

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

STATE OF DELAWARE,)
)
) I.D. NO. 9612002650
)
V.)
)
MARK A. KIRK,) CR.A. NO.: IN96120556-R2
)
)
) Defendant.)

Submitted: May 1, 2001
Decided: June 25, 2001

**Upon Defendant’s
Motion for Postconviction Relief.
DENIED.**

ORDER

This 25 day of June, 2001, upon consideration of the *pro se* Motion for Postconviction Relief filed by Mark A. Kirk (“Defendant”), it appears to the Court that:

1. After a bench trial, Defendant was sentenced in the Superior Court to three mandatory life terms plus 23 years. This sentence followed his conviction for the following crimes: three counts of Felony Murder First Degree, one count of Arson Third Degree, two counts of Assault First Degree, and one count of Assault

Third Degree.¹ Both the conviction and sentence were affirmed on appeal.²

2. Following the Supreme Court's affirmance of his conviction and sentence, Defendant filed his initial Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61") seeking an evidentiary hearing and a new trial. That motion raised three grounds for relief. First, Defendant asserted ineffective assistance of counsel based on: (1) failure to contest use of a taped interview with Defendant, (2) failure to obtain additional expert testimony, and (3) failure to move for recusal of the trial judge. Second, Defendant challenged the reliability of certain test data admitted as evidence against him. Third, Defendant contested the admissibility of his own statements made to police officers. The Court denied all aspects of Defendant's initial motion.³ That determination was affirmed

¹See *State v. Kirk*, Del. Super., ID No. 9612002650-R1, Barron, J. (May 23, 2000)(ORDER)("Kirk I").

²*Kirk v. State*, Del. Supr., No. 532, 1997, Berger, J. (Apr. 29, 1999)(ORDER)("Kirk II").

³*Kirk I*, *supra* n.1, Order at 14.

on appeal.⁴

3. Defendant filed the instant (his second) Motion for Postconviction Relief on May 20, 2001, again pursuant to Rule 61. Defendant raises two new grounds for relief. First, he avers that “no rational trier of fact could have found the essential element[s] of arson beyond a reasonable doubt.” As Defendant’s argument goes, his conviction under these circumstances was a violation of his due process rights. Second, Defendant propounds that “any fact that results in a penalty for a crime must be charged in an indictment . . . ,” and alleges violations of U.S. Const. amends. V, VI, and XIV. Specifically, Defendant argues that the indictment charging him with Arson First Degree did not correctly state the elements of the crime, and that a charge of Arson First Degree cannot support a conviction for Arson Third Degree (as a lesser included offense). For the reasons explained below, Defendant’s Motion is **SUMMARILY DISMISSED** pursuant to Rule 61(d)(4).

⁴*Kirk v. State*, Del. Supr., No. 271, 2000, Berger, J. (Oct. 16, 2000)(ORDER).

4. “This Court [must] appl[y] the rules governing procedural requirements before giving consideration to the merits of the underlying claim for postconviction relief.”⁵ Rule 61(I)(2) provides:

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 interests of justice.

Subsection (b)(2), in turn, provides:

Content of Motion. The motion shall specify all the grounds for relief which are available to the movant and of which the movant has or, by the exercise of reasonable diligence, should have knowledge, and shall set forth in summary form the facts supporting each of the grounds thus specified.

5. A review of Defendant’s motion exposes two entirely new challenges to his conviction and sentence. Neither of these grounds were raised by either Defendant or his counsel during his first appeal to the Supreme Court, his first postconviction

⁵*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)). See also *Flamer v. State*, Del. Supr., 585 A.2d 736, 745 (1990)(citations omitted).

relief motion, or his appeal to the Supreme Court following denial of that motion. Defendant's failure to raise these claims previously brings the two claims directly in line with Rule 61(I)(2)'s proscription. Provided that these claims qualify as "required by subdivision (b)(2) . . . ," their consideration by this Court is barred by subdivision (I)(2) of Rule 61.

