IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0107017041
	)	
TYRONE GUY,	)	
	)	
Defendant.	)	

Submitted: March 18, 2013
Decided: June 27, 2013

On Defendant's Third Motion for Postconviction Relief – DENIED

ORDER

Kathleen Jennings, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801. Counsel for State of Delaware.

Tyrone Guy, James T. Vaughn Correctional Center, 1181 Paddock Road, Smyrna, DE 19977. *Pro Se* Defendant.

CARPENTER, J.

On this 27th day of June 2013, upon consideration of Defendant's *Pro Se* Motion for Postconviction Relief, it appears to the Court that:

1. On March 11, 2013, Tyrone Guy ("Guy") filed a *Pro Se* Motion for Postconviction Relief, his third, pursuant to Superior Court Criminal Rule 61 ("Rule 61"). In his Motion, Guy raises the following grounds for relief: 1) failure of trial judge to give "modified *Bland*" instruction to jury; and 2) ineffective assistance of counsel appointed to represent him at his initial Rule 61 proceeding. For the reasons set forth below, Defendant's Third Motion for Postconviction Relief is **DENIED.**

2. Following a jury trial, Guy was found guilty on July 2, 2004 of the following charges: Murder First Degree, Felony Murder, Possession of a Firearm During Commission of a Felony, Attempted Robbery First Degree, and Conspiracy Second Degree. On September 30, 2005, Guy was sentenced to two (2) life terms of imprisonment and twenty (20) years at Level V. Guy's conviction and sentence were affirmed on appeal to the Supreme Court in December 2006. The Court will not recite the facts of the case as they are set forth in this Court's order, dated August 29, 2008.[1]

[1] *See State v. Guy*, 2008 WL 4152735, at *1 (Del. Super. Aug. 29, 2008).

3. Initially, Guy filed a *Pro Se* Motion for Postconviction Relief on March 14, 2007. Christopher D. Tease, Esquire ("Tease") was appointed to represent him, and a subsequent modified Motion for Postconviction Relief was filed by his appointed counsel on January 1, 2008. Guy's first Motion for Postconviction Relief was denied by this Court on August 28, 2008. On October 20, 2009, Guy filed his second Motion for Postconviction Relief, which was again denied by this Court on December 1, 2009.

4. On March 11, 2013, Guy filed the motion presently before the Court. However, prior to addressing the merits of any postconviction claim, the Court must determine whether the procedural requirements of Rule 61 have been met.[2] Specifically, any ground for relief raised by the Defendant that was not raised at trial or on direct appeal is procedurally barred, unless the Defendant shows both cause for relief and prejudice from a violation of his rights.[3] Additionally, any grounds for relief previously adjudicated, including those adjudicated in "the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding," are barred unless "reconsideration of the claim is warranted in the interest of justice."[4]

[2] *See e.g., Bailey v. State,* 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).
[3] *See* Super. Ct. Crim. R. 61(i)(3).
[4] Super. Ct. Crim. R. 61(i)(4).

*A. Modified "*Bland*" Instruction*

5. On appeal, Guy claims that he is entitled to relief because the trial judge failed to give a "modified *Bland*" instruction to the jury. In *State v. Brooks*[5], the Delaware Supreme Court held that "trial judges must give a modified version of the instruction from *Bland v. State* whenever the State offers accomplice testimony against the accused" and that a failure to do so will constitute plain error.[6] However, the Delaware Supreme Court carefully ruled that this requirement would apply prospectively—not retroactively.[7] Specifically, the Delaware Supreme Court affirming the conviction in *Brooks* stated that "the trial court judge correctly applied the law as it existed on the day he instructed the jury" and, therefore, could not be deemed to have committed plain error by failing to give an instruction that was not in effect at the time.[8] As such, the "modified *Bland*" instruction was not mandated at the time of Guy's 2004 trial and no legal error occurred. Like *Brooks*, the Court here finds that this Court properly instructed the jury according to the law then in effect and, therefore, finds Guy's first ground for relief to be without merit.

