

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

STATE OF DELAWARE)	
)	
v.)	ID No. 9811012362
)	
WILLIAM GREGORY)	
)	
Defendant.)	

Submitted: September 1, 2005
Decided: November 23, 2005

Upon Defendant's Motion for Postconviction Relief. DENIED.

ORDER

James Kriner, Deputy Attorney General, Wilmington, Delaware.

William Gregory, *pro se* Defendant, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware.

CARPENTER, J.

On this 23rd day of November, 2005, upon consideration of William Gregory's ("Defendant") *pro se* motion for postconviction relief (the "Motion"), it appears to the Court that:

1. Defendant filed his original Motion, pursuant to Superior Court Criminal Rule 61 ("Rule 61") on August 19, 2004, and amended it on June 13, 2005. For the reasons set forth below, Defendant's Motion for Postconviction Relief is denied.

2. Commencing February 15, 2000, a three-day jury trial was held in which the Defendant was found guilty of Attempted Murder First Degree, Possession of a Firearm During the Commission of a Felony, Conspiracy First Degree, Assault Second Degree and Possession of a Deadly Weapon During the Commission of a Felony. On May 12, 2000, this Court sentenced the Defendant to thirty years of incarceration followed by supervision at Levels 4, 3 and 2. The Defendant's convictions were affirmed by the Delaware Supreme Court in July of 2001, with the mandate issued on August 15, 2001. On August 19, 2004, the Defendant filed this Motion, in which he asserts nine claims for postconviction relief. At the request of the Court, on December 16, 2004, Joseph A. Hurley, Esquire, trial counsel for Mr. Gregory, filed an affidavit in response to the alleged charges of ineffective assistance of counsel. The State filed its response on February 28, 2005. After receiving the State's response, the Defendant requested an opportunity to respond and amend his

Motion, which was granted by the Court. The Defendant's Amended Motion was filed on June 13, 2005.

3. Before addressing the merits of any claim raised in a motion seeking postconviction relief, this Court must determine whether there has been compliance with the procedural requirements of Rule 61.¹ One requirement is that a motion must be filed within the three-year statute of limitations. Time is a jurisdictional requirement, and to be timely, a defendant's appeal must be received by the Court within the statute of limitations.² Further, since Delaware has not adopted the prison mailbox rule, a *pro se* prisoner is not provided any additional time to file an appeal.³ The sole exception to this rule is if the deadline is not met due to the conduct of court personnel.⁴

4. In the case at hand, the Supreme Court of Delaware issued its mandate on August 15, 2001, and the Defendant filed his Motion on August 19, 2004 – four days after the three-year limit set forth in Rule 61(I). The Defendant argues he served his Motion on August 12, 2004, the date of his signature, however since the Motion was

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

²*Carr v. State*, 554 A.2d 778, 779-80 (Del. 1989); see also, *Ryan v. State*, 584 A.2d 1203, 1204 (Del. Super. Ct. 1990); *Jackson v. State*, 654 A.2d 829, 832-33 (Del. Super. Ct. 1995).

³*Whalen v. State*, 759 A.2d 603 (Del. Super. Ct. 2000).

⁴*Id.* The Court notes that there has been no claim that any action of the Court staff in any manner affected the filing date.

received by the Prothonotary's Office on August 19, 2004, the Defendant's Motion is time-barred and jurisdiction of the petition has been lost.

5. As a result, the Defendant's grounds for appeal numbered one through three in his Motion, including 1) invalid grand jury proceedings; 2) prosecutorial misconduct through incorrectly characterizing evidence and using evidence which should have been excluded and 3) discovery violations of the Brady Rule, do not require further review, as each are procedurally barred.

6. The remaining six claims raised by the Defendant relate to his claims of ineffective assistance of counsel. Rule 61(I)(5) provides a defendant with a fundamental fairness exception to the procedural bars set forth above.⁵ Thus, a claim with respect to one's constitutional rights overcomes the procedural bar and the Court retains jurisdiction to hear that portion of the motion.⁶

7. A successful appeal on the grounds of ineffective assistance of counsel requires the Defendant to establish that the errors committed by counsel were so serious that the Defendant was deprived of a fair trial which resulted in an unreliable outcome. The *Strickland*⁷ standard dictates a defendant must show 1) the

⁵Super. Ct. Crim. R. 61(i)(5)

⁶*State v. Davis*, 2003 WL 1344564 (Del. Super. Ct.), at *3. (citing *Webster v. State*, 604 A.2d 1366 (Del. 1992)).

