

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 V.) ID No. 1002002758
)
 CORNELL HESTER,)
)
 Defendant.)

Submitted: June 15, 2012
Decided: August 21, 2012

**On Objections to Commissioner’s Report and Recommendation
Denying Defendant’s Motion for Postconviction Relief
and
Defendant’s Motion for Violation of Due Process and Speedy Trial Rights**

MEMORANDUM OPINION

Phyllis Scully, Esquire, Department of Justice, Wilmington, Delaware, Attorney
for the State

Cornel Hester, *Pro Se*

JOHNSTON, J.

Defendant Cornell Hester pled guilty to one count of Second Degree Assault and was sentenced to eight years at Level V, suspended after five years.

Pursuant to Superior Court Criminal Rule 61, Hester filed a motion for postconviction relief. On June 1, 2012, a Superior Court Commissioner submitted a report and recommendation denying Hester's Motion for Postconviction Relief and Motion for Violation of Due Process and Speedy Trial Rights.

For the following reasons, Hester's motions must be denied and the Commissioner's Report Recommendation accepted.

FACTUAL AND PROCEDURAL CONTEXT

Between March 15, 2010 and June 21, 2010 multiple criminal actions were consolidated against Hester. Based on these charges, Hester was indicted for 1st Degree Carjacking, 2nd Degree Kidnapping, 2nd Degree Assault, Carrying a Concealed Deadly Weapon, Terroristic Threatening, Criminal Mischief Under \$1000.00 Property Damage, four counts of Non-compliance with Bond Conditions, Stalking, and Criminal Contempt of a Domestic Violence Protective Order.

In June 2010, Hester was convicted in a separate case for 2nd Degree Burglary, 2nd Degree Unlawful Imprisonment, Harassment, two counts of Criminal Mischief, and Malicious Interference with Emergency Communications. Hester was sentenced as a habitual offender to fourteen years and nine months at Level V incarceration, to be suspended after twelve years for decreasing levels of probation.

While awaiting trial, on October 11, 2010, Hester's attorney requested a psychiatric evaluation. In November 2010, the evaluation results concluded that Hester was competent to stand trial. The following January 28, 2011, Hester filed two motions to dismiss the case, alleging violations of his right to a speedy trial and ineffective assistance of counsel. These motions were dismissed by this Court in February 2011. The Court found these claims lacking merit because the defendant had waited only 188 days for trial, consolidation of three cases required time, and Hester was not cooperating with his own defense counsel.

Prior to trial in February 2011, Hester accepted a plea agreement with the state, and pled guilty to 2nd Degree Assault in exchange for dismissal of the thirteen remaining charges.¹ Hester was sentenced to eight years at Level V incarceration, suspended after five years. During the Plea Colloquy and Sentencing, Hester admitted to the offense, pled guilty, and stated that he was satisfied with his counsel's representation.² Hester did not file a direct appeal from

¹ Had Hester been convicted of all 14 charges, he would have faced 80 years in prison, or life in prison if the Court found Hester to be an habitual offender.

² Transcript of Plea Colloquy and Sentencing at 4-5, *State v. Hester*, No. 1002002758 (Del. Super. Feb. 10, 2011).

the guilty plea and sentence. Hester filed a Motion for Modification of the Sentence, which was dismissed by the Superior Court on April 18, 2011.³

Hester filed a Motion for Postconviction Relief and Motion for Violations of Due Process and Speedy Trial Rights on September 19, 2011. The motions were referred to a Superior Court Commissioner pursuant to Rule 62. The Commissioner's report recommended that Hester's motions be denied. Hester objected to the report, claiming due process violations, lack of a speedy trial, judicial misconduct, prosecutorial misconduct, compulsory process, malicious prosecution, double jeopardy, ineffective assistance of counsel, and fair trial violations based on his "forced" appearance in his prison uniform at trial.

The defendant's objections are essentially duplicative of the arguments asserted in his April 2011 Motion for Modification of Sentence, and February 2011 Motion to Dismiss for Speedy Trial Violations and Ineffective Assistance of Counsel. These motions were denied by the Superior Court. For purposes of the instant motion, the claims are grouped into due process, speedy trial rights, ineffective assistance of counsel, and "forced" appearance in his prison uniform at trial.⁴

³ Hester appealed a separate case to the Supreme Court of Delaware and made arguments concerning this case. The Supreme Court dismissed the claims relating to this case for lack of jurisdiction.

