

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

)	
State of Delaware)	
)	
)	ID# 0004014742
v.)	
)	
Keith A. Blalock, Jr.,)	
)	
Defendant.)	
)	

Submitted: March 11, 2005
Decided: May 10, 2005

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

Josette D. Manning, Esquire, Deputy Attorney General, Office of the Attorney General, Wilmington, Delaware.

Keith A. Blalock, Jr., Smyrna, Delaware.

This 13th day of May 2005, upon consideration of a motion for postconviction relief filed by Keith A. Blalock, Jr. ("Defendant"), it appears to the Court that:

1. Defendant has filed this *pro se* motion for postconviction relief pursuant to Super. Ct. Crim. R. 61. Defendant makes three allegations: 1)

Ineffective Assistance of Counsel, 2) Double Jeopardy and 3) Vindictive Prosecution. This is Defendant's first motion for postconviction relief.

2. Defendant pled guilty to Possession of a Deadly Weapon by a Person Prohibited ("PDWBPP"), Carrying a Concealed Deadly Weapon ("CCDW") and Possession of a Narcotic ("PNSIICS"). Defendant was sentenced to 1) two years at Level V for the PDWBPP charge, 2) two years at Level V, suspended for two years at Level IV, after serving one year, suspended for one year at Level III for the CCDW charge, and 3) one year at Level V, suspended for two years at Level III, after serving one year, suspended for one year at Level II for the PNSIICS charge. In April 2003, while still on probation for the above charges, Defendant was charged with Attempted Murder. Based upon the new charges, Defendant was found to be in violation of his probation and was sentenced to one year at Level V on the PNSIICS charge and 18 months at Level V, after serving 12 months, suspended for six months at Level IV.

3. The Attempted Murder charges were dismissed in January 2004 due to the victim's refusal to testify. Defendant filed a letter with the Court in February 2004 in which he sought a modification of his sentence based on the dismissal of the Attempted Murder charge. Subsequently, counsel for Defendant filed a formal motion to modify the violation of probation

(“VOP”) sentence, which motion was denied. Defendant also filed a pro se writ of habeas corpus, which was also denied. Defendant did not take a direct appeal of his VOP sentence.

4. Before addressing the merits of any claim raised in a motion seeking postconviction relief, the Court must first apply the rules governing the procedural requirements of Super. Ct. Crim. R. 61.¹ Under Rule 61(i)(3) Procedural default “any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows (A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights.” The Delaware Supreme Court has held when a defendant “did not file a direct appeal challenging the validity of [his or her] guilty plea, [the defendant] is procedurally barred from raising that claim in a Rule 61 motion, unless [he or she] he can show cause for relief and actual prejudice.”² The Delaware Supreme Court has ruled that “‘cause’ for a procedural default on appeal ordinarily mandates ‘a showing of some external impediment preventing counsel from constructing or raising the

¹ *Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

² *Blackwell v. State*, 736 A.2d 971, 972 (Del. 1999).

claim’.”³ This Court has held that “unless the defendant has made and substantiated a concrete allegation of ‘cause’ and actual ‘prejudice’, any contention amounting to procedural default will be barred pursuant to Super.Ct. Crim. R. 61(i) (3).”⁴ Attorney error short of ineffective assistance of counsel does not constitute “cause” for a procedural default even when that default occurs on appeal rather than at trial.⁵

5. Defendant has asserted as grounds for postconviction relief claims of Vindictive Prosecution and Double Jeopardy. However, Defendant did not “assert[] [these two claims] in the proceedings leading to the judgment of conviction,” nor did Defendant file a direct appeal of his VOP sentence. Defendant was found to be in violation of his probation and sentenced on July 10, 2003. Under Supreme Court Rule 6(a)(ii), a criminal appeal must be filed within 30 days after a sentence is imposed in a direct appeal of a criminal conviction. Defendant’s conviction became final on August 10, 2003, 30 days after his sentencing on July 10th. The first “appeal” of Defendant’s VOP sentence was the motion for modification of sentence that was filed seven months after sentencing. Defendant’s “cause”

³ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁴ *State v. Ward*, 1991 Del. Super. LEXIS 507 *6.

⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

for why no appeal was taken is his assertion of ineffective assistance of counsel. To the extent the claims of Vindictive Prosecution and Double Jeopardy are separate claims from Defendant's claim of ineffective assistance of counsel claim, Defendant not shown "cause" and "actual prejudice" to overcome the procedural bar of Rule 61(i)(3).

