IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 0701005246
v.	:	
	:	
TROY McNALLY,	:	
	:	
Defendant.	:	

ORDER

On this 16th day of November, 2011, upon consideration of the Defendant's Motion for Postconviction Relief, the Affidavit of prior counsel, the State's Response, the Commissioner's Report and Recommendation, Defendant's Motions for Reconsideration of Commissioner's Order, the State's response to same, and the record in this case, it appears that:

The Defendant, Troy McNally ("McNally"), was found guilty by a jury on February 1, 2008 of four counts of Reckless Endangering in the First Degree; four counts of Possession of a Firearm During the Commission of a Felony; and two counts of Criminal Mischief. McNally was sentenced on March 12, 2008 to 38 years at Level 5, suspended after serving 12 years and 5 months, 12 years of which were minimum mandatory time.

McNally, through counsel, timely appealed his conviction to the Delaware Supreme Court which was affirmed on August 18, 2009..

Thereafter, McNally filed a *pro se* motion for postconviction relief. McNally alleged four grounds for relief, including ineffective assistance of counsel.

The matter was referred to the Court Commissioner for findings of fact and recommendation pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule

62. Commissioner Freud has filed a Report and Recommendation recommending that the Court deny defendant's motion for postconviction relief. The Defendant filed three Motions for Reconsideration of Commissioner's Order and the State responded. The motions do not advance his motion for postconviction relief in any substantive way.

NOW, WHEREFORE, after careful and *de novo* review of the record in this action, and for the reasons stated in the Commissioner's Report and Recommendation dated August 15, 2011,

IT IS ORDERED that the thoughtful and well-reasoned Commissioner's Report and Recommendation is adopted by the Court and defendant's Motion for Postconviction Relief is ***denied*** as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and as procedurally barred by Rule 61(i)(4).

/s/ William T. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Hon. Andrea M. Freud
Kathleen A. Dickerson, Esquire
Mr. Troy McNally, JTVCC
File

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	RK07-01-0938-01 through
	)	RK07-01-0941-01
TROY MCNALLY	)	RK07-01-0948-01through
	)	RK07-01-0949-01
Defendant.	)	RK07-02-0432-01 through
ID. No. 0701005246	)	RK07-02-0435-01

COMMISSIONER'S REPORT AND RECOMMENDATION

Upon Defendant's Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61

Kathleen A. Dickerson, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Troy McNally, *Pro se*.

FREUD, Commissioner
August 15, 2011

The defendant, Troy D. McNally ("McNally"), was found guilty by a jury of four counts of Reckless Endangering in the First Degree, 11 *Del. C.* § 604, four

counts of Possession of a Firearm During the Commission of a Felony, 11 *Del. C.* § 1447, and two counts of Criminal Mischief, 11 *Del. C.* § 811. The jury found McNally not guilty of six counts of Reckless Endangering First Degree, five counts of Possession of a Firearm During the Commission of a Felony, one count of Possession of a Deadly Weapon During the commission of a Felony and one count of Endangering the Welfare of a Child. The verdict was returned on February 1, 2008. McNally was sentenced on March 12, 2008 to a total of thirty-eight years incarceration, suspended after serving twelve years and five months, twelve of which were minimum mandatory time for probation.

McNally, through counsel, appealed his conviction to the Delaware Supreme Court. The three issues raised on appeal were ". . . the trial judge's jury instruction on reasonable doubt; the trial judge's decision to permit the State's ballistic expert to testify alleging that so doing violated McNally's right to confrontation and D.R.E. 702; and the trial judge's exercise of discretion by admitting gunshot residue (GSR) evidence when a chain of custody witness did not testify.[1] The Supreme Court found no error and affirmed McNally's conviction and sentence.[2]

Next McNally, *Pro se*, filed a motion for postconviction relief. The matter has been briefed and is now ready for decision.

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[1] *McNally v. State*, 980 A.2d 364, 366 (Del. 2008).

[2] *Id*. at 369.

FACTS

The following is a summary of the facts as noted by the Supreme Court in its opinion:

> On the night of January 6, 2007, someone shot four .45 caliber bullets in the direction of 82 Strawberry Drive, Magnolia, Delaware. Stacey Smith was visiting her mother at 102 Strawberry Drive, the house next door. Smith and McNally dated in the past, and they have two children together. One bullet struck Smith's car. The other three bullets struck the house at 82 Strawberry Drive. Four people were inside 82 Strawberry Drive that night. From 102 Strawberry Drive, Smith and her mother heard a loud noise. The went outside and found a bullet hole in the left front fender of Smith's car. In a 911 telephone call, Smith identified McNally as the shooter and claimed that he tried to run her off the road earlier that day. (FN1 While they were both driving, McNally allegedly motioned for Smith to pull over. She kept driving.) No one at the scene saw the shooter or the shooter's vehicle, although many people heard loud noises that sounded like firecrackers or gunshots. McNally denied being in the area of the shooting, or possessing or firing a gun. The police did not recover a firearm.
>
> The police identified McNally as a suspect based on his relationship with Smith and the alleged driving encounter earlier on the evening of the shooting. Police found four .45 caliber shell casings on the street in front of 82 Strawberry Drive. They also found three .45 caliber shell casing in McNally's aunt's SUV, which McNally drove the night of the shooting. (FN2 His aunt gave the police

