

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0812004092A
)	
ERIC JOHNSON,)	
)	
Defendant.)	

Submitted: January 12, 2012
Decided: January 19, 2012

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED.**

Joseph S. Grubb, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Eric Johnson, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 19th day of January, 2012, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Following a Superior Court jury trial held on June 30, 2009 and July 1, 2009, Defendant was found guilty of Burglary Second Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Weapon with a Removed Serial Number, Possession of Burglar Tools, Resisting Arrest, and Criminal Mischief. Defendant was sentenced to twenty-three years at Level V suspended after twelve years, followed by decreasing levels of probation.

2. Defendant filed a direct appeal to the Delaware Supreme Court. On September 24, 2010, the Delaware Supreme Court affirmed the judgment of the Superior Court.¹

FACTS

3. The facts giving rise to these charges, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal², are as follows: On November 7, 2008, Defendant Eric Johnson broke into the house of an acquaintance, Danielle Miller. Antoinette Munce was sleeping in the basement bedroom when she heard loud noises upstairs. Munce walked to and saw that the back door to the house had been broken in. Munce returned to the basement and called 911. Shortly after the call, Officer Matthew Derbyshire arrived and saw Johnson running from the rear door area of the house.³

4. During the pursuit, Officer Derbyshire noticed a gun in Johnson's right hand. Before surrendering, Johnson momentarily disappeared behind a house. Officer Derbyshire did not find the gun while making the arrest, but later searched the area where

¹ *Johnson v. State*, 5 A.3d 617 (Del. 2010).

² *Johnson*, 5 A.3d at 619.

³ *Id.*

Johnson had disappeared and found a loaded automatic handgun at the bottom of a large bucket filled with rainwater.⁴

DEFENDANT’S RULE 61 MOTION

5. On June 10, 2011, Defendant filed this motion for postconviction relief. In the subject motion, Defendant raises three grounds for relief. First, Defendant contends that his counsel provided ineffective assistance for a variety of reasons. Second, Defendant contends that “Juror #3 contaminated jury”. Third, Defendant alleges “Prosecution Misconduct and Withholding Evidence.”

6. Before making a recommendation, the record was enlarged by directing Defendant’s trial counsel to submit an Affidavit responding to Defendant’s ineffective assistance of counsel claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.⁵

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 61.⁶ In order to protect the procedural integrity of Delaware’s rules, the court will not consider the merits of a post conviction claim that fails any of Rule 61’s procedural requirements.⁷

8. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;⁸ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must

⁴ *Id.*

⁵ Super.Ct.Crim.R. 61(g)(1) and (2).

⁶ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁷ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally 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.⁹ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”¹⁰

9. In this case, Defendant’s second claim (Juror #3 contaminated the jury), and third claim (Prosecution Misconduct and Withholding Evidence), are both procedurally barred. Rule 61(i)(2) and Rule 61(i)(3) require Defendant to have raised these claims at trial, at sentencing, or on direct appeal to be procedurally preserved. Having failed to previously raise these claims, they are now procedurally barred.

10. In addition to being procedurally barred, these claims are also without merit. Defendant’s second claim of juror contamination is devoid of any factual or legal support. Defendant asserts in a conclusory fashion that the jury was not questioned about the comments made by Juror #3. On the first day of trial, Jury No. 3 brought to the court’s attention that her father-in-law was a New Jersey Police Officer and that she was a nurse at Christiana Hospital.¹¹ Outside the presence of the other jurors, the court questioned Juror No. 3 as to her ability to remain fair and impartial in light of her experiences or associations. Both defense counsel and the State were satisfied with her

⁹ Super.Ct.Crim.R. 61(i)(5).

¹⁰ Super.Ct.Crim.R. 61(i)(4).

¹¹ June 30, 2009 Trial Transcript, at pgs. 30-35.

responses and assurances and neither had any objection to her remaining a part of the panel.¹² The colloquy between Juror No. 3 and the court occurred outside the presence of the other jurors and the court cautioned Juror No. 3 not to discuss the matter with any of the other jurors.¹³ Defendant contends that the trial judge should have questioned the other jurors as to the comments made by Juror No. 3. Yet, because the colloquy occurred outside the presence of any of the other jurors, and Juror No. 3 was instructed not to discuss the matter with the other jurors, Defendant has failed to substantiate his claim that any alleged comments by Juror No. 3 somehow contaminated the jury. Conclusory, unsupported and unsubstantiated allegations are insufficient to support a motion for postconviction relief.¹⁴

11. Turning to Defendant's third ground, prosecution misconduct and withholding evidence, neither defense counsel nor the State is aware of any violations of withholding evidence. Defendant contends that the prosecution failed to provide defense counsel with reports by Sergeant Murray which state that someone other than Defendant was on the second floor of the house. The State, however, is "entirely unaware of any report by Sergeant Murray as referenced by Defendant."¹⁵ Likewise, defense counsel is also unaware of the existence of any exculpatory evidence or witness.¹⁶ This claim is conclusory, unsubstantiated and unsupported. It is therefore without merit.

