

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	ID No. 30805884DI
)	
DENNIS A. FRAZIER,)	
)	
Defendant.)	

MEMORANDUM OPINION

Defendant was convicted of multiple counts of kidnapping and unlawful sexual intercourse first as well as related offenses for crimes he committed in 1998. His convictions were affirmed and a post conviction motion for relief was denied. Now, some 25 years after his offense, Frazier brings another motion for post conviction relief claiming, for the second time, that his counsel was ineffective. His motion is dismissed because it is procedurally barred.

Frazier's crimes were succinctly described in this court's opinion denying his first Rule 61 motion:

On the morning of August 17, 1988, Dorenda Spencer was standing at a bus stop at Fifth and Orange Streets in Wilmington, Delaware. A man wearing a white leather cap approached her and asked her for her phone number. When she refused, he produced a knife and ordered her into the car he was driving. He drove her north on I-95 and once in Claymont, Delaware, parked the car.

The car was parked near an apartment complex. Both the assailant and the victim exited the car. He removed a jeans jacket from the trunk and forced her to walk into the woods. He ordered his victim to lay on the jacket. There, through threats of physical violence, the victim was raped. The assailant then drove the victim back to Wilmington where she contacted police, and gave them a description of the vehicle and the assailant. The assailant employed no disguise during the commission of the felonies. The victim was later able to provide a police sketch artist with a detailed description of the assailant, such that an accurate composite was created.

On the morning of August 26, 1988, Linda Jenkins was waiting for a bus at Third and King Streets in Wilmington, Delaware. A man approached her, asked a few questions, then put a knife to her back and forced her to walk a few blocks to a car. He drove her to a nearby park, removed a blanket from the trunk and forced her to lay on the blanket in the nearby woods. Through threats of physical violence, he raped her. He then offered her a ride back into town; she refused. On her way out of the woods she had the presence of mind to obtain the license number of the vehicle in which she was abducted. She then proceeded to the hospital. She was able to give police the license number of the vehicle, a description of the vehicle, and a description of the assailant. The description of the assailant included

a white leather cap and penny loafers. Again, the assailant employed no disguise throughout the time he was with the victim. Through the vehicle license number, the police were able to obtain the address of the owner of the vehicle.

The same day, the police went to the address of the owner of the vehicle and were met by Frazier. Just inside the door they noticed a white leather cap and penny loafers. Frazier was arrested. During a search of the home and the suspect vehicle, the police recovered the jeans jacket and the blanket used during the commission of the crimes of August 17 and 26, 1988.

While in custody, police informed Frazier of his Miranda rights and questioned him regarding the crimes. Frazier confessed to the crimes relating to Linda Jenkins. When asked if he committed the Dorenda Spencer rape and kidnapping, he said he could not remember (because of alcohol related problems) but that it was possible.

The procedural history here is largely unremarkable. His convictions were affirmed by the Delaware Supreme Court.¹ His first motion for post conviction relief, filed in 1995, was denied by this court² and that denial was affirmed by the Supreme Court for the reasons stated in this court's 1995 opinion.³ A later motion for correction of sentence by Frazier

¹ *Frazier v. State*, 1992 WL 135149 (Del.)

² *State v. Frazier*, 1995 WL 654433 (Del. Super.)

³ *Frazier v. State*, 1996 WL 69741 (Del.)

was denied by this court and that denial too was affirmed by the Supreme Court.⁴

In his present motion Frazier contends that his trial counsel was ineffective. He claims his trial counsel was ineffective because:

1. Failed to investigate his claim he was beaten by the police.
2. Failed to investigate the reason why the FBI did not do DNA testing.
3. Failed to assert that the State had not proven all of the elements of the kidnapping counts.
4. Made improper statements in his closing argument which implied he was guilty because Frazier did not testify.
5. Failed to use the F.B.I. report to his advantage at trial.

Frazier also claims that his counsel was ineffective because the *trial judge* failed to make an adequate investigation into his pre-trial complaint that his counsel was ineffective.

⁴ *Frazier v. State*, 2003 WL 21456292 (Del.)

Frazier raised most of these claims in his 1995 motion for post conviction relief. In that motion he argued that his trial counsel was ineffective because:

1. Defense counsel failed to investigate why the FBI would not conduct DNA testing in this case;
2. The trial judge failed to make adequate inquiry into the pre-trial complaints of ineffective assistance of counsel;
3. Defense counsel failed to use the FBI report in support of defendant at trial.

The new claims concern the alleged failure to investigate a purported beating by the police,⁵ the alleged failure to argue the State had not proven all of the elements of the crime of kidnapping and the alleged failure to use the F.B.I. report to his advantage.