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[5] 40 A.3d 346 (Del. 2012).
[6] *Id.* at 348.
[7] *See id.* at 351 (stating that the court was "announcing a different rule for the future" and that decisions made based upon current law at the time would not be deemed plain error).
[8] *Id.*

B. Ineffective Assistance of Appellate Counsel

6. Second, Guy claims that he is entitled to relief due to the ineffective assistance of appointed counsel on the initial Rule 61 collateral proceeding. Specifically, Guy contends that his appointed counsel, Tease, failed to raise ten (10) out of eleven (11) claims of ineffective assistance against his trial attorney to the Delaware Supreme Court after this Court denied those claims. Therefore, Guy reasons that Tease provided ineffective assistance by failing to exhaust all possible avenues of relief and cites *Martinez v. Ryan*[9] in support of this rationale. The Court cannot agree.

7. Ineffective assistance of counsel claims are governed by the two-part test established in *Strickland v. Washington*[10]. Specifically, a defendant's claim of ineffective assistance of counsel is subject to a strong presumption that the representation was professionally reasonable.[11] In order to overcome this presumption, the defendant must establish that: 1) his trial counsel's efforts fell below a reasonable objective standard; and 2) there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's unprofessional errors.[12] However, "mere allegations of ineffectiveness will not

[9] 566 U.S. at —, 132 S.Ct. (2012).
[10] 466 U.S. 668, 687 (1984); *see also Winn v. State*, 1998 WL 15002 (Del. Jan. 7, 1998).
[11] *See Winn*, 1998 WL 15002, at *2.
[12] *See Strickland v. Washington*, 466 U.S. 668, 689 (1984).

suffice."[13] Instead, "a defendant must make, and substantiate, specific allegations of actual prejudice."[14] Further, courts must evaluate defense counsel's conduct at the time of the trial in order to maintain the proper perspective and "eliminate 'the distorting effects of hindsight.'"[15]

8. Additionally, *Martinez* concerns the standard of review in federal *habeas corpus* proceedings.[16] Specifically, *Martinez* allows a federal *habeas* court to hear substantial claims of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding in the state court, there was no counsel or counsel in that proceeding was ineffective.[17] Although *Martinez* does not apply to state court proceedings, even if it did, Guy was provided counsel for his initial Rule 61 filing and therefore the *Martinez* ruling is not applicable.[18]

9. The Court recently amended Rule 61 to allow the appointment of counsel on an indigent's first postconviction proceeding. However, even if the amended Rule were applicable, which it is not, the Court would reach the same result. First, Guy had counsel to represent him for his first Motion for

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[13] *Gattis v. State,* 697 A.2d 1174, 1178.
[14] *Id.* at 1178-79.
[15] *Id.* at 1178 (citing *Strickland,* 466 U.S. at 689).
[16] *See Martinez v. Ryan*, 566 U.S. at —, 132 S.Ct. 1309, 1311 (2012) ("Where under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal *habeas* court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.").
[17] *See id.*
[18] 2013 Del. D.O. 0015; *see also State v. Travis*, 2013 WL 1196332, at *2 (Del. Super. Mar. 25, 2013).

Postconviction Relief. Further, although a defendant is entitled to effective assistance of counsel during his Rule 61 proceeding, this does not mean that his attorney must continue to raise every frivolous or unsupportable issue asserted by his client. Specifically, "[a] defendant can only show that his appellate counsel ineffectively represented him where the attorney omits issues that are clearly stronger than those the attorney presented."[19] Guy, however, does not explain why he has been prejudiced due to Tease's failure to raise ten (10) of the eleven (11) claims of ineffective assistance against his trial attorney on appeal. Moreover, Guy neither raised this issue on his Second Motion for Postconviction Relief nor provides a reason now as to why he may have been precluded from doing so then. Therefore, Guy's "conclusory ineffective assistance of counsel claim is barred because he failed to raise it earlier and because he has failed to make any attempt to show how consideration of the claim is warranted in the interest of justice."[20] Additionally, Guy "has failed to show the procedural bars are inapplicable pursuant to Rule 61(i)(5), as he has not advanced any 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

[19] *Ploof v. State*, 2012 WL 2422870, at *14 (Del. June 4, 2013) (citing *Jones v. Barnes,* 463 U.S. 745, 754 (1983)).
[20] *State v. Jones*, 2013 WL 2152198, at *3 (Del. Super. May 20, 2013) (citing Super. Ct. Crim. R. 61(i)(2)).

leading to the judgment of conviction."[21] As such, the Court finds that the latest claim of ineffective assistance of counsel to be without merit.

For the reasons above, the Defendant's Third Motion for Postconviction Relief is hereby **DENIED.**

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[21] *Id.* at *3.