

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

STATE OF DELAWARE,)	
)	
v.)	ID No. 0308021468
)	
)	
RORY BROKENBROUGH.)	
)	
Defendant.)	

ORDER

And now to wit, this 30th day of April, 2008, **IT IS HEREBY ORDERED** as follows:

Defendant Brokenbrough was convicted by a jury of first-degree assault, third-degree assault, first-degree attempted robbery, and third-degree conspiracy on April 29, 2005.¹ The Delaware Supreme Court affirmed his conviction on April 11, 2006.²

On April 5, 2007, Brokenbrough filed a motion for postconviction relief and on May 24, 2007 he filed a motion to amend.³ On October 16, 2007, after defense counsel and prosecutors responded to his amended

¹ Brokenbrough was sentenced to 25 years at level V for first-degree assault, 25 years at level V for attempted robbery, one year at level V for third-degree assault and one year at level V suspended immediately for one year at level III for the third-degree conspiracy conviction.

² *Brokenbrough v. State*, 897 A.2d 767 (Del. 2006).

³ Def. Mot. for Postconviction Relief, Docket Item ("D.I.") 69; Def. Mot. to Amend, D.I. 71.

postconviction motion, Brokenbrough filed another motion to amend, a motion for production of medical records and a motion for an extension of time.⁴ On October 30, 2007, this Court denied his postconviction motion.⁵

On October 31, 2007, Brokenbrough filed a reply to the State's response in opposition to his October 16, 2007 motions and on November 13, 2007 he filed a motion for reargument.⁶ On November 21, 2007, before this Court ruled on his pending motions, Brokenbrough appealed this Court's denial of his postconviction motion to the Delaware Supreme Court.⁷ In light of his appeal, this Court stayed decision on his pending motions.⁸

On December 17, 2007 Brokenbrough filed a motion requesting that the Delaware Supreme Court remand his case to this Court so that it could rule on his pending motions. On January 9, 2007, the Delaware Supreme Court remanded Brokenbrough's case to allow this Court to consider the timeliness of his motion for reargument and, within its discretion, to consider his other pending motions.⁹

⁴ Motions, D.I. 82, 83, 84.

⁵ *State v. Brokenbrough*, 2007 WL 3287938 (Del. Super. 2007).

⁶ D.I., 87, 88.

⁷ See Letter from Delaware Supreme Court to Sharon Agnew, D.I. 90.

⁸ Super. Ct. Crim. R. 61(d)(2) ("If any part of the record of prior proceedings in the case has been removed in connection with an appeal or federal habeas corpus proceeding, the judge may stay proceedings [in the Superior Court] until it has been returned.").

⁹ Mandate, D.I. 92.

For the reasons set forth below, this Court lacks jurisdiction to decide the merits of Brokenbrough's motion for reargument, and his three ancillary motions are **DENIED**.

Motion for Reargument

Brokenbrough's motion for reargument is untimely and therefore this Court does not have jurisdiction to consider the merits. A motion for reargument must be filed and served within five days after the Court's opinion or decision is filed.¹⁰ The five-day rule is jurisdictional and the Court does not have discretion to extend the deadline.¹¹ This Court's Opinion denying postconviction relief was issued on October 30, 2007.¹² Brokenbrough filed his motion for reargument on November 7, 2007, six days later.¹³ Consequently, his motion is untimely and the Court does not have authority to consider the merits of his motion.¹⁴

Motion to Amend

Brokenbrough moves to amend his motion for postconviction relief. Superior Court Criminal Rule 61(b)(6) allows a postconviction relief motion

¹⁰ Super. Ct. Civ. R. 59(e) (made applicable to this case by virtue of Super. Ct. Crim. R. 57(d)).

¹¹ *Id.*

¹² *Brokenbrough*, 2007 WL 3287938 (Del. Super. 2007).

