IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
v.	)	I.D. No. 1009014476
KEVIN RASIN,	)	
Defendant	)	

Submitted: August 17, 2017
Decided: November 14, 2017

On Defendant's Motion for Postconviction Relief. **DENIED.**

ORDER

Maria T. Knoll, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Anthony A. Figliola, Jr., Esquire, Greto Law, Wilmington, Delaware, Attorney for Defendant.

COOCH, R.J.

This 14th day of November, 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On March 13, 2012 a jury found Kevin Rasin ("Defendant") guilty of Gang Participation, Murder First Degree, Attempted Murder Frist Degree, two counts of Conspiracy Second Degree, two counts of Possession of a Firearm by a Person Prohibited, and Possession of a Firearm During the Commission of a Felony.[1] The Supreme Court of

[1] App. To State's Resp. to Def.'s Mot. for Postconviction Relief at 32.

Delaware affirmed Defendant's conviction on direct appeal on September 25, 2013.[2]

2. Defendant filed a *pro se* Motion for Postconviction Relief on September 18, 2014.[3] This Court ordered that counsel be appointed to represent Defendant.[4] Defendant's appointed counsel filed an amended motion for postconviction relief on October 31, 2016.[5]

3. Defendant, through appointed counsel, raises two[6] claims of ineffective assistance of counsel in his Amended Motion for Postconviction Relief:

> 2. Counsel was ineffective for not requesting either a mistrial or an inquiry of the [j]ury [p]anel as to [p]rejudice based upon Juror 11['s] failure to disclose the [m]urder of her son.
>
> 3. Counsel was ineffective for failing to object to [the] State'[s] vouching in closing argument. [7]

4. Defendant's trial counsel's brief affidavit responding to the two allegations of ineffective assistance of counsel reads *in toto*:

> I was defendant Rasin's trial counsel. I have received a copy of Rasin's amended motion for postconviction relief, asserting my ineffectiveness.
>
> Rasin claims, first, that I failed to object to co-conspirators' statements and/or "introduction of plea agreements not subject to cross-examination." I do not recall Rasin's trial with enough

[2] *Taylor & Rasin v. State*, 76 A.3d 791 (Del. 2013) (holding that the Delaware gang participation statute was not unconstitutionally vague and that the Superior Court did not abuse its discretion in allowing a rap video to be played for the jury, among other issues).
[3] Def.'s Mot. for Postconviction Relief.
[4] State's Resp. to Def.'s Mot. for Postconviction Relief at 3.
[5] Def.'s Am. Mot. for Postconviction Relief.
[6] Defendant originally raised four total claims. However, the Delaware Supreme Court's decision in *Phillips v. State*, 154 A.3d 1130 (Del. 2017) mooted Defendant's first and fourth claims. This Court will therefore not address the contentions that "1. Counsel was ineffective for not challenging the admission of plea agreements and statements of co[-]conspirators as a violation of U.S. Const. Amend VI" or "4. Counsel was ineffective for failing to challenge the Court's [r]uling regarding the unavailability of [a co-defendant]." Def.'s Am. Mot. for Postconviction Relief at 2.
[7] Def.'s Am. Mot. for Postconviction Relief at 2.

> specificity to appreciate the exact plea agreements to which Rasin refers. Nevertheless, I agree with the principle that defense counsel has an obligation to object to the introduction of co-conspirator plea agreements when said agreements are not accompanied by relevant testimony from said co-conspirators. A failure to do so strikes me as ineffective.
>
> I also cannot recall the particular disclosure made by juror 11, but agree that follow-up should have been conducted with anyone to whom juror 11 spoke. I cannot explain my failure to request the same.
>
> I leave it to the Court's judgment whether improper prosecutorial vouching occurred, but I agree with the point that if I failed to object to the State's vouching for the key witness in its case, that was ineffective.
>
> I have no recollection of the issue of Mill's unavailability and cannot comment on same.[8]

5. Rule 61 is the remedy for defendants "in custody under a sentence of this court seeking to set aside the judgment of conviction . . . ."[9] This Court "must first consider the procedural requirements of Rule 61 before addressing any substantive issues."[10] The procedural "bars" of Rule 61 are: timeliness, repetitiveness, procedural default, and former adjudication.[11] A motion is untimely if it is filed more than one year after the conviction is finalized or defendant asserts a new constitutional right that is retroactively applied more than one year after it is first recognized.[12]

6. A motion is repetitive if it is a "second or subsequent motion."[13] The procedural default bar applies where grounds for relief are not raised "in the proceedings leading to the judgment of conviction," unless defendant can show "cause for relief" and "prejudice from [the]

