

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID No. 0603015418A
)	
ANTHONY D. WHITE,)	
)	
Defendant.)	
)	

Submitted: April 29, 2009

Decided: May 1, 2009

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

Martin B. O’Connor, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Joseph A. Hurley, Esquire, 1215 King Street, Wilmington, Delaware.

Anthony White, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 1st day of May, 2009, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court as follows:

I. FACTS AND PROCEDURAL HISTORY

Following a Superior Court jury trial, Defendant Anthony White was convicted of Attempted Murder First Degree and Possession of a Firearm During the Commission of a Felony. Defendant was sentenced on June 15, 2007, and received a lengthy prison sentence. Defendant filed an appeal with the Delaware Supreme Court, which was denied on September 5, 2008.¹

The facts giving rise to this action reveal that on March 15, 2006, Jaywann Tucker, a 13 year old boy, was with another individual, 18 year old Ahmad Phoenix, when Tucker decided he would rob 14 year old QyMere Maddrey. Apparently, Tucker and Maddrey had a history of fighting and other confrontations with each other. At that time, Maddrey was hanging out with 14 year old Jeree Richardson. In short, Tucker went up to Maddrey, put a gun to his head, and took marijuana and a cell phone from him.

Right after the robbery occurred, Maddrey reported to Defendant Anthony White that Tucker had robbed him with a gun. White and Maddrey knew each other because White is the father to Maddrey's sister's children. In effect, Maddrey is the uncle to White's children.

Defendant Anthony White, a 25 year old adult, certainly could have called the police and reported the robbery. Instead, White decided to hunt down 13 year old Jaywann Tucker and shoot him.

White and Maddrey located Phoenix and Tucker walking on the sidewalk adjacent to the Compton Court Apartments. Maddrey asked Tucker for his cell phone

¹ *Anthony D. White v. State*, 2008 WL 4107980 (Del.).

back and Tucker told him that he did not have it. White then pulled out a 9 mm semiautomatic handgun and began firing at Tucker. Tucker ran down an alleyway/cut and White pursued him and fired at him a couple more times. White shot Tucker in the face, left shoulder and left foot.

The initial incident, where White pulled out a gun and fired at Tucker, was caught on the Compton Apartments surveillance camera and introduced into evidence at trial. The videotape clearly shows White shooting Tucker, while Maddrey is standing next to White.² Before Maddrey was aware of the existence of the videotape showing that White was the gunman, he told the police that he was the gunman and not White. Maddrey later explained that White told him to take the blame because Maddrey was a juvenile and would not get in as much trouble, and that White could not go to jail because he needed to support his kids.³

On January 14, 2009, Defendant Anthony White filed a motion for postconviction relief pursuant to Rule 61. In the motion he alleges three grounds as the basis for relief. He alleges ineffective assistance of counsel, abuse of discretion of the trial court's decisions and rulings, and prosecutorial misconduct. Despite these allegations of wrongdoing from everyone associated with the case, White completely disregards the visual evidence of the shooting. Incredulously, White represents that "there was no overwhelming evidence against the petitioner at his trial."⁴ In actuality, however, this was not a close case. It was not a credibility contest between witnesses. The case did not ultimately rest on the jury's evaluation of the credibility of the witnesses. The videotape of the shooting leaves no doubt that Defendant pulled out a gun and fired shots at Tucker.

² March 15, 2006 Compton Apartment Shooting Video, State's Trial Exhibit 33.

³ March 9, 2007 Trial Transcript, pgs. 42-43.

⁴ Defendant White's Rule 61 Memorandum of Law at pg. 26.

The videotape provided overwhelming evidence of Defendant's guilt and leaves no doubt that the convictions against White were substantiated and justified.

II. DISCUSSION

Defendant raises three grounds as the basis for his Rule 61 motion for postconviction relief. The first ground he raises is ineffective assistance of counsel, the second ground is abuse of discretion of the trial court, and the third ground is prosecutorial misconduct. Each ground is discussed separately below.

A) GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

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 61.⁵ If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.⁶

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.⁷

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."⁸ 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

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁶ *Id.*

⁷ *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁸ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

“that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the result of the proceeding would have been different.”⁹ There is a strong presumption that counsel’s conduct was professionally reasonable.¹⁰

When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.¹¹

Here, Defendant fails to satisfy either prong of the *Strickland* test. Addressing the second prong first, Defendant’s counsel’s actions, even if deficient, would not have altered the outcome of his trial. The videotape of the shooting shows the Defendant holding the gun and firing shots at Tucker. Even if counsel’s actions fell below a reasonable standard, it is difficult to comprehend how the outcome of the proceeding would have differed.

Defendant also fails to satisfy the first prong of the *Strickland* test, that counsel’s course of conduct “fell below an objective standard of reasonableness.” Defendant contends that counsel was ineffective for failing to request an Accomplice Liability instruction. Defendant is not seriously contending that his counsel was ineffective for not requesting the trial court to instruct the jury that even if Defendant was not the actual gunman, he could still be found guilty as a co-conspirator, an accomplice, to the shooting. Defendant must be contending that the jury should have been adequately instructed as to how to weigh the testimony of a witness who is also accused of criminal activity.

In fact, the jury was so instructed.¹² Indeed, the trial court also instructed the jury on how to consider conflicting testimony of witnesses to assess the credibility and the

⁹ *Id.* at 687-88, 694.

