

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0901003188
)	
D'ANDRE ROGERS,)	
)	
Defendant.)	

Submitted: October 10, 2012
Decided: January 17, 2013

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

Timothy J. Donovan, Jr., Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

D'Andre Rogers, Sussex Correctional Institution, Georgetown, Delaware, *pro se*.

PARKER, Commissioner

This 17th day of January, 2013, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. In May 2010, following a Superior Court jury trial, Defendant D'Andre Rogers was found guilty of second degree murder (a lesser included offense of first degree murder), possession of a firearm during the commission of a felony, and possession of a deadly weapon by a person prohibited.¹ On September 24, 2010, Defendant was sentenced to a total of forty years at Level V suspended after thirty-five years, followed by decreasing levels of probation.

2. Defendant filed a direct appeal to the Delaware Supreme Court. On March 20, 2012, the Delaware Supreme Court affirmed the decision of the Superior Court.²

FACTS

3. The facts giving rise to these charges are set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal.³ Briefly stated, on the night of January 3-4, 2009, Defendant Rogers drove his friend, Kenneth Miller, to the Wilmington residence of Miller's ex-girlfriend, Tonya Backus.⁴ Backus' new boyfriend, Derek Hoey, was present. Miller and Hoey became involved in a confrontation. Defendant Rogers decided to become involved. Defendant Rogers entered the residence and shot Hoey at least four times with a handgun, killing him.⁵ Defendant Rogers and Miller fled.

¹ A bench trial was held on the third charge, possession of a deadly weapon by a person prohibited, and the judge delivered the verdict on that charge.

² *Rogers v. State*, 2012 WL 983198 (Del.).

³ *Rogers*, 2012 WL 983198, at *1.

⁴ *Rogers*, 2012 WL 983198, at *1; See also, May 11, 2010 Trial Transcript, pg. 23; May 18, 2010 Trial Transcript, pg. 41.

⁵ *Rogers*, 2012 WL 983198, at *1; See also, May 13, 2010 Trial Transcript, pgs. 108-114; May 14, 2010 Trial Transcript, pgs. 37-38; September 24, 2010 Sentencing Transcript, pgs. 22-23.

Defendant Rogers was arrested four months later in North Carolina, where he was staying with Miller's relatives.⁶

4. Detective Simmons of the Wilmington Police Department interviewed Rogers. At trial, Simmons testified that Rogers admitted to shooting Hoey in the thigh. An audiotape of Rogers' statement was played for the jury. Rogers testified in his defense at trial that he lied to police when he admitted that he shot Hoey. Rogers testified that a person named "Tone" was the person that really shot Hoey, and that Rogers only told Detective Simmons that he was the person that shot Hoey to somehow protect Miller.⁷

DEFENDANT'S RULE 61 MOTION

5. On April 3, 2012, Defendant filed this motion for postconviction relief. In the subject motion, Defendant raises various grounds for relief. Defendant contends that his counsel, both at trial and on appeal, provided ineffective assistance for a variety of reasons. Defendant also contends that the jury instruction on the second degree murder charge was improper, he complains that his statement to the police and the redaction thereof was somehow improper, and Defendant complains of juror misconduct. Defendant also complains that the evidence was insufficient to support his convictions.

6. Before making a recommendation, the record was enlarged by directing Defendant's trial and appellate counsel to submit Affidavits responding to Defendant's ineffective assistance of counsel claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.⁸

⁶ *Id.*

⁷ *Rogers*, 2012 WL 983198, at *1; May 18, 2010 Trial Transcript, pgs. 63-64, 80-81, 87, 104-105, 110, 116-120.

⁸ Super.Ct.Crim.R. 61(g)(1) and (2).

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 61.⁹ 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.¹⁰

8. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹¹ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must 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.¹² Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."¹³

9. In this case, several of Defendant's claims are procedurally barred. Defendant's claim relating to the improper jury instruction on the second degree murder charge was already raised on direct appeal and is now procedurally barred by Rule 61(i)(4), as

⁹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁰ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹¹ 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).

¹² Super.Ct.Crim.R. 61(i)(5).

¹³ Super.Ct.Crim.R. 61(i)(4).

previously adjudicated. It appears that Defendant has reiterated this claim, and had re-raised it in this motion precisely in the manner in which it was raised on direct appeal. In addition, it appears that Defendant may have also restated this claim as an ineffective assistance of counsel contention and re-raised the issue herein in that context as well.

10. Either way, whether raised verbatim herein as was raised on direct appeal, or whether restated and recouched as an ineffective assistance of counsel claim, this claim is procedurally barred. The court is not required to re-examine claims that already received substantive resolution on direct appeal simply because the claim has now been refined, restated and recouched as an ineffective assistance of counsel claim.¹⁴

11. Furthermore, Defendant's claims of juror misconduct and insufficiency of the evidence are procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), for his failure to raise these claims on direct appeal.