12. We now turn to Defendant's ineffective assistance of counsel claim. The procedural requirement that a claim be raised on direct appeal to be preserved is not

¹² *Id.*

¹³ June 30, 2009 Trial Transcript, at pg. 35.

¹⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del. Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

¹⁵ State's Response to Defendant's Rule 61 motion, at pg. 3.

¹⁶ Affidavit of Bradley V. Manning, at pgs. 1-2.

applicable to ineffective assistance of counsel claims.¹⁷ A Rule 61 motion is the appropriate vehicle for an ineffective assistance of counsel claim.¹⁸ Consequently, Defendant's ineffective assistance of counsel claim (Count One) is not procedurally barred but is properly presented herein.

13. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.¹⁹ The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.²⁰

14. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.²¹ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.²² Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.²³

15. The United States Supreme Court recently reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v.*

¹⁷ *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

¹⁸ *Id.*

¹⁹ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

²⁰ *Id.* at 687-88, 694.

²¹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

²² *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

²³ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Richter,²⁴ the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.²⁵ The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.²⁶

16. The United States Supreme Court explained that a defendant is not guaranteed perfect representation, only a reasonably competent attorney. There is no expectation that competent counsel will be a flawless strategist or tactician. A defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.²⁷

17. The United States Supreme Court reasoned that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicates active and capable advocacy.²⁸ Counsel's representation must be judged by the most deferential of standards.²⁹

18. Turning now to the subject case, Defendant contends that his counsel was ineffective for: 1) failing to investigate issues; 2) failing to visit the crime site; 3) failing to poll jury; 4) failing to address Brady violation; 5) trial and appellate counsel never

²⁴ *Harrington v. Richter*, 131 S.Ct. 770 (2011).

²⁵ *Id.*, at *791.

²⁶ *Id.*

²⁷ *Id.*, at *787-792

²⁸ *Id.* at 791.

²⁹ *Id.* at 787-88.

discussed appeal issues; 6) failing to file motion for appointment of investigator; 7) failing to request lesser-included offenses in jury instructions; 8) failing to introduce police officer newspaper article which was different than testimony; and 9) failing to “summons witnesses.”

19. Defendant’s first ineffective assistance of counsel contention, that defense counsel failed to investigate issues, is too conclusory and lacking in detail to establish a claim of ineffectiveness. Defendant has not alleged any specific facts or issues that his counsel should have investigated but failed to do so. Defendant has also failed to establish how he suffered any actual prejudice by the failure to investigate any unspecified fact or issue(s). This claim is too conclusory and lacking in detail to support a claim of ineffectiveness.

20. Defendant’s second ineffective assistance of counsel contention, that counsel was ineffective for failing to visit the crime site, is also without merit. Defense counsel, in his Affidavit, represented that he did, in fact, visit the crime scene (exterior only) prior the day of trial.³⁰ Even if counsel had not visited the crime site, counsel’s failure to do so does not, in and of itself, establish ineffectiveness.³¹ Defendant must also establish actual prejudice as a result from any alleged deficiency. Because Defendant has not established that his counsel was deficient or that he suffered actual prejudice as a result thereof, this claim must fail.

21. Defendant next contends that his counsel was ineffective because he did not poll the jury. After the verdict was read by the forelady, the court asked the entire jury if the forelady accurately reported the verdict. The jury responded that she had accurately

³⁰ Affidavit of Bradley V. Manning in response to Defendant’s Rule 61 Motion, at pg. 1.

³¹ See, *Gee v. State*, 2010 WL 3719891, at *1 (Del. 2010).

reported their verdict.³² Defendant makes no allegations as to how polling the jury would have changed anything. Defendant has failed to establish how he suffered actual prejudice as a result of any alleged deficiency.

22. Defendant contends that his counsel was ineffective for failing to “address Brady violation.” Defendant has failed to substantiate this allegation. Defense counsel is unaware of the existence of any Brady violation(s).³³ Defendant has failed to establish that defense counsel’s conduct was deficient in any way nor has he established actual prejudice resulting from any alleged deficiency.