¹⁰ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

¹¹ *Strickland*, 466 U.S. at 697.

weight to be given their statements, to assess the motivations and interests of the witnesses, and all other significant parameters that should be considered when evaluating the testimony of witnesses.¹³

Defendant's allegations are without merit that his counsel was ineffective for making objections, failing to make objections, failing to request a mistrial, failing to request that portions of, or the entire testimony of, witnesses be "stricken from the record", and failing to advise witnesses that if they are not telling the truth they can be charged with perjury. Also without merit are Defendant's allegations that his counsel somehow colluded with the prosecutor to convict him, somehow colluded with the trial court to rush the proceedings, or that his counsel was ineffective for failing to somehow slow down the proceedings.

As to each of these allegations, Defendant was required to make and substantiate concrete allegations of both unreasonable attorney conduct and actual prejudice.¹⁴ Defendant fails to explain which objections his counsel should have made but did not, and which objections that were made which should not have been made, or should have been made more forcefully. He fails to explain why he was entitled to a mistrial. Similarly, he fails to explain which witness's or witnesses' testimony lacked admissibility. Defendant has pointed to nothing in the record to demonstrate a lack of diligence on behalf of his counsel. He failed to demonstrate any arguably inadmissible evidence which was presented to the jury. He fails to identify any particular evidence which was improperly admitted and failed to explain how additional time during the trial would have somehow altered his presentation at trial or would have altered the outcome.

¹² *State v. White*, March 9, 2007 Transcript of Jury Instructions, pg. 20-21.

¹³ *State v. White*, March 9, 2007 Transcript of Jury Instructions, pgs. 18-25.

¹⁴ *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989).

Finally, Defendant contends that his counsel was ineffective because of his lack of independent testing of the shell casings at the scene of the crime. Defendant believes that because “modern technology has expanded into unlimited heights”¹⁵, a more thorough analysis of the shell casings would have revealed who handled the gun and who fired the weapon. Both defense counsel and the prosecutor recognize that despite Defendant’s unsupported faith in modern technology, in reality, technology has not expanded into this height, that no such determination could be made, and that Defendant’s contention is not grounded in science.

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

B) GROUND TWO: ABUSE OF DISCRETION OF THE TRIAL COURT

Defendant’s second ground for relief, abuse of discretion of the trial court, is procedurally barred.¹⁶ This ground for relief was not previously raised in a prior postconviction proceeding, nor was it asserted at trial or on direct appeal as required by the court rules. In order to overcome the procedural bar, Defendant must show a “colorable claim that there was a miscarriage of justice”.¹⁷ The miscarriage of justice exception is a narrow one and has been applied only in limited circumstances.¹⁸ Defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”¹⁹ 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.

¹⁵ Defendant’s Rule 61 Memorandum of Law, pg. 12.

¹⁶ Super.Ct.Crim.R. 61(i)(2) & (3).

¹⁷ Super.Ct.Crim.R. 61(i)(4).

¹⁸ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

¹⁹ *Id.*

Even if Defendant's claim was not procedurally barred, it is without merit. The criticisms levied against the trial court are simply not warranted. The trial court's evidentiary rulings were in accordance with the Delaware Rules of Evidence, the jury instructions were in accordance with Delaware law, and all aspects of the trial were fair and unbiased.

Defendant's contention that the jury was disgusted, confused, inattentive and impatient is unsubstantiated. Defendant has failed to identify anything in the record that would lead to the conclusion that the jurors were unable to be fair and impartial in hearing the evidence and render a fair and impartial decision at the conclusion of the evidence. Indeed, the jurors definitively indicated that they could be fair and impartial and that they foresaw no problems in faithfully performing their duties.²⁰

Defendant failed to identify any particular evidence which was improper, inadmissible, or which warranted corrective action by the Court. He fails to explain how any decision by the trial judge was erroneous or exceeded the discretion of the Court. Defendant contends that the proceedings were rushed but fails to identify what additional time he needed, how he was restricted in any respect from fully and fairly presenting his defense, how any additional time would have somehow changed the outcome of trial, nor how he suffered prejudice in any way from the trial court's handling of the case.

Defendant's claim that the trial court abused its discretion in its decisions and rulings is procedurally barred and factually unsubstantiated.

²⁰ *State v. White*, March 8, 2007 Trial Transcript, pg. 35-36.

C) GROUND THREE: PROSECUTORIAL MISCONDUCT

Defendant's third ground for relief, prosecutorial misconduct, like Defendant's second ground for relief, is also procedurally barred. Here again, Defendant failed to raise this issue at trial or in prior postconviction proceedings. 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 third ground for relief was not procedurally barred, it is without merit. The prosecutor made defense counsel aware of all plea agreements and conflicting witness statements, which were used by defense counsel during cross examination of the State's witnesses at trial.

Defendant also failed to identify any specific allegations of improper conduct by the prosecutor during the trial. Defendant failed to identify particular questions, arguments or comments made by the prosecutor during the trial that were improper and impermissible and which resulted in prejudice to Defendant. Conclusory allegations are insufficient to establish a claim under Rule 61.

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

III. CONCLUSION

It was not Defendant's counsel who was allegedly ineffective that resulted in Defendant's conviction. It was not the trial court who allegedly rushed the proceeding that resulted in Defendant's conviction. It was not the jury who were allegedly disgusted, confused, inattentive and impatient that resulted in Defendant's conviction. It was not the prosecutor who was allegedly out to get the Defendant that resulted in Defendant's conviction. Although Defendant seeks to blame everybody else associated with his trial for his conviction, in reality, the fact that Defendant was caught on videotape shooting at Tucker leaves room for only one conclusion: that Defendant shot Tucker and that his convictions were substantiated and justified.

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

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

cc: Prothonotary