⁷*Strickland v. Washington*, 466 U.S. 668, 694 (1984).

representation he received was deficient and 2) the deficiency of his counsel resulted in prejudice to the Defendant.⁸ The Defendant bears the burden of overcoming a “strong presumption that the representation was professionally reasonable.”⁹ The Defendant raised six specific claims of ineffective assistance of counsel, each of which will be addressed below.

8. First, the Defendant alleges he was denied the right to testify on his own behalf. The Defendant asserts he was told by counsel he was not “able” to testify. While the Court is confident that his counsel would have carefully reviewed the advantages and disadvantages of taking the stand and testifying, there is nothing other than the Defendant’s unsupported statements to endorse his claim that his counsel prevented him from taking the stand. On the other hand, Mr. Hurley’s affidavit clearly set forth his practice in this area, and the Court is convinced there is nothing unique about the Defendant’s case that would have caused Mr. Hurley to deviate from his many decade old practice. Mr. Hurley is an experienced defense attorney who appreciates the significance of the decision to testify and the right of the Defendant to make that decision. While the Defendant may have believed that the disadvantages associated with testifying as explained by Mr. Hurley to be a reflection of his opinion,

⁸*Id.* at 687.

⁹*Evans v. State*, 795 A.2d 667 (Del. 2002).

the Court is confident the decision whether to testify was made by the Defendant after being provided appropriate and professional advice. The Defendant bears the burden of persuading this Court he was not allowed to testify by overcoming a strong presumption that trial counsel's conduct was reasonable.¹⁰ That burden has not been met, and the Court finds this claim to simply be an effort to find a scapegoat for a decision the Defendant, in hindsight, wishes was decided differently. As such, the Court finds this claim to be without merit.

9. Next, the Defendant avers trial counsel was ineffective because he failed to conduct additional investigation regarding the victim's medical condition. The affidavit filed by Mr. Hurley reflects that the medical evidence with respect to the victim (specifically, the fact that she suffered from multiple gunshot wounds and injuries consistent with being hit with a baseball bat), were not disputed because the trial strategy was not one which made this evidence particularly relevant. Since there was no question that the victim was significantly injured, it would have been foolhardy and unwise for counsel to attack her medical condition. As such, the trial strategy was to concede that the victim was significantly injured, but the State had

¹⁰*State v. Young*, 2005 WL 1952934 (Del. Super. Ct.), at *1, 2. (Defendant argued he was advised by his trial counsel that he was not allowed to testify, and the deprivation of his right to testify resulted in his conviction. The Court determined, based on the affidavit provided by trial counsel which indicated the contrary and based on the lack of substance to the potential testimony had the defendant testified, the defendant did not have a valid claim for ineffective assistance of counsel.)

arrested the wrong defendant. The Court's recollection of the evidence is that this was the only realistic defense available for counsel to pursue, and clearly was an appropriate litigation decision. As such, this claim also lacks merit.

10. The third ground raised by the Defendant alleges trial counsel was ineffective for failure to file a motion to suppress the baseball bat and two guns seized by the police. Mr. Hurley's affidavit reflects that he did not file a motion to suppress the recovered weapons because the Defendant did not have standing to contest the search, and even if he could get over that hurdle, there was no good faith basis to attack the seizure. The trial strategy for the defense was that the Defendant was not at the crime scene, thus the instruments of the crime were not his.¹¹ This decision is consistent with the only viable defense available to counsel, and his analysis of this legal issue will not be disturbed by the Court. Mr. Hurley's decision was based upon a reasonable analysis of evidentiary law, and as such, the Defendant fails to meet the first prong of the Strickland test. Accordingly, Defendant's third ground for relief is unsuccessful.

¹¹*State v. Powell*, 2003 WL 194929 (Del. Super. Ct.), at *2. (Defense counsel could have reasonably concluded, based on preliminary hearing testimony, that a motion to suppress evidence would be denied. Thus the defense counsel met the reasonable professional standard.); *State v. McCurley*, 2004 WL 2827857 (Del. Super. Ct.) (Defendant failed to show the defense counsel did not base his decision to not file a motion to suppress on a reasonable analysis of evidentiary law, thus his claim for ineffective assistance of counsel failed.).

11. Next, the Defendant states he received ineffective assistance of counsel since trial counsel did not request a Getz analysis prior to admitting testimony of the victim with respect to an uncharged act allegedly committed by the Defendant three days prior to the attempted murder. Mr. Hurley indicates in his affidavit that he believes the victim's testimony with respect to the uncharged incident was not objected to because it was intertwined with the attempted murder, and therefore admissible under *Pope v. State*.¹²

To prevail on this claim, the Defendant must overcome a "strong presumption that counsel's conduct was reasonable or could have been considered sound trial strategy at the time."¹³ The Court will not review actions of counsel through a lens of hindsight,¹⁴ and if trial counsel investigated both the laws and facts and made reasonable strategic choices at the time of the trial, those choices are "virtually unchallengeable."¹⁵ Further, counsel has no obligation to pursue legal arguments which he is convinced are not supported by the law. Accordingly, a defendant will not receive postconviction relief merely because he is unhappy with the outcome of the trial and now wishes counsel employed a different trial strategy.