6. The two issues currently raised by Defendant directly concern the conduct of his trial. The first ground, that no rational trier could have found the elements of arson beyond a reasonable doubt, directly relates to the sufficiency of the evidence produced against him at trial. The second contention, that the indictment brought against him neglected to include a fact necessary for an Arson Third Degree conviction, also directly relates to the conduct of his trial. Defendant has not supplied any reasoning as to why he did not have knowledge of these grounds at the time he filed his initial motion for postconviction relief. Consequently, the Court finds that both grounds currently being asserted by plaintiff were available to him at the time he filed his first motion under Rule 61. Therefore, Defendant was required by Rule 61(b)(2) to assert these claims in that initial motion. Because Defendant failed to do so, the claims raised in the instant Motion for Postconviction relief are barred by 61(i)(2).

7. In accordance with subsection (i)(2), therefore, the Court can not review

Defendant's claims "unless consideration of the claim is warranted in the interests of justice." This exception has been narrowly interpreted to apply only to defendants able to "allege or establish that the Superior Court lacked the authority to convict or punish him."⁶ Defendant does not address this aspect of Rule 61 in his Motion for Postconviction Relief and, consequently, the Court finds that both of his claims are barred by Rule 61(i)(2).

8. Although Defendant specifically does not address the fact that his claims are barred by 61(i)(2), the Court must address whether that bar is overcome by the charge of Rule 61(i)(5). A Defendant may bypass the bar of Rule 61(i)(2) by relying upon Rule 61(i)(5), which provides:

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.

Defendant does not present a claim that this Court lacked jurisdiction over his

⁶*Maxion v. State*, Del. Supr., 686 A.2d 148, 150 (1996)(citing *Flamer*, 585 A.2d at 746).

conviction and sentence. He must, therefore, satisfy the “fundamental fairness” exception contained in subsection (i)(5) in order to overcome subsection (i)(2)’s hurdle.

9. The “fundamental fairness” exception contained in Rule 61(i)(5) “is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.”⁷ To further demarcate the boundaries of subsection (i)(5), this Court has recently observed:

In order to obtain postconviction relief under Rule 61, a defendant must do more than identify a mistake that happened before or during trial. Once defendant’s conviction has been affirmed, the courts are only interested in mistakes that are so substantial they call into question whether defendant is innocent or, at least, whether his conviction was wrong. That is why, for example, Rule 61(i)(5) refers to “a miscarriage of justice” that is “fundamental.” The fact, if it is a fact, that a mistake has been made in a pretrial proceeding or at trial does not mean that any subsequent conviction amounts to a “miscarriage of justice.” Nor does

⁷*Younger*, 580 A.2d at 555 (citations omitted).

every mistake necessarily undermine a conviction's foundation.⁸

⁸*State v. Taylor*, Del. Super., ID No. 9408012457, Silverman, J. (Oct. 27, 2000), Order at 5.

10. As previously indicated, Defendant's first assertion is that "no rational trier of fact could have found the essential element[s] of arson beyond a reasonable doubt." Defendant points out that he was convicted of Arson Third Degree, which requires proof that he "recklessly damage[d] a building by intentionally starting a fire" ⁹ The Court reads defendant's argument as one essentially challenging the sufficiency of the evidence presented against him at trial, thus implicating a question as to whether the evidence permitted a finding of "guilty beyond a reasonable doubt."

11. Defendant attempts to establish a "fundamental miscarriage of justice," presumptively, by pointing the Court to lofty constitutional principles. For example, he cites United States Supreme Court precedent indicating that "a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm." ¹⁰

12. Examination of the precedent upon which Defendant relies, namely the *Jackson* decision, does reveal a firm constitutional foundation for his claim. *Jackson*

⁹11 *Del. C.* § 801(a).