[8] Aff. of Def.'s Trial Counsel, James J. Haley, Jr., March 7, 2017.
[9] Del. Super. Ct. Crim. R. 61.
[10] *State v. Stanford*, 2017 WL 2484588, at *2 (Del. Super. Ct. June 7, 2017) (quoting *Bradley v. State*, 135 A.3d 748, 756 (Del. 2016)).
[11] Del. Super. Ct. Crim. R. 61(i); *Stanford*, WL 2484588, at *2.
[12] Del. Super. Ct. Crim. R. 61(i)(1).
[13] Del. Super. Ct. Crim. R. 61(i)(2).

violation."[14] Grounds for relief that have been formerly adjudicated in the case including "proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus hearing" are barred.[15] "If any of these bars apply, the movant must show entitlement to relief under Rule 61(i)(5)".[16] The contentions in a Rule 61 motion must be considered on a "claim-by-claim" basis.[17]

7. Before it may address the merits of Defendant's Fourth Motion for Postconviction Relief, this Court must analyze the procedural bars of Superior Court Criminal Rule 61(i).[18] If one or more of the procedural bars applies, then this Court will not proceed to consider the merits of Defendant's postconviction claim.[19]

8. Defendant's motion does not fall into any of the four procedural bar categories of Rule 61(i). As such, it is not procedurally barred. This Court will therefore proceed to consider the merits of Defendant's Motion for Postconviction Relief.

9. A successful ineffective assistance of counsel requires that a defendant demonstrate "that counsel's representation fell below an objective standard of reasonableness[]"[20] and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[21] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[22] "Because of the difficulties inherent in making the evaluation [of the trial attorney's performance], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

[14] Del. Super. Ct. Crim. R. 61(i)(3).
[15] Del. Super. Ct. Crim. R. 61(i)(4).
[16] *Stanford*, WL 2484588, at *2.
[17] *State v. Reyes*, 155 A.3d 331, 342 n.15 (Del. 2017) (holding that "Rule 61 analysis should proceed claim-by-claim, as indicated by the language of the rule.").
[18] *Brathwaite*, 2014 WL 4352170, at *2.
[19] *Id.*
[20] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
[21] *Id.* at 694.
[22] *Id.*

overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[23]

10. Defendant's two ineffective assistance of counsel claims fail as they do not meet the *Strickland* standard.

Juror Issue

11. First, Defendant argues that there was error at trial because "the remaining jury [members were] not questioned[]" following Juror No. 11 telling another juror that her brother had been murdered 27 year prior. Defendant's argument reads *in toto*:

> On February 14, 2012, Juror 11 came forward and acknowledged that she had failed to notify the [C]ourt during [j]ury selection that her brother was killed. The juror candidly expressed that she could be fair and impartial[.] Counsel did not request her removal. Counsel however was ineffective for not following up on her acknowledgment that she had given the information to a fellow juror. The court did not follow up this issue. Counsel should have requested that the entire panel be questioned regarding, whether they had been told of Juror 11's situation and whether it would affect their ability to remain impartial.[24]
>
> The issue is not that the defense failed to ask for the removal of Juror 11[.] [T]he error is that the remaining jury panel was not questioned. Juror 11 admitted talking to another juror[.] [T]he Court never questioned that juror regarding his or her ability to be fair and impartial. Also the record was never established whether the juror who received the information from Juror 11 ever communicated the information to other jurors. Counsel for Rasin should have requested and the Trial Court should have conducted further *voir dire* with the entire jury panel to satisfy whether Rasin had an impartial jury. Without full questioning of the entire [j]ury panel[,] it was impossible to determine whether Rasin had an impartial jury.[25]

[23] *Id.* at 689 (quoting *Michel v. State of La.*, 350 U.S. 91, 101 (1955)).
[24] The entire jury "panel" at that point had been dismissed.
[25] Def.'s Am. Mot. for Postconviction Relief at 5-6.

While Defendant's challenge is under the guise of ineffective assistance of counsel for failure to request a mistrial or further inquiry into the potential juror bias, he also contends that "the Trial Court should have conducted further *voir dire* with the entire jury panel to satisfy whether [Defendant] had an impartial jury."[26] Neither argument has merit.

