

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 V.) Cr. ID No. 0609019779
)
TYRONE MATHIS,)
)
 Defendant.)
)

Submitted: July 25, 2016
Decided: September 30, 2016

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF SHOULD
BE SUMMARILY DISMISSED; DEFENDANT’S MOTION FOR
EVIDENTIARY HEARING SHOULD BE DENIED; AND DEFENDANT’S
MOTION FOR APPOINTMENT OF COUNSEL SHOULD BE DENIED**

Joseph Grubb, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Tyrone Mathis, Howard R. Young Correctional Institute, Wilmington, Delaware,
Pro Se.

MAYER, Commissioner

This 30th day of September, 2016, upon consideration of Defendant's Motion for Postconviction Relief, Motion for Evidentiary Hearing, and Motion for Appointment of Counsel, it appears to the Court that:

BACKGROUND, FACTS AND PROCEDURAL HISTORY

1. The facts of this case arise from an incident that occurred on September 27, 2006, while Gloria Benitez and Felix Tiempos were working at a Burger King in New Castle, Delaware.¹ In short, the State asserted at trial that Defendant Tyrone Mathis robbed both employees at knife point. It began when Benitez heard someone tell her to "Give me the money" and "Put the money in a bag." Defendant was later identified as the man that made these comments while waving a knife and advancing toward Ms. Benitez. While this was occurring, Ms. Tiempos came in and Defendant yelled at her to "Come over here with her." When she refused, Defendant began to chase her with a knife. Both women eventually fled and Defendant was arrested and charged.

2. On May 1, 2007, after a jury trial, Defendant was found guilty of four offenses including: (i) two separate counts of Robbery First Degree and (ii) two separate counts of Possession of a Deadly Weapon During the Commission of a Felony.

¹ The facts herein were taken from the opinion of the Supreme Court of Delaware in *Mathis v. State*, Del. Supr., No. 516, 2007, Ridgely, J., (May 19, 2008) (Order), at *2-3.

3. On September 27, 2007, Defendant filed a direct appeal with the Supreme Court of Delaware. The Supreme Court issued a decision on May 19, 2008, affirming the judgment of this Court² and Defendant's judgment of conviction became final.

4. Defendant's appeal argued that there was insufficient evidence to support the robbery and possession charge with respect to victim Tiempos and that the identification procedure was overly suggestive. The Supreme Court held that the claim challenging the sufficiency of the evidence was not properly raised below and was therefore barred. Further, Defendant had not argued for plain error, and even if he had, the court did not find any.³

5. Defendant then filed his first Motion for Postconviction Relief, *pro se*, on May 27, 2009, that was re-filed on June 25, 2009. The record was enlarged and this Court considered an Affidavit from trial counsel, a response from the State, as well as a reply from the Defendant. On February 15, 2010, Commissioner Reynolds issued a Report and Recommendation that Defendant's Motion for Postconviction Relief should be denied.⁴ On March 3, 2010, the Superior Court adopted the Report and Recommendation.⁵

² *Mathis v. State*, Del. Supr., No. 516, 2007, Ridgely, J., (May 19, 2008) (Order).

³ *Id.* at *6.

⁴ Docket No. 47.

⁵ Docket No. 49.

6. Through his first Motion for Postconviction Relief, Defendant argued two grounds for relief. First, he argued that there was insufficient evidence to convict him of Robbery First Degree and Possession of a Deadly Weapon During the Commission of a Felony as to Tiempos. Second, Defendant argued trial counsel was ineffective for failing to file a timely motion to suppress his identification by the two robbery victims. Notably, during the briefing process, the State cited the case of *State v. Bridgers*, 988 A.2d 939 (Del. Super., 2007) (“*Bridgers*”)⁶ and therefore, this decision was before the Court for consideration during Defendant’s first motion for postconviction relief.⁷ With respect to the first argument, the Court reviewed the record and arguments made by the parties and held that “the argument based upon the sufficiency of the evidence...does not raise a constitutional claim, and therefore it is thereby not subject to the exclusions of Rule 61(i)(5).”⁸ The Court then found that the sufficiency of evidence claim was barred as untimely by Rule 61(i)(1).⁹ Defendant’s second claim was found to be without merit and the motion for postconviction relief was denied.

