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

| | | |
|---|---|---|
| STATE OF DELAWARE | ) | |
| | ) | |
| v. | ) | I.D. No. 0605023366 |
| | ) | |
| GERARD E. SZUBIELSKI, | ) | |
| | ) | |
| Defendant. | ) | |

UPON CONSIDERATION OF DEFENDANT'S SECOND
*PRO SE* MOTION FOR POSTCONVICTION RELIEF
**DENIED**

Submitted: June 17, 2008
Decided: June 20, 2008

This 20th day of June, 2008, it appears to the Court that:

1. On January 1, 2007, a jury found Gerard E. Szubielski ("Szubielski") guilty of assault in the first degree pursuant to DEL. CODE. ANN. tit. 11, § 613. On March 2, 2007, the Court granted the State's motion to declare Szubielski an habitual offender and sentenced him to life imprisonment pursuant to DEL. CODE. ANN. tit. 11, § 4214(b). Although Szubielski claimed that he filed a *pro se* appeal to the Supreme Court on June 25, 2007, there was no record of any appeal filed by Szubielski, nor did the Supreme Court ever render a decision regarding his claims of error.

2. On August 14, 2007, Szubielski filed his first *pro se* motion for postconviction relief. In that motion, Szubielski claimed, *inter alia*, that he

received ineffective assistance of counsel because his attorney failed to inform him in writing of his right to appeal. Although counsel stated that Szubielski never requested that an appeal be filed on his behalf, counsel admitted that he had failed to advise Szubielski in writing of his right to appeal. The Court therefore granted Szubielski's first motion for postconviction relief on October 22, 2007. In doing so, the Court vacated the earlier sentence, resentenced him to the same terms and conditions, but made the effective date October 22, 2007, thereby allowing Szubielski thirty days from that date to file an appeal to the Supreme Court.[1] Despite the Court's decision which identified the reason for giving a new effective date so that the defendant could have a second opportunity to appeal, Szubielski still did not file an appeal within thirty days.[2]

3. On June 2, 2008, Szubielski filed this, his second *pro se* motion for postconviction relief. In this motion, Szubielski claims that he never

[1] *State v. Szubielski*, 2007 WL 3105080 (Del. Super. Ct. Oct. 22, 2007). The Court regrets that its October 22, 2007 decision contains typographical errors reflecting different dates on which Szubielski's new sentence became effective. Specifically, the decision granting his motion indicates that his new sentence became effective on October 16, 2007, while the Order effecting his new sentence reflects a date of October 17, 2007. Moreover, the Court's decision was not docketed until October 22, 2007. Although Szubielski never sought clarification of the date on which his new sentence became effective, the Court determines, in the interests of fairness, that the last date, October 22, 2007, be the date from which the thirty days to appeal would run.

[2] Szubielski's appeal would have had to be filed, at the latest, on November 21, 2007. The Court notes that Szubielski's failure to appeal within thirty days of October 22, 2007 renders the Court's lack of clarity in its previous decision irrelevant.

received the Court's earlier decision that permitted him thirty days to file an appeal. Because of his inexperience, he seeks appointment of counsel to assist him in filing an appeal. Szubielski also raises the same grounds for relief that he raised in his previous motion, arguing: (1) that his attorney failed to investigate mechanical problems with his vehicle, which, if the jury believed the testimony, would have affected the jury's determination of guilt; (2) that the Judge failed to have an adequate colloquy with Szubielski; (3) that Szubielski's attorney failed to file a notice of appeal to the Supreme Court pursuant to Supreme Court Rule 26,[3] failed to advise Szubielski of his right to appeal, and failed to withdraw if he believed that an appeal was without merit; and (4) that Szubielski should have been charged with vehicular assault rather than assault in the first degree.

4. 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").[4] If the procedural requirements of Rule 61 are not met, in order

[3] Sup. Ct. R. 26.

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

to protect the integrity of the procedural rules, the Court should not consider the merits of a postconviction claim.[5]

5. Rule 61(i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;[6] (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 unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formerly adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, 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."[7] Moreover, the procedural bars of (2) and (4) may

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

[6] If the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, however, the motion must be filed within one year. *See* Super. Ct. Crim. R. 61(i)(1) (July 1, 2005) (amending Super. Ct. Crim. R. 61(i)(1) (May 1, 1996)).