12. The Court, the State, and counsel for co-defendants met with Juror No. 11. The record reads *in toto*:

> JUROR ENTERS CONFERENCE ROOM
>
> THE COURT: Good morning, Juror Number 11.
>
> THE JUROR: Good morning, everyone.
>
> THE COURT: I asked the bailiff to have you come in because I gather you said something to him yesterday about something your brother [apparent omission by the court reporter].
>
> THE JUROR: Well, I have – I had two brothers, and coming in there yesterday all the lights it like makes me get confused and stuff, and I didn't tell you that I had a brother killed before, shot and killed. So I wanted to let you all know that because I forgot to tell you yesterday.
>
> THE COURT: When was that?
>
> THE JUROR: About 27 years ago.
>
> THE COURT: Briefly, what were the circumstances?
>
> THE JUROR: He was at a bouncer at a club and the person had to be told to leave and they came back in.
>
> THE COURT: Was this in Wilmington?
>
> THE JUROR: No. In Jersey.
>
> THE COURT: Is there anything about that experience with your brother 27 years ago that would make it difficult for you to be a fair and impartial juror in this trial?
>
> THE JUROR: No, because the person did go to court and they went to court and everything and he got locked up and everything for the situation.
>
> THE COURT: Do you know what – I was going to ask you what the disposition was. He went to Court, was he sentenced to jail for some period of time?
>
> THE JUROR: Yes.
>
> THE COURT: Would you have any bias because of this situation even slight in favor of the prosecution in this case because your brother was a victim? Would you have any bias in favor of the State because of that experience?

[26] Def.'s Am. Mot. for Postconviction Relief at 6.

THE JUROR: No, because, like I said, I have been on both sides of the fence, so I know as far as what my one brother what his situation and then with that and the courts did what they had to do, you know, in both cases.

THE COURT: Do you believe, then, that you could be a fair and impartial juror in this case?

THE JUROR: I feel as though I can.

THE COURT: Thank you. Please step out in the hallway for just a minute.

THE JUROR: I am going to go with what the evidence shows is what we have to deal with.

JUROR STEPS OUT OF CONFERENCE ROOM

THE COURT: Thank you.

Are there any applications? [Note: none were then made] Also, I thought her demeanor was excellent and she seems truly able to be a fair and impartial juror. We will instruct here not to talk to the juror members about this.

JUROR RE-ENTERS THE CONFERENCE ROOM.

THE COURT: First, I appreciate your coming forward, and you will remain as a juror on the case. But I do instruct you not to mention to any other jurors about the situation. Did you mention this situation to any other juror?

THE JUROR: No, only to one individual in there.

THE COURT: You did mention to it one other juror?

THE JUROR: Yes, I did.

THE COURT: What did you say?

THE JUROR: I just told her what the situation was, that I wanted to talk to you because of that situation. I was telling her I need to talk to you, let you know about that. That's all I told her.

THE COURT: What was her response?

THE JUROR: She didn't say nothing. She don't know me or – she didn't know.

THE COURT: Now, in the future, if anything comes up, don't talk to any other juror about anything.

THE JUROR: I didn't even think about that situation because I guess it wasn't pertaining to the case so I didn't think.

THE COURT: Just if that other juror speaks to you or wants to know anything say I am not allowed to discuss it.

THE JUROR: Exactly.

THE COURT: Please go back to the jury room. We will get started. Which juror was it that you spoke to?

THE JUROR: I don't know her name or number.

THE COURT: Female juror?

THE JUROR: The lady by me with the short hair.

THE COURT: If we need to we will figure that out.

JUROR LEAVES THE CONFERENCE ROOM

> THE COURT: She did mention it to another juror. Any applications?
>
> [COUNSEL FOR DEFENDANT]: None from [Defendant], Your Honor.
>
> [COUNSEL FOR CO-DEFENDANT]: None from [co-defendant].
>
> THE COURT: Under the circumstances there is no need to inquire further.[27]

13. Defendant has failed to demonstrate that by failing to request a mistrial or further inquiry into the Juror No. 11 issue trial counsel was ineffective pursuant to the two-prong *Strickland* test. Defendant's counsel and counsel for the co-defendant failed to object to Juror No. 11's explanation of her potential bias and that she mentioned it to another member of the jury.[28] The apparent incident had occurred 27 years earlier. The Court observed that Juror No. 11's demeanor was "excellent."[29] As any prejudice to the jury would have affected both defendants, the fact that neither counsel objected is evidence that their actions did not fall below an objective standard of reasonableness.

14. Also, Defendant has failed to show that counsel's actions were dispositive to Defendant's conviction, that is, that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[30] Defendant merely proffers that "it was impossible to determine whether [Defendant] had an impartial jury.[31] Without more, mere conjecture of juror bias is insufficient to warrant additional inquiry by the court.[32] Defendant's ineffective assistance of counsel claim as to the Juror No. 11 issue is thus unavailing.

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[27] App. To State's Resp. to Def.'s Mot. for Postconviction Relief at 33-34.

[28] App. To State's Resp. to Def.'s Mot. for Postconviction Relief at 34

> THE COURT: She did mention it to another juror. Any application?
> [COUNSEL FOR DEFENDANT]: None from [Defendant], Your Honor.
> [COUNSEL FOR CO-DEFENDANT]: None from [co-defendant].

The State also made no application for any further action by the Court.

[29] *Id.*

[30] *Strickland*, 466 U.S. at 694.

