

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

STATE OF DELAWARE)
)
 v.) I.D. No. 9612002650
)
MARK A. KIRK,)
)
 Defendant.)

UPON CONSIDERATION OF DEFENDANT’S FOURTH
PRO SE MOTION FOR POSTCONVICTION RELIEF
SUMMARILY DISMISSED.

Submitted: March 21, 2007
Decided: May 14, 2007

This 14th day of May, 2007, it appears to the Court that:

1. On October 23, 1997, the Court found Mark A. Kirk (“Kirk”) guilty of three counts of felony murder first degree, two counts of assault first degree, one count of assault third degree, and one count of arson third degree.¹ He was sentenced to three mandatory terms of life imprisonment plus 23 years. The Supreme Court affirmed Kirk’s convictions and sentence on direct appeal.²

¹ See Docket 19; DEL. CODE ANN. tit. 11, §§ 835, 841, 1257.

² See Docket 76, 115.

2. Kirk has since filed three *pro se* motions for postconviction relief.³ The Court denied Kirk's first motion and summarily dismissed his second. The Supreme Court affirmed both of those decisions. Kirk's third postconviction relief motion was granted by this Court to the extent that his convictions for three counts of felony murder first degree and two counts of assault first degree were vacated pursuant to *Williams v. State*.⁴ Kirk was instead convicted of three counts of manslaughter first degree and two counts of assault second degree.⁵ He was re-sentenced to 30 years of incarceration for the manslaughter convictions and 16 years of incarceration for the assault convictions. Kirk's sentence for the assault third degree and arson third degree convictions were not disturbed. The Supreme Court affirmed the convictions and sentence on appeal.⁶

³ Kirk also filed a petition for writ of habeas corpus, which was denied by the United States District Court for the District of Delaware. *Kirk v. Carroll*, 243 F. Supp. 2d 125 (D. Del. 2003).

⁴ 818 A.2d 906 (Del. 2003) (“In our view, the statutory language of the Delaware felony murder statute not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony. To the extent that the *Chao* [*v. State*, 604 A.2d 1351 (Del. 1992)] opinion states that the ‘in furtherance of’ language of the statute addresses solely the identity of the person who is committing the actual killing, it is overruled. Accordingly, we adhere to the holding of *Weick* [*v. State*, 420 A.2d 159 (Del. 1980)] and hold that the felony murder language requires not only that the defendant, or his accomplices, if any, commit the killing but also that the murder helps to move the felony forward.”).

⁵ See DEL. CODE ANN. tit. 11, §§ 612, 632.

⁶ See Docket 120, 140, 146, 147, 149, 158, 159, 172, 176, 185.

3. Now before the Court is Kirk's fourth *pro se* motion for postconviction relief. Kirk asserts the following grounds on which he claims his rights were violated: (1) denial of the right to a fair trial; (2) ineffective assistance of counsel; and (3) coerced confession. Kirk concedes that these grounds have been previously raised, but argues that they have not been raised "in this particular light" because of the "discovery of new evidence." Specifically, Kirk claims that "newly discovered evidence" demonstrates that he was convicted with perjured testimony, false evidence and junk science; that his counsel was derelict in his duties and incompetent; and that his confession was coerced because he "confessed to an impossible act."⁷

4. This "newly discovered evidence" Kirk refers to is a video created by forensic fire investigator John Lentini ("Lentini video"). The Lentini video depicts three failed attempts by Mr. Lentini to ignite 70-proof Captain Morgan's Rum on an electric stovetop burner. According to Kirk, the failure of the rum to ignite proves his innocence because it clearly negates the State's theory that Kirk started the fire, which killed three individuals, by pouring rum on a hot stovetop. As Kirk avers in his memorandum in support of his motion, "[s]imply put, starting a fire with a

⁷ See Docket 186.

nonflammable substance is impossible; it defies the laws of physics.”⁸ Kirk also contends that the Lentini video confirms that the State’s witnesses at trial, specifically the Fire Marshal, committed perjury and that the State’s video, which was shown at trial and depicts rum igniting when poured onto an electric stovetop burner, was falsified as it was clearly “fraught with discrepancies and inaccuracies.” The discrepancies in the State’s video, according to Kirk, include the uncertainty regarding the amount of rum used in the State’s test, the fact that the burner was “*white-hot*”, indicating it had been tampered with, and the fact that the test was performed at a “*private residence*”, as opposed to the Fire Marshal’s facility. In short, Kirk argues that the Fire Marshal’s perjured testimony, the junk science used by the State to create the ignition of the rum on the stovetop burner, and the falsified video evidence, have denied him the right to a fair trial.⁹

