

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

January 13, 2003

Richard D. McCane
S.C.I.
P.O. Box 500
Georgetown, DE 19947

RE: State v. McCane, Def. ID# 9711007448

DATE SUBMITTED: October 17, 2002

Dear Mr. McCane:

Defendant Richard D. McCane ("defendant") has filed his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The Court denies the motion because it is procedurally barred, and defendant has not established any exceptions to the applicability of the procedural bars.

In June, 1998, a jury found defendant guilty of the charges of unlawful sexual intercourse in the first degree (two counts) and continuous sexual abuse. On July 17, 1998, the Court sentenced defendant. Defendant appealed, and the Supreme Court affirmed the judgment of the Superior Court. McCane v. State, Del. Supr., No. 343, 1998, Hartnett, J. (April 19, 1999).

On April 18, 2000, defendant filed his first motion for postconviction relief. The Court assigned the case to a Superior Court Commissioner who recommended that the Court rule against

defendant on each of the thirty-two issues he raised and that it deny the Rule 61 motion. Defendant took exceptions thereto; this Court adopted the Commissioner's Proposed Findings of Fact and Recommendations and denied the Rule 61 motion. State v. McCane, Def. ID# 9711007448, Stokes, J. (October 10, 2000). The Supreme Court affirmed. McCane v. State, Del. Supr., No. 43, 2001, Holland, J. (August 3, 2001).

On August 5, 2002, defendant filed his second motion for postconviction relief. In it, he merely repeats several of the arguments he previously has raised but he does couch some of the arguments in different legal contexts. Specifically, he asserts ineffective assistance of counsel; prosecutorial misconduct; improper vouching of the victim by a witness; lack of proof of every element to convict on the first degree charges; jury misconduct; and perjury by the victim.

Defendant's claims are procedurally barred.

First, the claims are time-barred. In Super. Ct. Crim. R. 61(i)(1), it is provided:

Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

Defendant does not assert a retroactively applicable right which has been newly recognized. Consequently, he was required to file the motion within three years after the judgment of conviction was final. Defendant erroneously argues that the judgment of

conviction was not final until the Supreme Court affirmed the decision on the postconviction motion in August, 2001. The three year time period began to run when the direct appeal process was complete, which was the date of the issuance of the mandate under Supreme Court Rule 19. Jackson v. State, Del. Supr., 654 A.2d 829, 833 (1995). That date was May 5, 1999.

Defendant's three year period for filing a Rule 61 motion ended on May 5, 2002. His motion, filed in August, 2002, is time-barred.

Even if defendant's motion was not time-barred, it is procedurally barred pursuant to Rule 61(i)(2). Therein, it is provided:

Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

I hold that defendant has not asserted any new claims for postconviction relief. Instead, he has regurgitated the old claims, smothering them in new arguments and surrounding them with different case law. Even if any of the claims were considered to be new, defendant fails to assert why any of the claims should be considered in the interest of justice. Several times, he argues vaguely that the claims should be considered in the interest of justice and he cites to general constitutional maxims. However, he never specifies what "interest of justice" will be served by considering the claims.

The bar of Rule 61(i)(4) is the correct bar to apply in

addition to the time bar of Rule 61(i)(1). Therein, it is provided:

Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

Again, defendant has vaguely argued that the claims should be considered in the interest of justice and he cites to general constitutional maxims. Defendant does state that he failed to satisfy the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), because he did not understand it. That is not sufficient to establish the need to reconsider the ineffective assistance of counsel claims because of an "interest of justice". He also asserts that all of the alleged errors set forth in the motion, when combined, require the Court to reconsider his pending claims in the interest of justice. This Court and the Supreme Court already have considered these alleged errors. Defendant's mere reargument, refinement, and reassertion of them does not establish an "interest of justice" element.

The only way defendant can avoid the procedural bars set forth above is if the "the court lacked jurisdiction" or if defendant establishes "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." Rule 61(i)(5). Except for making the general argument that all of the alleged errors combined constitute 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, defendant has not attempted to establish that either of these exceptions exist in connection with any of the claims which are procedurally barred. Consequently, I conclude these exceptions do not apply.

For the foregoing reasons, I deny the motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Melanie Withers, DAG
Edward C. Gill, Esquire