[31] Def.'s Am. Mot. for Postconviction Relief at 6.

[32] *Lovett v. State*, 516 A.2d 455, 475 (Del. 1986).

15. Moreover, Defendant's argument that this Court has an affirmative duty to inquiry into possible impartiality of the jury *sua sponte* when counsel for both of the defendants failed to request, as did also the State, it is likewise unavailing. "The Court will not displace trial counsel's prudent decisions."[33] The standard in Delaware is "that unless a defendant can prove a reasonable probability of juror taint due to egregious circumstances that are inherently prejudicial, he will have to prove actual prejudice."[34] "Egregious circumstances" are "circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of defendant."[35] The "egregious circumstances" test places the burden on the defendant to demonstrate prejudice, not on the court. Thus, that "the Court never questioned th[e] juror"[36] or "the entire panel[,]"[37] is irrelevant as Defendant cites no case law establishing a *sua sponte* duty to do so.[38] This Court has "broad discretion in deciding whether a case must be retried or the juror summoned and investigated due to alleged exposure to prejudicial information or improper outside influence."[39] Thus, Defendant's ineffective assistance of counsel claim as to the Juror No. 11 issue is without merit.

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[33] *State v. Neal*, 2013 WL 1871755, at *9 (Del. Super. Ct. May 1, 2013), *aff'd*, 80 A.3d 935 (Del. 2013) (holding that trial counsel may choose whether to pursue inquiry into juror bias without requesting the Court to do so).

[34] *Massey v. State*, 541 A.2d 1254, 1259 (Del. 1988).

[35] *Id.* at 1257.

[36] Def.'s Am. Mot. for Postconviction Relief at 6.

[37] Def.'s Reply in Support of Am. Mot. for Postconviction Relief at 2.

[38] Courts have recognized the "importance of questioning jurors whenever the integrity of their deliberations is jeopardized." *Baird v. Owczarek*, 93 A.3d 1222, 1231 n.44 (Del. 2014) (quoting *Gov't of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 578 (3d Cir. 1994)). However, the nature of the juror prejudice is typically far more extreme. *See, e.g.*, *U.S. v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) ("In cases where a bribe or a threat to a juror was communicated to the other jurors, the trial judge must fully examine the effect of the threat on the remaining jurors.") (emphasis omitted); *Baird*, 93 A.3d at 1230 ("An investigation is mandatory when there is an allegation of internet research by a juror."); *Jackson v. State*, 374 A.2d 1, 2 (Del. 1977) (holding that the administration of justice is compromised when a juror deliberately fails to disclose material information during *voir dire*).

[39] *Sheeran v. State*, 526 A.2d 886, 897 (Del. 1987) (emphasis omitted).

Vouching Issue

16. Second, Defendant argues that counsel was ineffective for failing to object to the State's alleged vouching during closing argument. "Improper vouching occurs when the prosecutor implies that he possesses some personal superior knowledge-beyond that logically inferred from the evidence presented at trial-that the witness has testified truthfully."[40] Because Defendant fails to demonstrate how any of the alleged instances constitute vouching—much less that they rise to the *Strickland* level of ineffective assistance of counsel—this argument fails.

17. The State's use of the word "lie" was for the purpose of responding to Defendant's counsel's attacks on the credibility of the State's witnesses. "[T]he prosecution may fairly attempt to neutralize strident defense arguments in the same manner as they were made."[41] As the State was responding to Defendant's counsel's use of the word liar, the State's use of the word was not improper.[42]

18. Further, Defendant's argument that the State's use of the first person in its rebuttal argument is "dangerous" because "there is no way to determine the effect on the jury" is meritless because it was not impermissible vouching that meets the burden of ineffective assistance of counsel in *Strickland*.[43] Delaware Courts caution against use of the first person in arguments.[44] However, the spirit behind the encouraged avoidance of "I" or "we" is to prevent attorneys from submitting their personal beliefs to the jury for consideration.[45] The State's use of the first person here did not upset the purpose of this policy. Therefore, Defendant's ineffective assistance of counsel claim as to the vouching issue is without merit.

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[40] *Miller v. State*, 750 A.2d 530 (Del. 2000).
[41] *Hooks v. State*, 416 A.2d 189, 205 (Del. 1980).
[42] *See Torres v. State*, 979 A.2d 1087, 1096 (Del. 2009) ("We have held that the use of the word 'lie' should be used sparingly when describing the testimony of a witness. . . . Nevertheless, there is no blanket prohibition on the use of the word 'lie.'").
[43] Def.'s Reply in Support of Am. Mot. for Postconviction Relief at 2.
[44] *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987) (holding that "arguments in the first person are extremely dangerous and should be assiduously avoided.")
[45] *Id.*

Therefore, Defendant's Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary
Investigative Services