23. Defendant contends that his trial and appellant counsel never discussed appeal issues with him. Defense counsel represents that, in fact, both trial and appellant counsel did discuss possible appeal issues.³⁴ In any event, Defendant does not state what issue or issues he would have raised on appeal that were not raised and how he suffered any prejudice by the failure to raise the issue or issues. Defendant has not explained what good faith basis existed for the raising of any other issue on appeal. Moreover, counsel is not required to raise every meritorious ground for appeal. Counsel may determine that weaker arguments should not be raised so as not to detract from stronger arguments advanced.³⁵ Defendant has failed to meet his burden to establish that defense counsel’s conduct was deficient nor has he established actual prejudice as a result from any alleged deficiency.

24. Defendant contends that his counsel was ineffective for failing to file a motion to appoint an investigator. Defense counsel, in his Affidavit, represented that all necessary

³² July 1, 2009 Trial Transcript, pg. 64.

³³ Affidavit of Bradley V. Manning in response to Defendant’s Rule 61 Motion, at pg. 1.

³⁴ Affidavit of Bradley V. Manning in response to Defendant’s Rule 61 Motion, at pg. 1.

³⁵ See, *State v. Washington*, 2007 WL 2297092, at *3 (Del.Super.), *aff’d*, *Washington v. State*, 2008 WL 697591, at *2 (Del.).

investigative work was handled by investigators employed within the Public Defender's office. Thus, no outside assistance was needed and therefore was not requested.³⁶ Defendant has not established why any additional outside assistance was needed, what investigative work the outside assistance would have performed that the Public Defender's investigators was not able to perform or failed to perform, and how Defendant suffered actual prejudice as a result thereof. This contention is too conclusory and lacking in detail to establish a claim of ineffectiveness.

25. Defendant contends that his counsel was ineffective for not requesting a lesser included offense instruction. Defense counsel advises that he did not request a lesser included offense instruction because there was no basis in fact to do so. Defense counsel explains that it was an all or nothing case.³⁷ Defendant has failed to support his contention that a lesser included offense instruction should have been requested. Defendant has failed to establish what good faith basis existed to request a lesser included offense instruction. Defense counsel cannot be deemed ineffective for failing to raise an issue that lacks merit. Defendant has not established that his counsel was deficient or that he suffered actual prejudice as a result thereof.

26. Defendant contends that counsel was ineffective for not introducing a newspaper article that differed from the police officer's testimony at trial. Defense counsel advises that he made a tactical decision not to seek the introduction of the newspaper article because, according to the article, police (or a witness) claimed to have observed Defendant inside the house during the burglary. At trial, the State did not call any witness who was able to place Defendant inside the house during the burglary.

³⁶ Affidavit of Bradley V. Manning in response to Defendant's Rule 61 Motion, at pgs. 1-2.

³⁷ Affidavit of Bradley V. Manning in response to Defendant's Rule 61 Motion, at pg. 2.

Defendant was only observed fleeing the area of the backyard by the police. Because Defendant was not charged with conspiracy, defense counsel was able to argue to the jury that someone other than the Defendant committed the burglary since he was never observed inside the home and he was not captured with any stolen property.³⁸

27. The decision as to whether or not to call a witness, and how to examine and/or cross-examine witnesses who are called are tactical decisions.³⁹ Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.⁴⁰ Defendant has failed to overcome this strong presumption and his ineffectiveness claim must fail.

28. Lastly, Defendant contends that his counsel failed to "summons witnesses." Defense counsel advises that he is unaware of any witness who would have helped Defendant's case. Defendant was apprehended fleeing the backyard of the residence with a loaded handgun.⁴¹ Defendant has not identified which witness or witnesses that were not called, should have been called, and thereafter to establish how that witness(es) testimony would have resulted in a different outcome of his trial. Defendant does not provide concrete allegations as to how any unidentified witness would have helped his defense. Defendant does not make any concrete factual allegations, let alone concrete allegations of actual prejudice. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.⁴²

³⁸ Affidavit of Bradley V. Manning in support of Rule 61 Motion, at pg. 2.

³⁹ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

⁴⁰ *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

⁴¹ Affidavit of Bradley V. Manning in response to Defendant's Rule 61 Motion, at pg. 2.

⁴² *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

29. In this case, for those claims that are procedurally barred, Defendant has failed to overcome any of the procedural bars by showing a “colorable claim that there was a miscarriage of justice” or that “reconsideration of the claim is warranted in the interest of justice.” The “miscarriage of justice” exception is a “narrow one and has been applied only in limited circumstances.”⁴³ The defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”⁴⁴ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the “interests of justice” require it to consider the otherwise procedurally barred claims for relief.⁴⁵

For all of the foregoing reasons, Defendant’s Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
cc: Bradley V. Manning, Esquire

⁴³ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

⁴⁴ *Id.*

⁴⁵ *Id.*