¹⁰*Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786, 61 L.E.2d 560 (1979)(citing *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960)).

clearly requires that, at trial, the evidence used to convict a defendant must be such

that a rational trier of fact could conclude, based on that evidence, that the Defendant was guilty beyond a reasonable doubt.

13. Exploration of the trial court's factual analysis in this case, nevertheless, clearly reveals sufficient evidence to find that Defendant intentionally started the fire.¹¹ For example, the trial Judge considered evidence that Defendant had previously supplied two opposing explanations for how the incendiary (spiced rum) became ignited. In one version, Defendant claimed that he was lighting a cigarette from the stove and accidentally spilled the rum. In another version, Defendant insisted that alcohol had ruined his life and that he was disposing of it when it ignited.¹² The trial judge also determined that Defendant's actions immediately after the fire began were inconsistent with accidental ignition. In illustrating this point, the Court pointed out

¹¹*See generally State v. Kirk*, Del. Super., ID No. 9612002650, Barron, J. (Dec. 3, 1997), Findings After Penalty Hr'g at 2-7.

¹²*Id.* at 3.

that he made no effort to either extinguish the ensuing fire or summon assistance.¹³

This evidence clearly belies Defendant's claim that there is no evidence upon which he could be found guilty beyond a reasonable doubt.

¹³*Id.* at 4.

14. The Court holds that Defendant has failed to set forth a “colorable claim” that he was deprived of fundamental fairness at trial. Defendant has not, therefore, satisfied his burden (as set forth in Rule 61(i)(5)) to overcome subsection (i)(2)’s bar to relief. Defendant’s first claim, that there was insufficient evidence of his intent for conviction at trial, is **SUMMARILY DISMISSED** pursuant to Rule 61(d)(4).

15. Turning to Defendant’s second claim, he contends that since the indictment only charged him with Arson First Degree he cannot be convicted of Arson Third Degree. The indictment charges that Defendant “did intentionally damage a building by starting a fire, knowing that another person, not an accomplice, was present in the building at the time.” Defendant’s argument parses out differences in the *mens rea* components of the two arson statutes. Defendant then attempts to link this argument to constitutional principles. To illustrate, Defendant points out that he was indicted for “intentionally damaging a building” and not “intentionally starting a fire.” Averting that this procedural stance deprived him of 5th and 6th Amendments rights, Defendant contends the principle holding that “any fact that results in a penalty for a crime must be charged in an indictment . . .” was violated. Defendant steers the Court to *Apprendi v. New Jersey*¹⁴ in support of this contention.

¹⁴530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

16. Unfortunately for Defendant, although he directs the Court to a living and substantial constitutional principle, he in no way presents a “colorable claim” of any mistake, if a mistake took place at all, which undermined the fundamental fairness of the proceedings leading to his conviction.¹⁵ In other words, Defendant has not set forth how an indictment reflecting the allegation that he “intentionally started a fire” (as opposed to one alleging that he “intentionally damaged a building by starting a fire”) prejudiced his defense in any way at trial. Additionally, the Court does not see how engaging in Defendant’s game of semantics raises questions about his innocence. An allegation that Defendant “intentionally started a fire” is only a more specific way of stating that he “intentionally damaged a building.” Defendant simply does not describe how a defect in the indictment, if it exists at all, undermined the fundamental fairness of his trial, nor has his assertions caused this Court to question his guilt. Accordingly, Defendant’s second claim also is **SUMMARILY DISMISSED** as set forth in Rule 61(d)(4).

17. In summation, the entirety of Defendant’s Motion for Postconviction Relief is barred by Rule 61(i)(2) because the claims raised were not asserted in his

¹⁵See *Taylor, supra*, Order at 5.

initial motion under Rule 61. Further, Kirk has not overcome the bar to relief as provided in Rule 61(i)(5) and his Motion for Postconviction Relief must be **SUMMARILY DISMISSED** as provided by Rule 61(d)(4).

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary

cc: Mark A. Kirk