¹³ In its Order, the Delaware Supreme Court states that "it appears from the automated docket that the Superior Court's October 30, 2007 opinion, in fact, may not have been docketed until October 31, 2007." Upon review of the docket, it appears that two dates are given for each entry, one reflecting the "date" (presumably the date filed) and one reflecting the "add date" (presumably the date docketed). Were the Court to consider the October 31, 2007 "add date," then the docket shows the "add date" for Brokenbrough's motion for reargument as November 8, 2007 which is still a six day delay.

¹⁴ See Super. Ct. Civ. R. 6(b).

to be amended “as a matter of course at any time before a response is filed or thereafter by leave of court, which shall be freely given when justice so requires.”¹⁵ A motion under this rule is addressed at the discretion of the court.¹⁶ At the time that Brokenbrough filed his motion to amend, the State had already responded to his postconviction motion. Because the time period for Brokenbrough to amend his postconviction motion had passed, the Court did not consider his new claims in deciding his postconviction motion. The Court will now address his new claims as a second motion for postconviction relief.

By his motion, Brokenbrough asserts for the first time that his conviction for first degree assault is defective under *Williams v. State*¹⁷ and this Court’s later decision in *State v. Kirk*.¹⁸ He claims that there was insufficient evidence to prove that the assault of Dennis Nichols was “in furtherance of” his attempted robbery and that his indictment was deficient because it did not reflect the law as set forth in *Williams*.¹⁹ Brokenbrough’s claims are procedurally barred under Rule 61(i)(3) because he did not raise them in any of the proceedings leading to judgment.²⁰ Brokenbrough argues that his claims survive procedural default because they are based on a newly

¹⁵ Super. Ct. Crim. R. 61(b)(6).

¹⁶ *Shy v. State*, 246 A.2d 926, 927 (Del. 1968).

¹⁷ 818 A.2d 906 (Del. 2002).

¹⁸ 2004 WL 396407 (Del. Super).

¹⁹ Def. Req. to Amend at 3-6, D.I. 83.

²⁰ Super. Ct. Crim. R. 61(i)(3).

retroactive right. This is incorrect. There is no newly recognized right applicable to this case because *Williams* and *Kirk* were decided before Brokenbrough's conviction. Pursuant to Rule 61(i)(1), claims based on newly retroactive rights are permitted only when the new right is recognized *after* defendant's judgment of conviction is final.²¹ Brokenbrough's judgment became final on April 11, 2006, well after the December 2002 decision in *Williams* and the February 2004 decision in *Kirk*. Therefore, he fails to show cause for not raising his claims under *Williams* and *Kirk* in earlier proceedings. Because Brokenbrough fails to overcome procedural default under Rule 61(i)(3), his claim is **SUMMARILY DISMISSED**.

Motion for Production of the Medical Records of Nichols

Brokenbrough moves this Court to compel production of additional medical records of Dennis Nichols because he claims insufficient evidence existed as to the cause of Nichols' injuries. This motion is **DENIED** for the reasons set forth in the Court's Opinion denying postconviction relief issued October 30, 2007.²²

²¹ Super. Ct. Crim. R. 61(i)(1) permitting a claim that "asserts a retroactively applicable right that is newly recognized *after* the judgment of conviction is final [that is brought no] more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court." (emphasis added).

²² *Brokenbrough*, 2007 WL 3287938 (Del. Super. 2007).

Motion for Extension of Time and to Stay All Proceedings

Brokenbrough moves this Court to grant him an extension of time in order to reply to the State's response to his motions filed on October 16, 2007. The Court is in receipt of Brokenbrough's reply filed on October 31, 2007 in which he argues that the new meaning given to the phrase "in furtherance of," as used in the statute defining felony murder, is applicable to 11 *Del. C.* § 613(a)(4) (first degree assault). Nothing in his reply changes the outcome of the Court's rulings on his motions. Because Brokenbrough's reply has been considered by this Court, his motion is moot and therefore **DENIED.**

IT IS HEREBY ORDERED.

Jan R. Jurden, Judge