

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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| STATE OF DELAWARE |) | ID. No. 1403008516 |
| |) | In and for Kent County |
| v. |) | |
| |) | RK14-03-0599-01 Burglary 2 nd (F) |
| JEFFREY W. THOMAS, |) | RK14-03-0600-01 Theft MV (F) |
| |) | RK14-03-0602-01 Theft<\$1500 (M) |
| Defendant. |) | RK14-05-0002-01 Conspiracy 2 nd (F) |

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Zachary A. George, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Jeffrey W. Thomas, *Pro se*

FREUD, Commissioner
October 11, 2017

The defendant, Jeffrey W. Thomas (“Thomas”), was found guilty on January 8, 2015 by a jury of one count of Burglary in the Second Degree, 11 *Del. C.* § 825; one count of Theft of a Motor Vehicle, 11 *Del. C.* § 841A; one count of Conspiracy in the Second Degree, 11 *Del. C.* § 512 ; and one count of Theft, 11 *Del. C.* § 841. An Investigative Services Office report was ordered. On March 3, 2015 the State

filed a motion to declare Thomas an habitual offender pursuant to 11 *Del. C.* § 4214(a). The Court granted the State's motion and declared Thomas an habitual offender. On March 12, 2015 Thomas was sentenced to a total of twenty-two years incarceration as an habitual offender, suspended for probation after serving twenty-one and a half years for varying levels of probation.

A timely Notice of Appeal to the Delaware Supreme Court was filed. Thomas's counsel filed a brief and motion to withdraw pursuant to Supreme Court Rule 26[©]. In the motion to withdraw, appellate counsel represented that he conducted a conscientious review of the record and concluded that no meritorious issues existed. By letter, counsel informed Thomas of the provisions of Rule 26[©] and attached a copy of the motion to withdraw and accompanying brief. Thomas was informed of his right to supplement his attorney's presentation. Thomas, *pro se*, raised eight issues for appeal for the Supreme Court to consider, which the Supreme Court summarized as follows:

(7) Thomas fairly raises the following eight points for the Court's consideration on appeal: (i) the Superior Court erred in allowing Detective Toto to testify about what Thomas said during the videotaped interview; (ii) the Superior Court should have given a jury instruction under 11 *Del. C.* § 274; (iii) Thomas did not receive adequate notice of the State's habitual offender motion; (iv) the State failed to preserve evidence; (v) the indictment was defective; (vi) Thomas's statement to police was not knowing, intelligent, and voluntary; (vii) Thomas was denied the right to confront Heath, his co-defendant; and (viii) Thomas should not have been declared a habitual

offender because his New Jersey convictions for third degree burglary were not qualifying predicate convictions.¹

The Supreme Court granted the State's motion to affirm as to all of Thomas's claims.² Next, Thomas, *pro se*, filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61. In his motion, Thomas raises one ground for alleging ineffective assistance of counsel in a variety of ways.

FACTS

The following is a summary of the facts as noted by the Superior Court in its opinion on Thomas's Direct Appeal:

(3) The trial record fairly reflects that, on March 8, 2014, Dover police responded to a report of a burglary and car theft. The victim lived alone in a first floor apartment on Division Street. She told police that, sometime after she went to sleep the previous evening, someone had entered her apartment and taken her computer, cell phone, wallet, and car keys, among other things. Her car, a 2005 Nissan Sentra, was missing from where she had parked it outside her apartment. Later that morning, the victim discovered that her credit card had been used at a nearby convenience store and a Burger King restaurant. After interviewing witnesses and reviewing surveillance evidence from the two businesses, the police were able to develop Monica Heath and Thomas as suspects. At trial, the victim testified that the day before the burglary, Thomas, whom she did not

¹ *Thomas v. State*, 2015 WL 9265084, at *2 (Del. Supr.).

² *Id.* at *4.

know, had helped her carry groceries into her apartment. The victim never informed the police about this encounter before trial.

(4) The investigating officer, Detective Toto, interviewed Thomas on March 12, 2014 at the police station. The interview was recorded, but the recording quality was poor. At trial, Detective Toto testified that Thomas told him that he and Heath went to the apartment on Division Street and saw the victim sleeping in her bed. Thomas lifted Heath up through an open window, and Heath unlocked the front door of the apartment to let Thomas in. Thomas took the victim's car keys. The recording of Thomas's interview was admitted at trial without objection.

(5) Thomas testified in his own defense at trial. He admitted lifting Heath up through the window. He also admitted that he knew the apartment did not belong to Heath. He asserted, however, that he had never entered the apartment and that Heath drove off in the victim's car alone. He further denied that he had ever been in the apartment or helped the victim with her groceries the day before the burglary.³

THOMAS'S CONTENTIONS

In his motion and amended motion, Thomas raises essentially one ground [add with subparts?] for relief captioned under "Grounds for Ineffective Assistance of

³ *Thomas*, 2015 WL 9265084, at *1.

Counsel:” In its response the State summarizes Thomas’s claim as follows: ⁴

- Ground one: Trial counsel failed to conduct general trial preparation and made errors at trial;
- Ground two: Trial counsel failed to call a co-defendant as a witness at trial;
- Ground three: Trial counsel failed to address “accomplice liability” at the prayer conference;
- Ground four: Collusion between trial counsel and the prosecutor;
- Ground five: Improper habitual sentencing; and
- Ground six: The cumulative effect of trial counsel’s ineffective acts warrants a new trial.

