

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

STATE OF DELAWARE,)	
)	
v.)	I.D. # 0308021468
)	
)	
RORY BROKENBROUGH,)	
)	
Defendant.)	

Date Submitted: Sept. 21, 2007
Date Decided: October 30, 2007

OPINION

Defendant's Pro Se Motion for Postconviction Relief
DENIED.

Rory Brokenbrough, Delaware Correctional Center, Paddock Road, Smyrna, Delaware 19977, Defendant, *pro se*.

William L. George, Jr., Esq., Dept. of Justice, 820 North French St., Wilmington, DE 19801.

Gordon L. McLaughlin, Esq., 1203 N. Orange St., Wilmington, DE 19801.

JURDEN, J.

I. INTRODUCTION

The defendant collaterally attacks his convictions on assault, attempted robbery and conspiracy charges. He claims due process violations and ineffective assistance of counsel require this Court to grant a new trial. Defendant's due process claim is procedurally barred under Rule 61(i)(3) and therefore **SUMMARILY DISMISSED**. Defendant fails to establish that his counsel was ineffective, and therefore, that claim is **DISMISSED**.

II. BACKGROUND

On April 29, 2005, a jury convicted defendant Rory L. Brokenbrough of first-degree assault, third-degree assault, first-degree attempted robbery, and third-degree conspiracy. Brokenbrough's convictions are based on two separate incidents in which he assaulted and robbed his victims. The first victim recovered from his injuries, but the second victim suffered permanent brain damage as a result of the assault. Brokenbrough was indicted for the following offenses: Count I – first-degree robbery, Count II – second-degree conspiracy, Count III – first-degree assault, and Count IV – first-degree attempted robbery. The special verdict sheet gave the jury the option of convicting on the lesser-included offenses of third-degree assault, third-degree conspiracy and second-degree assault for the first three counts of the indictment. The jury returned a verdict on Counts III and IV for the indicted offenses but convicted Brokenbrough on the lesser-included offenses for Counts I and II. Brokenbrough was sentenced on September 2,

2005 to 51 years at Level V.¹ Brokenbrough appealed his conviction and the Supreme Court affirmed on April 11, 2006.²

This is Brokenbrough's first motion for postconviction relief. He cites denial of due process and ineffective assistance of counsel as his bases for relief³. Brokenbrough filed an amendment to his motion for postconviction relief on May 24, 2007 alleging additional grounds in support of his ineffective assistance of counsel claim.⁴

III. DISCUSSION

Before addressing the merits of a postconviction relief claim, the Court must first determine whether the claims pass through the procedural filters of Rule 61(i).⁵ To protect the integrity of the procedural rules, the Court will not address the substantive aspects of defendant's claims if they are procedurally barred.

A. Brokenbrough's Violation of Due Process Claim is Procedurally Barred.

Brokenbrough first argues that his due process rights were violated because the trial court amended his indictment after the evidence was presented to the jury. Not only is this claim factually inaccurate,⁶ it is procedurally barred pursuant to Superior Court Criminal Rule 61(i)(3). Rule 61(i)(3) specifically bars consideration of any claim "that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court... unless the movant shows cause for relief from the procedural

¹ Brokenbrough was sentenced to 25 years at level V for first-degree assault, 25 years at level V for attempted robbery, one year at level V for third-degree assault and one year at level V suspended immediately for one year at level III for the third-degree conspiracy conviction.

² *Brokenbrough v. State*, 897 A.2d 767 (Del. 2006).

³ Def. Mot. for Postconviction Relief ("Motion"), Docket Item ("D.I.") 69.

⁴ Mot. to Amend Postconviction Relief, D.I. 71.

⁵ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) ("The first inquiry in any analysis of a post-conviction relief claim is whether the petition meets the procedural requirements of Rule 61.") *See also Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁶ The record does not reflect that an amendment was made to the indictment. Rather, it shows that the trial court, upon agreement by Mr. McLaughlin and the State, instructed the jury on lesser-included offenses of third-degree assault, third-degree conspiracy, and second-degree assault as to Count I, II and III of the indictment.

default and prejudice from violation of the movant's rights."⁷ This claim was not "asserted in the proceedings leading to the judgment of conviction." Nor has Brokenbrough shown either cause for relief from the procedural default or prejudice from violation of his rights. Therefore, this claim is procedurally barred.

