

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
 v.) I.D. # 9604017809
)
 CRAIG ZEBROSKI,)
)
 Defendant.)

Submitted: June 12, 2018
Decided: September 4, 2018

Upon Zebroski's Motion for Postconviction Relief: DENIED

OPINION

Stamatios Stamoulis, Esquire, of STAMOULIS & WEINBLATT, LLC, Wilmington, Delaware, and Tiffani D. Hurst, Esquire, of the FEDERAL DEFENDER DISTRICT OF DELAWARE, Wilmington, Delaware, Attorneys for Craig Zebroski.

Elizabeth R. McFarlan, Esquire, of the STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware, Attorney for the State.

LeGrow, J.

Defendant filed his fifth motion for postconviction relief after the Superior Court vacated his capital sentence under the Delaware Supreme Court's decisions in *Rauf v. State*¹ and *Powell v. State*.² Before the Superior Court ruled on his motion, Defendant appealed his new sentence to the Supreme Court. In affirming Defendant's life sentence, the Supreme Court expressly rejected most of the arguments raised in Defendant's postconviction motion. The remaining issues require this Court to consider whether a defendant may establish a strong inference of actual innocence with evidence purportedly negating his intent to commit a crime. Because innocence of intent does not constitute actual innocence, Defendant's motion does not satisfy the actual innocence exception to Rule 61's procedural bars. Accordingly, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

The events underlying this motion occurred on April 25, 1996, when Craig Zebroski and his friend, Michael Sarro, robbed a gas station in New Castle. During the robbery, Zebroski threatened the attendant and demanded the attendant open the cash register. When the attendant failed to respond, Zebroski shot him in the forehead, killing him. In the guilt phase of the trial, the jury found Zebroski guilty of intentional killing and felony murder. During the penalty phase, the jury voted nine to three to recommend a death sentence, and the Superior Court

¹ 145 A.3d 430 (Del. 2016)

² 153 A.3d 69 (Del. 2016).

ultimately sentenced Zebroski to death. The Supreme Court affirmed Zebroski's conviction and sentence on direct appeal.

In *Rauf v. State*,³ the Delaware Supreme Court held Delaware's capital punishment scheme violated the Sixth Amendment to the United States Constitution. In *Powell v. State*,⁴ Court held *Rauf* applied retroactively to previous convictions. In view of *Rauf* and *Powell*, this Court vacated Zebroski's death sentence on March 16, 2017. The next day, Zebroski filed a motion for postconviction relief (the "Motion").

Zebroski raised three arguments in support of his Motion. First, Zebroski argued he was entitled to a new sentencing proceeding because the Supreme Court's decision in *Rauf* invalidated 11 *Del. C.* § 4209 in its entirety, including both the death penalty provision and the alternative mandatory life sentence. Section 4209(a) provides "[a]ny person who is convicted of first-degree murder . . . shall be punished by death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction."⁵ The rest of Section 4209 details the capital sentencing procedures. Zebroski argued the Supreme Court's decision in *Rauf* invalidated Section 4209(a) along with the capital sentencing procedures because the Court held the section provisions were

³ 145 A.3d 430 (Del. 2016).

⁴ 153 A.3d 69 (Del. 2016).

⁵ 11 *Del. C.* § 4209(a).

not severable. Zebroski therefore argued his life imprisonment sentence is unconstitutional under *Rauf*.

Second, Zebroski argued imposing a mandatory life sentence without considering a defendant's age violated the Eighth Amendment of the United States Constitution because he only was eighteen years old when he committed the acts underlying his conviction. Zebroski contended new neurological studies have proven eighteen-year-old brains have not fully developed and therefore he was unable to control his impulses at the time of the robbery. Failing to take his age into account, Zebroski argued, constituted cruel and unusual punishment.

Finally, Zebroski contended he was entitled to a new trial because his sentence violated his right to due process under the Fourteenth Amendment as well as his right to effective assistance of counsel under the Sixth Amendment. Zebroski maintained his due process rights were violated because his trial counsel would have employed a different trial strategy had he known Delaware's capital punishment scheme would be held unconstitutional. Zebroski claimed his trial counsel was ineffective because counsel failed to raise a state of mind defense to his first-degree murder charge. Zebroski also argued his state of mind defense proves he actually is innocent of first-degree murder.

Before the Court ruled on the Motion, Zebroski moved for resentencing so he could be reclassified. The Court sentenced Zebroski to life imprisonment

without benefit of probation or parole. Zebroski then appealed the new sentence and the Superior Court stayed the Motion.

