

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.) Cr. ID No. 0909002859
)
SALAAT ISLAM,)
)
 Defendant.)

Submitted: August 28, 2014
Decided: November 25, 2014

*Upon Consideration of Defendant's Motion
For Postconviction Relief, **DENIED.***

*Upon Counsel's Motion to Withdraw, **GRANTED.***

OPINION

Matthew Frawley, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Saagar B. Shah, Esquire, Wilmington, DE, Attorney for the Defendant.

Salaat M. Islam, James T. Vaughn Correctional Center, Smyrna, Delaware.

MEDINILLA, J.

INTRODUCTION

On June 15, 2010, Defendant Salaat Islam (“Defendant”) pleaded guilty to two counts of Robbery First Degree, two counts of Assault Second Degree, and one count each of Possession of a Firearm during the Commission of a Felony and Conspiracy Second Degree. On October 22, 2010, this Court sentenced Defendant to 15 years at Level V incarceration, including 11 years of minimum mandatory time, with a period of probation to follow. Defendant filed the instant Motion for Postconviction Relief on November 6, 2013. Defendant’s appointed counsel filed a Motion to Withdraw on June 18, 2014, on the grounds that there are no meritorious claims which can be ethically advocated. For the reasons that follow, Defendant’s Motion for Postconviction Relief is **DENIED** and Counsel’s Motion to Withdraw is **GRANTED**.

FACTUAL AND PROCEDURAL HISTORY

On September 3 and 4, 2009, the Wilmington Police Department were called to investigate three separate robberies involving two individuals who were later identified as the Defendant and his co-defendant, Kevin Martin.

The first robbery took place shortly before midnight on September 3 on West Fifth Street in Wilmington. One of the assailants was armed with a black

lever-action rifle and the other demanded the victim turn over the contents of his pockets, including a cell phone and five dollars.

The second robbery took place just after midnight on September 4 on North Clayton Street in Wilmington. Two individuals,¹ one armed with a black lever-action rifle, approached five men and instructed them not to move. The unarmed individual took a wallet with \$60 cash from one of the victims. A second victim attempted to grab the rifle from the armed assailant, but was shot in the chest and upper torso. A third victim was also shot in the face, and the unarmed assailant took \$57 from his person after he fell to the ground.

The third robbery took place at approximately 3:00 am on September 4 on East Tenth Street in Wilmington. A man, later determined to be the Defendant, approached three men and asked for a cigarette. The three men ignored Defendant while a second man, later determined to be Kevin Martin, appeared from behind a van armed with a black rifle. Martin pointed the rifle at the three men while Defendant demanded that the victims remove all their clothing and give up their belongings. Defendant flaunted his tattoos and bragged about his membership in the “Bloods” street gang. When one of the victims attempted to flee, Martin shot him in the hip, calf, and ankle.

¹ Wilmington Police arrested a man who was identified by one of the victims as one of the assailants on September 5, 2009. This suspect was apparently ruled out because he was released and the charges were nolle prossed on September 10, 2009.

Police assembled a photographic array of 30 known members of the “Bloods” street gang. At the hospital, the victim shot during the third robbery positively identified Defendant as one of the two men involved. A second victim of that same robbery also independently identified Defendant from the photographic lineup.

During a taped, post-*Miranda* interview with Wilmington Police on September 9, 2009, Kevin Martin confessed to the three robberies and implicated Defendant as his co-conspirator. A search of Kevin Martin’s residence uncovered a black lever-action rifle that matched the casings found at the scenes of the second and third robberies. Defendant also gave a taped, post-*Miranda* interview at the City of Chester probation office where he was serving probation. Defendant was arrested by Wilmington Police on September 24, 2009.

On October 30, 2009, a Grand Jury indicted Defendant and Kevin Martin on charges to include 25 felonies and one misdemeanor for their alleged involvement in the three robberies. On June 15, 2010, Defendant entered a guilty plea to Robbery First Degree, two counts of Assault Second Degree, and one count each of Possession of a Firearm during the Commission of a Felony and Conspiracy Second Degree. During the plea colloquy, Defendant acknowledged his guilt of these offenses. This Court accepted Defendant’s plea as being knowing,

intelligent, and voluntary. On October 22, 2010, this Court sentenced Defendant to 20 years at supervision Level V, of which 11 years are minimum mandatory, to be suspended after 15 years with a period of probation to follow.

Defendant filed this Motion for Postconviction Relief on November 6, 2013. Defendant's sole claim is that his trial counsel rendered ineffective assistance because he failed to discover and disclose that Defendant was incarcerated in Pennsylvania at the time of the three robberies to which he pleaded guilty. As this is his first motion, counsel was appointed for the purpose of representing Defendant pursuant to Rule 61(e)(1) ("Rule 61 Counsel"). Rule 61 Counsel filed a Motion to Withdraw as Counsel on June 18, 2014. In order to thoroughly evaluate Defendant's Rule 61 Motion, and Rule 61 Counsel's Motion to Withdraw, this Court enlarged the record by directing Defendant's trial counsel to submit an affidavit responding to Defendant's claims. Trial Counsel's affidavit was filed on August 28, 2014.