Criminal Rule 61(i)(4) provides that “[a]ny ground for relief that was formally adjudicated, whether in the proceedings leading to judgment of conviction, in an appeal, in a postconviction proceeding . . . is thereafter barred, unless

⁵ The trial court gave credence to the police officers’ testimony during the suppression hearing that they did not beat Frazier. Frazier’s current motion does not state what is in his medical records which supports his contention. His counsel reviewed them and saw nothing.

reconsideration of the claim is warranted in the interests of justice.” This bar is not limited to the ineffective assistance arguments previously presented by Frazier but extends to his new theories of ineffective assistance. In *State v. Wright*⁶ the defendant challenged the language used by the interrogating officer when administering the *Miranda* warnings to the defendant. Defendant’s confession was challenged in several proceedings, albeit never on the basis of the specific language used by the officer when he gave those warnings. The Supreme Court held that this argument was barred. “[A] defendant is not entitled to have a court re-examine an issue that has been previously resolved simply because the claim is refined or restated.”⁷ Frazier’s additional claims of ineffective assistance of counsel are simply an embellishment on his previously presented claim that his counsel was ineffective. The new theories are therefore barred by 61(i)(4).

Rule 61(i)(4) permits this court to reconsider previously denied claims if “warranted in the interests of justice.” This exception has been construed by the Delaware Supreme Court

⁶ 2013 WL 2302049 (Del.)

⁷ *Id.* at *3 (internal quotation marks omitted)(collecting cases)

to require “a movant must show that (1) subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him, (2) the previous ruling was clearly erroneous, or (3) there has been an important change in the factual basis for issues previously posed.”⁸ Frazier makes no such showing here, and therefore the “interest of justice” exception is not available to him.

Frazier points this court to the United States Supreme Court’s ruling in *Martinez v. Ryan*⁹ as conferring a Sixth Amendment right to counsel to a defendant in a state post-conviction proceeding when the defendant is challenging the effectiveness of trial or appellate counsel. Frazier argues in the alternative that *Martinez* amounts to an exception to procedural bars which is available to defendants pursuing state post conviction remedies. Neither is correct. *Martinez* simply held that, as a matter of equity, certain federal habeas corpus petitions from state prisoners would not be subjected to federal procedural bars if the state prisoner was not represented by counsel when the prisoner first sought to

⁸ *Guy v. State*, 992 A.2d 863, 868 (Del. 2010)(footnotes omitted)

⁹ 366 U.S. 1 (2012)

challenge the effectiveness of his trial counsel. On repeated occasions this court has rejected the notion that *Martinez v. Ryan* creates a constitutional right. In *State v. Jones*¹⁰ Judge Stokes of this court cogently summarized the now-established law:

Defendant's second ground for relief is based upon the contention that, in the case of *Martinez v. Ryan* the United States Supreme Court established a newly created right which thereby provides relief from the time bar of Rule 61(i)(1). Although in all other situations the three-year time bar noted earlier in this decision applies, if a “new right” is created, then “a defendant whose action is otherwise time barred has one year to file the motion from the date the new right was established. [quoting *Martinez*.]”

Martinez did not create a constitutional right, which is the type of “right” Rule 61(i)(1) encompasses. The United States Supreme Court's holding in *Martinez* was that “in federal habeas actions, defendants would be able to avoid procedural default in federal court due to what happened in the earlier state postconviction actions” and that holding “is limited only to that narrow procedural situation under federal law concerning *habeas corpus*.” As the Superior Court concluded in [*State v. Travis*, 2013 WL 1196332 (Del. Super.)] “[t]his cannot qualify as a ‘new right’ under Rule 61(i)(1).”¹¹

¹⁰ 2013 WL 2152198 (Del. Super.)

¹¹ *Id.* at 2-3 (footnotes omitted)

The Delaware Supreme Court has also weighed in on this issue. In *State v. Smith*¹² this court held that *Martinez v. Ryan* “does not provide a constitutional right to have effective counsel at the initial post-conviction proceedings in order to raise an ineffective assistance of counsel claim against trial counsel.” The holding in *Smith* was affirmed on appeal by the Delaware Supreme Court.¹³

Frazier raises four claims not based on the Sixth Amendment. He contends (1) his constitutional rights were violated when he allegedly stood trial on a charge for which he was not arrested; (2) the prosecution withheld evidence favorable to his defense; (3) his rights were violated when the court refused to order DNA testing of certain evidence and (4) the judge failed to respond to his motion to have DNA testing done at a private laboratory. Each of these contentions has been presented and rejected by this court in Frazier’s first motion for post conviction relief. Frazier appealed that ruling and the Supreme Court affirmed.

¹² 2012 WL 5577827 (Del. Super.)

¹³ 2012 WL 3870567 (Del.)

As discussed earlier, post conviction motions which argue claims which have previously been presented and denied are barred by Rule 61(i)(4). Frazier argues that the exception in Rule 61(i)(5) serves to preserve his claim. He is wrong—Rule 61(i)(5) does not, under its own terms, apply to claims barred by Rule 61(i)(4). Therefore these claims are also procedurally barred.

For the foregoing reasons, Frazier’s motion for relief pursuant to Rule 61 is **DISMISSED** because it is procedurally barred.

Date: June 19, 2013

John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary

cc: Defendant
Department of Justice, Wilmington, Delaware