DISCUSSION

Under Delaware law, this Court must first determine whether Thomas has met the procedural requirements of Superior Court Criminal Rule 61(1) before it may consider the merits of his postconviction relief claim.⁵ Under Rule 61, postconviction

⁴ Thomas’s motion and amended motion are less than clear in outlining his contentions. The State has done an admirable job in summarizing the claims.

⁵ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

claims for relief must be brought within one year of the conviction becoming final.⁶ Thomas's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the claims raised in his motion. As this is Thomas's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for the procedural fault and (2) prejudice from a violation of the movant's rights.⁷ The bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim or miscarriage of justice stemming from a constitutional violation that "undermines the fundamental legality, reliability, integrity or fairness of the proceeding leading to the judgment of conviction."⁸

To some degree Thomas's second, third and fifth grounds for relief are simply restatements of the arguments he previously raised in his direct appeal. Rule 61(i)(4) bars any ground for relief that was formerly adjudicated unless reconsideration of the claim is warranted in the interest of justice.⁹ Thomas raised these claims before and the Supreme Court found them meritless. Thomas has made no attempt to argue why

⁶ Super. Ct. Crim. R. 61(i)(1).

⁷ Super. Ct. Crim. R. 61(i)(3).

⁸ Super. Ct. Crim. R. 61(i)(5).

⁹ Super. Ct. Crim. R. 61(i)(4).

reconsideration of these claims is warranted in the interest of justice. The interest of justice exception of Rule 61(i)(4) has been narrowly defined to require that the movant show that “subsequent legal developments have revealed that the trial court lacked the authority to convict or punish” him.¹⁰ Thomas has made no attempt to demonstrate why this claim should be revisited. This Court is not required to reconsider Thomas’s claim simply because it is “refined or restated.”¹¹ For this reason, these grounds for relief should be dismissed as previously adjudicated under Rule 61(i)(4).

Thomas’s remaining three claims, however, are premised to some degree, on allegations of ineffective assistance of counsel. To the extent that Thomas’s second, third and fifth claims are newly raised they also allege ineffective assistance of counsel. These types of claims are not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Thomas, allege ineffective assistance of counsel in order to overcome the procedural default.

However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are

¹⁰ *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996) (quoting *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)).

¹¹ *Riley v. State*, 585 A.2d 719, 721 (Del. 1990).

distinct, albeit similar, standards.¹² The United States Supreme Court has held that:

[i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not “[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance”[;] [i]neffective assistance of counsel, then, is cause for a procedural default.¹³

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two part analysis enunciated in *Strickland v. Washington*¹⁴ and adopted by the Delaware Supreme Court in *Albury v. State*.¹⁵

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.¹⁶ Second, under *Strickland* the movant must show there is a reasonable degree of

¹² *State v. Gattis*, 1995 Del. Super. LEXIS 399, at *13.

¹³ *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

¹⁴ 466 U.S. 668 (1984).

¹⁵ 551 A.2d 53, 58 (Del. 1988).

¹⁶ 466 U.S. at 687-88; see *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.¹⁷ In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.¹⁸

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.¹⁹ However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."²⁰ In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis

¹⁷ 466 U.S. at 694; see *Dawson*, 673 A.2d at 1190; *Accord*, e.g., *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003); *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002); *Steckel v. State*, 795 A.2d 651, 652 (Del. 2002); *Johnson v. State*, 813 A.2d 161, 167 (Del. 2001); *Bialach v. State*, 773 A.2d 383, 387 (Del. 2001); *Outten v. State*, 720 A.2d 547, 552 (Del. 1998); *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992); *Flamer v. State*, 585 A.2d 736, 753-754 (Del. 1990).

¹⁸ See, e.g., *Outten v. State*, 720 A.2d 547, 552 (Del. 1998); *Righter v. State*, 704 A.2d 262, 263 (Del. 1997); *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *Skinner v. State*, 1994 Del. LEXIS 84; *Brawley v. State*, 1992 Del. LEXIS 417; *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989). *Accord Wells v. Petsock*, 941 F.2d 253, 259-60 (3d Cir. 1991).

¹⁹ 466 U.S. at 687.

²⁰ *Id.* at 697.

alone.²¹ Furthermore, the defendant must rebut a “strong presumption” that trial counsel’s representation fell within the “wide range of reasonable professional assistance,” and this Court must eliminate from its consideration the “distorting effects of hindsight when viewing that representation.”²²

In the case at bar, Thomas attempts to show cause for his procedural default by making merely conclusory assertions of ineffectiveness of counsel. In regards to prejudice, Thomas simply claims that the failure of counsel to raise certain issues was prejudicial. Under the circumstances of the case, Thomas’s allegations are meritless.

The Supreme Court found no error in the trial. The record indicates that Thomas’s trial attorney did in fact adequately prepare for the trial and called all appropriate witnesses at trial.²³ Thomas has utterly failed to demonstrate prejudice as a result of his counsel’s alleged failure. This failure is fatal to Thomas’s motion. His motion is therefore procedurally barred.²⁴

CONCLUSION

After reviewing the record in this case, it is clear that Thomas has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). Consequently, I

²¹ *State v. Gattis*, 1995 Del. Super. LEXIS 399, at *13.

²² 466 U.S. at 689; *Dawson*, 673 A.2d at 1190; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

²³ See Affidavit of Counsel for a complete overview of Counsel’s preparation for trial.

²⁴ See, e.g. *Wright*, i 671 A. 2d at 1356; *Wright v. State*, 1992 Del LEXIS 62; *Brawley v. State*, 1992 Del. LEXIS 417.

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recommend that Thomas's postconviction motion be *denied* as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and Rule 61(i)(4) as previously adjudicated on direct appeal.

/s/ Andrea M. Freud

Commissioner

AMF/dsc