12. In addition to some of Defendant's claims being procedurally barred, all of Defendant's claims are without merit.

13. In the subject motion, Defendant claims that his counsel was ineffective, both at trial and on appeal, for a variety of reasons. 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.¹⁵ 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

¹⁴ *Johnson v. State*, 1992 WL 183069, at *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.¹⁶

14. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹⁷ 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.¹⁸ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.¹⁹

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. Richter*,²⁰ 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.²¹ 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.²²

16. The United States Supreme Court reasoned that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicates active and

¹⁶ *Id.* at 687-88, 694.

¹⁷ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁸ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

¹⁹ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

²⁰ *Harrington v. Richter*, 131 S.Ct. 770 (2011).

²¹ *Id.*, at * 791.

²² *Id.*

capable advocacy.²³ Counsel's representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.²⁴

17. Turning now to the subject case, whether or not defense counsel was a flawless strategist, it is clear from a review of the record that defense counsel provided active and capable advocacy. When reviewing the entire proceeding, the record reflects counsel's overall performance as being active, thorough and capable advocacy.

18. With these standards as the backdrop, we turn to Defendant's specific claims.

DEFENDANT'S SPECIFIC CLAIMS

19. Rogers' first complains that the court gave an improper jury instruction on the second degree murder charge. Defendant contends that the court's instruction about the phrase "cruel, wicked and depraved indifference to human life" was inadequate. This claim of error was already raised and fully and thoroughly addressed in Rogers' direct appeal.²⁵ The Delaware Supreme Court concluded that the Superior Court's instruction on the second degree murder was not improper. The Delaware Supreme Court ruled that the Superior Court's initial instruction and supplemental instruction on the second degree murder charge, taken together, permitted the jury to properly discharge its function within the bounds of the law.²⁶

²³ *Id.* at 791.

²⁴ *Id.* at 787-88.

²⁵ *Rogers*, 2012 WL 983198, at *1-2.

²⁶ *Id.*

20. This claim is now procedurally barred as formerly adjudicated under Rule 61(i)(4), and is also without merit for the reasons discussed in detail by the Delaware Supreme Court on Defendant's direct appeal.²⁷

21. To the extent that Defendant has restated and recouched this claim as an ineffective assistance of counsel claim, this claim remains procedurally barred as formerly adjudicated under Rule 61(i)(4) and remains without merit, for the reasons already stated by the Delaware Supreme Court.

22. It is important to note that a defendant does not have a right to have the jury instructed in a particular form.²⁸ The defendant is entitled to have the jury instructed with a correct statement of the substantive law.²⁹ The Delaware Supreme Court has already held that the jury was adequately instructed. Defense counsel was not ineffective for failing to request anything additional or different. Defendant has not established that his counsel was deficient or that he suffered actual prejudice as a result thereof.

23. Defendant next claims that his counsel was ineffective for failing to file a suppression motion. Defense trial counsel, in his Affidavit in response to Defendant's Rule 61 motion, advises that he did not file a suppression motion because there was no legal basis to do so.³⁰ Moreover, Defendant has failed to set forth any legal or factual basis to support a meritorious suppression motion. Trial counsel does not have to file meritless motions; in fact, counsel has an obligation not to do so.

24. Defendant goes on to complain that counsel's failure to move to suppress his statement to the police gave the State the opportunity to redact the statement. It appears,

²⁷ *Id.*

²⁸ *Stones v. State*, 1996 WL 145775, at *3 (Del.).

²⁹ *Guy v. State*, 913 A.2d 558, 563 (Del. 2006).

³⁰ Superior Court Docket No. 67, Affidavit of Ralph D. Wilkinson, IV, Esquire, in response to Defendant's Rule 61 motion.

therefore, that Defendant is contending that his trial counsel was ineffective for agreeing to the redactions made by the State. The redactions made to Defendant's statement were to remove irrelevant and unfairly prejudicial comments. Trial counsel reviewed Defendant's statement carefully and made sure everything objectionable was redacted.³¹ Trial counsel can not be deemed ineffective for agreeing to such redactions.

25. Defendant then appears to contend that there was insufficient evidence to support his convictions. First, this issue is procedurally barred because it was not raised on direct appeal.

26. Second, when reviewing a challenge to the sufficiency of the evidence to support a conviction, the standard to be employed is whether a rational trier of fact, considering the evidence most favorable to the prosecution, could find the essential elements of the offense beyond a reasonable doubt.³² Defendant's primary complaints all concern the credibility of witnesses and what Defendant perceives as conflicts in the evidence. It has long been our law that the jury is the sole judge of the credibility of the witnesses and responsible for resolving conflicts in the testimony.³³ The jury reached a unanimous verdict based on the weight and credibility of the evidence presented at trial. The weighing of the evidence in the case is within the province of the jury.