DISCUSSION

MOTION TO WITHDRAW AS COUNSEL

This Court will first consider Defense Counsel's Motion to Withdraw. Rule 61(e)(2) provides:

If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

In his Motion to Withdraw, Rule 61 Counsel represents that he has undertaken a thorough analysis of the record and determined that Defendant's claims are not sufficiently meritorious to be ethically advocated.² Rule 61 Counsel further represents that his careful review of the record revealed no other meritorious claims for relief available to Defendant.³ The Motion to Withdraw includes a detailed description of both factual and legal bases for this opinion, and gives Defendant proper notice of his right to respond within 30 days. Defendant did not respond to the Motion to Withdraw.

² Motion to Withdraw at 1, 10, State v. Islam, Case No. 0909002859 (Del. Super. June 18, 2014).

³ *Id.* at 11.

This Court also conducted its own review of the record, and is satisfied that Rule 61 Counsel properly determined that Defendant does not have a meritorious claim.⁴ Defense Counsel's Motion to Withdraw as Counsel is therefore **GRANTED**.

MOTION FOR POSTCONVICTION RELIEF

Defendant seeks relief pursuant to Rule 61 based on a claim of ineffective assistance of trial counsel. Specifically, Defendant contends that trial counsel failed to properly investigate and notify the State that Defendant was incarcerated in Pennsylvania during the time of the alleged robberies.

I. Procedural Bars

Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether 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 claim.⁶ Specifically, 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

⁴ *Roth v. State*, 2013 WL 5918509, at *1 (Del. 2013).

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

⁶ *Id.*

for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant can show cause for relief and prejudice to his rights; and (4) any basis for relief must not have been formally adjudicated in any proceeding.

The Court considers the four mandates and finds that Defendant is procedurally barred under 61(i)(1)-(3). The instant motion was filed after the one-year time bar under 61(i)(1). Because Defendant's conviction resulted from a guilty plea, Defendant did not assert his claim at trial or on direct appeal. This is Defendant's first Motion for Postconviction Relief, however, and none of the claims put forth in this motion were previously asserted.

Procedural bars to relief can be overcome if Defendant's claim falls within the exception set forth under Rule 61(i)(5):

The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall 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.

The "miscarriage of justice" or "fundamental fairness" exception contained in Rule 61(i)(5) is "[a] narrow one and has been applied only in limited

circumstances.”⁷ One such occasion is where the defendant alleges that the assistance of his trial counsel was so ineffective as to prejudice his constitutional rights. This Court will, therefore, entertain the merits of his motion pursuant to Rule 61(i)(5).

II. Defendant’s Claim

a. Ineffective Assistance of Counsel

Defendant’s sole claim is that the assistance of his trial counsel was ineffective because due diligence would have revealed the fact that Defendant was incarcerated in Pennsylvania on September 3 and 4, 2010 – the date of the robberies to which Defendant pleaded guilty.

Defendant argues that he had a valid basis to assert an alibi defense, that his attorney failed to pursue said defense, and as such, he makes a claim for ineffective assistance of counsel. In order to prevail on an ineffective assistance of counsel claim, a defendant must meet the two-pronged *Strickland* test by showing that counsel performed at a level below an objective standard of reasonableness, and

⁷ *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989)) (emphasis added).

that the deficient performance prejudiced the defense.⁸ That is, counsel's deficient performance was so prejudicial as to undermine faith in the outcome.⁹

In this case, Defendant's argument that trial counsel was ineffective is without any factual support whatsoever. The record is devoid of evidence to support Defendant's contention that he was incarcerated in Pennsylvania at the time of the robberies. First, Defendant gave a statement to Wilmington Police on September 9, 2009 at the City of Chester Probation Office where Defendant was a probationer at the time.¹⁰ Defendant was on probation, and not incarcerated, on September 3 and 4, 2009. Defendant's trial counsel states in his affidavit to this Court that Defendant's claim is "contrary to the evidence presented and the facts made available" at the time Defendant entered his guilty plea.¹¹ Defendant admitted his guilt for these crimes and his plea was accepted as knowing, voluntary and intelligent. Finally, after diligently investigating Defendant's claim, Rule 61 Counsel represents to this Court that Defendant's claim "fails on the facts." Considering these facts and its own careful consideration of the record, this Court finds Defendant's claim to be entirely without merit.

⁸ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

⁹ *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¹⁰ Pursuant to the Interstate Compact Agreement, Defendant was serving probation in Pennsylvania on a sentence imposed by this Court in Delaware.

¹¹ Under Delaware law, there is a strong presumption that defense counsel's conduct constitutes a sound trial strategy. *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).

Conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel.¹² Defendant simply cannot substantiate his claim that he was incarcerated at the time of these crimes. Even if he had been, he fails to make out a claim that the assistance of his trial counsel fell below an objective standard of reasonableness, or that such conduct resulted in prejudice to his defense. Accordingly, Defendant has not established a violation of his Sixth Amendment rights and fails to establish that there was a miscarriage of justice because of a constitutional violation pursuant to Rule 61(i)(5).

After carefully reviewing the record, this Court agrees with Rule 61 Counsel that Defendant can assert no other meritorious claims for relief. Accordingly, Defendant's Motion for Postconviction Relief is **DENIED**, and Rule 61 Counsel's Motion to Withdraw is **GRANTED**.

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Judge Vivian L. Medinilla

cc: Prothonotary

¹² See *Younger*, 580 A.2d at 556 (“[defendant] has made no concrete allegations of “cause” . . . and thus, does not substantiate to any degree such a claim.”).