

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

STATE OF DELAWARE,)
)
 v.)
)
FREDDY L. FLONNORY,) I.D. No. 9707012190
)
 Defendant.)
)

Submitted: January 26, 2007
Decided: February 14, 2008

On Defendant Freddy L. Flonnory's Motion for
Postconviction Relief. **DENIED.**

MEMORANDUM OPINION

Freddy L. Flonnory, Defendant, *Pro Se*

Elizabeth R. McFarlan, Esquire, James T. Wakley, Esquire, Deputy
Attorneys General, Department of Justice, Wilmington, DE

JOHNSTON, J.

PROCEDURAL CONTEXT

In September 1997, defendant Freddy Flonnory was indicted along with his co-defendant, Korey Twyman, on two counts of first degree intentional murder, attempted first degree murder, first degree conspiracy, and related weapons offenses. The Superior Court severed the defendants for trial. Flonnory was convicted by a jury of all charges. After a penalty hearing, the Court imposed the death penalty for each of the two murder convictions. On August 14, 2001, the Delaware Supreme Court reversed Flonnory's conviction and sentence.¹

On February 5, 2004, Flonnory was convicted of: (1) two counts First Degree Intentional Murder; (2) Attempted First Degree Murder; (3) First Degree Conspiracy; and (4) related weapons charges. Flonnory was sentenced to life in prison for both first degree murder convictions, life in prison for the attempted murder conviction, and 60 years for the remaining convictions.

On January 26, 2007, Flonnory filed a *pro se* motion for postconviction relief based on ineffective assistance of counsel. Flonnory claims counsel failed to: (i) argue the State relied on perjured testimony and altered ballistics evidence to advance a case based on a "false theory of

¹ *Flonnory v. State*, 778 A.2d 1044 (Del. 2001).

crime and criminal liability;” (ii) correctly argue return gunfire may have caused the death of the victims; (iii) argue that the State failed to provide Flonnery with a correct transcript of Lionel Robinson’s Statement to police; (iv) argue the trial court erred, when it allowed the prosecution to knowingly introduce Dwayne Warren’s testimony into evidence;” (v) investigate the theory that Dwayne Warren was liable for the murders; (vi) properly argue that the State knowingly introduced Ahkee Flonnory’s perjured testimony; and (vii) properly argue that the State knowingly introduced Joy Watson’s perjured testimony.

On July 30, 2007, Assistant Public Defenders Brian J. Bartley and Nicole M. Walker filed an affidavit in response to Flonnory’s Rule 61 Motion. On November 6, 2007, the State filed an answer to Flonnory’s Motion. Flonnory filed a reply to the State’s response on December 14, 2007.

STANDARD OF REVIEW

In evaluating a postconviction relief motion, the Court must first ascertain if any procedural bars of Superior Court Criminal Rule 61(i) apply.² If a procedural bar is found to exist, the Court should refrain from

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

considering the merits of the individual claims.³ This Court will not address claims for postconviction relief that are conclusory and unsubstantiated.⁴

Pursuant to Rule 61(a), a motion for postconviction relief must be based on “a sufficient factual and legal basis.” According to Rule 61(i)(1), a postconviction relief motion may not be filed more than a year after judgment of conviction is final or one year after a newly-discovered, retroactively-applicable right is recognized by the United States Supreme Court or the Delaware Supreme court. Pursuant to Rule 61(b)(2): “[T]he motion shall specify all the grounds for relief which are available to movant..., and shall set forth in summary form the facts supporting each of the grounds thus specified.”

Any ground for relief not asserted in a prior postconviction relief motion is thereafter barred unless consideration of the claim is necessary in the interest of justice.⁵ Grounds for relief not asserted in the proceedings leading to the judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for the procedural default; and (2) prejudice

³ *See id.*

⁴ *See id.* at 555.

