

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

STATE OF DELAWARE)	
)	
v.)	ID No. 0506007270
)	
CARLOS LOPEZ,)	
)	
Defendant.)	

Submitted: November 15, 2007
Decided: February 29, 2008

On Defendant's *Pro Se* Motion for Postconviction Relief. DENIED.
On Defendant's Motion for Reduction of Sentence. DENIED.

ORDER

Josette D. Manning, Deputy Attorney General, Department of Justice, 802 N. French Street, Wilmington, Delaware 19801

Carlos Lopez, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware 19977. *Pro se.*

CARPENTER, J.

On this 29th day of February, 2008, upon consideration of Defendant's Motion for Postconviction Relief it appears to the Court that:

1. On August 3, 2007 Carlos Lopez ("Defendant") filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). For the reasons set forth below, Defendant's Motion for Postconviction Relief is **DENIED**.

2. The Defendant was indicted and charged with one count of Rape in the Second Degree¹, for engaging in sexual intercourse with a twelve year old female. A jury convicted the Defendant on February 6, 2006, and on April 17, 2006, the Defendant was sentenced as a habitual offender. On appeal, the Delaware Supreme Court affirmed the Defendant's conviction and a mandate was issued on January 15, 2007. Thereafter, the Defendant filed this timely motion for postconviction relief. At the Court's request, Defendant's attorney for trial and appeal, David J. J. Facciolo ("Counsel"), filed an affidavit in response to the claims of ineffective assistance of counsel.

3. Prior to addressing the merits of a postconviction claim, the Court must first determine that the motion meets the procedural requirements of Rule 61(I).² Claims

¹See 11 Del C. § 772.

²*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)).

of ineffective assistance of counsel, however, are not generally subject to the procedural bars of Rule 61(I).³ Because Defendant's only claims are of ineffective assistance of counsel, the Court will address the motion before it in full.

4. To establish a claim of ineffective assistance of counsel, a defendant must meet the two-part test set forth in *Strickland v. Washington*.⁴ First, the Defendant must establish that counsel's representation fell below an objective standard of reasonableness, and second, a reasonable probability exists that the outcome of the proceeding would have been different but for counsel's error.⁵ As to the first prong, whenever evaluating the conduct of counsel, the Court must indulge "a strong presumption that counsel's conduct was professionally reasonable."⁶ As to the second prong, a reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" of the proceeding.⁷ A movant must support

³*State v. Denston*, 2003 WL 22293651 at *3 (Del. Super. Oct. 2, 2003)(noting that "an allegation of ineffective assistance of counsel is a type of claim not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal unless the claim was adequately raised in the lower court.").

⁴466 U.S. 668 (1984).

⁵*Wright v. State*, 608 A.2d 731 (Del. 1992), citing *Albury v. State*, 551 A.2d 53, 58 (Del. Super. 1988).

⁶*Albury v. State*, 551 A.2d 53, 59 (Del. 1998).

⁷*Strickland*, 466 U.S. at 693-94.

a claim of ineffective assistance of counsel with concrete allegations of actual prejudice, otherwise the movant risks summary dismissal.⁸

5. First, the Defendant claims counsel was ineffective for failing to interview and question witnesses to whom the victim disclosed the alleged rape. Specifically, Defendant refers to Cheryl Kolar, a registered medical assistant at A.I. DuPont Hospital and who the victim first told about the incident. The Defendant suggests that further investigation of the victim's statements to Kolar could have led to discovery of inconsistent statements and "caused the allege[d] victim to perjure herself."⁹ Defendant similarly argues that Edward Speedling, a social worker at A.I. DuPont Hospital who subsequently interviewed the victim, was a necessary witness, and that counsel's failure to interview him or call him to testify limited counsel's ability to attack the victim's credibility. This claim fails both prongs of *Strickland*. The Supreme Court has held, "whether to call a witness, and how to cross-examine those who are called are tactical decisions. A defendant challenging such decisions has the burden of supplying precisely what information would have been obtained had counsel undertaken the desired investigation."¹⁰ The Defendant fails to

⁸*State v. Mason*, 1998 WL 449563 (Del. Super. April 28, 1998); *Younger*, 580 A.2d at 556.

⁹Def.'s Motion at 11.

¹⁰*Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

demonstrate how further investigation of Kolar could have been helpful to his case. Likewise, in his affidavit counsel states, “[a]lthough Edward Speedling did interview the victim in detail, no substantial breakthrough evidence would have likely been obtained by using Edward Speedling’s testimony. The victim still maintained the allegation in full even when she spoke to Edward Speedling.”¹¹ Based on counsel’s affidavit and the record, the Court finds the Defendant has failed to show counsel’s conduct was objectively unreasonable as required by *Strickland*. In addition, conclusory allegations that additional witness testimony would have influenced a jury are insufficient to demonstrate prejudice.¹² The assertion that Speedling’s testimony could have possibly been used to discredit the victim is mere conjecture on the part of the Defendant. In addition, there is nothing to indicate that additional questioning of Kolar would have provided a basis to attack the credibility of the victim’s statement. Therefore, this ineffective assistance of counsel claim fails.