On appeal, Zebroski largely repeated the arguments raised in his Motion, but asked the Supreme Court not to consider the substance of his actual innocence and ineffective assistance of counsel arguments. The Court rejected Zebroski's new trial request, upholding the validity of Section 4209(a)'s alternative life sentence.⁶ The Court noted that, under *Rauf*, Section 4209(a)'s alternative punishment of life without parole remained valid as it was severable from the capital punishment scheme.⁷ The Court clarified that the *Rauf* decision only held Section 4209's constitutionally-sound capital punishment provisions were not severable from the constitutionally-infirm capital punishment provisions.⁸

The Court also rejected Zebroski's Eighth Amendment argument, holding it would not depart from the United States Supreme Court's decision in *Roper v. Simmons*,⁹ which upheld eighteen as the constitutional age-of-majority.¹⁰ The Court noted the rationale in *Roper* was based on "society's collective judgment about when the rights and responsibilities of adulthood should accrue."¹¹ Zebroski's neuroscience-based arguments therefore were irrelevant. Finally, the

⁶ *Zebroski v. State*, 179 A.3d 855, 859-60 (Del. 2018).

⁷ *Id.* at 860.

⁸ *Id.* at 859.

⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁰ *Id.* at 861 (citing *Roper v. Simmons*, 543 U.S. 551 (2005)).

¹¹ *Id.* at 862.

Court held Zebroski's due process argument had no legal basis.¹² The Court noted that Delaware never has vacated a defendant's conviction when the state's capital punishment scheme was invalidated. Accordingly, the Supreme Court affirmed Zebroski's sentence.

After the Supreme Court affirmed Zebroski's sentence, this Court asked the parties whether the Supreme Court's decision mooted Zebroski's Motion. Zebroski maintains the substance of his actual innocence and ineffective assistance of counsel arguments were not addressed by the Supreme Court and therefore his Motion is not moot. Zebroski contends he actually is innocent of first degree murder. Zebroski argues new evidence regarding his traumatic and abusive childhood as well as his dependence on drugs and alcohol negated his state of mind and therefore "establishes his innocence of first degree murder."¹³ Additionally, Zebroski claims his trial counsel was ineffective by failing to raise the state of mind defense.

ANALYSIS

Because Zebroski previously has filed several motions for postconviction relief, he must overcome Rule 61's bar for second or subsequent motions. Rule 61(d)(2)(i) provides, in relevant part:

¹² *Id.* at 863.

¹³ Mot. at 12.

A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted after a trial and the motion . . .

(i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted¹⁴

Under Rule 61, Zebroski’s Motion must show new evidence exists showing he actually is innocent of the facts underlying the charges of which he was convicted. Zebroski’s ineffective assistance of counsel claims procedurally will be barred if he fails to prove actual innocence.

Zebroski argues he actually is innocent of first degree murder because he did not have the state of mind necessary to commit murder. Zebroski maintains his traumatic childhood and dependence on drugs and alcohol negated his state of mind.

This Court recently addressed a similar actual innocence claim in *State v. Taylor*,¹⁵ where the defendant argued his traumatic childhood affected his ability to self-modulate his behavior, thereby proving he actually was innocent of the intent to commit first-degree murder. The Court rejected the defendant’s argument, holding “actual innocence requires more than innocence of intent; it requires new evidence that a person other than the petitioner committed the crime.”¹⁶ The Court

¹⁴ Super. Ct. Crim. R. 61.

¹⁵ 2018 WL 3199537 (Del. Super. June 28, 2018).

¹⁶ *Id.* at *7.

quoted the United States Supreme Court's decision in *Sawyer v. Whitley*¹⁷ to expound on the meaning of actual innocence:

A prototypical example of “actual innocence” in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions. But in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake.¹⁸

In *Taylor*, the Court concluded that “a petitioner who argues only that he lacked the requisite intent to commit a crime fails to establish a strong inference of actual innocence under [] Rule 61.”¹⁹

Here, Zebroski's Motion fails to establish a strong inference of actual innocence. Zebroski does not claim that he did not commit the acts underlying the charges of which he was convicted. Rather, he claims he lacked the necessary intent to kill his victim due to his traumatic childhood and drug abuse. Innocence of intent, however, does not establish actual innocence under *Sawyer* and *Taylor*. Zebroski therefore has failed to prove he actually is innocent of first degree murder. Accordingly, Zebroski's ineffective assistance of counsel argument procedurally is barred under Rule 61.

¹⁷ 505 U.S. 333 (1992).

¹⁸ *Id.* at 340-41.

¹⁹ *Taylor*, 2018 WL 3199537, at *7.

After Zebroski replied to the State's answer, he filed a third brief in which he argued: (i) his Motion should not be regarded as a successive motion because it is the first one filed after his resentencing; (ii) the post-2014 version of Rule 61 fails to provide adequate habeas relief; (iii) the Court should consider the substance of Zebroski's claims under *Guy v. State*; and (iv) his Motion meets the pleading requirements of Rule 61.²⁰ Zebroski failed to raise these arguments in his Motion, however, and he therefore has waived them.

CONCLUSION

For all the foregoing reasons, Zebroski's Motion for Postconviction Relief is **DENIED. IT IS SO ORDERED.**

²⁰ D.I. 278, 279.