7. Defendant appealed this Court’s denial of his first motion for postconviction relief and the State of Delaware moved to affirm the decision. On appeal, Defendant again argued that he was improperly charged with, and convicted of,

⁶ The *Bridgers* decision was affirmed at *State v. Bridgers*, 2009 WL 824536 (Del., Mar. 30, 2009).

⁷ Docket No. 45 at p.8.

⁸ Docket No. 47 at p.11.

⁹ *Id.*

two counts of Robbery First Degree and two weapon counts, as well as ineffective assistance of counsel relating to the failure to file a motion to suppress. On June 2, 2010, the Supreme Court of Delaware issued an Order affirming the Superior Court's decision.¹⁰ The Supreme Court held that Defendant's first claim – with respect to the robbery charge – was formerly adjudicated in his direct appeal and Defendant failed to establish error to avoid the procedural bar.¹¹ Further, the Supreme Court held that “[i]t is manifest on the face of the opening brief that the appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.”¹²

8. On July 25, 2016, Defendant filed his second Motion for Postconviction Relief.¹³ Defendant's second motion seeks relief pursuant to Rule 61(i)(4) and (5) and argues that (a) his constitutional rights were violated when he was charged with Robbery First Degree of victim Tiempos; and (b) counsel was ineffective for having failed to file a motion to acquit relating to the Robbery First Degree charge and for not raising the issue on appeal.¹⁴ In support of his claims, Defendant argues that the evidence at trial was insufficient to support the Robbery First

¹⁰ *Mathis v. State*, Del. Supr., No. 147, 2010, Ridgely, J., (June 2, 2010) (Order).

¹¹ *Id.* at *3.

¹² *Id.* at *4.

¹³ On April 28, 2016, Defendant also filed a motion that was considered a Motion for Modification of Sentence. This motion was denied on August 8, 2016. *See* Docket No. 60.

¹⁴ Docket No. 54.

Degree charge and cites *Bridgers*, a case previously considered during Defendant's first postconviction motion, as a basis for relief.

ANALYSIS OF DEFENDANT'S RULE 61 MOTION

9. Pursuant to Superior Court Criminal Rule 61(d)(5) the motion may be summarily dismissed because it plainly appears from the record in the case that the movant is not entitled to relief. Defendant's motion is procedurally barred for several reasons. As such, the Court should not consider the merits of the claim.¹⁵

10. In second or subsequent postconviction motions, the motion shall be summarily dismissed unless the defendant establishes (i) that new evidence exists that creates a strong inference that he is actually innocent of the charge for which he was convicted, or (ii) the existence of a new rule of constitutional law made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court rendered his convictions invalid.¹⁶

11. Defendant is attempting to restate and re-couch the issues raised during his direct appeal, the first Motion for Postconviction Relief, and the subsequent appeal of that motion, as ineffective assistance of counsel contentions (or constitutional claims). The Court is not required to re-examine claims that were already adjudicated on the merits simply because the claim is now being presented as a

¹⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990); *Paul v. State*, 2011 WL 3585623 (Del. Aug. 15, 2011), at *1 ("Delaware law provides that the Superior Court must first consider whether the defendant has satisfied the procedural requirements of Rule 61 before considering the merits of his postconviction motion.")

