

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)

v.)

PAUL A. FAHMY,)

Defendant.)

ID No. 0410013428A

MEMORANDUM OPINION

Defendant was convicted of attempted murder in the first degree and possession of a deadly weapon during the commission of a felony. His conviction was affirmed on direct appeal.¹ Thereafter Fahmy filed a motion for post conviction relief in which he alleged, among other things, that he did not receive effective representation from his counsel. This court denied that application², and that denial was affirmed by the Delaware Supreme Court.³ Presently before the court is

¹ *Fahmy v. State*, 2006 WL 2842726 (Del.)

² *State v. Fahmy*, 2008 WL 215193 (Del. Super.)

³ *Fahmy v. State*, 2009 WL 189838 (Del.)

Fahmy's second motion for post conviction relief in which he once again alleges his trial counsel was ineffective. He also argues that (1) his pretrial identification was impermissibly suggestive; (2) this court committed plain error and abused its discretion when it allowed an expert to testify a metal fragment was removed from the victim's head; and (3) this court committed plain error when it instructed on attempt to commit a felony murder. Each of these claims is procedurally barred.

a. The ineffective assistance of counsel claims

This is the second round of ineffective assistance of counsel claims made by Defendant. The court has reviewed those claims and the affidavit filed by Fahmy's trial counsel (this is counsel's second affidavit). Although the court believes Fahmy's claims are likely frivolous, it cannot reach those merits because they are procedurally barred.⁴

Rule 61(i)(4) prohibits re-litigation of issues which were previously decided. In 2008 Fahmy claimed in a Rule 61 motion that his trial counsel was ineffective because (1) counsel failed to move for a sentence modification; (2) failed to

⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)

adequately confer with him before trial; (3) talked to witnesses without his consent; and (4) failed to file a motion to sever his trial from his codefendant's trial.⁵ As mentioned earlier those claims were denied by this court and that denial was affirmed by the Supreme Court. Now he claims his counsel was ineffective by (1) allowing improper questioning of a detective;⁶ (2) failing to subpoena certain witnesses;⁷ (3) failing to challenge ballistics testimony; and (4) failing to investigate physical evidence. This court's denial of Fahmy's previous Rule 61 motion based upon ineffective assistance of counsel bars his latest iteration of that claim. In *State v. Wright*⁸ the defendant challenged the language used by the interrogating officer when administering the *Miranda* warnings to the defendant. Defendant's confession was challenged in several proceedings, albeit never on the basis of the specific language used by the officer when he gave those warnings. The Supreme Court held that this argument was barred. "[A] defendant is not entitled to have a court re-examine an issue

⁵ This summary is taken from *Fahmy v. State*, 2009 WL 189838 (Del.)

⁶ This "improper questioning" was a single question which was withdrawn after an objection.

⁷ Ironically Fahmy previously complained that his counsel interviewed certain witnesses without his permission.

⁸ 2013 WL 2302049 (Del.)

that has been previously resolved simply because the claim is refined or restated.”⁹ Accordingly Fahmy’s attempt to re-litigate his Sixth Amendment claim simply by conjuring new ways in which his counsel may have been ineffective is procedurally barred.¹⁰

b. Improperly suggestive identification

Defendant argues for the first time that the victim’s identification of him was made under improperly suggestive circumstances. This claim is barred by Rule 61(i)(1),(2) and (3). Fahmy relies upon Rule 61(i)(5) to excuse these procedural defaults. That portion of the rule requires Fahmy to show “there is 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.” Here Fahmy’s claim that his identification was the result of unnecessarily suggestive circumstances is based upon his condition that the victim was in a hospital; bed and allegedly under the effects of alcohol

⁹ *Id.* at *3 (internal quotation marks omitted)(collecting cases)

¹⁰ Fahmy relies upon Rule 61(i)(5) to relieve him of the procedural bar. By its term, however, that portion of Rule 61 does not apply to the bar found in Rule 61(i)(4), which is the procedural bar found here.

and pain killers when he identified Fahmy. This falls far short of the requisite showing under Rule 61(i)(5).¹¹

(3) Allowing expert to testify about metal fragment found in victim's head

Fahmy argues that this court should have *sua sponte* excluded expert testimony that a metal fragment removed from the victim's head was a bullet because there allegedly was no scientific corroboration of the expert's conclusions. The portion of the transcript upon which Fahmy relies merely shows that the expert did not match the bullet to a gun because no gun was recovered. This does not come close to the showing required by Rule 61(i)(5).

4. Instructing on attempt to commit felony murder

Fahmy contends that he was denied his constitutional rights when the court ostensibly instructed on "attempt to commit felony murder." No such instruction was given, and therefore Fahmy cannot satisfy 61(i)(5).

For the foregoing reasons Defendant's Rule 61 motion is

DISMISSED.

¹¹ Fahmy does not argue the "interest of justice" exception to 61(i)(2) or the cause and prejudice exception to 61(i)(3). Neither of those exceptions apply here, but even if one or both did, they would not operate to excuse the procedural bar found in 61(i)(1).

Dated: June 19, 2013

John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary

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