⁴ Hester also raises the issue of the failure of the Courts to provide him with the requested transcripts, which were eventually received but were incomplete. However, these transcripts

STANDARD OF REVIEW

When reviewing a motion for postconviction relief, a court may designate a Commissioner to review any applications made by criminal defendants.⁵ In the event that any objections to the Commissioner's report are filed, the court shall make a *de novo* determination as to the validity of the objections.⁶ Based on the report, a judge has the ability to "accept, reject or modify, in whole or in part, the findings or recommendations made by the Commissioner."⁷

DISCUSSION

Superior Court Criminal Rule 61 allows the Court to set aside a prior judgment if necessary.⁸ Rule 61 provides certain bars to postconviction relief, including: time limitations; repetitive motions for claims that were not submitted in prior postconviction motions; claims not raised prior to conviction; and claims that already have been adjudicated.⁹ The time limitation, repetitive motion and

pertained to a different case from June 2010. Further, the stated purpose of these transcripts was to bolster Hester's claim of ineffective assistance of counsel, but Hester admitted in the Plea Colloquy transcript that he had no complaints about his attorney's representation in this matter.

⁵ 10 *Del. C.* § 512(b); Super. Ct. Crim. R. 62.

⁶ 10 *Del. C.* § 512(b)(1)(d).

⁷ *Id.*

⁸ Super. Ct. Crim. R. 61(a)(1).

⁹ Super. Ct. Crim. R. 61(i).

procedural default bars can be overcome if the court lacks jurisdiction, or if there was a miscarriage of justice due to a constitutional violation.¹⁰

Due Process

If the defendant fails to raise an issue on direct appeal, the defendant is barred from postconviction relief, on those grounds, unless relief is in the interest of justice.¹¹ However, a defendant can overcome the bar by demonstrating: “(1) cause for the failure to raise the claim in the original proceeding, and (2) actual prejudice flowing from the failure to assert the claim.”¹² In the event that a defendant’s claims were not raised on direct appeal, except for constitutional issues, the Court has the ability to dismiss the motion for postconviction relief.¹³

Claims raised and adjudicated in the former motions for postconviction relief also are barred.¹⁴ This bar may be overcome if the court determines that hearing the motion is in the interest of justice.¹⁵

Hester’s postconviction relief claims can be dismissed based upon procedural failures as well as for lack of merit.¹⁶ Hester raises the same issues in

¹⁰ Super. Ct. Crim. R. 61(i)(5).

¹¹ Super. Ct. Crim. R. 61(i)(2).

¹² *Id.*

¹³ *See* Super. Ct. Crim. R. 61(i)(2).

¹⁴ Super. Ct. Crim. R. 61(i)(4).

¹⁵ *Id.*

this Motion for Postconviction Relief that previously were raised in his Motion to Dismiss for Speedy Trial Violations and Motion for Modification of Sentence. Such claims are prohibited by the former adjudication bar.¹⁷ His previous motions were denied by this Court in August 2010 and February 2011. Further, Hester's Motion for Modification of the Sentence again raised the due process, speedy trial and ineffective counsel issues, and was denied in April 2011.

Additionally, Hester's claims for relief were waived upon acceptance of the plea agreement.¹⁸ Hester waived his right to object to events that transpired prior to the plea agreement.¹⁹

Speedy Trial Rights

Delaware courts have adopted a four-part test to assess whether a speedy trial violation has occurred. These four factors consist of: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy

¹⁶ Hester makes numerous claims for judicial misconduct, prosecutorial misconduct, illegal indictment, and illegal sentences (categorized as Due Process claims), which were never raised on direct appeal. Hester raised these issues as part of arguments in an unrelated trial. The Delaware Supreme Court dismissed those claims for lack of jurisdiction.

¹⁷ Super. Ct. Crim. R. 61(i)(4).

¹⁸ See *Mojica v. State*, 2009 WL 2426675, at *1 (Del. Super.); see also *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).

