

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
)	I.D. No. 1007020056
v.)	
)	
TWYAAN JOHNSON)	
)	
Defendant.)	

Submitted: December 19, 2014

Decided: March 3, 2015

On Defendant's Amended Motion for Postconviction Relief.
SUMMARILY DISMISSED IN PART. DENIED IN PART.

ORDER

Morgan T. Zurn, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State

Christopher S. Koyste, Esquire, Wilmington, Delaware, Attorney for
Defendant

COOCH, R.J.

This 3rd day of March, 2015, upon consideration of Defendant's
Amended Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Tywaan Johnson was found guilty in September 2011 of Murder in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony, Robbery in the First Degree, Possession of a Deadly Weapon by a Person Prohibited, and Conspiracy in the Second Degree.¹

¹ D.I. # 79, 83.

2. Defendant was sentenced as a habitual offender in March 2012 to life in prison for both the first degree murder charge and the first degree robbery charge, ten years at Level V for each of the possession of a firearm charges, and two years at Level V, suspended for one year at Level II for the conspiracy charge.² The Delaware Supreme Court affirmed Defendant's convictions and sentences on appeal on September 7, 2012.³
3. Defendant filed a *pro se* Motion for Postconviction Relief and a Motion for Appointment of Counsel in September 2013. Counsel was appointed and Defendant, through counsel, filed the instant Amended Motion for Postconviction Relief. The State filed its Response and Defendant filed his Reply. Also filed were affidavits by Defendant's trial counsel Michael C. Heyden, Esquire and Anthony A. Figliola, Esquire.
4. Defendant's Amended Motion for Postconviction Relief sets forth six claims for relief, which may be fairly summarized as follows:
 - (1) Trial counsel failed to adequately cross-examine Gregory Napier, a State's witness, with respect to his plea agreement and future cooperation with the State;
 - (2) Trial counsel failed to object to the admission of Gregory Napier's 3507 statement;
 - (3) Trial counsel failed to object, request a mistrial, and/or request a curative instruction when a State witness commented on Defendant's right to counsel;
 - (4) Defendant's constitutional right to a fair trial was denied due to trial counsel's failure to investigate the identity of "Jamal" and his knowledge, if any, of the crimes;
 - (5) The State committed a *Brady* violation by failing to disclose information regarding "Jamal."

² See Sentence Order, D.I. #100 (Mar. 21, 2012). Defendant was also sentenced to a number of years of probation.

³ See *Johnson v. State*, 53 A.3d 302, 2012 WL 3893524 (Del. Sept. 7, 2012) (ORDER). On appeal, the Supreme Court rejected Johnson's argument that his Fourth, Fifth, and Sixth Amendment rights were violated when his recorded prison phone calls were introduced at trial. See *id.* at *1.

- (6) Defendant's constitutional right to a fair trial was denied to due cumulative due process error.⁴
5. Defendant's Motion for Postconviction Relief is controlled by Superior Court Criminal Rule 61.⁵ Before addressing the merits of this Motion for Postconviction Relief, the Court must address any procedural requirements of Superior Court Criminal Rule 61(i).⁶
6. Under Superior Court Criminal Rule 61(i), a Motion for Postconviction Relief can be potentially procedurally barred for time limitations, successive motions, procedural defaults, and former adjudications.⁷ If a procedural bar exists, then the Court will not consider the merits of the postconviction claim unless the Defendant can show that, pursuant to Rule 61(i)(5), the procedural bars are inapplicable.
7. Rule 61(i)(5), provides that consideration of otherwise procedurally barred claims is limited to claims 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."⁸
8. This Court finds that all six of Defendant's claims are timely as Defendant's motion was filed within one year after Defendant's conviction was finalized on direct appeal.⁹ Nonetheless, this

⁴ Def.'s Amended Mot. for Postconviction Relief at 17-42, D.I. # 124 (Jun. 17, 2014).

⁵ See Super. Ct. Crim. R. 61. Rule 61 has undergone a number of changes in recent months, but the version of the Rule in effect at the time Defendant filed his original Motion is controlling.

