

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE, )  
 )  
 Plaintiff, )  
 )  
 v. ) Cr. ID No. 0609001649  
 )  
 TERRY C. MALIN, )  
 )  
 Defendant. )  
 )

Submitted: July 21, 2009

Decided: July 30, 2009

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

Paul R. Wallace, Esquire, Chief of Appeals, Department of Justice, Wilmington,  
Delaware, Attorney for the State.

Kathryn Van Amerongen, Esquire, J. Brendan O’Neill, Esquire, and Ferris Wharton,  
Esquire, Public Defender of the State of Delaware, Wilmington, Delaware.

Terry C. Malin, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 30th day of July, 2009, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court as follows:

**I. FACTS AND PROCEDURAL HISTORY**

Defendant Terry C. Malin was arrested on September 5, 2006 for crimes that occurred the day before when he attacked 60 year old M.O., at her residence in New Castle, Delaware. In October 2006, Defendant Malin was charged with one count of Attempted Murder in the First Degree, Burglary in the Second Degree, Robbery in the First Degree, Theft of a Motor Vehicle, two counts of Attempted Rape in the First Degree, and four counts of Possession of a Deadly Weapon During the Commission of a Felony (PDWDCF).

On November 28, 2007, Defendant Malin stipulated to the waiver of his jury trial right and the matter proceeded as a bench trial. The Superior Court bench trial commenced on December 4, 2007, and the following day, December 5, 2007, the trial judge found Defendant Malin guilty of one count of Attempted Rape in the First Degree, Assault in the First Degree (as a lesser-included offense of Murder in the First Degree), Burglary in the Second Degree, Robbery in the First Degree, and four counts of PDWDCF. Defendant Malin was found not guilty of one count of Attempted Rape First Degree and Theft of Motor Vehicle.

On January 25, 2008, the Superior Court sentenced Defendant as follows: Attempted Rape First Degree- 30 years at Level V; Assault First Degree- 10 years at Level V; Robbery First Degree- 5 years at Level V; for each count of PDWDCF- 5 years at Level V; and Burglary Second Degree- 8 years at Level V suspended after serving 5 years for diminishing levels of supervision.

Defendant filed a direct appeal to the Delaware Supreme Court. His convictions and sentences were affirmed on September 24, 2008.<sup>1</sup>

The facts giving rise to this action reveal that at noon on September 4, 2006, sixty-year old M.O. was watching television at her home in New Castle, Delaware, when Malin knocked on her door. M.O. recognized Malin as the son of a handyman who had done work for her over the years. When M.O. answered the door Malin told her that his car had broken down and he asked to use the telephone. M.O. let Malin in. Malin then asked to use a telephone book because he could not remember the number of the person he was attempting to call. M.O.'s telephone book was in her bedroom, and when she went there to retrieve it, Malin had followed her. When the victim turned around, she saw that the defendant had closed the bedroom door and was standing with his back to that door and a rope wrapped around both of his hands.

It was in that bedroom that Malin attacked M.O. Malin first put his arm around M.O.'s throat and when she yelled for her son, he told her to shut up. As they struggled, M.O. fell to the floor face down and Malin put the rope around her neck. Malin then took off his belt and put it around the victim's neck, put the rope around her hands behind her back and pulled her pants down. Malin then attempted without success to penetrate M.O.'s vagina and/or anus with his penis. He then tightened the belt around her neck until she lost consciousness.

When M.O. regained consciousness she found that Malin was still in her bedroom, rummaging through her belongings. Malin hog-tied M.O. and left, taking with him her car keys, cell phone and credit cards.

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<sup>1</sup> *Malin v. State*, 2008 WL 4358718 (Del.).

M.O. went to the hospital where she was examined by a sexual assault nurse. At trial, the nurse testified that M.O. suffered from redness, swelling and an abrasion in her vaginal/anal area. According to the nurse, M.O. also suffered a traumatic injury to her left vocal cord and hemorrhaging of her eyes and throat, all of which were consistent with strangulation.

Malin was arrested the following day in Maryland by the Maryland State Police. At the time of the arrest, Malin was driving M.O.'s car and had with him her cell phone and credit cards. At trial, the State presented DNA evidence linking Malin to various items of M.O.'s clothing and swabs taken from her.

Malin testified in his own defense at trial. Malin testified that on the date of the incident, he and M.O. were engaged in consensual sexual activity at M.O.'s residence when an intruder appeared and demanded money from them for a previous drug sale. Malin testified that the intruder choked and robbed M.O.

The trial judge, sitting as the trier of fact, chose to believe M.O.'s version of the events rather than Malin's. The Delaware Supreme Court held on direct appeal that M.O.'s testimony, considered together with the other evidence, was more than sufficient to support Defendant's convictions.<sup>2</sup>

On March 30, 2009, Defendant Malin filed a motion for postconviction relief pursuant to Rule 61.

## **II. DISCUSSION**

Defendant raises three grounds as the basis for his Rule 61 motion for postconviction relief. The first ground he raises is the denial of a right to a speedy trial,

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<sup>2</sup> *Id.* at 3.

the second ground is prosecutorial misconduct, and the third ground is ineffective assistance of counsel. Each ground is discussed separately below.

A) GROUND ONE: DENIAL OF RIGHT TO A SPEEDY TRIAL

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.<sup>3</sup> If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.<sup>4</sup>

Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction; (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 or 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.<sup>5</sup> Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”<sup>6</sup> The “miscarriage of justice” exception is a “narrow

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<sup>3</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> *Id.*

<sup>5</sup> Super.Ct.Crim.R. 61(i)(5).

