

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	I.D. No. 9908026980
)	
JOHN C. JOHNSON)	
)	
Defendant)	

Submitted: October 21, 2013

Decided: January 17, 2014

On Defendant's Motion for Postconviction Relief.

DENIED.

On Defendant's "Motion for Reconsideration of Appointment of Counsel and Evidentiary Hearing."

DENIED.

ORDER

Andrew J. Vella, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

John C. Johnson, Smyrna, Delaware, *pro se*.

COOCH, R.J.

This 17th day of January 2014, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. On May 8, 2001, Defendant John C. Johnson ("Defendant") pled guilty to Murder Second Degree and Possession of a Firearm During the Commission of a Felony. Defendant was sentenced on July 12,

- 2001 to 20 years level 5, suspended after serving 17 years for 3 years level 4 for the Murder Second Degree conviction and 10 years level 5 for the Possession of a Firearm During the Commission of a Felony conviction.
2. Defendant filed his first *pro se* Motion for Postconviction Relief on May 9, 2008. This Court denied his motion,¹ a decision which was later affirmed by the Supreme Court.²
 3. Defendant filed this second Motion for Postconviction Relief based upon claims of ineffective assistance of trial counsel and an invalid plea/sentence.³ Defendant requested appointment of counsel, an evidentiary hearing, and for the Court to “vacate his sentence, invalidate his plea, and nullify the conviction in this case.”⁴
 4. This Court **DENIED** Defendant’s request for appointment of counsel in its Order of Briefing on April 22, 2013, but reserved decision on the Motion and whether to hold an evidentiary hearing until the conclusion of the briefing.⁵
 5. Defendant also filed a subsequent Motion for Reconsideration of Appointment of Counsel and Evidentiary Hearing, in which he argued, again, for the appointment of counsel because he was not represented in his first Rule 61 Motion. He also requested an evidentiary hearing “if for no other reason, in the interest [of] justice.”⁶
 6. Defendant’s first ineffective assistance argument contends that his counsel failed to properly represent him during plea negotiations.⁷ He claims counsel “failed to seek a decision on the Motion to Strike Death Penalty as Potential Sentence, prior to encouraging a plea.”⁸ Defendant contends he would not have accepted the guilty plea if he knew the death penalty was not a consideration.⁹ Defendant similarly cites

¹ *State v. Johnson*, 2009 WL 866180 (Del. Super. March 31, 2009).

² *Johnson v. State*, 2009 WL 2860974 (Del. Sep. 4, 2009) (ORDER).

³ Def.’s Mot. for Postconviction Relief.

⁴ *Id.* at 7.

⁵ Or. of Br. ¶5. Defendant filed an Interlocutory Appeal as to the Order of Briefing that was later denied. *Johnson v. State*, 2013 WL 3004063 (Del. Super. May 20, 2013).

⁶ Def.’s Mot. for Reconsideration of Appointment of Counsel and Evid. Hrg. at 3.

⁷ Def.’s Mot. for Postconviction Relief at 2.

⁸ *Id.* at 3.

⁹ *Id.*

- alleged procedural mistakes involving a Motion to Suppress.¹⁰ Defendant also claims that due to deficiencies in the plea negotiation process he was improperly sentenced as a habitual offender.¹¹ He contends this is another factor that would have caused him to reject the plea.¹²
7. Defendant's second set of ineffective assistance of counsel arguments relate to his sentencing. Defendant asserts his presentence report was neither shown to him nor discussed by counsel.¹³ Defendant also reiterates his habitual offender complaints¹⁴ and contends that he improperly received a sentence enhancement due to a prior conviction.¹⁵
 8. Before addressing the merits of this Second Motion for Postconviction Relief, the court must first apply the procedural bars of Superior Court Criminal Rule 61(i).¹⁶ If a procedural bar exists, then the Court will not consider the merits of the postconviction claim.¹⁷
 9. Under the Delaware Superior Court Rules of Criminal Procedure, a Motion for Postconviction Relief can be barred for time limitations, repetitive motions, procedural defaults, and former adjudications.¹⁸ Motions exceed time limitations if they are filed more than one year after the conviction is finalized or they assert a newly recognized, retroactively applied right more than one year after it is first recognized.¹⁹ A motion is considered repetitive and therefore barred if it asserts any ground for relief "not asserted in a prior postconviction proceeding."²⁰ Repetitive motions are only considered if it is "warranted in the interest of justice."²¹ Grounds for relief "not asserted in the proceedings leading to the judgment of conviction" are barred as procedural default unless movant can show "cause for relief and "prejudice from [the] violation."²² Grounds for relief formerly