¹²632 A.2d 73 (Del. 1993).

¹³*State v. Hammons*, 2004 WL 1874692 (Del. Super. Ct.), at *1 (citing *Strickland*, 466 U.S. 689).

¹⁴*State v. Dawson*, 681 A.2d 407, 415 (Del. Super. Ct. 1995) (quoting *Strickland*, 466 U.S. at 687).

¹⁵*Strickland*, 466 U.S. 690.

The Defendant offers no substantive evidence Mr. Hurley did not adequately investigate both the law and facts and make a sound legal decision. More importantly to the case at hand, the effect of the victim's testimony with respect to the uncharged incident appears to be minimal, at best, given the additional evidence produced by the State. Therefore, the Defendant has failed to show he was unfairly prejudiced by counsel's decision to not challenge this testimony, nor did it have any effect on the outcome of the trial. For these reasons, the Defendant's fourth argument for ineffective assistance of counsel falls short.

12. The Defendant next states that his trial counsel failed to impeach two of the State's witnesses (Nichole Hansley and Larry Barnard), who allegedly committed perjury. The Defendant argues his counsel did not impeach these witnesses with respect to where the Defendant spent his time in the Summer of 1998 though November 22, 1998, the date of the incident. However, the Court has reviewed the record and it shows Mr. Hurley did attempt to discredit Larry Barnard through specific questioning with respect to the Defendant's patterns in the latter part of 1998.¹⁶ Further, the record also reveals Mr. Hurley aggressively attempted to

¹⁶On cross-examination by Mr. Hurley of Larry Barnard, the following took place:

Q. You have testified under oath on direct examination, have you not?

A. Yes.

Q. And I want to make sure I understood your testimony. It was your sworn testimony that that person that I'm pointing to over there with the suit and the glasses, between the summer of 1998 and November of 1998, spent three to four

impeach Nichole Hansley, the victim, though he did not specifically ask where the Defendant spent his evenings in the later half of 1998. The court finds Mr. Hurley's conduct was reasonable and consistent with that expected of counsel in the examination of adverse witnesses. In addition, the Defendant did not show how the impeached testimony would affect the outcome of the trial, nor what the impeached testimony would have been. Accordingly, this claim fails both the first and second prong of the Strickland test.

13. Lastly, the Defendant insists his appellate counsel was ineffective. To prevail on a claim of ineffective appellate counsel, the Defendant must meet the same burden under the *Strickland* test.¹⁷ The Defendant must include more than mere

nights a week at Apartment No. 4, sleeping there overnight?

A. Yes.

Q. Do you remember telling this gentleman that Mr. Gregory was staying at a motel with a girl in your statement on November 23?

A. Yes.

Q. So if people come in from New York and say he was staying up in New York, they would be dead wrong?

A. You can stay two places: one where you really want to rest, and one place where you want to hang out.

Q. How could you do that?

A. Split the time up.

Q. Split yourself in half?

A. Split the time up.

Q. We're talking about the time you go to sleep at night, between 11:00 p.m. and 6:00 a.m., you're saying three to four times a week, during the summer up through November, that man put his head down on a pillow in your apartment?

A. Yes.

Trial Tr. 66-68, February 16, 2000.

¹⁷*Zebroski v. State*, 822 A.2d 1038, 1043 (Del. Super. Ct. 2003) (citing *Strickland*, 466 U.S. 689).

conclusory or vague allegations for this Court to determine an attorney was ineffective.¹⁸ In his original Motion, the Defendant merely indicates conclusory and vague allegations and does not express what, if any, additional appeals were not filed due to the alleged unprofessional or unreasonable conduct by counsel. In the Defendant's Amended Motion, he indicates the claims he wanted to appeal, but does not show how appellate counsel's failure to appeal each claim was unreasonable, and further fails to show how appellate counsel's actions caused prejudice to the Defendant. As such, the Court finds this claim to also be without merit.

14. Based on the foregoing, the Defendant is not entitled to postconviction relief and the Motion is hereby **DENIED**.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

¹⁸*State v. St. Louis*, 2004 WL 2153645 (Del. Super. Ct.), at *3 (citing *Younger*, 580 A.2d at 555).