27. At sentencing, the trial judge summed up the case as follows:

I did preside over this trial. I remember it vividly. Even in the best scenario, Mr. Rogers, what the facts revealed, if one is to believe the version of events that was offered on behalf of the defense in this case, you were witness to a friend who was in a physical confrontation and was not getting the better of it. In fact, he was getting the worst of it. And instead of attempting to break up the altercation, or allowing it to unfold as it would, you

³¹ May 14, 2010 Trial Transcript. pg. 4.

³² *Hoyle v. State*, 2008 WL 361139, at *1 (Del.).

³³ *Williams v. State*, 539 A.2d 164, 168 (Del. 1988).

introduced a firearm to the situation, fired shots, not one, but several, many of which struck Mr. Hoey and ultimately led to his death. You brought a firearm to a fist fight. And that's looking at the facts most favorably to you. Obviously, other facts suggested that the fist fight that was described never occurred.³⁴

In any event, the lack of judgment you showed to do what you did in that split of an instant has now dramatically changed the lives of the Hoey family. . . All in that split of an instant and all because you decided that you were going to bring a firearm out into a situation that otherwise would have resolved itself with some bumps and bruises at best, and you took another man's life for it. It's extraordinary. Senseless doesn't even begin to describe it.³⁵

28. A rational trier of fact, considering the evidence most favorable to the prosecution could find the essential elements of each of the offenses for which Defendant was charged beyond a reasonable doubt. There was sufficient evidence to convict Defendant on each of the offenses for which he was charged.

29. The next claim of error concerns a juror who realized during trial that she was acquainted with one of the police officers who interrogated Defendant after his arrest. The juror brought this to the attention of the trial judge and was excused.³⁶ The issue was immediately addressed and remedied. No prejudice resulted. There was no trial error as a result thereof and Defendant's counsel was not deficient in any regard related thereto.

30. Defendant's claims of juror "misconduct"; failure to move to suppress Defendant's statement; redactions to Defendant's statement; and failure to move for "dismissal" (sufficiency of evidence), have already been addressed herein. We turn now to Defendant's remaining ineffective assistance of counsel claims which deal with trial

³⁴ September 24, 2010 Trial Transcript, pgs. 22-23.

³⁵ *Id.*

³⁶ May 14, 2010 Trial Transcript, pgs. 40-44.

counsel's alleged failures in preparing for trial and with appellate counsel's alleged failures in handling Defendant's direct appeal.

31. Chief among Defendant's complaints of ineffective assistance of counsel, is according to Defendant, his counsel's failure to subpoena witnesses who attended a party with Defendant the night before the murder. Defendant faults his counsel for also failing to introduce into evidence a photograph of Defendant at the party. According to Defendant, his counsel refused to use the photograph because it looked like a "gang picture."³⁷ Defendant contends that the witnesses and photograph would establish that the clothes he was wearing at the party were not the same as the clothing worn by Hoey's killer as described by witnesses. Defendant does not address why he could not have changed his clothes between the party and the murder, and no reason is apparent. Defense counsel chose instead to use a different photograph of Defendant to show what Defendant looked like at the time period at issue.³⁸ Defendant has failed to demonstrate how the presentation of this evidence would have affected the outcome of his trial.

32. 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.

33. Defendant next complains that his attorney never "pushed the fact" that Miller was not charged. Whether or not Miller was charged, would not affect the outcome of

³⁷ See, Defendant's Memoranda of Law in Support of Rule 61 Motion, at pg. 20.

³⁸ See, May 18, 2010 Trial Transcript, pg. 54-55.

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).

the charges against Defendant. Defendant fails to explain how this issue would have any impact on Defendant's defense or the outcome of his trial.

34. Defendant complains that his attorney failed to acquire the telephone "records" of Tonya Backus, which, Defendant contends would have shown that Backus invited Miller to come to her house. How this fact, even if established, would have been helpful to Defendant's defense is unclear. Whether Miller was invited or uninvited to Backus' house, it was undisputed that Miller came to her house with Defendant and that Miller got involved in an argument. Defendant has failed to establish that his counsel was deficient in any regard related to this claim nor has he established actual prejudice resulting from any alleged deficiency.

35. Defendant contends that his attorney was ineffective because he did not "push for" case reviews. Defendant appears to contend if there were more case reviews, there would have been more opportunities for him to be given additional plea offers. First, there were a number of different case reviews that were conducted on this case. There is no showing that any additional case reviews were needed or warranted or for that matter would have been granted by the court. More importantly, a defendant has no constitutional right or other legal entitlement to a plea offer.⁴¹ Since the State does not have a duty to extend any plea offer to a defendant, this Defendant cannot complain that the State should have extended additional and better offers to him. Defendant's counsel cannot be deemed deficient for not obtaining more and better plea offers from the State.