5. Kirk next contends that the Lentini video reveals that defense counsel was derelict in his duties because the defense expert retained by counsel for trial was “totally unqualified and incompetent.” That is, even though the defense expert recorded via videotape his own tests showing that rum could not be ignited when poured on an electric stovetop burner, the

⁸ *Id.*

⁹ *Id.*

fact that he was not as credible, or had as much arson experience, as the State's expert was extremely detrimental to Kirk's defense. Therefore, Kirk claims that his counsel was clearly ineffective for hiring a "hack for \$500.00" when more qualified experts, such as Mr. Lentini, were readily available.¹⁰

6. Lastly, Kirk claims his confession was coerced. As support, he cites to the Lentini video as proof that his confession was nothing more than the product of police coercion because ultimately, as the Lentini video establishes, he confessed to the impossible act of igniting a fire by pouring rum on an electric stovetop burner.¹¹

7. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61 ("Rule 61").¹² If the procedural requirements of Rule 61 are not met, the Court should not consider the merits of a postconviction claim.¹³

¹⁰ *Id.*

¹¹ *Id.*

¹² *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). *See also Bailey v. State*, 588 A.2d 1121, 1127 (Del. Super. Ct. 1991).

¹³ *State v. Gattis*, 1995 WL 790961, at *2 (Del. Super. Ct. Dec. 28, 1995) (citing *Younger*, 580 A.2d at 554).

8. Rule 61(i) imposes four procedural imperatives: (1) the motion must be filed within three years of a final order of conviction;¹⁴ (2) any basis for relief must have been asserted previously in any prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules; and (4) any basis for relief must not have been formerly adjudicated in any proceeding. However, under Rule 61(i)(5), the bars to relief under (1), (2) and (3) do 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 judgment of conviction.”

9. In applying the procedural imperatives to this case, Kirk’s claims are barred. To begin with, Kirk’s motion is untimely as it was not brought within three years of the Supreme Court’s mandate affirming his original convictions and sentence, which occurred on April 29, 1999;¹⁵ and it was not brought within one year of the Supreme Court’s mandate affirming his most recent manslaughter and assault second convictions and sentence,

¹⁴ The motion must be filed within three years if the final order of conviction occurred before July 1, 2005, and within one year if the final order of conviction occurred on or after July 1, 2005. See Rule 61, annot. *Effect of amendments*.

¹⁵ See *Kirk v. State*, 1999 WL 415802 (Del. Apr. 29, 1999).

which occurred on December 23, 2005.¹⁶ Also, while the claims Kirk raises in his motion have been previously asserted either at trial, on direct appeal, or in his previous three postconviction motions, those claims have already been adjudicated in prior proceedings.¹⁷ Kirk has, therefore, not met the procedural requirements of Rule 61(i)(1) and (i)(4) and, as such, his claims are barred.

10. Kirk, however, does not contest that the procedural “bars contained in subsection (i) [of Rule 61] ... apply”¹⁸ to his motion, and he is cognizant that the grounds for relief he now asserts are untimely and have been previously raised and formerly adjudicated. Yet, Kirk maintains that the resurgence of these same claims is appropriate because of the “newly discovered evidence” he has presented to the Court. Specifically, Kirk reasons that, because the Lentini video is new evidence that sheds new light on the claims he has previously raised, he has presented colorable claims “that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of

¹⁶ See *Kirk v. State*, 2005 WL 3526325 (Del. Dec. 23, 2005).

¹⁷ See Docket 63, 66, 69, 80, 74, 83, 84, 115, 120, 140, 146, 147, 149, 158.

¹⁸ Docket 186, p. 3.

the proceedings leading to the judgment of conviction.”¹⁹ Therefore, Kirk argues the merits of his claims should be addressed. The Court does not agree.

11. At the outset, the Court notes that Kirk is essentially seeking a new trial based on newly discovered evidence – the Lentini video. The “appropriate vehicle for considering this motion is Rule 33.”²⁰ However, even if Rule 33 applies in a particular case, “it does not control the question of whether a defendant also can move for a new trial under Rule 61 if the motion can properly be classified as seeking postconviction relief.”²¹ This “Court has previously considered untimely postconviction relief motions based on newly discovered evidence under Rule 61(i)(5)[,] as *potentially* presenting ‘a colorable claim that there was a miscarriage of justice[,]’” and under the “interest of justice” exception in Rule 61(i)(4).²² It is, therefore, appropriate to determine whether Kirk’s “newly discovered evidence” presents a “colorable claim” or should be reviewed in the “interest of justice.”