¹⁹ See *id.*

trial; and (4) prejudice to the defendant.”²⁰ The threshold factor, however, is the length of delay.²¹ For example, when a defendant waited two years, six months and seventeen days from the time of the arrest to the start of the trial, the court found a “presumption of prejudice.”²²

The Delaware Supreme Court’s Administrative Directive 130 provides that for all non-capital criminal cases, “[a]t least 90% of all criminal cases shall be adjudicated as to guilt or innocence or otherwise disposed of within 120 days from the date of indictment/information, 98% within 180 days, and 100% within one year.”²³ Generally, the timeframe for the adjudication of all non-capital criminal cases in Delaware is one year.²⁴

Hester has failed to adequately assert a claim based on violation of his Sixth Amendment right to a speedy trial.²⁵ During the 188 days Hester was incarcerated prior to his criminal trial (with additional time spent waiting for a psychiatric

²⁰ *Page v. State*, 934 A.2d 891, 896 (Del. 2007) (citing *Barker v. Wingo*, 407 U.S. 514, 519 (1972)).

²¹ *Skinner v. State*, 575 A.2d 1108, 1115 (Del. 1990).

²² *Id.* at 896-97; see generally *Middlebrook v. State*, 802 A.2d 268, 274 (Del. 2002) (holding defendant’s wait of almost four years held strong presumption of violation of defendant’s right to speedy trial); *Mills v. State*, 2006 WL 1027202, at *2 (Del.) (fifteen month wait in uncomplicated case could be excessive).

²³ See *State v. Hester*, 2011 WL 664073, at *2 (Del. Super.).

²⁴ *Id.*

²⁵ See U.S. CONST. amend. VI.

evaluation), Hester was serving a twelve-year prison sentence in another case. This period of time does not constitute a speedy trial violation.

Other factors support the constitutionality of Hester's wait in prison. Hester's delay was based in part on his unwillingness to work with his own defense counsel, and the consolidation of multiple cases. This wait did not prejudice Hester because he already was serving a sentence for another crime. Finally, Hester's 188 day wait falls within the Supreme Court's Directive, which requires all non-capital criminal defendants to be tried within one year.²⁶

“Forced” Appearance in Prison Uniform at Trial

Postconviction relief is warranted when a defendant is not given the right to a fair trial.²⁷ A criminal defendant should not be *forced* to wear a prison uniform during trial when the defendant requests to wear street clothes.²⁸ However, the Delaware Supreme Court has held that “[i]n the absence of the element of compulsion, there was no constitutional violation.”²⁹ In the event that a defendant

²⁶ See *State v. Hester*, 2011 WL 664073, at *2 (Del. Super.).

²⁷ U.S. CONST. amend. VI.

²⁸ *State v. McGlotten*, 2011 WL 987534, at *13 (Del. Super.) (emphasis added).

²⁹ *Smith v. State*, 2009 WL 1659873, at *2 (Del.).

was not forced, but simply failed to make arrangements to obtain regular clothing, this Court has found that a constitutional violation did not occur.³⁰

Hester's request for postconviction relief – based on the violation of his right to a fair trial for having to wear prison clothes during trial – also lacks merit. Hester puts forward no evidence demonstrating that he was forced to wear prison clothes to court, and without compulsion, there is no constitutional violation.³¹ Further, because a plea agreement was reached by the parties, the argument that a jury was in some way prejudiced obviously is frivolous.

Ineffective Assistance of Counsel

The United States Constitution grants each citizen the right to counsel in criminal cases.³² Failure of the appointed counsel to provide “adequate legal assistance” is a constitutional violation, and one reason to provide postconviction relief, even if a procedural bar exists.³³ To demonstrate ineffective assistance of counsel, the defendant is required to show the attorney's performance was: (1) not functioning as the “counsel” guaranteed to the defendant by the Sixth Amendment; and (2) prejudicial to the defense and deprived the defendant of the right to a fair

³⁰ *McGlotten*, 2011 WL 987534, at *13 (Without evidence that the defendant's appearance in prison clothes affected the jury's views, this Court was unable to find a cause to overturn the ruling.).