36. Finally, Defendant complains that his appellate counsel provided ineffective assistance. Defendant contends that his counsel filed a meritless appeal, did not have the

⁴¹ *Washington v. State*, 844 A.2d 293, 296 (Del. 2004).

trial transcripts, and refused to file ineffective assistance of counsel claims against his trial counsel.

37. Appellate counsel, in his Affidavit, represented that he had reviewed the trial transcripts and initially independently determined that there were no meritorious issues to raise on appeal.⁴² Based on his determination, he filed a non-merit brief in the Delaware Supreme Court.⁴³ At the time appellate counsel filed the no-merit brief, he was not aware that there had been a jury note and a supplemental instruction on the second degree murder charge.⁴⁴

38. Appellate counsel then learned that there was a jury note and a supplemental instruction on the second degree murder charge and he ordered the additional transcript of those proceedings. After the additional transcript was prepared, received and reviewed, appellate counsel determined that, in fact, there was a meritorious issue to be raised on appeal based on the jury note and the supplemental instruction.⁴⁵ Appellate counsel then prepared and filed a brief on the merits raising two issues related to the jury note and supplemental instruction.⁴⁶

39. Appellate counsel, in his Affidavit, represented that he raised the only issues on appeal that he believed had any merit.⁴⁷ Appellate counsel represented that he considered the possible appeal issues Defendant wanted him to raise, as well as independently thoroughly reviewed the trial record to make his own determination, and that he raised the only issues on the appeal that he believed had merit.⁴⁸ Although

⁴² Superior Court Docket No. 68, at ¶3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at ¶3-5.

⁴⁸ *Id.*

Defendant wanted appellate counsel to raise the issue of juror misconduct, that his statement should have been suppressed, that his statement was improperly redacted, and that his counsel was ineffective for committing other trial errors, Appellate Counsel did not raise any of those issues because he did not believe there was any good faith basis to do so.⁴⁹

40. Defense counsel cannot be deemed ineffective for failing to raise issues which have no apparent legal or factual basis. In fact, counsel is not required to even 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.⁵⁰

41. Moreover, ineffective assistance of counsel claims are raised in Rule 61 postconviction relief motions not on direct appeal.⁵¹ Appellate counsel would not have raised any ineffective assistance of counsel claims against Defendant's trial counsel on direct appeal, to the extent he believed any existed, and therefore cannot be deemed ineffective for not doing so.

42. It appears, however, that appellate counsel raised the only meritorious issues he believed existed on direct appeal and did not believe that trial counsel provided ineffective assistance in any regard.⁵² Defendant has failed to meet his burden to establish that appellate counsel's conduct was deficient nor has he established actual prejudice as a result from any alleged deficiency.

⁴⁹ *Id.*

⁵⁰ See, *State v. Washington*, 2007 WL 2297092, at *3 (Del.Super.), *aff'd*, *Washington v. State*, 2008 WL 697591, at *2 (Del.).

⁵¹ *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁵² See, Superior Court Docket No. 68, Affidavit of Appellate Counsel.

43. To the extent that any of the claims raised by Defendant were not specifically addressed herein, and as to any general contention made by Defendant that defense counsel's representation was deficient, Defendant has failed to make any concrete allegations of actual prejudice and substantiate them. Defendant has failed to meet his burden to establish that defense counsel's conduct was deficient in any regard nor has he established actual prejudice as a result of any alleged deficiency. Defendant's motion for postconviction relief must fail.

44. 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."⁵³ The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."⁵⁴ 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.⁵⁵

45. Defendant's request for the appointment of counsel is hereby denied. Rule 61(e) permits the court to appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown. The Delaware Supreme Court has consistently held that there is no constitutional right to counsel in a postconviction proceeding.⁵⁶ The

⁵³ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Garnett v. State*, 1998 WL 184489 (Del.); *Cropper v. State*, 2001 WL 1636542 (Del.).

United States Supreme Court's decision in *Martinez v. Ryan*,⁵⁷ did not change Delaware's longstanding rule that defendants have no constitutional right to counsel in a postconviction proceeding.⁵⁸ Indeed, the United States Supreme Court in *Martinez* made it clear that when, like Defendant's Rule 61 motion, a Rule 61 motion is insubstantial, wholly lacking in merit, and wholly without any factual support, a request for the appointment of counsel is properly denied.⁵⁹

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: Bernard J. O'Donnell, Esquire
Ralph D. Wilkinson, IV, Esquire

⁵⁷ *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

⁵⁸ See, *Martinez*, 132 S.Ct. at 1315-1320.

⁵⁹ *Id.*