⁶ See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁷ See Super. Ct. Crim. R. 61(i)(1)-(4).

⁸ Super. Ct. Crim. R. 61(i)(5).

⁹ See Super. Ct. Crim. R. 61(i)(1) (barring postconviction motion filed more than one year after judgment of conviction is final); *Felton v. State*, 945 A.2d 594 (Del. 2008) (measuring start of filing period from date direct Supreme Court mandate was issued and direct appeal process concluded). Defendant in this case filed a "Motion for Counsel to be Appointed for the Filing/Argument/Brief/Memorandum Under Rule 61" on September 5, 2013. Defendant filed his Rule 61 Motion on September 12, 2013.

Court finds one of Defendant's claims to be procedurally barred. For clarity, all six claims will be addressed in the order presented to this Court.

9. Defendant's first claim is that trial counsel failed to adequately cross examine one of the State's witnesses, Gregory Napier regarding benefits he was to receive from the State for his future cooperation.¹⁰ Defendant relies on *Moore v. Sec'y Pennsylvania Dep't of Corrections*¹¹ to argue that trial counsel's actions fell below the *Strickland* standard of reasonableness and prejudiced Defendant.¹² In response, the State notes that it questioned Mr. Napier about his plea extensively on direct examination.¹³ The State contends that trial counsel's strategic decision not to "badger" Napier on cross examination was reasonable, especially given that Napier's testimony was corroborated by physical evidence and the testimony of other witnesses. The State further argues that additional cross-examination regarding Napier's plea agreement would not have led to Defendant's acquittal.¹⁴
10. To successfully articulate an ineffective assistance of counsel claim, a claimant must demonstrate: 1) that counsel's performance was deficient, and 2) that the deficiencies prejudiced the Defendant by depriving him or her of a fair trial with reliable results.¹⁵ To prove counsel's deficiency, a Defendant must show that counsel's representation fell below an objective standard of reasonableness.¹⁶ Moreover, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.¹⁷ "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."¹⁸ A successful Sixth Amendment claim of ineffective assistance of

¹⁰ See Def.'s Amended Mot. at 18. For a detailed statement of facts, see *Johnson v. State*, 53 A.3d 302, 2012 WL 3893524 (Del. Sept. 7, 2012) (ORDER).

¹¹ 457 F. App'x 170 (3d Cir. 2012).

¹² See Def.'s Amended Mot. at 19-20.

¹³ See State's Resp. at 9, D.I. # 129 (Oct. 15, 2014); See also Aff. of Anthony A. Figliola, Esquire at 1, D.I. # 126 (Aug. 27, 2014).

¹⁴ See *id.*

¹⁵ See *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

¹⁶ *Id.*

¹⁷ *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

¹⁸ *Strickland*, 466 U.S. at 689.

counsel requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁹

11. First, this Court finds this case to be distinguishable from *Moore*. In *Moore*, the Third Circuit held that the actions of trial counsel were unreasonable where trial counsel failed to introduce evidence about the terms of a key witness’s plea agreement and the benefits flowing therefrom.²⁰ Specifically, in that case, trial counsel failed to cross examine the key witness about the reduced charges and reduced exposure to prison time that accompanied his plea agreement.²¹ The instant facts are easily distinguishable. Here, there was a lengthy line of questioning on direct and on cross-examination regarding Napier’s plea agreement.²² Moreover, unlike *Moore*, testimony regarding Napier’s charges and original prison exposure was developed, along with testimony about the charges pled to and the actual sentence received as a result of taking a plea.²³
12. Applying the *Strickland* standard, This Court finds that counsel conducted a cross examination of the witness as part of a reasonable trial strategy, and the fact that trial counsel did not focus on Napier’s potential to receive even further reductions in sentence for future testimony in unrelated criminal matters was not objectively unreasonable. Defendant has failed to show that trial counsel’s actions fell below an objective standard of reasonableness and therefore, cannot meet the first prong of *Strickland*.
13. Even if Defendant could show that failure to further develop Napier’s testimony on this issue was objectively unreasonable, Defendant has not shown that but for the actions of trial counsel, the result of the proceeding would have been different. The jury was made aware of the fact that Napier had made a plea agreement with the State and had already received significant

¹⁹ *Id.* at 694.

