**IT IS SO ORDERED.**

          /s/ Fred S. Silverman            
Judge

cc: Prothonotary (criminal)  
    Josette Manning, Deputy Attorney General  
    Carlos Charriez