⁵ Super. Ct. Crim. R. 61(i)(2).

from violation of movant's rights.⁶ Any formerly-adjudicated ground for relief, whether in a proceeding leading to the judgment of conviction, in an appeal, or in a postconviction proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.⁷

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's errors were so grievous that counsel's performance fell below an objective standard of reasonableness; and (2) actual prejudice, that is, that there is a reasonable degree of probability that but for counsel's errors, the outcome of the proceedings would have been different.⁸ In making a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.⁹ Although the *Strickland* standard is a two-part test, the showing of prejudice is so central to this claim that "[i]f it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice, which we expect will often be so, that source should be

⁶ Super. Ct. Crim. R. 61(i)(3).

⁷ Super. Ct. Crim. R. 61(i)(4).

⁸ *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

⁹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989).

followed.”¹⁰ In other words, if the Court finds that there is no possibility of prejudice even if a defendant’s allegations regarding counsel’s representations were true, the claim may be dismissed on this basis alone.

ANALYSIS

Ground (i). Flonnory alleges that his counsel failed to argue that the State’s case was based on a “false theory of crime.” Instead, Flonnory argues that his defense should have vigorously pursued Flonnory’s theory that his apparent guilt was the result of a “conspiracy.” Flonnory’s counsel stated that they lacked a good faith basis to advance the “conspiracy” argument. After carefully considering the State’s evidence, counsel chose to develop and raise reasonable doubt, credibility and factual arguments in support of Flonnory’s defense. The tactical decisions of counsel will not be questioned merely because they were unsuccessful.¹¹ Flonnory must demonstrate with reasonable probability that, the outcome would have been different if his counsel advanced the “conspiracy” argument.¹²

¹⁰ *Strickland*, 466 U.S. at 697.

¹¹ *State v. Ducote*, 2006 WL 3872845, at *1 (Del.Super.).

¹² *See HState v. Cabbage*, 2005 WL 914470, at *11 (Del.Super.)H.

Delaware has recognized a strong presumption that decisions made by trial counsel during trial were trial strategy.¹³ Absent the showing of prejudice, the Court will not analyze strategic tactical decisions made by counsel.¹⁴ Flonnory speculative arguments do not establish the requisite reasonable probability of prejudice. To the contrary, it appears to the Court that advancement of the conspiracy theory would have been fruitless and indeed would have lessened Flonnory's chances for acquittal. The Court finds Flonnory has not demonstrated that he was prejudiced due to counsels' tactical decisions.

Ground (ii). Flonnory alleges that his counsel failed to *correctly* argue that "return gunfire from other people" may have caused the death of the victims. Flonnory's counsel used the ballistics report to argue the bullet that killed Angela Farmer was fired from a revolver. Lionel Robinson testified that Flonnory had possessed a semi-automatic, not a revolver. Flonnory testified that there was return gun fire. Thus, Flonnory's counsel did advance the "return gunfire" theory at trial. Evaluation of the facts in evidence was properly the province of the jury.

¹³ *Ducote*, 2006 WL 3872845, at *2.

¹⁴ *State v. Guinn*, 2006 WL 1454811, at *2 (Del. Super.).

Ground (iii). Flonnory alleges that his counsel failed to argue that the State violated *Brady*, when it produced “an inaccurate transcript of Lionel Robinson’s videotaped statement.” Flonnory claims this misleading material lead him to testify at his first trial.

Flonnory’s counsel discovered that the State had produced an inaccurate transcript of Lionel Robinson’s statement. Upon discovery, Flonnory’s counsel filed a motion to preclude Flonnory’s prior testimony and when denied, appealed the trial court’s ruling. The Delaware Supreme Court addressed and upheld the trial court’s ruling.¹⁵ The Supreme Court found no *Brady* violation occurred because Flonnory was provided with a copy of the entire videotaped statement along with the transcript. Flonnory is barred from arguing, in a postconviction motion, a ground for relief that formerly was adjudicated.¹⁶ The Court finds ground (iii) has been thoroughly litigated by counsel and barred from further consideration by this Court.

Ground (iv). Flonnory alleges his counsel failed to correctly argue that the admission of Dwayne Warren’s former testimony as evidence in his

¹⁵ *Flonnory v. State*, 778 A.2d 1044 (Del. 2001).