¹⁶ Super. Ct. Crim. R. 61(d)(2)(i), (ii) & (5); and Rule 61(i)(2)(i).

claim for ineffective assistance of counsel unless it is in the interest of justice to do so.¹⁷

12. Defendant has not pled with particularity that any new evidence exists to create a strong inference that he is actually innocent of the charge for which he was convicted nor that there is a new rule of law by the United States Supreme Court or the Delaware Supreme Court that would render his convictions invalid (as required in second Rule 61 motions to overcome the procedural bar). To the extent Defendant relies on *Bridgers*, this decision was issued in 2007 and was available to the Defendant at the time of the Supreme Court's decision on his direct appeal, during the briefing process at the time of his first Motion for Postconviction Relief, as well as during the time of his appeal of the denial of that motion.

13. The *Bridgers* case involved two defendants that robbed a bank by taking money from four employees at gunpoint. During the course of the robbery, these defendants also threatened three other bank employees who were compelled to actively participate in the theft (the "employees") and confronted nine customers at gunpoint (the "bystanders"), but did not take anything from them and they otherwise simply watched the defendants rob the bank. The court held that in order to support a charge of robbery, if property has not been taken from the victim, then "the victim must become involved or Defendant must force the victim

¹⁷ *Johnson v. State*, 1992 WL 183069, at *1 (Del. 1992); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

to become involved in the theft, and be threatened by Defendant in the process.”¹⁸ In contrast, “[a] person who only is forced to watch a theft or a robbery from another person and who is not otherwise involved is not a robbery victim.”¹⁹ Thus, the charge as to the “bystanders” did not rise to the level of robbery, but the defendants could be charged with robbery of the “employees”.

14. The Court’s decision in *Bridgers* was specific to the facts of that case. The Court did not issue a decision of constitutional law applicable retroactively to Defendant’s case. The facts of Defendant’s case are materially different from those presented in *Bridgers* and based on the facts presented to the jury in this case, the Defendant was found guilty of robbery by the trier of fact. The Defendant’s conviction was later upheld by the Supreme Court. Defendant now simply repeats again here the same arguments that were previously raised. As such, Defendant has failed to meet the pleading requirements allowing him to proceed with his Rule 61 motion and the motion should be summarily dismissed.²⁰

15. Moreover, Defendant’s motion is procedurally barred as untimely. Rule 61(i) requires a motion for postconviction relief to be filed within one year of a final order of conviction.²¹ Defendant’s present motion was filed more than eight

¹⁸ *State v. Bridgers*, 988 A.2d 939, 945 (Del. Super., 2007).

¹⁹ *Id.*

²⁰ As Defendant has failed to meet the pleading requirements of Super. Ct. Crim. R. 61(d)(2)(i) and (ii), Defendant is not entitled to relief under Super. Ct. Crim. R. 61(i)(5).

²¹ Super. Ct. Crim. R. 61(i)(1).

(8) years after the judgment became final and was therefore filed well outside the applicable one year limit and is time-barred.²²

16. Finally, Defendant's motion is procedurally barred because Defendant failed to raise all bases for relief in a first timely filed motion for postconviction relief and has failed to establish exceptional circumstances for relief (i.e. discovery of new evidence or a new rule of constitutional law). Nor has Defendant established cause for relief from the procedural bar requiring all claims to have been raised at trial or on direct appeal.²³ Likewise, as set forth above, the Supreme Court has already held that Defendant's basis for relief was previously formally adjudicated.²⁴ The Superior Court has already held, and the Supreme Court has already affirmed, that Defendant's claim challenging the Robbery First Degree charge as to victim Tiempos is barred. Defendant's attempt to re-assert this same claim again is now procedurally barred as previously adjudicated.²⁵

17. Even if Defendant's claims are considered anew here as ineffective assistance of counsel claims, they would likewise fail. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's

²² To the extent Defendant asserts that the *Bridgers* decision affects his case, Defendant's motion is still untimely as having been filed more than one (1) year after the decision was issued. Super. Ct. Crim. R. 61(i)(1).

²³ Super. Ct. Crim. R. 61(i)(3).

²⁴ *Mathis v. State*, Del. Supr., No. 147, 2010, Ridgely, J., (June 2, 2010) (Order), at *3.