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁷ *Id.*

¹⁸ Super Ct. Crim. R. 61(i).

¹⁹ Super Ct. Crim. R. 61(i)(1).

²⁰ Super Ct. Crim. R. 61(i)(2).

²¹ *Id.*

²² Super Ct. Crim. R. 61(i)(3).

- adjudicated in the case, including “proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus hearing” are barred.²³ Former adjudications are only reconsidered if “warranted in the interest of justice.”²⁴ The procedural bars to Motions for Postconviction Relief will not apply if the court “lacked jurisdiction [or there is] a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”²⁵
10. To successfully articulate an ineffective assistance of counsel claim, a claimant must demonstrate first that counsel’s performance was deficient. To prove counsel’s deficiency, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness.”²⁶ Secondly, a defendant must demonstrate that the deficiencies prejudiced the defendant by depriving them of a fair trial with reliable results. This requires a showing that there is a “reasonable probability” that but for the counsel’s unprofessional errors, the proceeding’s results would have been different.²⁷ “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.”²⁸
 11. Whether or not an evidentiary hearing should be held is at the judge’s discretion.²⁹ “It is well-settled that the Superior Court is not required to conduct an evidentiary hearing upon a Rule 61 motion if, on the face of the motion, it appears that the petitioner is not entitled to relief.”³⁰ “If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.”³¹
 12. All of Defendant’s claims are procedurally barred under Rule 61(i). Defendant’s conviction was finalized in 2001 and thus his Motion for Postconviction Relief, filed almost 12 years later, is time barred pursuant to Rule 61(i)(1). Alternatively, it appears almost all of his

²³ Super Ct. Crim. R. 61(i)(4).

²⁴ *Id.*

²⁵ Super Ct. Crim. R. 61(i)(5).

²⁶ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

²⁷ *Id.* at 687-688.

²⁸ *Id.* at 670.

²⁹ Super Ct. Crim. R. 61(h)(1).

³⁰ *Hawkins v. State*, 2003 WL 22957025, at *1 (Del. 2003) (ORDER).

³¹ Super Ct. Crim. R. 61(h)(3).

arguments are a mix of old³² and slightly new issues and can be either barred for time, as a repetitive motion, a procedural default, a formerly adjudicated claim, or a combination of the Rule 61 bars. This Court finds the “interests of justice” do not require any of the above procedural bars to be reversed.

13. Defendant claims that the “time limitation bar is to no avail” because he “placed before the Court a *colorable claim that there was a miscarriage of justice because of a constitutional violation and undermined the fundamental legality, reliability, integrity, and fairness of the proceedings leading to the judgment of conviction.*”³³ He fails, however, to articulate any support for this assertion. He again relies on *Martinez v. Ryan*,³⁴ *Lafler v. Cooper*,³⁵ and other cases to support his arguments but which have not been held to have retroactive applications. These cases were decided after Defendant’s conviction became final and therefore are inapplicable to his Motion. Defendant has failed to show evidence the procedural bars should be disregarded under Superior Court Criminal Rule 61(i)(5) and thus all procedural bars apply.
14. While Defendant’s claim is procedurally barred, this Court will address the ineffective assistance of counsel claims on the merits.³⁶ This Court finds that Defendant fails to show that but for the counsel’s unprofessional errors, the proceeding’s results would have been different.
15. Defendant contends that both pre-trial motions “were highly prejudicial to a fair plea negotiation process,” but fails to elaborate other than saying they were both “an act of futility, and a poor representation of effective assistance.”³⁷ Defendant argues that if he received a favorable ruling on the Motion to Strike Death Penalty as Potential Sentence or Motion to Suppress he would not have taken the plea. However, establishing prejudice “requires more than a showing of a theoretical possibility that the outcome was affected.”³⁸ This

³² The Court agrees with the State’s assertion that Defendant’s claims are mostly a “recapitulation of claims he made in his first motion.” St.’s Response to Def.’s Mot. for Postconviction Relief at 4. See *State v. Johnson*, 2009 WL 866180 (Del. Super. March 31, 2009).

