

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

STATE OF DELAWARE,)
)
 v.)
)
ALEM LOPEZ,) ID. No. 0404018958
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 Defendant.)
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)

Submitted: April 3, 2008
Decided: May 8, 2008

On Defendant Alem Lopez’s Motion for
Postconviction Relief. **DENIED.**

ORDER

Alem Lopez, *Pro Se*

JOHNSTON, J.

1. On September 7, 2006, Alem Lopez pled guilty to: (1) Possession of a Firearm During the Commission of a Felony, and was sentenced to mandatory 10 years at Level V; and (2) Manslaughter, and was sentenced to 25 years at Level V (suspended after 23 years for 2 years at Level IV, suspended after 6 months for 18 months Level III).

2. Lopez filed a *pro se* motion for postconviction relief on October 29, 2007. Lopez claims: (i) ineffective assistance of counsel; (ii) the trial court committed reversible error by refusing to accept defendant's withdrawal of his guilty plea; (iii) the trial court's refusal to grant a continuance was prejudicial error; and (iv) counsel's conflict of interest with Lopez warrants an evidentiary hearing. On January 15, 2008, the Court sent a letter to defense counsel requesting additional information in order to address Lopez' motion for postconviction relief. On February 29, 2008, Lopez filed a Motion for Summary Judgment. On March, 6, 2008, Lopez' defense counsel filed a supplemental affidavit responding to allegations of ineffective assistance of counsel. On April, 3, 2008, Lopez filed a reply.

3. In evaluating a postconviction relief motion, the Court must first ascertain if any procedural bars of Superior Court Criminal Rule 61(i) apply.¹ If a procedural bar is found to exist, the Court should refrain from

¹ See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

considering the merits of the individual claims.² This Court will not address claims for postconviction relief that are conclusory and unsubstantiated.³

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), “the 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.”

5. 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.⁴ 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)

² *See id.*

³ *See id.* at 555.

⁴ Super. Ct. Crim. R. 61(i)(2).

prejudice from violation of movant's rights.⁵ 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.⁶

6. This Motion was filed more than one year after Lopez' final judgment of conviction. Superior Court Criminal Rule 45(b)(2) explicitly states the Superior Court "may not extend the time for taking any action" under Rule 61(i)(1).⁷ However, this time limit is not applicable if "the court lacked jurisdiction or...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."⁸ Lopez' Grounds (ii), (iii) and (iv) are barred by Rule 61(i)(1).

7. Lopez did not raise Ground (i), ineffective assistance of counsel, in his initial postconviction relief application filed on February 1, 2007. The claim is barred unless consideration of the claim is necessary in

⁵ Super. Ct. Crim. R. 61(i)(3).

⁶ Super. Ct. Crim. R. 61(i)(4).

⁷ See *Smallwood v. State*, Del. Supr., No. 473, 2006, Steele, C. J. (Feb. 13, 2007).

⁸ Del. Super. Ct. Crim. R. 61(i)(5).

the interest of justice. By definition, a claim of ineffective assistance of counsel constitutes a “constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceeding.”⁹ Therefore, the Court will consider Ground (i).

8. **Ground (i).** 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.¹⁰ In making a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.¹¹ 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

⁹ *State v. Morla*, 2007 WL 2566012, at *3 (Del. Super.).

¹⁰ *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

¹¹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989).

course should be followed.”¹² 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.

9. Lopez claims his attorney: (1) failed to interview and question a witness; (2) failed to conduct pre-trial investigation; (3) failed to effectively prepare for trial; (4) failed to communicate and properly devise sound trial strategy; (5) failed to aggressively take on and assume the posture of a defense advocate; (6) made racial epithets which undermined Lopez’ trust and confidence in counsel; (7) failed to investigate and to determine the merit of the Sixth Amendment “speedy trial” violation while defendant was on detainer; and (8) failed to call character witnesses who were willing to testify.

10. Lopez pled guilty to Manslaughter and Possession of a Firearm During the Commission of a Felony. Lopez indicated on his Truth-in-Sentencing Guilty Plea Form that he was “satisfied with his lawyer’s representation” and fully advised of his rights. Additionally, during the plea colloquy Lopez stated he had not been pressured or coerced into entering a

¹² *Strickland*, 466 U.S. at 697.

plea.¹³ In the absence of clear and convincing evidence to the contrary, Lopez is bound by his answers on the Truth-in-Sentencing Guilty Plea Form and by his testimony prior to the acceptance of the guilty plea.¹⁴

11. Lopez claims his attorney was ineffective for eight different reasons. Claims (1)-(3) and (8) relate to counsel's alleged failure to properly prepare for trial and interview witnesses. These claims are contradicted by the record and Lopez' Truth-in-Sentencing plea form.