permission to search her vehicle.) Police found GSR residue in that SUV and on McNally's hands. The State's ballistics expert, Carl Rone, determined that the shell casings found in the SUV and the street came from the same gun. Another expert, Elana Foster, testified that the evidence found on McNally's hands and in his aunt's SUV was gunshot residue. Foster testified that GSR on McNally's hands indicates the he either fired a gun, was near a gun when it was fired, or came into contact with a person or object that had GSR on it.[3]

MCNALLY'S CONTENTIONS

In his motion, he raises the following grounds for relief:

Ground One:	Ineffective Assistance of Trial Counsel.
Ground Two:	Ineffective Assistance of Appellate Counsel.
Ground Three:	Evidence Tampering by Police a Lack of Qualified Expert Testimony, and Chain of Custody Failures Should have Excluded all Evidence Relating to Ballistics and Gun Shot Residue.
Ground Four:	Defendant's right to Confront His Accusor (sic) under the Sixth Amendment was violated.[4]

[3] *McNally*, 980 A.2d at 366-67.

[4] McNally states "See Memorandum of Law" for arguments supporting his grounds.

DISCUSSION

Under Delaware law, the court must first determine whether McNally has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.[5] Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.[6] McNally's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is McNally's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

McNally's third and fourth grounds for relief are procedurally barred under Superior Court Criminal Rule 61(i)(4) because they were previously raised on direct appeal. As the Supreme Court stated in *Riley v. State*, "[j]ustice does not require that an issue that has been previously considered and rejected be revisited simply because the claim is refined or restated."[7] McNally previously argued that the evidence was insufficient at the close of the State's evidence when he moved for a judgment of acquittal. This Court denied his motion. McNally also raised this issue in his direct appeal to the Delaware Supreme Court, which was denied by that Court. McNally's third and fourth grounds for relief are simply a restatement of his previous argument

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[5] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

[6] Super. Ct. Crim. R. 61(i)(1).

[7] 585 A.2d 719, 721 (Del. 1990), *rev'd on other grounds*, *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001).

and as such they are barred by Rule 61(i)(4). Since the Court has previously ruled on these claims, McNally is not entitled to re-litigate them.

McNally's first and second grounds for relief have not previously been raised. Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural fault; and (2) prejudice from a violation of the movant's rights.[8] The bars to relief are inapplicable to a jurisdictional challenge or "to a colorable claim or miscarriage of justice stemming from a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[9]

Both of McNally's remaining claims are premised on allegations of ineffective assistance of counsel. McNally has therefore alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. McNally's ineffective assistance of counsel claims are not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including McNally, allege ineffective assistance of counsel in order to overcome the procedural default. "However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are

[8] Super. Ct. Crim. R. 61(i)(3).

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

distinct, albeit similar, standards."[10] The United States Supreme Court has held that:

> [i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that the responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance;' [i]neffective assistance of counsel then is cause for a procedural default.[11]

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two part analysis enunciated in *Strickland v. Washington*[12] and adopted by the Delaware Supreme Court in *Albury v. State*.[13]

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.[14] Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings

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[10] *State v. Gattis*, 1995 WL 790961 (Del. Super.).

[11] *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[12] 466 U.S. 668 (1984).

[13] 551 A.2d 53, 58 (Del. 1988).

[14] *Strickland*, 466 U.S. at 687; *see Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

would have been different, that is, actual prejudice.[15] In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.[16]

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.[17] However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[18] In other words, if the court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the court may dispose of the claim on this basis alone.[19] Furthermore, the defendant must rebut a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance," and this court must eliminate from its consideration the "distorting effects of hindsight when viewing that representation."[20] McNally has failed to establish any

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[15] *Strickland*, 466 U.S. at 694; *see Dawson*, 673 A.2d at 1190.

[16] *See* e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Bughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

[17] *Strickland*, 466 U.S. at 687.

[18] *Id.* at 697.

[19] *Gattis*, 1995 WL at *4.

[20] *Strickland,* 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

prejudice arising from his counsel's alleged ineffective representation. Therefore his claims are clearly barred by Rule 61(i)(3).

Despite the procedural bar, I will briefly address McNally's contentions. Ground One of McNally's motion claims that his trial counsel was ineffective. Specifically, McNally alleges that trial counsel was ineffective for failing to do the following: file a motion for judgment of acquittal, object to an allegedly incredible ballistics expert, object to supposed "tampering of evidence done by the police officer" and investigate and prepare the case. The affidavit of Lloyd Schmid, Jr., Esq., McNally's trial counsel, articulates that a motion for judgment of acquittal was presented to the court. According to trial counsel, the Judicial Action Form indicates that trial counsel did move for an acquittal. Thus, this claim by McNally should be summarily dismissed.