6. Defendant has also asserted a claim for ineffective assistance of counsel. Defendant's basis for the claim of ineffective assistance of counsel is his contention that he asked his attorney to file an appeal of the VOP sentence but the appeal was never taken. Defendant asserts that "[l]ater, [he] requested the appeal again" but was told by his attorney that it was beyond the normal appeal period."⁶

In order to prevail on an ineffective assistance of counsel claim, Defendant must show that his attorney's representation fell below an objective standard of reasonableness and that but for counsel's unprofessional errors, the outcome of the trial would have been different.⁷ The defendant must make concrete allegations of ineffectiveness and substantiate those allegations by showing actual prejudice or risk summary

⁶ Defendant's counsel filed a motion for modification of sentence instead of a Rule 61 motion because the time had run for the filing of an appeal to Defendant's sentence.

⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

dismissal.⁸ There is a strong presumption that the defense counsel's conduct was professionally reasonable.⁹ Ineffective assistance of counsel may constitute "cause" for a procedural default even when that default occurs on appeal rather than at trial.¹⁰

7. Defendant has not made "concrete allegations of ineffectiveness and substantiate those allegations by showing actual prejudice." Defendant makes an unsubstantiated claim that he "requested his [attorney] to appeal his VOP [sentence] after the VOP hearing, but the appeal was never entered." There is no assertion as to when the request was made for an appeal to be taken. It appears from the record that Defendant made a request for an appeal but that request was not fulfilled because the time for an appeal had run. Having not filed a direct appeal of his VOP sentence, Defendant would have been unable to assert grounds for postconviction relief because he was potentially procedurally barred by Rule 61(i)(3).¹¹ Defendant's counsel filed a motion for modification of sentence, which was a viable alternative.

⁸ *Gattis v. State*, 697 A.2d 1174, 1178-79 (Del. 1997).

⁹ *Strickland v. Washington*, 466 U.S. at 689.

¹⁰ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹¹ In a letter dated March 1, 2004, Defendant wrote to the Court to assert grounds for postconviction relief that were not included in his motion for modification of sentence.

Even if Defendant had made concrete allegations of ineffective assistance of counsel, he has failed to show actual prejudice or that the outcome would have been different. Defendant has not made any allegations that he received ineffective counsel during his plea, rather Defendant claims that counsel's alleged failure to file an appeal was "cause" for Defendant to overcome the procedural bar of Rule 61(i)(3). The gist of Defendant's claims of Vindictive Prosecution and Double Jeopardy is that his VOP sentence should be overturned because the underlying charges of Attempted Murder, which was the basis for the VOP, were dismissed.

However, even if this Court were to hear these claims on the merits, it would not change the outcome of Defendant's VOP. In response to an arrest for violation of parole under 11 *Del. C.* §4334(c)

the court shall cause the probationer to be brought before it without unnecessary delay, for a hearing on the violation charge. The hearing may be informal or summary. If the violation is established, the court may continue or revoke the probation or suspension of sentence, and may require the probation violator to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

This Court has held that '[r]evocation of probation is an 'exercise of broad discretionary power' in Delaware."¹² At a VOP hearing "[p]roof sufficient to

¹² *State v. Owens*, 2002 Del. Super. LEXIS 6 at *4, quoting *Brown v. State*, 249 A.2d 269, 271 (Del. 1968).

support a criminal prosecution is not required to support a judge's discretionary order revoking probation.”¹³ The Delaware Supreme Court has held that “[t]he burden of proof to sustain a finding of a violation of probation is preponderance of the evidence.”¹⁴

Defendant’s contention that the VOP sentence should be overturned because the Attempted Murder charges were dropped is also without merit. The Supreme Court has held that “[t]he Superior Court was within its discretion to find a VOP where the probationer merely had been charged with new criminal offenses.”¹⁵ The Court in *Mann v. State*, in finding that a not guilty verdict of the underlying probation violation does not overturn a VOP, held that “[the defendant] incorrectly argue[d] that a finding of not guilty equates to a conclusion that he did not commit all of the acts that the State argued [he committed].”¹⁶ Defendant has failed to “show that his attorney’s representation fell below an objective standard of reasonableness.” Further, Defendant has not made “concrete allegations of

¹³ *Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

¹⁴ *Mann v. State*, 2001 Del. LEXIS 91 at *5.

¹⁵ *Downing v. State*, 803 A.2d 427 (Del. 2002).

¹⁶ *Mann v. State*, 2001 Del. LEXIS 91 at *5.

ineffectiveness and substantiate[d] those allegations by showing actual prejudice.”

For the foregoing reasons, Defendant’s motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

oc: Prothonotary
cc: Investigative Services
David M. Lukoff, Esquire