Because this claim is procedurally barred under Rule 61(i)(3), the Court must determine whether it falls within the exception set forth in Rule 61(i)(5). This exception allows a defendant to avoid the first three procedural bars if (1) the court lacked jurisdiction or (2) defendant states a colorable claim that must be remedied to avoid a miscarriage of justice.⁸ This exception, however, is narrowly construed and the defendant has the burden of proof to show that there has been a deprivation of a substantial Constitutional right that "undermined the fundamental...reliability" of the prior proceedings. Because Brokenbrough does not claim that this court lacked jurisdiction, he must establish 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."⁹

Brokenbrough fails to establish any Constitutional violation concerning the jury instructions on the lesser-included offenses. Under Delaware law, a trial court can instruct the jury on a lesser-included offense upon request of one of the parties "if the evidence presented is such that a jury could rationally find the defendant guilty of the lesser-included offense and acquit the defendant of the greater offense."¹⁰ Here, the trial court was correct in instructing the jury on the lesser-included offenses. Mr.

⁷ Super. Crim. Ct. R. 61(i)(3).

⁸ Super. Ct. Crim. Rule 61(i)(5).

⁹ *Id.*

¹⁰ *Cox v. State*, 851 A.2d 1269, 1275 (Del. 2003).

McMcLaughlin requested the instruction and the Court found there was a rational basis in the record to support the argument that the jury could acquit Brokenbrough of first-degree robbery, second-degree conspiracy and first-degree assault and convict him of the lesser-included offenses. Therefore, this claim does not implicate a Constitutional violation as required under Rule 61(i)(5) and is **SUMMARILY DISMISSED**.

B. Defendant's Ineffective Assistance of Counsel Claim Fails the *Strickland* Test.

Brokenbrough alleges multiple grounds for ineffective assistance of counsel. This claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a motion, even when the claim has not been previously raised.¹¹ To prevail on this claim, Brokenbrough must meet the two-pronged *Strickland* test by showing that (1) counsel performed at a level “below an objective standard of reasonableness,” and (2) “the deficient performance prejudiced the defense.”¹² The first prong requires Brokenbrough to show by a preponderance of the evidence that Mr. McLaughlin was not reasonably competent, while the second prong requires him to show “that there is a reasonable probability that, but for Mr. McLaughlin's unprofessional errors, the result of the proceeding would have been different.”¹³ There is a strong presumption that counsel's conduct was professionally reasonable.¹⁴ When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.¹⁵

¹¹ See *HReynolds v. Ellingsworth*, 843 F.2d 712, 723 (3d Cir.1988)H, cert. denied, 488 U.S. 960 (1988)H.

¹² *HStrickland v. Washington*, 466 U.S. 668, 687-88 (1984)H.

¹³ *HId.* at 687-88, 694.

¹⁴ *HAlbury v. State*, 551 A.2d 53, 59 (Del.1988)H.

¹⁵ *HId.* at 697.

1. Consent to Third-Degree Assault Instruction

Brokenbrough claims that Mr. McLaughlin did not consult him before requesting the jury instruction on the lesser-included offense of third-degree assault. He also claims that he did not agree to such a charge and that it compromised his “all or nothing” strategy. There is no factual basis to support this claim. Mr. McLaughlin submits he spoke with Brokenbrough and told him that based on the evidence in his case, an instruction on third-degree assault would be an “appropriate and proper strategy.” Mr. McLaughlin states that “at no time did [Brokenbrough] ever advise [him] he was insisting on an ‘all or nothing’ strategy as to Counts I and II of the indictment.”¹⁶ Furthermore, the Court agrees with Mr. McLaughlin that sufficient evidence was presented to convict Brokenbrough on first-degree robbery and second-degree conspiracy which would have exposed him to a longer period of incarceration under the TIS Guidelines.¹⁷ Because Brokenbrough benefited from the instruction, he is unable to establish prejudice. Therefore, this claim fails under both prongs of *Strickland*.

2. Failure to Receive Discovery

a. Toxicology Report

Brokenbrough claims that Mr. McLaughlin was ineffective for failing to obtain Dennis Nichols’ toxicology report.¹⁸ He argues that the was prejudiced because the toxicology report would establish that Nichols was intoxicated and it “could have lead the jury to believing that [Nichols] fell down, got into a fight outside of the bar or hit by any

¹⁶ Aff. of Gordon L. McMcLaughlin in Response to Def.’s Mot. for Post Conviction Relief Pursuant to Super. Ct. Crim. R. 61 (“McMcLaughlin Aff.”), D.I. 74.