¹⁶ Super. Ct. Crim. R. 61(i)(4).

second trial was improper. Flonnory argues Warren's testimony was introduced in violation of his 6th Amendment right to confrontation.

On December 21, 2003, the State filed a *Motion In Limine* to admit the former testimony of Warren. Defense counsel opposed the motion and subsequently appealed the admission of Warren's testimony. Defense counsel argued that the trial court violated Flonnory's 6th Amendment rights to confrontation and cross examination when they allowed Warren's former testimony. At trial, counsel attempted to show the inconsistencies and weaknesses in Warren's testimony through evidence of Warren's weapons charges and his psychiatric report.

The Court finds ground (iv) of Flonnory's complaint was fully argued by defense counsel during trial. Flonnory does not proffer any evidence tending to show ineffective assistance based on the admission of Warren's testimony. Ground (iv) is barred by Rule 61(i)(4).

Ground (v). Flonnory alleges his attorney failed to investigate the theory that Dwayne Warren was "liable" for the murders. Flonnory believes Warren, the only surviving victim of the shootings, may have intentionally shot and killed both victims.

During trial, defense counsel advanced the argument that Warren may have been the source of the return gunfire, which killed one of the two

victims. Defense counsel made the tactical decision not to advance the argument that Warren possessed and fired a semi-automatic, since the second victim was killed by a revolver. Counsel believed such an argument would have been confusing to the jury and would have seriously weakened the “return gunfire” theory. Therefore, they did not proffer evidence tending to show Warren intentionally shot the victims. This evidence included Warren’s subsequent murder charges and his drug dealing activities.

To be successful, Flonnory must establish “both attorney deficiency and actual prejudice.”¹⁷ The Court finds Flonnory has not established evidence tending to show Counsel’s tactical decision prejudiced the outcome of the case.¹⁸

Ground (vi). Flonnory alleges his attorneys failed to argue that the State knowingly introduced the perjured testimony of Ahkee Flonnory. Flonnory claims Ahkee Flonnory’s out-of-court statements were made to avoid jail time. Ahkee’s subsequently recanted his statements. Flonnory does not argue that counsel failed to object to the introduction of Ahkee’s statements. Flonnory claims his counsel failed to make a *proper* objection.

¹⁷ *State v. Tolston*, 1992 WL 3544027, at *6 (Del. Super. 1992).

¹⁸ *Ducote*, 2006 WL 3872845, at *2.

Ahkee testified at trial as a hostile witness and the State introduced several of Ahkee's out-of-court statements. During pre-trial motions, Flonnory's counsel was able to preclude from introduction several of Ahkee's statements. During trial, counsel attempted to explore on cross Ahkee's motives to lie. Additionally, counsel introduced to the jury Ahkee's affidavit recanting his statements.

Counsel states they had no good faith basis to argue that the State conspired to convict Flonnory by knowingly introducing perjured statements. Therefore, it would have been unethical and improper for counsel to have followed the course urged by Flonnory. Tactical decisions of counsel will not be analyzed without the showing of prejudice.¹⁹ Flonnory has not demonstrated with specificity that he was prejudiced due to counsel's tactical decisions.

Ground (vii). Flonnory alleges his counsel failed to properly argue that the State knowingly introduced the perjured testimony of Joy Watson. Joy Watson was the girlfriend of Ahkee Flonnory. She was questioned in order to confirm Ahkee's statement to the police. Flonnory claims the State knowing used her false statement to obtain a conviction.

¹⁹ *Guinn*, 2006 WL 1454811, at *2.

Defense counsel filed a motion in limine to preclude Joy Watson's statements. At trial they challenged the credibility of Watson's statements. However, counsel had no good faith basis to believe the State conspired to introduce false testimony. Flonnory has not demonstrated with specificity that he was prejudiced due to counsel's tactical decisions.

CONCLUSION

Flonnory has failed to demonstrate that any of his Rule 61 claims survive procedural bars, or have substantive merit. **THEREFORE,** Flonnory's Motion for Postconviction Relief is hereby **DENIED.**

IT IS SO ORDERED.

The Honorable Mary M. Johnston