²⁰ *Moore v. Sec’y Pennsylvania Dep’t of Corr.*, 457 F. App’x 170, 182 (3d Cir. 2012).

²¹ *See id.*

²² *See* Def.’s Amended Mot. at A111; *See also* Affidavit of Michael C. Heyden, Esquire at ¶ 1, D.I. #127 (Sept. 11, 2014).

²³ *See* Def.’s Amended Mot. at A117-18.

benefit from that agreement. Napier was questioned on the subject both on direct and cross examination. Defendant has not set forth sufficient evidence to show that if Napier's testimony on cross-examination were further developed, there is a reasonable probability that the jury would have disregarded his testimony as lacking credibility and the proceeding would have had a different outcome. This Court finds that Defendant's first claim of ineffective assistance of counsel fails to meet either prong of the *Strickland* standard.

14. Defendant's second claim is that trial counsel was ineffective for failing to object to the admission of Napier's 3507 statement on the basis that the statement was involuntary. Defendant argues that the requirement of voluntariness was not met because the detective who interviewed Napier put pressure on him by "repeatedly" bringing up Napier's family.²⁴ But for trial counsel's failure to object, Defendant argues that the only evidence linking Defendant to the gun would have been Napier's in-court testimony.²⁵ The State argues in response that Napier's statement was voluntary, and that Napier's family was only brought up "in the context of asking Napier to cooperate so that he would not "drag [his] whole family through this.""²⁶ The State further contends that a proper foundation was laid for the admission of the statement into evidence, that trial counsel's lack of objection was not unreasonable, and that Napier's testimony was corroborated by evidence other than his prior statement.²⁷
15. For a prior statement of a witness to be admissible under 11 *Del. C. § 3507*, the statement must be voluntary, the witness must testify about the content of the prior statement, the witness must be asked if the prior statement is true, and the witness must be available for cross examination regarding the prior statement.²⁸ For a statement to be considered involuntary, the totality of the circumstances must demonstrate that the witness's will was overborne.²⁹ One of several factors that may indicate that a

²⁴ See Def.'s Amended Mot. at 23, 27.

²⁵ See Def.'s Amended Mot. at 29.

²⁶ See State's Resp. at 11 (internal citations omitted).

²⁷ See State's Resp. at 10.

²⁸ See, e.g., *Burns v. State*, 76 A.3d 870, 788 (Del. 2013) (internal citations omitted).

²⁹ See *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986).

statement is involuntary is a threat or threats by authorities to take the witness's child away.³⁰ Notably, however, police questioning does not automatically render a statement involuntary.

16. This Court finds that the questioning by the detective in this case was not so coercive as to render Napier's will overborne. The detective who interviewed Napier brought up Napier's family, but did not threaten to take them away. Rather, the detective suggested that cooperation with the police would be favorable and would put less of a strain on his family. Moreover, Napier testified at trial that his statement was voluntary and he was given *Miranda* warnings at the time the statement was made.³¹ Taken together, the facts do not convince this Court that Napier's prior out of court statement was involuntary. The foundation for Napier's statement was properly laid by the State, and the statement's admission into evidence was permissible. As a result, this Court further finds that failure to object to the introduction of Napier's 3507 statement into evidence did not fall below any standard of reasonableness and did not cause any prejudice to the Defendant. Defendant's second claim fails.
17. Defendant's third claim is that trial counsel was ineffective for failing to object or declare a mistrial when one of the State's witnesses commented on Defendant's termination of an interview by police. During cross-examination at trial, the prosecutor asked Detective Harris regarding his interview of the Defendant: "at some point in time, did [Defendant] terminate that interview?"³² Detective Harris answered "yes, he did."³³ After the exchange between the prosecutor and Detective Harris, trial counsel requested a sidebar conference, during which trial counsel did not make a formal objection or application, but rather expressed concern over that question and answer. Trial counsel stated on the record that he did not want to formally object in an effort to avoid bringing even more attention to the statement.³⁴ During closing arguments, the prosecutor made a

³⁰ See *Roth v. State*, 788 A.2d 101, 107-09 (Del. 2001).