¹⁷ *Id.*

¹⁸ Dennis Nichols is the victim that Brokenbrough assaulted at Captain Witherspoon on August 24, 2004.

individual he may have argued with as most drunks do.”¹⁹ This claim is without merit. Several witnesses testified that Mr. Nichols was intoxicated when he left the bar and the State did not contend otherwise. The toxicology report would not have established that Nichols’ injuries were the result of a simple fall even if he was intoxicated.²⁰ Under these circumstances, Brokenbrough fails to establish that Mr. McLaughlin’s failure to obtain the toxicology report was objectively unreasonable or that he was prejudiced by his attorney’s conduct.

b. Medical Records

Brokenbrough next claims that Mr. McLaughlin was ineffective for failing to obtain Nichols’ medical records. He hypothesizes that the medical records could potentially show that Nichols’ injuries were pre-existing, exacerbated by illegal narcotics or caused by the use of a weapon (which he did not possess). This claim is also without merit. Mr. McLaughlin’s letter to Brokenbrough on January 14, 2005 states,

I am enclosing a complete copy of the medical records I have received on Mr. Nichols. Although I do not have all the medical records from Christiana Hospital it is absolutely clear that these records show massive injury to Mr. Nichols brain. In addition, the physical injuries that he sustained are completely inconsistent with your version of the events which is that you hit him twice in the head and he fell over and hit his head.²¹

The record reflects that Mr. McLaughlin did obtain medical records pertaining to the extent and cause of Nichols’ injuries. Brokenbrough fails to establish that Mr. McLaughlin’s failure to obtain additional medical records (which highlight the extent of injuries to Nichols and assist the State in proving the element of serious physical injury)

¹⁹ Motion, D.I. 69.

²⁰ Nichols sustained severe head injury, multiple broken ribs, bilateral facial fractures, two cervical spine fractures and assorted other injuries. McMcLaughlin Aff., D.I. 74.

²¹ Letter from Gordon L. McMcLaughlin to Rory Brokenbrough (Jan. 14, 2005).

was objectively unreasonable or that additional records would have affected the outcome of his case. Furthermore, there is also no factual basis to support Brokenbrough's claim that the State withheld Nichols' medical reports in violation of *Brady v. Maryland*.²² The Court will not entertain baseless accusations of prosecutorial misconduct.

c. Medical Expert

Brokenbrough claims that Mr. McLaughlin was ineffective for failing to hire a medical expert. Given the severe nature of Nichol's injuries, a medical expert would have refuted Brokenbrough's theory that Nichols fell and would have weakened his case.²³ Mr. McLaughlin's decision to avoid highlighting the severity of Nichol's injuries through medical expert testimony was tactical and not objectively unreasonable.

d. Pre-Trial Discovery

Brokenbrough claims that Mr. McLaughlin was ineffective for failing to obtain discovery materials and therefore he was "not informed of the true proceedings against him."²⁴ Mr. McLaughlin's letter to Brokenbrough dated November 12, 2004 states:

"When we met on Wednesday, November 10, 2004, I also advised you I have received the rest of the evidence needed to see including all the photo line ups, the search warrant returns, surveillance tapes, photos of Nichols and Tearl and listened to the audio taped statements of Daron Rodgers, Brian Sadler and Tyrell Thomas. . . . As you know, we also discussed in great detail the evidence against you."²⁵

The record reflects that Mr. McLaughlin obtained necessary discovery and reviewed it with Brokenbrough.²⁶ Mr. McLaughlin spoke with Brokenbrough several times advising him of the strengths and weaknesses of his case and the pros and cons of accepting or

²² 373 U.S. 83 (1963).

²³ McLaughlin Aff., D.I. 74.

²⁴ Motion, D.I. 69.

²⁵ Letter from Gordon L. McLaughlin to Rory Brokenbrough (Nov. 12, 2004).

²⁶ McLaughlin Aff., D.I. 74.

rejecting the State's plea offer.²⁷ To the extent that Brokenbrough does not identify what additional discovery materials he required or how the absence of that discovery prevented him from being "fully informed", this claim is vague, unsubstantiated and therefore unavailing.