6. Next, the Defendant claims counsel was ineffective for failing to properly and effectively prepare for trial.¹³ Rather than asserting concrete allegations of Counsel’s misconduct, Defendant makes general references to case law and sweeping

¹¹ Facciolo Aff. at Item 1 (C).

¹² *Outten*, 720 A.2d at 552.

¹³ Def.’s Motion at 13.

claims of counsel's failures to investigate documents and witnesses. The Defendant further contends that counsel brushed off Defendant's comments as "irrelevant" and only spoke to Defendant in English, when Defendant's native language is Spanish.¹⁴ As counsel explains in his affidavit, he understood and was sensitive to his client's limited ability to speak English.¹⁵ The Defendant informed counsel he did not need an interpreter, and counsel was satisfied that he was able to effectively communicate with the Defendant in preparation for case reviews and trial. Since it appeared to counsel that the Defendant understood his questions and comments and that the client's responses were appropriate to the topic being discussed, it was not unreasonable for counsel to forego an interpreter, especially since counsel was aware from a prior representation that the Defendant had proceeded in court without one. Counsel further admits that the majority of the issues raised by the Defendant were in fact irrelevant, and while he may have made some comments to his client about his requests, he did not tell his client this out of disrespect, but rather to inform his client that these matters would not be admitted into evidence at trial because they lacked legal relevancy.¹⁶ The Court acknowledges the strong presumption that counsel's

¹⁴*Id.* at 14.

¹⁵Facciolo Aff. at Ground Two.

¹⁶*Id.*

conduct was professionally reasonable, and finds counsel did not act unreasonably in his communications with his client or his preparation for trial. Whether matters have a legal basis for admission or are legally relevant to the issues being tried are solely within the province of counsel to decide. Counsel is not simply the mouthpiece of his client to say and act as his client wishes. The Court expects that counsel will control the litigation and not raise issues or questions on matters that are clearly frivolous and have no relevance. In any event, the Defendant has still made no concrete allegations of prejudice. Quite the opposite, counsel likely did his client a favor by not entertaining or attempting to present to the Court issues that were irrelevant to Defendant's case and would have further undermined the Defendant's case. For these reasons Defendant's second claim fails.

7. Next, the Defendant claims counsel was ineffective for failing to interview and call as a witness Defendant's nephew, Joey Torres. It was Torres who asked the victim multiple times to perform oral sex on the Defendant, and he was present in the room when it occurred. It is Defendant's contention that it was Torres, and not Defendant, who received oral sex from the victim. Counsel argued this as one of the defenses raised at trial, and in his affidavit states, "[Joey's] absence from the trial provided some additional argument for reasonable doubt. Indeed, counsel raised the

issues relating to Joey, the nephew, in his closing argument.”¹⁷ The decision not to call Torres as an adverse witness was a strategic one made in counsel’s professional judgment. The Defendant has failed to overcome the presumption that counsel’s choices were appropriate trial strategy under the circumstances, and this claim fails the first prong of the *Strickland* test.¹⁸ Furthermore, Defendant cannot show he was prejudiced by Torres’s absence at trial, since he would have been an adverse witness and was present when the crime occurred. If anything, Defendant benefitted from Torres’s absence, as it allowed counsel to suggest to the jury in closing that it was Torres who was the offender without the jury being confronted by Torres’s denial.¹⁹ For these reasons Defendant’s claim fails.

8. Finally, Defendant claims counsel was ineffective for failing to object or raise on appeal the imposition of the habitual offender sentence. The Defendant contends he was not eligible for habitual offender status despite numerous attempts by counsel to explain otherwise. Counsel thoroughly reviewed Defendant’s criminal

¹⁷*Id.* at Ground Three; *see* Trial Tr. February 6, 2006 at 49, 57.

¹⁸*See Strickland*, 466 U.S. at 689.

¹⁹Facciolo Aff. at Ground One (B). “[A]s counsel analyzed his defense during the trial, he concluded that this could only benefit the defendant and not harm him since Joey [Torres] was the alterative possible perpetrator other than my client.”

history and urged him to consider the plea offer extended by the State.²⁰ Counsel could not in good faith raise the issue of Defendant's habitual status on direct appeal, since it was clear that his prior criminal record established the prerequisite for such status. Counsel went to great lengths to make his client aware of the risk of going through with a trial and the potential outcome that could result from a guilty verdict. The Defendant cannot now complain when counsel's comments have come true. The Defendant fails to satisfy *Strickland*, as counsel's conduct was objectively reasonable as it related to his client's habitual offender status. For these reasons, this ineffective assistance of counsel claim fails.

9. For the reasons set forth above, the Defendant's Motion for Postconviction Relief is hereby DENIED. Consequently, the Defendant's request of appointed counsel is moot.

10. The Court has also reviewed the Defendant's request for reduction of sentence, although it was filed untimely. The motion raises issues similar to those in the Rule 61 petition and the Court finds that the sentence imposed was appropriate

²⁰Facciolo Aff. at Ground Four. "Counsel was aware of defendant's past mental health issues and learning disabilities and did discuss his criminal record, showing him computer generated documentation of it. Counsel did so to . . . establish for him his habitual status if convicted."

and consistent with the requirements of the habitual offender statute. As such, a reduction is not warranted, and the motion for reduction of sentence is DENIED.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.