³³ Def.’s Reply to St.’s Response to Mot. for Postconviction Relief at 2 (emphasis in original).

³⁴ 132 S. Ct. 1309 (2012).

³⁵ 132 S. Ct. 1376 (2012).

³⁶ Defendant also asserts a jurisdictional argument as to a prior conviction that the Court finds is without merit and will not address further.

³⁷ Def.’s Reply at 1.

³⁸ *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

- Court finds Defendant has not established that but for these motions, his proceeding's results would have been different.
16. Defendant's counsel was able to secure a plea that, while a longer duration than Defendant would have liked, excluded a sentence of death or life imprisonment. Defendant's complaints regarding the unresolved Motion to Strike Death Penalty fail, as his plea was the reason the Motion was never decided. Defendant admits that the plea and the Motion ultimately had the same goal, to "remove the death penalty from the Court's consideration,"³⁹ and fails to articulate the prejudice he suffered. Defendant's Motion to Suppress claims appear to confuse two separate pretrial motions, one involving Defendant's own statements and another concerning his victim's. Thus these claims are factually incorrect and without merit. Defendant's claims about the Motion filed after his plea also are without merit. The docketed date does not necessarily reflect the date the Motion was received by the Court, and even assuming it was filed late it does not amount to significant evidence of ineffective assistance of counsel.
 17. Defendant's claims that information about his possible habitual offender status would have caused him to reject the plea are also without merit. The State conceded that Defendant's habitual offender status, as seen on the sentencing order,⁴⁰ is a clerical error.⁴¹ Therefore he cannot show sufficient prejudice for his ineffective assistance claim.
 18. Defendant's ineffective assistance of counsel claims regarding his sentence likewise fail. Two of Defendant's arguments regarding his sentencing are factually incorrect. Defendant's apparent assertion that he received an enhanced sentence on his Possession of a Firearm During the Commission of a Felony is incorrect, as the Court found the three-year penalty (not the enhanced five-year penalty) applied.⁴² Defendant's habitual offender arguments fail for the reasons stated above.
 19. Defendant cannot support his claims that counsel failed to show him the presentence report or review it with him in any way prior to

³⁹ Def.'s Reply at 4.

⁴⁰ Ex. 18 to Def.'s Mot for Postconviction Relief.

⁴¹ St.'s Response at 10.

⁴² Ex. 15 to Def.'s Mot for Postconviction Relief.

sentencing. In his affidavit, trial counsel Thomas Pedersen explicitly refutes this assertion.⁴³ Therefore, the Court finds this argument without merit.

20. The remainder of Defendant's argument is classified by the state as "broad[] claims that counsel failed to provide effective assistance at sentencing."⁴⁴ The Court agrees with this assertion and, without evidence of prejudice, does not find that Defendant has made a showing of ineffective assistance of counsel.
21. It appears on the face of Defendant's motions that he is not entitled to relief. Accordingly, the Court has decided, in its discretion, not to grant the Defendant an evidentiary hearing. In addition, the Court again denies Defendant's request for counsel for the reasons stated in the Order of Briefing.

Therefore, for the reasons stated above, Defendant's motion for postconviction relief is **DENIED**. Defendant's "Motion for Reconsideration of Appointment of Counsel and Evidentiary Hearing" is also **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary
Investigative Services

⁴³ "Counsel reviewed and shared with Johnson the contents of the pre-sentence report in anticipation of his sentencing." Pederson Aff. at 2.

⁴⁴ St.'s Response at 11.