[7] Super. Ct. Crim. R. 61(i)(5).

be overcome if "reconsideration of the claim is warranted in the interest of justice."[8]

6. In applying the procedural imperatives to this case, Szubielski's claims are barred. Under Rule 61(i)(1), he did not file an appeal within thirty days of his sentencing in Superior Court.[9] Rule 61(i)(3) also bars Szubielski's claims because he failed to file a timely appeal wherein he could have alleged any mechanical errors, any problems with the colloquy, or any error regarding the charge. Finally, Rule 61(i)(4) bars all of his claims because this Court has already considered all of the claims of error raised in this second motion and has concluded that they have no merit.[10] Accordingly, to overcome the procedural bars, Szubielski must demonstrate that there was a miscarriage of justice or that reconsideration is warranted in the interest of justice.

7. Szubielski has not demonstrated a miscarriage of justice or shown that his motion should be reconsidered in the interest of justice. The requirement to file an appeal within thirty days is jurisdictional and may not

[8] *Id.* R. 61(i)(4).

[9] Szubielski was sentenced by the Superior Court on March 2, 2007. Docket 25. He did not file his appeal, however, until June 25, 2007, more than three months after his sentence. Even after his new sentence became effective on October 22, 2007, he did not file an appeal within thirty days. *See* Dockets 34 & 35.

[10] *State v. Szubielski*, 2007 WL 3105080 (Del. Super. Ct. Oct. 22, 2007).

be excused absent unusual circumstances that are not attributable to the defendant or his attorney.[11] The Court first notes that Szubielski's status as a *pro se* defendant does not excuse his failure to timely file an appeal.[12] Moreover, in the case of a defendant in prison, the Delaware Supreme Court has held that a defendant must file his appeal within thirty days, irrespective of the mailing date.[13] Here, Szubielski not only failed to file an appeal within thirty days of his sentence, but even after the Court expressly permitted him an additional thirty days, he again failed to act. The Court docket reflects that the decision was docketed on October 22, 2007.[14] In his motion, Szubielski states that he received a copy of the October decision from his mother, thereby substantiating that a copy of the decision was mailed and received. Under the circumstances, Szubielski cannot overcome the presumption that the decision was properly mailed.[15]

8. More importantly, Szubielski waited until June 2008 to file his second postconviction motion, more than seven months after the Court

---

[11] *Carr v. State*, 554 A.2d 778, 779 (Del. 1989).

[12] *Id.*

[13] *Id.* (citing 10 *Del. C.* § 147 and Sup. Ct. R. 6).

[14] The Court notes that it is standard practice that, in addition to docketing a decision, all decisions are mailed directly to incarcerated defendants through the State mail system.

[15] *Id.* (citing *Bey v. State*, 402 A.2d 362, 363-64 (Del. 1979)).

issued its October decision. Even more telling is the fact that he filed his first postconviction motion on August 14, 2007, nearly ten months ago. In all of that time, Szubielski has never attempted any communication seeking the status of his first postconviction motion.[16] Even if the Court could enlarge the thirty-day window to file an appeal, which it cannot, the Court will not sentence Szubielski a third time when Szubielski has made no effort to seek an appeal in almost ten months after he was provided an unprecedented second opportunity to do so.

9. The Court now turns to Szubielski's motion for appointment of counsel. In that motion, Szubielski requests that this Court appoint him counsel to assist him in his appeal because he is unskilled in the law and it would serve the best interests of justice. Because Szubielski failed to file an appeal within the statutorily-required period, however, there is no need to

[16] Coincidentally, Szubielski's mother sent a letter on his behalf to the Court on October 22, 2007, the same date as the Court's decision on Szubielski's first postconviction motion. Docket 36. Because both he and his mother have made efforts in the past to communicate with this Court on their own initiative, Szubielski's failure to ask the status of his first motion is particularly puzzling.

appoint counsel to assist him in filing his appeal.[17] The motion for appointment of counsel is therefore denied.[18]

10. For all of the foregoing reasons, Defendant's motion for postconviction relief and Defendant's motion for appointment of counsel are hereby **DENIED**.

**IT IS SO ORDERED.**

_____
Peggy L. Ableman, Judge

Original to Prothonotary

cc: Gerard E. Szubielski
James J. Haley, Esq.

[17] *See* 10 *Del. C.* § 147 ("No appeal from the Superior Court in a criminal action shall be received or entertained in the Supreme Court unless the praecipe or notice of appeal is duly filed in the office of the Clerk thereof within 30 days after the date of the judgment or decree.").

[18] *See* Super. Ct. Crim. R. 61(e)(1) ("The court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown, but not otherwise.").