¹⁹ Rule 61(i)(5).

²⁰ *State v. Hassett*, 2003 WL 21999594, at *1 (Del. Super. Ct. Aug. 25, 2003).

²¹ *Weedon v. State*, 750 A.2d 521, 527 (Del. 2000).

²² *State v. Briggs*, 1998 WL 1029256, at *2 (Del. Super. Ct. Dec. 7, 1998) (emphasis supplied). *See also Weedon*, 750 A.2d at 527.

12. “To warrant a new trial, newly discovered evidence must (1) be likely to change the result of the trial, (2) have been discovered since the proceedings leading to the judgment and could not have been discovered before the proceedings by the exercise of due diligence and (3) not be merely cumulative or impeaching.”²³

13. In this case, the showing of the Lentini video at trial would not have changed the outcome. When initially explaining its findings after trial, the Court stated that the tests performed by the defense expert (showing the rum could *not* ignite) and the tests performed by the State’s expert (showing the rum *could* ignite) “negated each other.”²⁴ Had the Lentini video instead been shown at trial, the result would have been the same. Merely because Mr. Lentini was a potentially more qualified, or credible, expert than Kirk’s original expert does not necessarily suggest that the Lentini video would have been more of a benefit to Kirk. That is to say, it is unlikely that the Court would have determined that the Lentini video presented irrefutable

²³ *Briggs*, 1998 WL 1029256, at *3. See also *State v. Hamilton*, 406 A.2d 879, 880 (Del. 1974) (quoting *State v. Lynch*, 128 A. 565 (Del. Oyer Ter. 1925) (“In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial and could not have been discovered before by the exercise of due diligence; (3) that it is not merely cumulative or impeaching.”)).

²⁴ See Docket 186, Ex. 63 (The Court: “First of all, the test that Mr. Broskey [defense expert] performed via the videotapes, was basically offset by the State’s experiment, which was also offered by way of videotape. In other words, each negated the other.”).

evidence so as to render the State's video futile. Rather, in the end, the Lentini video and the State's video would *still* have negated each other.

14. The Court finds unconvincing Kirk's argument that, even though the Court stated that the two videos presented at trial negated each other, the Court really "believed the [S]tate's test, and discredited [Kirk's] test, as is evident in the guilty verdict."²⁵ Kirk's guilt was not solely founded upon the State's video. There were ample amounts of other evidence presented at trial, besides the videos, which support the guilty verdict – namely Kirk's confession. Therefore, in spite of the fact that the Court determined that the State's video and Kirk's video negated each other, a sufficient amount of other evidence existed for finding Kirk guilty beyond a reasonable doubt.

15. The Court also finds that Kirk has failed to establish that the Lentini video "could not have been discovered before the proceedings by the exercise of due diligence."²⁶ To the contrary, a video depicting the same tests performed by Mr. Lentini was, in fact, "discovered" and documented via video by Kirk's trial expert. Kirk does not get a second bite at the apple

²⁵ *Id.*, p. 10.

²⁶ *Briggs*, 1998 WL 1029256, at *3.

simply because he has now found a more credible expert to perform the same tests that his own expert had performed in preparation for trial.

16. Finally, the Lentini video is “merely cumulative [and] impeaching.”²⁷ It is cumulative in that it depicts relatively the same tests that Kirk’s trial expert performed, with the only real difference being that the two sets of tests were performed by people with differing levels of arson expertise. It is impeaching in that it is offered only to discount the State’s video and show that a more qualified and credible arson expert could not achieve the ignition of rum on an electric stovetop. The Lentini video has no other evidentiary value.

17. Therefore, the Court finds that the newly discovered Lentini video is not likely to change the result of the trial, could have been discovered before trial, and is merely cumulative and impeaching. A new trial is not warranted.

18. Based on all the foregoing, Kirk’s motion does not present a “colorable claim that there was a miscarriage of justice,” nor do the interests of justice require that the merits of his motion be reviewed. Accordingly, because Kirk has not met the procedural requirements of Rule 61(i)(1) and

²⁷ *Id.*

(i)(4), his motion for postconviction relief must be **SUMMARILY
DISMISSED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Mark A. Kirk
Donald R. Roberts, Esquire