Next, McNally alleges that trial counsel failed to object to the expert testimony of Carl Rone ("Rone"). The record of the case proves otherwise. McNally's trial counsel engaged in a lengthy attempt to challenge Rone's credibility. This effort was recognized by the Supreme Court in its decision on the admissibility of Rone's testimony. The Court stated:

> Rone did explain his principles and methodology and applied those principles and methods to the facts. McNally was able to cross examine Rone on those principles and his methodology. McNally was also able to expose Rone's lack of recollection about the application of the

methodology to the facts here.[21]

Later in its opinion, the Court stated that "Rone's inability to recall the basis of his opinion went to the weight, not the admissibility, of his testimony. It was for the jury to assess Rone's credibility."[22] Not only is McNally's claim that his trial counsel failed to object to Rone's testimony incorrect, this claim is barred under Rule 61(i)(4) as the Supreme Court considered the issue in the direct appeal.

McNally alleges that trial counsel should have moved to suppress all evidence from the SUV due to evidence tampering purportedly perpetrated by Cpl. Killen. McNally's trial counsel attempted to exclude the shell casings due to alleged chain of custody issues but the trial court ruled against him. Trial counsel states that he did not move to suppress all evidence gathered from the SUV because he did not see a basis in the law to do so. McNally fails to show any legal authority to contradict trial counsel. As a result, McNally's claim should be summarily dismissed

Lastly, McNally alleges that trial counsel failed to "properly investigate and prepare for trial." Defendant claims that Anthony Brinkley and Mary Jones could have provided outcome altering information. According to trial counsel's affidavit, these witnesses did not possess any pertinent information. McNally's assertions are conclusory and fail to detail any facts that would have changed the outcome of the case. The Superior Court has repeatedly ruled that a defendant is not entitled to post

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[21] *McNally*, 980 A.2d at 370.

[22] *Id*.

conviction relief when the claims are conclusory or lack any factual basis.[23] McNally's claim is a blanket assertion wholly without support. McNally's claim is void of any factual support and his claim of ineffective assistance of counsel should fail.

Ground Two of McNally's motion claims that his appellate counsel, Kevin M. Howard, Esquire, was ineffective for failing to argue that the trial counsel was ineffective, for failing to object to the admission of the GSR evidence, and for failing to file a motion to reargue with the Delaware Supreme Court. First, as stated by appellate counsel, ineffective assistance of counsel is not an issue heard on direct appeal by the Supreme Court. Ineffective assistance of counsel claims are within the purview of the Superior Court.[24] This claim by McNally should be summarily dismissed.

McNally's argument that appellate counsel was ineffective for failing to object to the admission of the GSR evidence is misguided. One of the main arguments on appeal was the admissibility of the GSR evidence. In fact, in response to McNally's claim, appellate counsel remarked that "[a]pparently Mr. McNally didn't read the brief that was filed on his behalf." The mere fact that the Court did not agree with the

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[23] *State v. Harris*, 2006 WL 1679455 (Del. Super.) (no right to postconviction relief for ineffective assistance of counsel when claims are "merely conclusory"); *See also State v. Broadnax*, 2006 WL 1679583 (Del. Super.) (postconviction relief summarily dismissed when claim of ineffective assistance of counsel conclusory).

[24] *Casalvera v. State*, 410 A.2d 1369 (Del. 1980).

arguments of appellate counsel and ruled against his argument does not make him ineffective. The issue of GSR admissibility was considered by the Supreme Court in a direct appeal. McNally is attempting to use this motion for postconviction relief to re-litigate the issue. Rule 61(i)(4) bars the rehashing of formerly adjudicated issues such as this one. Again, McNally's claim should be summarily dismissed.

Appellate counsel has stated that he did not file a motion to reargue because "there was no basis to ask the Court to re-examine the issues that it considered on appeal." McNally fails to establish how re-litigating this issue would change the outcome. The information cited by McNally was part of the record examined by the Court. As such, this claim should be dismissed.

CONCLUSION

After reviewing the record in this case, it is clear that McNally has failed to avoid the procedural bases of Rule 61(i). A review of his counsels' affidavits clearly shows that counsel represented McNally in an exemplary fashion and were in no way ineffective. Consequently, I recommend that McNally's motion be denied as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and as procedurally barred by Rule 61(i)(4).

/s/ Andrea Maybee Freud
Commissioner

AMF/dsc

State v. McNally
ID No. 0701005246
August 15, 2011

oc: Prothonotary
cc: Hon. William L. Witham, Jr.
Kathleen A. Dickerson, Esq.
Lloyd A. Schmid, Jr., Esq.
Kevin M. Howard, Esq.
Troy McNally, VCC
File