³¹ *See Smith v. State*, 2009 WL 1659873, at *2 (Del.) (Table).

³² *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

³³ *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)); Super. Ct. Crim. R. 61(i)(5).

trial.³⁴ Counsel's performance must be judged according to an objective standard of reasonableness.³⁵

Judicial scrutiny of counsel's performance must be highly deferential.³⁶ The Delaware Supreme Court has adopted a deferential view of appointment of counsel, noting that even if the defendant and counsel disagreed about how to proceed with a case, ineffective counsel is not a necessary conclusion.³⁷ The Sixth Amendment right to appointment of counsel is not a right to appointment of counsel whom the defendant desires.³⁸

Hester's claim of ineffective assistance of counsel may be raised, despite any procedural bars.³⁹ However, Hester must show that his counsel was not functioning appropriately on his behalf, and that this resulted in a prejudicial outcome.⁴⁰ Hester claims that his defense counsel made various threats towards

³⁴ *Strickland*, 466 U.S. at 687.

³⁵ *Id.* at 687-88.

³⁶ *Id.* at 689.

³⁷ *Austin v. State*, 2001 WL 898621, at *2 (Del. Super.) (“While Austin had a right to counsel without a conflict of interest, he did not have a right to counsel who would not disagree with him about how to proceed with his case, which is the ‘conflict’ about which Austin complains here.”).

³⁸ *Bultron v. State*, 897 A.2d 758, 762-63 (Del. 2006) (citing *Hunter v. State*, 659 A.2d 228 (Del. Super. 1994)(quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

³⁹ See Super. Ct. Crim. R. 61(i)(5).

⁴⁰ See *Strickland*, 466 U.S. at 687.

Hester, and that counsel worked against him in an attempt to get revenge for Hester's complaints. In response to these accusations, the Commissioner requested that the defense counsel submit an affidavit stating whether or not these statements were true. Defense counsel submitted the requested document, denying any threats ever were made.

Delaware attorneys are entitled to some deference regarding ineffective representation claims.⁴¹ This Court may grant deference by accepting counsel's affidavit as true.⁴²

Defense counsel must make strategic determinations on how to proceed with the case, even if this path does not perfectly match what the defendant believes to be the best strategy.⁴³ Although Hester wanted to call certain witnesses, defense counsel was free to follow another strategy, if that strategy was in the client's best interests.⁴⁴ Hester has provided no valid reasons indicating that calling his witnesses would have positively altered the outcome of the case. The fact that

⁴¹ *See id.* at 689.

⁴² *See id.*

⁴³ *See Austin*, 2001 WL 898621, at *2.

⁴⁴ *See id.*

Hester admitted to this Court that he was satisfied with his counsel's work during his Plea Colloquy also weighs against the ineffective counsel claim.⁴⁵

Finally, the ineffective assistance claim should be viewed in light of the result of Hester's case. The defendant must show that a better result would have been obtained or the attorney's actions somehow negatively impacted his case.⁴⁶ Hester was facing 80 years to life if he was convicted and found to be a habitual offender. However, his defense counsel was able to obtain a plea agreement with the State for a recommended sentence of eight years at Level V, to be suspended after five years for decreasing levels of probation. There is no basis for Hester's apparent belief that he would have received a lesser sentence with another attorney. Therefore, Hester has failed to make a showing of ineffective assistance of counsel.⁴⁷

CONCLUSION

The Court finds that Hester's claims for postconviction relief are procedurally barred, and relief is not warranted in the interest of justice. Because Hester's claims for relief lack merit, were previously adjudicated, and were never

⁴⁵ See Transcript of Plea Colloquy and Sentencing at 4-5, *State v. Hester*, No. 1002002758 (Del. Super. Feb. 10, 2011).

⁴⁶ See *Strickland*, 466 U.S. at 687.

⁴⁷ *Id.*

raised on direct appeal, his Motion for Postconviction Relief and Motion for Violation of Due Process and Speedy Trial Right must be denied.

THEREFORE, Defendant's objections to the Commissioner's Report and Recommendation are hereby **DENIED**. The Court accepts the Report and Recommendation in its entirety.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston