

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

STATE OF DELAWARE)	
)	
v.)	ID No. 9811011584
)	
NUGI NICHOLS,)	
)	
Defendant.)	

Submitted: September 10, 2004
Decided: December 27, 2004

On Defendant's *Pro Se* Motion for Postconviction Relief. Denied.

ORDER

James Freebery and Francis E. Farren, Deputy Attorneys General, Wilmington, Delaware. Attorneys for the State.

Nugi Nichols, *pro se* Defendant, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware.

CARPENTER, J.

On this 27th day of December, 2004, upon consideration of Defendant's *pro se* motion for postconviction relief it appears to the Court that:

1. Nugi Nichols, ("Defendant"), has filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). At the request of the Court, Defendant's trial attorney, Raymond J. Otlowski ("Counsel"), filed an affidavit refuting the allegations of ineffective assistance of counsel. For the reasons set forth below, Defendant's motion for postconviction relief is **DENIED**.

2. A jury trial was held on February 18, 2000, and the Defendant was found guilty of Attempted Murder in the First Degree, Possession of a Firearm During the Commission of a Felony, Conspiracy in the First Degree, and Possession of a Deadly Weapon by a Person Prohibited. On May 12, 2000, this Court collectively sentenced the Defendant to 30 years of incarceration followed by supervision at Level IV, III, and II.¹

After filing an appeal on behalf of the Defendant, Counsel filed a brief and a Motion to Withdraw, pursuant to Delaware Supreme Court Rule 26(c), asserting that there were no arguably appealable issues.² The Defendant, however, raised two

¹ In reviewing the Defendant's sentence further it appears that the sentence imposed for Attempted Murder First Degree may be below the statutory requirement. The Court will forward this Order to the State for whatever action they believe is appropriate.

²*Nichols v. State*, 768 A.2d 470 (Del. 2001).

issues for the Court's consideration. Defendant claimed that (i) the State's witnesses were not credible; and (ii) there was insufficient evidence to support his conviction. The Supreme Court concluded that Defendant's claims were without merit and affirmed the judgment of the Superior Court. The mandate was issued on February 8, 2001.

3. On January 8, 2004, the Defendant filed a *pro se* motion for postconviction relief. Defendant raises the following seven grounds for relief:

- (i) Ineffective assistance of counsel for failure to file a motion for a reverse amenability hearing;
- (ii) Ineffective assistance of counsel for failure to raise question of severance and misjoinder;
- (iii) Ineffective assistance of counsel for filing a Supreme Court Rule 26(c) motion to withdraw as appellate counsel;
- (iv) Insufficient evidence to support a guilty verdict for attempted murder and related weapons offense;
- (v) Ineffective assistance of counsel for failure to file a motion for acquittal of the charge of attempted murder and related weapons offense;
- (vi) Abuse of discretion and authority by the trial court for failing to set aside the guilty verdict returned by the jury for lack of sufficient evidence to support a conviction of attempted murder and related weapons offense;
- (vii) Abuse of discretion and authority by the trial court for allowing the State to introduce evidence that should have been inadmissible.

After receiving Defendant's motion for postconviction relief, this Court ordered Counsel to submit an affidavit responding to the allegations of ineffective assistance

of counsel and it was filed on September 10, 2004.³

4. Before addressing the merits of any claims raised in a motion seeking postconviction relief, the Court must apply the rules governing the procedural requirements of Rule 61(i).⁴ In order to maintain the integrity of the procedural rules, the Court should not consider the merits of postconviction claims where a procedural bar exists.⁵

5. Rule 61(i)(3) bars “any ground for relief that was not asserted in the proceedings leading to the judgment of conviction.” Defendant’s seventh ground for relief consists of a claim that the trial court abused its discretion and authority by allowing the State to introduce inadmissible evidence. However, the Defendant neglected to raise this ground for relief earlier in the proceedings, so the claim is barred under Rule 61(i)(3). There is an exception to this rule, but the Defendant has failed to show the requisite cause for relief from the default, or prejudice from violation of his rights.⁶ As a result, the Court finds the Defendant’s seventh ground for relief unconvincing.

³The delay associated with issuing this opinion is related to the difficulty the Court had in receiving a response from counsel. It was not until a threat of contempt was made that an affidavit was received.

⁴*See Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

⁵*State v. Trump*, 2004 WL 1874691, at *1 (Del. Super.).

⁶Super. Ct. Crim. R. 61(i)(3)(A), (B).

6. Another procedural bar is Rule 61(i)(4) which bars any ground for relief that was formerly adjudicated, unless reconsideration of the claim is warranted in the interest of justice.⁷ Defendant's fourth ground for relief alleges that there was insufficient evidence to support a guilty verdict for attempted murder and related weapons offense. However, the Defendant already asserted that there was insufficient evidence to support his conviction in his direct appeal and the Delaware Supreme Court held that the testimony of three eyewitnesses that Defendant was one of the perpetrators of the crime was "more than sufficient to support a conviction."⁸ The Defendant is not entitled to have the Court reexamine an issue that has been previously resolved simply because the issue has been restated or refined.⁹ The interest of justice exception has been narrowly tailored to require the Defendant to show that the trial court lacked the authority to convict or punish the Defendant.¹⁰ There is no indication that reconsideration is warranted. Consequently, the Defendant's fourth ground for relief, which was formerly adjudicated, is procedurally barred.¹¹

⁷Super. Ct. Crim. R. 61(i)(4).

⁸*Nichols v. State of Delaware*, 768 A.2d 470 (Del. 2001).

⁹*Skinner v. State*, 607 A. 2d 1170, 1172 (Del. 1992).

¹⁰*State v. Lee*, 2004 WL 2827966, at *3 (Del. Super.).

¹¹Super. Ct. Crim. R. 61(i)(4).

In addition, Defendant's sixth ground for relief is undermined by 61(i)(4) for the same reason. He claims that the trial court abused its discretion and authority when it neglected to set aside the guilty verdict because the verdict was not supported by sufficient evidence to uphold a conviction. However, as indicated above, the Delaware Supreme Court determined that the evidence was sufficient to support the conviction.¹² Defendant provides no evidence that reconsideration is merited in the interest of justice and therefore, Defendant's sixth ground for relief is also procedurally barred.¹³

7. Defendant bases his four remaining grounds for relief on various claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, the Defendant must satisfy the two-part test set forth in *Strickland v. Washington*.¹⁴ The Defendant must establish, by a preponderance of the evidence:¹⁵ (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that the result of the proceedings would have been different had counsel not committed such unprofessional errors.¹⁶ Under the

¹²*Nichols v. State*, 768 A.2d 470 (Del. 2001).

¹³Super. Ct. Crim. R. 61(I)(4).

¹⁴466 U.S. 668 (1984).

¹⁵*State v. Wright*, 653 A.2d 288, 294 (Del. Super. Ct. 1994).

¹⁶*Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

first prong, the Court will indulge a strong presumption that counsel's representation was professionally reasonable.¹⁷ In addition, Delaware has held that a defendant must make "concrete allegations of actual prejudice" and substantiate them or risk summary dismissal in claims of ineffective assistance of counsel.¹⁸

8. First, the Defendant alleges that his counsel was ineffective because he failed to file a motion for a reverse amenability hearing. Counsel contends that he did not file a reverse amenability pleading because he was operating under the belief that Attempted Murder in the First Degree "was under the sole discretion of the Superior Court."¹⁹ Under 10 *Del. C.* § 1010(a)(1), a "child shall be proceeded against as an adult where . . . the acts alleged to have been committed constitute first or second degree murder. . . or any attempt to commit said crimes." Furthermore, this Court has held that "juvenile defendants between the ages of 15²⁰ and 18 charged in Superior Court with Possession of a Firearm During the Commission of a Felony, pursuant to 11 *Del. C.* § 1147A(e), are not entitled to have that charge transferred to the Family Court under the reverse amenability process."²¹

¹⁷*Id.* at 59.

¹⁸*See Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁹Aff. of Raymond J. Otlowski at 2.

²⁰Defendant was 15 years old when he committed the offense.

²¹*State v. Roscoe*, 2000 WL 973132, at *1 (Del. Super.).

Defendant further contends that Counsel was ineffective because he did not file a motion for a reverse amenability hearing for the remaining charges in the indictment. However, even upon application of the Defendant for such a hearing, it is still within the discretion of the Court “to transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer.”²² Given the Defendant’s prior criminal record and the obvious serious offenses he was facing in Superior Court, it was a reasonable course of conduct for Counsel to attempt to resolve all the charges in a single proceeding and to negotiate with the Attorney General’s Office with all the charges on the table. Because of the potential sentences facing the Defendant for the charges he would be tried for in the Superior Court there would be no advantage for the Defendant to separate them to different courts.

In addition, the Delaware Supreme Court has said that “the Superior Court most likely will decide to retain jurisdiction over companion charges simply because the standards of joinder may so suggest.”²³ The Court is free to consider “as a factor, perhaps a significant factor, the fact that the felony/firearm offense must be decided in the Superior Court and that the juvenile will not be spared adult court proceedings in any event, regardless of the merit of the companion charges and the prospect for

²²10 *Del. C.* § 1011(b).

²³*State v. Anderson*, 697 A.2d 379, 384 (Del. 1997).

rehabilitation.”²⁴ There is no reasonable probability that the result of the proceedings would have been different if Counsel had moved for a reverse amenability hearing.²⁵ As such, the Court is not prepared to rule that Counsel’s performance falls below the *Strickland* standard, therefore, the Defendant’s first ground for relief is insufficient to establish ineffective assistance of counsel.

9. Next, the Defendant in his second ground asserts that his counsel was ineffective because he failed to address the issues of severance and misjoinder. The Delaware Supreme Court held that the testimony of three eyewitnesses that Defendant and a co-defendant were the perpetrators of the crime was more than sufficient to support Defendant’s conviction.²⁶ Therefore, the evidence was also sufficient to merit joinder of the offenses and the defendants because the charges “are based on the same act or transaction”²⁷ and the defendants “are alleged to have participated in the same act or transaction.”²⁸ Counsel for Defendant is not required to file motions that clearly would be without merit and would reasonably be denied.

²⁴*Id.*

²⁵*Strickland*, 466 U.S. 668.

²⁶*Nichols v. State*, 768 A.2d 470 (Del. 2001).

²⁷Super. Ct. Crim. R. 8(a).

²⁸Super. Ct. Crim. R. 8(b).

Furthermore, this Court denied a similar claim of ineffective assistance of counsel for lack of severance in the past, citing procedural default, under Rule 61(i)(3).²⁹ In *State v. Brown*, the Defendant attempted to disguise his claim for severance as an ineffective assistance of counsel claim. The Court held that the manner in which the Defendant framed the claim was not dispositive. Instead, the Court held that the claim, despite its description, was subject to the procedural bar set forth in Rule 61(i)(3), and as a result, the claim failed because the Defendant did not raise the issue of severance or misjoinder at trial or on direct appeal.³⁰ Similarly, Defendant has not previously protested severance, nor has he provided the requisite evidence of cause for relief from the procedural default, or prejudice from violation of his rights.³¹ Therefore, despite the Defendant's attempts to shield this claim from the procedural bars set forth in Rule 61(i), his second ground for relief fails.³²

10. In his third ground for relief, the Defendant claims that his counsel was ineffective because he filed a motion to withdraw as appellate counsel.³³ However, Counsel is permitted to withdraw where, "after conscientious examination of the

²⁹*State v. Brown*, 1990 WL 81879, at *4 (Del. Super.).

³⁰*Id.*

³¹Super. Ct. Crim. R. 61(i)(3)(A), (B).

³²Super. Ct. Crim. R. 61(I)(3).

³³Supr. Ct. R. 26(c).

record and the law,[he] concludes that an appeal is wholly without merit.”³⁴ The Delaware Supreme Court found that Counsel made a conscientious effort to examine the record and properly determined that the Defendant could not raise a meritorious claim on appeal.³⁵ The Court is not permitted to relitigate claims which have already been resolved in postconviction proceedings.³⁶ In the case at bar, Defendant’s third ground for relief has already been resolved and is entirely conclusory. As a result, the Court will exercise its right of summary dismissal, under Rule 61(d)(4).

11. Finally, in the Defendant’s fifth ground for relief, he avers “ineffective assistance of counsel for failure to file a motion for acquittal of the charge of attempted murder and related weapons offense.” However, the Defendant’s claim fails because the Delaware Supreme Court already stated unequivocally that there was “more than sufficient” evidence to support Defendant’s conviction. Therefore, despite another attempt by the Defendant to disguise this claim as one based on ineffective assistance of counsel, the Court concludes that Defendant’s fifth ground is procedurally barred under Rule 61(i)(4), because it was already addressed by the Delaware Supreme Court on Defendant’s direct appeal.³⁷ Put another way, even if

³⁴Supr. Ct. R. 26(c).

³⁵*Nichols v. State*, 768 A.2d 470 (Del. 2001).

³⁶*Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992).

³⁷*Nichols*, 768 A.2d 470.

raised by his counsel it clearly would have been denied, and the Defendant has not been prejudiced by his counsel's conduct.

12. Based upon the above reasoning, the Court finds that neither *Strickland* prong has been established and the Defendant is not entitled to postconviction relief and therefore the motion is hereby **DENIED**.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.