<sup>6</sup> Super.Ct.Crim.R. 61(i)(4).

one and has been applied only in limited circumstances.”<sup>7</sup> The defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”<sup>8</sup>

In this case, Defendant’s speedy trial claim is procedurally barred pursuant to Rule 61 (i)(4) since it has already been formally adjudicated. Indeed, the Delaware Supreme Court after thoroughly and fully considering Malin’s speedy trial complaint concluded that his speedy trial claim is without merit.<sup>9</sup>

Although Defendant appears to be raising the identical claim previously raised, to the extent that he has recouched this contention differently in an attempt to re-litigate the claim, any new contention is now procedurally barred.<sup>10</sup> The Superior Court is not required to re-examine a claim that has received “substantive resolution” at an earlier time simply because the claim is now refined or restated.<sup>11</sup> Defendant had time and opportunity to raise any fact, argument or issue on his speedy trial claim in his direct appeal, and either did so, or neglected to do so. Having already been provided with a full and fair opportunity to present any issues desired to be raised, any attempt at this late juncture to raise anything else related to this issue is barred.

Moreover, 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 revisit the speedy trial claim that was previously raised and adjudicated.

B) GROUND TWO: PROSECUTORIAL MISCONDUCT

Defendant’s second ground for relief, prosecutorial misconduct, is procedurally barred pursuant to the provisions of Rule 61(i)(2) and (3). If Defendant genuinely

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<sup>7</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>8</sup> *Id.*

<sup>9</sup> *Malin v. State*, 2008 WL 4358718, at \*2 (Del.).

<sup>10</sup> Super.Ct.Crim.R. 61(i)(2) & (i)(3).

<sup>11</sup> *Johnson v. State*, 1992 WL 183069 at \*1 (Del.Supr.).

believed his contentions of prosecutorial misconduct had any merit, he was required to raise those contentions in prior proceedings. The prosecutorial misconduct ground stems from the State's alleged conduct pre-trial and at trial and was, of course, known to the Defendant at the time of his direct appeal. Defendant had time and opportunity to raise this ground in prior proceedings. Having failed to raise these contentions in his direct appeal, they are now procedurally barred. Again, Defendant has failed to provide any basis upon which this Court could conclude that it is in the interests of justice to consider this otherwise barred claim for relief.

Even if Defendant's second ground for relief was not procedurally barred, it is without merit. Defendant contends that the prosecutor withheld blood work of the victim because it contained cocaine. In response to this contention, the State represents that in actuality, there was no such drug test and no such results. The State further represents that it provided Defendant with complete pre-trial discovery including the medical treatment and examination records of the victim's September 4, 2006 medical evaluation, examination and treatment following the sexual assault.

Defendant appears to be contending that the State otherwise engaged in misconduct but his allegations are wholly conclusory without any specific factual support. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim under Rule 61.<sup>12</sup>

Defendant's claim of prosecutorial misconduct is procedurally barred and without merit.

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<sup>12</sup> *State v. Chambers*, 2008 WL 4137988, at \*1 (Del.Super.).

C) GROUND THREE: INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's ineffective assistance of counsel claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a claim, even when it has not been previously raised.<sup>13</sup>

Turning then to the substantive merits of this claim, to prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense."<sup>14</sup> 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 there is a reasonable probability that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different."<sup>15</sup>

The defendant must make concrete allegations of actual prejudice and substantiate them or risk dismissal.<sup>16</sup> There is a strong presumption that counsel's conduct was professionally reasonable.<sup>17</sup>

Defendant's allegation of ineffective assistance of counsel is wholly conclusory, unintelligible and incoherent.<sup>18</sup> Defendant's ineffective assistance of counsel contention is devoid of any specificity. It contains no concrete factual allegations, let alone concrete allegations of actual prejudice. Defendant's claim is based on vague generalities of

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<sup>13</sup> *Malin v. State*, 2009 WL 537060, at \*5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

<sup>15</sup> *Id.* at 687-88, 694.

<sup>16</sup> *State v. Donohue*, 2008 WL 5206779 (Del.Super.).

<sup>17</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>18</sup> The Court need not address an unintelligible and incoherent claim. See, *State v. Mobley*, 2007 WL 3287999, at \*3 (Del.Super.).



“clouds of prejudice” and an “unfriendly environment” that rendered his representation a “mockery of justice.”

Here, Defendant fails to set forth any allegation upon which the Court could find either prong of *Strickland* satisfied. Defendant makes no argument that defense counsel’s representation fell below an objective standard of reasonableness or that, but for defense counsel’s alleged substandard representation, the result would have been different. Defendant does not allege that defense counsel failed to investigate any potential defense, failed to file a particular legal motion or failed to call a particular witness. Defendant fails to provide anything specific about defense counsels’ conduct. His claim is premised solely upon vague, unsupported and unsubstantiated complaints.

Although Defendant describes his relationship with defense counsel as unfriendly, he fails to explain why his attorneys’ actions were deficient and how their alleged deficient performance probably altered the outcome of his trial. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate allegations of actual prejudice.<sup>19</sup>

Defendant has failed to establish either prong of the *Strickland* test, and therefore, his claims of ineffective assistance of counsel fail.

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<sup>19</sup> *Younger v. State*, 580 A.2d 552, 556 (1990).

**III. CONCLUSION**

For the reasons stated above, Defendant's Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**

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Commissioner Lynne M. Parker

cc: Prothonotary