3. Failure to File For Suppression of Suggestive Identification

Brokenbrough claims that Mr. McLaughlin was ineffective for failing to "file for the suppression of suggestive identification procedures" relating to the assault at the bar.²⁸ This claim is without merit. Upon review of the record, it is clear that Mr. McLaughlin engaged in vigorous and effective cross-examination sufficient to test the credibility of all the State's witnesses. Because Brokenbrough was identified by Tyrell Thomas and Brian Sadler who accompanied him to the bar, Mr. McLaughlin's objection to their identification of Brokenbrough would have been frivolous.

4. Ineffective Cross Examination of Maria Jefferson

Brokenbrough claims that Mr. McLaughlin was ineffective in his cross examination of Maria Jefferson because he failed to use her out-of-court statements to impeach her credibility at trial. Specifically, he claims that "Mrs. Jefferson never said anything about [him] having the wallet in any pretrial reports, it was first revealed on the stand in trial."²⁹ This claim is inaccurate. Jefferson's testimony at trial is consistent with the information she provided to Corporal Armstrong on the night of the assault.³⁰ Furthermore, the record shows that Mr. McLaughlin aggressively attempted to limit the reliability of Jefferson's testimony by highlighting the fact that she could not positively

²⁷ *Id.*

²⁸ Motion, D.I. 69.

²⁹ Mot. to Amend Postconviction Relief, D.I. 71.

³⁰ Aff. Cpl. James C. Armstrong, D.I. 1.

identify the men outside of the bar.³¹ Accordingly, Brokenbrough fails to establish that Mr. McLaughlin's conduct fell below the standards of reasonableness or that the outcome of the trial would have been affected by a different cross examination of Maria Jefferson. Therefore, this claim fails under both prongs of *Strickland*.

5. Failure to Discover That Brokenbrough Was Charged With Only One Count of Assault

Brokenbrough claims that Mr. McLaughlin was ineffective for stating that Brokenbrough was charged with two counts of assault instead of one in his opening statement. Brokenbrough fails to establish that counsel's preparation or performance at trial fell below the standard of professional reasonableness and, to the extent that the jury convicted Brokenbrough of only one indicted count of assault, he fails to establish any actual prejudice to his case.

6. Failure to Move for Acquittal

Brokenbrough claims that Mr. McLaughlin was ineffective for failing to move for acquittal of the first-degree robbery charge after Timothy Tearl³² stated that he previously thought someone other than Brokenbrough had robbed him. This claim has no merit. The trial transcript reflects that Tearl identified Brokenbrough through a photo lineup, again identified him in the courtroom during trial and stated that there was no doubt in his mind that Brokenbrough was the man that punched him and pulled him out of the car.³³ The State's witness, Diedra Brickhouse, provided independent corroborating testimony.³⁴ Under these circumstances, the evidence at trial was clearly sufficient to

³¹ Tr. Transcript, 53:9-13, 54:21-56:6.

³² Timothy Tearl is the victim of the assault that occurred on Lake Street on August 22, 2003.

³³ See Trial Tr., 59:9-60:9.

³⁴ Brickhouse was present the night Tearl was assaulted on Lake Street and she testified that she witnessed Brokenbrough hit Tearl. Tr. Transcript, 136:19-23.

support the jury's verdict and Mr. McLaughlin's conduct in not moving for acquittal was not objectively unreasonable.

7. Failing to Object to Insufficient Evidence to Prove Attempted Robbery

Brokenbrough claims that Mr. McLaughlin was ineffective for failing to object to insufficient evidence to prove attempted robbery where no evidence of force was established. This claim is also without merit. Brokenbrough's attempted robbery conviction arises from his assault of Dennis Nichols. Brian Sadler testified that he witnessed Brokenbrough hit Nichols in the face.³⁵ Maria Jefferson's testimony established that Brokenbrough repeatedly hit Nichols as he lay in the parking lot and that "[h]e would take the things out of [Nichols'] wallet and throw them away. And he would check them out first and then throw them away."³⁶ The testimony from these witnesses establishes the element of force required to support Brokenbrough's conviction on attempted robbery.

Because Brokenbrough does not present the Court with evidence that Mr. McLaughlin's conduct fell below that of reasonable professional standards or that he was prejudiced as a result of his attorney's conduct, he fails to meet the *Strickland* test and his claim of ineffective assistance of counsel is **DISMISSED**.

³⁵ Tr. Trial. R. at 163:7-9.

³⁶ Tr. Trial R. at 48:22-49:2.

* * *

For the above mentioned reasons, Brokenbrough's Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61, is hereby **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