³¹ See Def.'s Amended Mot. at A22, A110.

³² Def.'s Amended Mot. at A119.

³³ *Id.*

³⁴ See *id.* at A120.

reference to Defendant's termination of the interview and at that point, trial counsel made a formal objection which was overruled by this Court.³⁵ In its ruling, this Court noted on the record at trial, the term or phrase "Defendant terminated the interview" was "general enough" and did not suggest that the Defendant "terminated" the interview because he wanted an attorney.³⁶

18. The lack of objection to this exchange between the State and Detective Harris during Harris's testimony is evaluated under the three-prong test articulated in *Hughes* and *Hunter*: 1) the closeness of the case; 2) the centrality of the issue affected by the (alleged) error; 3) and the steps taken to mitigate the effects of the error.³⁷ The Court finds that this issue was not central to the case and notes that there was substantial additional physical and testimonial evidence implicating Defendant. This Court further finds that trial counsel took reasonable action to mitigate the effects of the statement. The first time the exchange between Defendant and Detective Harris was brought up, there was no formal objection but rather a sidebar to discuss trial counsel's concerns. When the State brought up the exchange a second time during closing arguments, trial counsel then made a formal objection. Both times the topic was brought up, trial counsel took corrective action. As stated at trial, this Court finds that the term or phrase "Defendant terminated the interview" does not suggest that Defendant requested an attorney. Given the content of the statement and evaluation in light of the *Hughes* factors, this Court finds the comment was permissible.
19. Trial counsel's request for a sidebar and the subsequent statements during the sidebar conference are evidence of a reasonable trial strategy that was designed to minimize the attention brought to a potentially damaging statement for the Defendant. The decision not to make a formal objection or take any other curative action at sidebar did not fall below any standard of reasonableness. The decision to formally object the

³⁵ Def.'s Amended Mot. at A125.

³⁶ Def.'s Amended Mot. at A120.

³⁷ See *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981); *Hunter v. State*, 815 A.2d 730, 737-38 (Del. 2002). See also *State v. Norcross*, 2010 WL 1493120, at *7 (Del. Super. Apr. 8, 2010) (applying *Hughes* standard to analyze claim that counsel was ineffective for not objecting to prosecutor's comments).

second time the State brought up the comment similarly did not fall below any standard of reasonableness. Defendant has failed to meet the first prong of *Strickland*, and as a result, Defendant's third claim fails.

20. Defendant's fourth claim is that trial counsel failed to investigate the identity of a fourth man at the crime scene named "Jamal."³⁸ Defendant argues that Jamal was involved in the robbery, and was not just a driver, as Napier had testified. Defendant argues that Jamal's role in the crime was something that merited a more thorough investigation than trial counsel engaged in. The State responds by noting that Napier gave a description of Jamal that neither matched another witness's description of the "bald man" present at the robbery, nor Defendant's description of the alleged fourth man present at the robbery with a gun.³⁹ The State also points to trial counsels' affidavits, wherein they affirm that they conducted an investigation into Jamal and his whereabouts that to date, has not been fruitful.⁴⁰
21. This Court finds that Defendant has not set forth sufficient facts to survive either prong of *Strickland*. Deference to counsel's judgments regarding decisions not to investigate are given "a heavy measure of deference."⁴¹ Defendant has failed to provide specific facts showing trial counsels' actions fell below an objective standard of reasonableness. Trial counsel affirms that there was some measure of investigation done into the identity of Jamal.⁴² Such an affirmation is sufficient to demonstrate that trial counsels' actions did not fall below an objective standard of reasonableness.
22. Assuming *arguendo* that there was no investigation done and Defendant could show that his argument survives the first prong of *Strickland*, Defendant has failed to show that but for any alleged error by trial counsel, there is a reasonable probability

³⁸ The parties' filings refer to the man as "Jamal" or "Jameel" interchangeably, but for clarity, this Court will refer to him as "Jamal."