²⁵ Superior Court Criminal Rule 61(i)(4) bars any claims that were formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal or in a postconviction proceeding.

representation fell below an objective standard of reasonableness and that but for the errors, there is a reasonable probability that the outcome of the proceedings would have been different.²⁶ Defendant must overcome a strong presumption that counsel's conduct was reasonably professional under the circumstances.²⁷ Defendant claims that counsel was ineffective for having failed to file a motion to acquit relating to the Robbery First Degree charge and for not raising the issue on appeal. However, the *Bridgers* decision that Defendant relies on was available to both the Superior Court and the Supreme Court during the Defendant's post-conviction motions and appeals and the courts have already determined that Defendant has not established a basis to overturn the conviction. As such, Defendant has not established that either prong of the *Strickland* test has been met. Defendant has not established deficient conduct nor has he established alleged prejudice as a result thereof. He has not established that the outcome of the proceedings would have been different if a motion to acquit had been filed.

18. Defendant has not established any prejudice to his rights and/or cause for relief. Defendant had time and opportunity to raise any issue presented herein in a timely filed postconviction motion as well as on appeal. There is no just reason for Defendant's delay and Defendant has failed to justify reconsideration of the issues.

²⁶ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Hitchens v. State*, 757 A.2d 1278 (Del. 2000).

²⁷ *State v. Wright*, 653 A.2d 288, 293-94 (Del. Super. 1994) (citations omitted).

Having been provided with a full and fair opportunity to present any issues by motion to the trial court and on appeal, and in a timely filed motion for postconviction relief, any attempt at this time to state, re-state or re-couch the claims is procedurally barred. As Defendant has failed to meet the pleading requirements for proceeding with the present motion, the motion should be summarily dismissed.

Defendant's Motion for Evidentiary Hearing

19. Defendant filed a motion requesting an evidentiary hearing to ascertain “whether the State met [its] burden relative to the offense charged so as to determine the reliability, validity and legality of the judgment of conviction of the Defendant...”²⁸

20. Pursuant to Superior Court Criminal Rule 61(h)(3), if it appears that an evidentiary hearing is not desirable, the court shall make disposition of the motion as justice dictates. Defendant's argument in support of an evidentiary hearing is an attempt to re-try the evidence presented against him and to force the State to once again meet its burden of proof relating to the robbery charge. Following a full, comprehensive and thorough review of the evidentiary record, Defendant's allegations were either reasonably discounted as not supported by the record or not

²⁸ Docket No. 56 at p. 2.

material to a determination of Defendant's claim. It does not appear that an evidentiary hearing will aid in the resolution of this motion and is denied.

Defendant's Motion for Appointment of Counsel

21. Along with the above motions, Defendant filed a Motion for Appointment of Counsel.²⁹ In his motion, Defendant incorrectly states that this is his "first" petition for postconviction relief and that the ineffective assistance of counsel claims are raised herein in the "first instance since trial." The record clearly demonstrates that Defendant has raised the issues herein on multiple occasions or had the opportunity to raise these claims by motion or on appeal, including his first motion for postconviction relief filed in 2009.

22. When a second or subsequent postconviction motion is presented, the judge may appoint counsel only if the judge determines that the motion satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.³⁰ As set forth above, Defendant's present motion does not satisfy the pleading requirements of Superior Court Criminal Rule 61(d)(2)(i) or (2)(ii). Therefore, the request for appointment of counsel should be denied.

For all the foregoing reasons, Defendant's Motion for Postconviction Relief should be summarily dismissed, Defendant's Motion for Evidentiary Hearing

²⁹ Docket No. 57.

³⁰ Super. Ct. Crim. R. 61(e)(4).

should be denied and Defendant's Motion for Appointment of Counsel should be denied.

IT IS SO RECOMMENDED.

Commissioner Katharine L. Mayer

oc: Prothonotary
cc: Joseph Grubb, Esquire
Tyrone Mathis