

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

STATE OF DELAWARE,)
)
 v.) ID: 9801000147
)
 MARCO A. VASQUEZ,) CR. A. NO. 98-01-0317-R1
) 98-02-1488-R1
 Defendant.)

Submitted: December 29, 2000
Decided: January 31, 2001

ORDER

This 31st day of January, 2001, upon consideration of the *pro se* Motion for Postconviction Relief filed by Defendant, Marco A. Vasquez (“Defendant”), it appears to the Court that:

1. Defendant has filed this Motion for Postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). Defendant, a resident alien from Mexico, asks the Court to overturn his conviction and, in so doing, asserts a single ground for relief. Defendant contends that the arresting officer failed to inform him of his rights to consular notification established under the Vienna Convention on

Consular Rights.¹ Accordingly, Defendant contends that his conviction must be set aside. For the reasons explained below, Defendant's Motion is summarily **DISMISSED** pursuant to Rule 61(d)(4).

2. New Castle County Police officers arrested Defendant on January 1, 1998. He subsequently was charged with Murder First Degree and Possession of a Firearm During Commission of a Felony ("PFDCF"). Following a plea agreement, Defendant was sentenced on December 17, 1998. As to the Murder First Degree charge, Defendant pled guilty to the lesser included offense of Murder Second Degree and was sentenced to seventeen (17) years Level V incarceration. Defendant also pled guilty to PFDCF and was sentenced to three (3) years and six (6) months at Level V, suspended after three (3) years for six (6) months probation at Level III. Defendant did not appeal his conviction or sentence.

¹Defendant acknowledges the arresting officer properly administered *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. E. 2d 694 (1966).

3. The Vienna Convention (the “Convention”), formally ratified on November 12, 1969, codified existing international law governing the arrest and detention of foreign nationals. Defendant asserts that Article 36 of the Convention was violated by the arresting officer when the officer failed to inform Defendant of his right to contact his national consul.² Defendant failed to raise the issue of consular notification during the proceedings leading to his conviction and sentence.

4. When considering a motion brought pursuant to Rule 61, this Court must first review the procedural bars set forth at Rule 61(i)(3):³

Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgement of conviction, as required by the rules of this Court, is thereafter barred, unless the movant shows
(A) Cause for Relief from the procedural default and
(B) Prejudice from violation of the movant’s rights.

“A showing of cause is not satisfied by showing merely that a claim was not timely raised; a movant must show ‘some external impediment’ which prevented him from raising the claim.”⁴ Since Defendant did not raise the issue of consular notification

²See generally *State v. Reyes*, Del. Super., 740 A.2d 7 (1999)(suppressing incriminating statements made by a Defendant not informed of his right to consular notification).

³See *Flamer v. State*, Del. Supr., 585 A.2d 736, 745 (1990)(citations omitted); *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990)(citing *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 1044, 103 L. Ed. 2d 308 (1989)).

⁴*State v. Davis*, Del. Super., No. 9705002445, Cooch, J. (Feb. 24, 2000), 2000 WL 305447, at *1 (citing *Younger*, 580 A.2d at 556 (citing *Murray v. Carrier*, 477 U.S. 478, 492, 106 S. Ct.

during the proceedings leading to his conviction and sentence, he must set forth sufficient cause for failing to do so.

2639, 2647, 91 L. Ed. 2d 397 (1986))).

5. Defendant, however, has failed specifically to address the issue of cause. The only contention that arguably addresses this issue is Defendant's representation that he was unaware of his right to consular notification until he read an article in the Wilmington News Journal detailing the *Reyes* decision. The News Journal ran this story on October 14, 2000. Defendant's claim of ignorance is insufficient to establish cause for his failure to raise the issue of consular notification in the proceedings leading to his conviction.⁵ The Vienna Convention had been in effect in the United States for nearly thirty years when Defendant was sentenced on December 17, 1998. The basis for the claim, therefore, was both evident and available to Defendant and his counsel during the proceedings leading to his conviction and sentence.⁶ Since the

⁵Defendant does not assert an ineffective assistance of counsel claim.

⁶*See, e.g., Breard v. Pruett*, 4th Cir., 134 F.3d 615, 619-20 (1998) (“[A] reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant”) (citation omitted), *cert. denied*, *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998); *Murphy v. Netherland*, 4th Cir., 116 F.3d 97, 100 (1997) (“Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a

Court has concluded that Defendant has failed to establish sufficient cause under Rule 61(i)(3)(A), it need not address the issue of prejudice under Subsection (i)(3)(B).⁷

6. Defendant attempts to bypass the procedural bars of Rule 61(i)(3) by relying upon Rule 61(i)(5), which provides in part:

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 judgement of conviction.

foreign national.”), *cert. denied*, 521 U.S. 1144, 118 S. Ct. 26, 138 L. Ed. 2d 1050 (1997).

⁷See *Flamer*, 585 A.2d at 747-48.

(emphasis added). Defendant fails to meet the requirements of subsection (i)(5). The Defendant's motion is based entirely upon asserted violations of his right to consular notification; a right Defendant contends is elevated to constitutional status by the Supremacy Clause of the United States Constitution.⁸ Although treaty rights are guaranteed by the Supremacy Clause, the clause does not elevate a treaty right to a constitutional right as described in Subsection (i)(5) of Rule 61.⁹ Defendant's Motion, by failing to identify a constitutional violation, also fails to set forth a "colorable claim that there was a miscarriage of justice because of a constitutional violation" Defendant's Motion is procedurally barred by Rule 61(i)(3). Therefore, in order to maintain the integrity of Rule 61's predicates to relief, the Court should not, and will not, address the merits of the Motion.¹⁰

⁸See U.S. Const. art. VI, § 2.

⁹See *Murphy*, 116 F.3d at 100 ("[E]ven if the Vienna Convention . . . could be said to create individual rights . . . it certainly does not create *constitutional* rights.") (emphasis in original).

¹⁰See *State v. Gattis*, Del. Super., Cr. A. No. IN90-05-1017, Barron, J. (Dec. 28, 1995), 1995 WL 790961, at *3 (citing *Younger*, 580 A.2d at 554; *Saunders v. State*, Del. Supr., No. 185, 1994,

Walsh, J. (Jan.13, 1995)(ORDER); *Hicks v. State*, Del. Supr., No. 417, 1991, Walsh, J. (May 5, 1992)(ORDER).

7. Defendant has failed to establish cause for not raising the issue of consular notification in the proceedings leading to his conviction. Furthermore, Defendant has failed to put forth a colorable claim of a constitutional violation. Accordingly, Defendant's Motion for Postconviction Relief should be, and hereby is, summarily **DISMISSED** according to Rule 61(d)(4).

IT IS SO ORDERED.

Judge Joseph R. Slights, III

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