

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

| | | |
|-------------------|---|---------------------|
| STATE OF DELAWARE |) | |
| |) | I.D. No. 0107010230 |
| v. |) | |
| |) | |
| ROBERT GARVEY |) | |
| |) | |
| Defendant |) | |

Submitted: September 26, 2013
Decided: December 20, 2013

Upon Defendant's Fourth Motion for Postconviction Relief.
DENIED.

Upon Defendant's Motion for Reconsideration of Appointment of Counsel and
Evidentiary Hearing.
DENIED.

ORDER

Martin B. O'Connor, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Robert Garvey, Smyrna, Delaware, *pro se*.

COOCH, R.J.

This 20th day of December 2013, upon consideration of Defendant's Fourth Motion for Postconviction Relief and Motion for Reconsideration of Appointment of Counsel and Evidentiary Hearing, it appears to the Court that:

1. Defendant Robert Garvey ("Defendant") filed this Fourth Motion for Postconviction Relief¹ and Motion for Reconsideration of

¹ The Court declines to treat this motion as a "request [that] this court re-open [Defendant's] first Rule 61 post-conviction proceedings..." and instead will treat this as a Fourth Motion for Postconviction Relief. Def.'s Reply Br. at 1 (emphasis in original).

Appointment of Counsel and Evidentiary Hearing based on Defendant's apparent belief that his trial counsel was ineffective and that harm was compounded by the Court's denial of counsel in his subsequent Motions for Postconviction Relief.

2. Defendant was found guilty in 2003 of Murder First Degree, Robbery First Degree, Attempted Robbery First Degree, Possession of a Firearm During the Commission of a Felony (two counts), Carrying a Concealed Deadly Weapon (two counts), and Conspiracy Second Degree for his part in a robbery gone awry.² He was subsequently sentenced on the Murder charge to life imprisonment without benefit of probation or parole. Defendant directly appealed to the Supreme Court. Defendant's Supreme Court appeal was denied and his three subsequent Motions for Postconviction Relief were denied by this Court and affirmed by the Supreme Court. A federal *habeas corpus* application was also denied.
3. Defendant's claims are spread among several documents submitted to the Court.³ Defendant requests that the Court "[r]eopen movants initial Motion for Post-conviction Relief appeal and Appoint counsel to properly illustrate and present All of movants substantial ineffective assistance of Trial counsel claims...."⁴ Defendant contends arguing ineffective assistance of counsel claims without representation is "unrealistic" and reduces his rights to an "illusion" as he lacks the education and legal skills necessary to effectively represent himself in a Motion for Postconviction Relief against licensed attorneys.⁵ Defendant's ineffective assistance of counsel claims include:

a speedy trial violation; the use of perjured testimony to exact a conviction; a sufficiency of the evidence claim as to the Murder First Degree conviction; a Fourth Amendment violation; and a defect in the jury selection process whereby he claims an entitlement to have been present during individual juror voir dire.⁶

² For additional procedural history and facts not relative to the motions before this Court *see Garvey v. State*, 873 A2d 291 (Del. 2005); *State v. Garvey*, 2009 WL 1037740 (Del. Super. Apr. 8, 2009).

³ Defendant wrote the Court "[Judge] Cooch, I had a falling-out with the inmate (jailhouse lawyer) in here that was preparing my memorandum of law section. I couldn't pay him the price he was charging." It appears the Court received documents prepared both by the Defendant and this "jailhouse lawyer." For clarity, citations to these documents will include the Court's filing date.

⁴ Def.'s Mot. for Postconviction Relief/Evid. Hrg. Req., at 4 (March 18, 2013).

⁵ Def.'s Supporting Memo. of L., at 2, 3 (Apr. 11, 2013).

⁶ State Response to Def.'s Mot. for Postconviction Relief at 1.

4. Defendant argues that in the alternative, should he not be granted counsel, he be granted an evidentiary hearing “so that [he] can orally discuss [his] legal points next to the prosecutors.”⁷
5. Whether or not an evidentiary hearing should be held is at the judge’s discretion.⁸ “It is well-settled that the Superior Court is not required to conduct an evidentiary hearing upon a Rule 61 motion if, on the face of the motion, it appears that the petitioner is not entitled to relief.”⁹ “If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.”¹⁰
6. Under the Delaware Superior Court Rules of Criminal Procedure, a Motion for Postconviction Relief can be barred for time limitations, repetitive motions, procedural defaults, and former adjudications.¹¹ Motions exceed time limitations if they are filed more than one year after the conviction is finalized or they assert a newly recognized, retroactively applied right more than one year after it is first recognized.¹² A motion is considered repetitive and therefore barred if it asserts any ground for relief “not asserted in a prior postconviction proceeding.”¹³ Repetitive motions are only considered if it is “warranted in the interest of justice.”¹⁴ Grounds for relief “not asserted in the proceedings leading to the judgment of conviction” are barred as procedural default unless movant can show “cause for relief and “prejudice from [the] violation.”¹⁵ Grounds for relief formerly adjudicated in the case, including “proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus hearing” are barred.¹⁶ Former adjudications are only reconsidered if “warranted in the interest of justice.”¹⁷
7. Defendant bases his argument that counsel is required primarily on the case of *Martinez v. Ryan*.¹⁸ Defendant’s Request for Appointment of Counsel was **DENIED** in this Court’s Amended Order of Briefing.¹⁹

⁷ Def.’s Supporting Memo. of L., at 6 (Apr. 11, 2013).