³⁹ State's Resp. at 18.

⁴⁰ See State's Resp. at 17 (citing Figliola Aff. at 2; Heyden Aff. at ¶ 4).

⁴¹ *Strickland*, 466 U.S. at 691.

⁴² Figliola Aff. at 2, D.I. #126 (Aug. 28, 2014); Heyden Aff. at ¶ 4, D.I. #127 (Sept. 11, 2014).

that the outcome of the trial would have been different. Napier gave trial testimony describing “Jamal”, and stated that Jamal was not present at the time of the crime. Defendant’s testimony gave a description of a fourth man carrying a gun that did not match the description Napier gave of “Jamal”. Defendant simply does not offer any evidence to show that there is a reasonable probability that more information about Jamal would have led to a different result at trial. Defendant’s fourth claim does not survive either prong of *Strickland*.

23. Defendant’s fifth claim is that the State committed a *Brady* violation by failing to disclose information relating to “Jamal.” This Court finds this claim to be procedurally defaulted pursuant to Rule 61(i)(3) for failure to raise the claim at trial or on direct appeal. The miscarriage of justice exception under Rule 61(i)(5) does not save Defendant’s claim from summary dismissal, as a *Brady* violation must be valid to overcome Rule 61(i)(3).⁴³
24. A *Brady* violation occurs where “(1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant.”⁴⁴
25. Defendant argues that the State had information about “Jamal” and that the State failed to disclose that information to trial counsel. The State argues in response that Defendant “wrongfully assumes that the State, including the police, had any information about Jamal to disclose.”⁴⁵ This Court agrees with the State, and finds Defendant’s argument to be without merit. The detective involved with the case testified on cross-examination that he attempted to track Jamal down but was unable to, and did not know anything other than his first name.⁴⁶ The record reflects that there was no additional evidence about Jamal obtained. As there was no evidence in existence that could

⁴³ See *State v. Fogg*, 2012 WL 2356466, at *7 (Del. Super. Jun. 6, 2012), *aff’d*, *Fogg v. State*, 2012 WL 6553921 (Del. Dec. 13, 2012); See also *Jackson v. State*, 770 A.2d 506 (Del. 2001).

⁴⁴ See, e.g., *Starling v. State*, 882 A.2d 747, 756 (Del. 2005).

⁴⁵ State’s Resp. at 19.

⁴⁶ See State’s Resp. at 20.

have potentially been suppressed, Defendant's argument that a *Brady* violation occurred fails.

26. Finally, Defendant cannot overcome Rule 61(i)(3) because he cannot assert any cause for relief from his failure to raise this issue on appeal, nor can he demonstrate any actual prejudice, as just discussed. The appropriate disposition of Defendant's fifth claim is Summary Dismissal.
27. Defendant's sixth and final claim is that of cumulative error. Defendant argues that taken together, all six of his claims show that he was deprived of a fair trial. The state argues that because none of Defendant's claims have merit, the Court should not engage in an analysis of Defendant's claim of cumulative error.
28. As discussed, none of Defendant's individual claims of ineffective assistance have merit, either because of a failure to survive the performance prong of *Strickland*, the prejudice prong of *Strickland*, or both. Moreover, Defendant's remaining claim of a Brady violation is both procedurally barred and without merit. Because all of Defendant's claims are without merit, Defendant's claim of cumulative error is also without merit. Therefore, Defendant's Motion for Postconviction Relief is **SUMMARILY DISMISSED IN PART** and **DENIED IN PART**. Further, Defendant's Request for an Evidentiary Hearing is **DENIED AS MOOT**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services
Morgan T. Zurn, Esquire
Christopher S. Koyste, Esquire