12. The police made efforts to locate possible witnesses. Counsel attempted to locate possible alibi witnesses in Illinois as requested by Lopez. Lopez claims his uncle was an alibi witness and was never interviewed. However, Lopez' uncle was interviewed on August 1, 2006. His uncle was unsure of the exact dates Lopez was in Illinois. Additionally, Lopez' uncle would not commit to being able to testify in Delaware because of work-related issues. Lopez' claims related to failure to interview potential witnesses and prepare for trial are not supported by the record.

13. Lopez argues his attorney failed to properly investigate or request a ballistics report. During the plea colloquy Lopez' attorney stated: "The State has no ballistics report and the deadline for that type of report

¹³ On February 1, 2007 Lopez filed a motion to withdraw his guilty plea. Lopez claimed he was innocent and coerced into the plea. The Court found that Lopez "voluntarily, intelligently and knowingly pled guilty."

¹⁴ *Savage v. State*, 2003 WL 214963, at *2 (Del. Super.).

has passed.... [N]o gun was recovered.” However, the investigative report states: “This investigator took custody of one brown paper bag marked ‘EVIDENCE’...within the bag was one .357 gun.”

14. Prior to trial, defense counsel spoke with the prosecutor. According to the prosecutor, the gun recovered was not considered the murder weapon. The bullets from the crime scene did not match the gun. At trial defense counsel stated “no gun was recovered,” because no gun was recovered that was linked to the crime. Additionally, Lopez never requested that his counsel obtain a ballistics report. Defense counsel believed the lack of a gun or ballistics report was beneficial to Lopez during trial, because the lack of evidence might have raised reasonable doubt.

15. To be successful, Lopez must establish “both attorney deficiency and actual prejudice.”¹⁵ The Court finds Lopez has not established evidence tending to show Counsel’s pre-trial preparation or tactical decisions (claims 1 through 3) prejudiced the outcome of the case.¹⁶

16. Lopez remaining claims are that his counsel: failed to communicate and properly devise sound trial strategy; failed to aggressively take on and assume the posture of a defense advocate; and made racial

¹⁵ *State v. Tolston*, 1992 WL 3544027, at *6 (Del. Super.).

¹⁶ *See State v. Ducote*, 2006 WL 3872845, at *2 (Del. Super.).

epithets that undermined Lopez' trust and confidence in counsel. Prior to trial, defense counsel met with Lopez on four separate occasions to answer questions, discuss the case and develop trial strategy. Defense counsel also sent numerous letters to Lopez outlining the status of the case. Defense counsel sent Lopez a copy of the victim's death certificate, examination report and toxicology report. Defense counsel denies making racial epithets and Lopez provides no evidence to the contrary. The Court finds Lopez' ineffective assistance claims (4) through (6) are conclusory allegations, not supported by evidence in the record and without merit.

17. Finally, Lopez claims he was denied his right to a speedy trial (claim 7). Lopez argues his attorney should have filed a motion to dismiss based on Lopez' Sixth Amendment right to a speedy trial. On November 29, 2004, Lopez was indicted and a warrant was issued in the State of Delaware. At that time Lopez was incarcerated in Illinois.

18. Pursuant to 11 *Del. C.* § 2542(g), Uniform Interstate Agreement of Detainers ("UAD"), a prisoner who makes a request for disposition, while incarcerated in a foreign state, must be brought to trial in Delaware within 180 days. The purpose of the UAD is "to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, information or

complaints.”¹⁷ Delaware case law requires that Lopez adhere to the procedural requirements of an UAD, including sending actual notice to both the prosecuting agency and appropriate court.¹⁸

19. Lopez claims he filed the appropriate documents on December 2, 2004. The Agreement on Detainers Form consists of four sections. Section I was signed and dated December 2, 2004. However, Sections II-IV were dated August 26, 2005. The 2005 dates correspond to a memorandum sent to Lopez by the Illinois Department of Corrections on July 26, 2005, which states: “You did not complete the request for Interstate Agreement on Detainer. You indicated you wanted to speak to someone from home and would contact me if you choose to finish the request. You did not contact me.” After receiving this memorandum, it appears Lopez attempted to fill out the remaining sections of the Agreement on Detainers Form.

20. On November 15, 2005, Lopez told his attorney about his UDA request. Defense counsel contacted the Superior Court Prothonotary. The Prothonotary had no record of an UDA request from Lopez. Lopez was notified that the Court had no record of the UAD request. Defense counsel asked Lopez for any additional information including return receipts

¹⁷ 11 *Del. C.* § 2540.

¹⁸ *State v. Farrow*, 2005 WL 1653992, at *2 (Del. Super.).

verifying the UAD request. Defense counsel did not receive the requested additional information from Lopez. On November 17, 2005 and January 30, 2006, defense counsel wrote to the warden of the Shawnee Correctional Facility requesting information regarding Lopez' UDA request. Defense counsel never received a response.

21. Without more evidence to establish that a UDA was properly filed, defense counsel could not prevail on a Motion to Dismiss. Thus, Lopez has not demonstrated with specificity that he was prejudiced due to counsel's tactical decision not to file Motion to Dismiss.

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

IT IS SO ORDERED.

The Honorable Mary M. Johnston