⁸ Super Ct. Crim. R. 61(h)(1).

⁹ *Hawkins v. State*, 2003 WL 22957025, at *1 (Del. 2003) (ORDER).

¹⁰ Super Ct. Crim. R. 61(h)(3).

¹¹ Super Ct. Crim. R. 61(h).

¹² Super Ct. Crim. R. 61(i)(1).

¹³ Super Ct. Crim. R. 61(i)(2).

¹⁴ *Id.*

¹⁵ Super Ct. Crim. R. 61(i)(3).

¹⁶ Super Ct. Crim. R. 61(i)(4).

¹⁷ *Id.*

¹⁸ 132 S.Ct. 1309 (2012).

¹⁹ Amended Or. of Br.

As stated there, Defendant's reliance on *Martinez* is misplaced.²⁰ The holding in *Martinez* "permits a federal court to review a 'substantial' ineffective assistance of counsel claim on federal habeas review."²¹ It does not apply to state court proceedings.²² *Martinez* "did not create a new right such as to qualify as means of relief from the procedural bar of Rule 61(i)(1). Further, since *Martinez* did not establish a new constitutional right, it cannot be applied retroactively."²³

8. Before addressing the merits of this Fourth Motion for Postconviction Relief, the court must first apply the procedural bars of Superior Court Criminal Rule 61(i).²⁴ If a procedural bar exists, then the Court will not consider the merits of the postconviction claim.²⁵
9. All of Defendant's claims are procedurally barred under Rule 61(i). Defendant's speedy trial claim is barred because it was adjudicated in his First Motion for Postconviction Relief.²⁶ His argument that perjured testimony was used to convict is likewise barred under Rule 61(i) 1-3 because it is being asserted here for the first time. The elements of Defendant's claim that there was insufficient evidence to sustain his Murder First Degree conviction are a mix of old²⁷ and new issues²⁸ and can be either barred for time, as a repetitive motion, a procedural default, a formerly adjudicated claim, or a combination of the Rule 61 bars. Defendant's Fourth Amendment and juror bias claims are barred as previously adjudicated.²⁹ This Court finds the

²⁰ *Id.*

²¹ *Morrissey v. State*, 2013 WL 2722142, at *2 (Del. June 11, 2013).

²² *State v. Desmond*, 2013 WL 1090965, at *3 (Del. Super. Feb. 26, 2013); *State v. Rodgers*, 2012 WL 3834908, *2 (Del. Super. Aug. 30, 2012); *State v. Finn*, 2012 WL 2905101, at *2 (Del. Super. July 17, 2012) ("*Martinez* did not change Delaware's longstanding rule that defendants are not entitled postconviction relief counsel."); *State v. Smith*, 2012 WL 5577827, at *1 (Del. Super. June 14, 2012), *aff'd*, 53 A.3d 303 (Del. 2012) (TABLE).

²³ *State v. Travis*, 2013 WL 1196332 (Del. Super. Mar. 25, 2013), *aff'd sub nom.*, *Anderson v. State*, 69 A.3d 370 (Del. 2013) and *aff'd*, 69 A.3d 372 (Del. 2013).

²⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

²⁵ *Id.*

²⁶ *State v. Garvey*, 2006 WL 1495786 (Del. Super. May 25, 2006), *aff'd*, *Garvey v. State*, 925 A.2d 503 (Del. 2007) (TABLE).

²⁷ Defendant's argument that First Degree Murder was an improper charge because the State could not prove intent is similar to an argument presented in his Second Motion for Postconviction Relief. See *State v. Garvey*, 2008 WL 1952159 (Del. Super. Feb. 13, 2008), *aff'd*, *Garvey v. State*, 962 A.2d 917 (Del 2008) (TABLE). There, it was argued that his felony murder conviction should be vacated because the State could not prove the death "furthered" the crime.

²⁸ Defendant's claim regarding the ballistics evidence appears to be new. As is his claim that the Court should not have instructed the jury on accomplice liability. Both of these new claims are barred by Rule 61(i)(1-3) as time barred, repetitive, and procedural default.

²⁹ See *State v. Garvey*, 2008 WL 1952159 (Del. Super. Feb. 13, 2008) (adjudicating juror bias claim); *State v. Garvey*, 2006 WL 1495786 (Del. Super. May 25, 2006) (adjudicating Fourth Amendment claim).

“interests of justice” do not require any of the above procedural bars to be reversed.

10. It appears on the face of Defendant’s motions that he is not entitled to relief. Accordingly, the Court has decided, in its discretion, not to grant the Defendant an evidentiary hearing.

Therefore, Defendant’s Fourth Motion for Postconviction Relief and Motion for Reconsideration of Appointment of Counsel and Evidentiary Hearing is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services