

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PETER M. SCHELLINGER,	§	
	§	No. 296, 2004
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County in Cr.
	§	A. Nos. IN98-10-0839, 0840;
STATE OF DELAWARE,	§	IN98-11-1162.
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 9810003616

Submitted: April 12, 2005
Decided: July 12, 2005

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 12th day of July 2005, upon consideration of the briefs of the parties, the Superior Court record, and the parties' post-briefing submissions, it appears to the Court that:

(1) The appellant, Peter M. Schellinger, has appealed from the Superior Court's denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). We find no merit to the appeal. Accordingly, we affirm.

(2) In September 1999, a Superior Court jury convicted Schellinger of Murder in the First Degree, Attempted Murder in the First Degree and

Possession of a Deadly Weapon During the Commission of a Felony.¹ The Superior Court sentenced Schellinger to two life sentences for the murder and attempted murder convictions, and to twenty years at Level V for the weapons offense. On direct appeal, this Court affirmed Schellinger's conviction and sentence.²

(3) In December 2003, Schellinger filed a motion for postconviction relief.³ Schellinger raised a number of claims, including ineffective assistance of counsel, judicial misconduct, and prosecutorial misconduct. Moreover, Schellinger alleged that the evidence used to convict him was either insufficient or inadmissible. At the Superior Court's request, Schellinger's defense counsel and the prosecutor submitted responses to the postconviction motion. By opinion and order dated June 10, 2004, the Superior Court denied Schellinger's ineffective assistance of counsel claim on its merits and denied the remaining claims as procedurally barred. This appeal followed.

¹Schellinger was convicted of killing Janice Markovic at her home and then stabbing and attempting to kill Janice Markovic's fourteen-year old son, Joshua Markovic.

²*Schellinger v. State*, 2000 WL 1587950 (Del. Supr.).

³In September 2003, Schellinger submitted a postconviction motion that was returned as non-compliant.

(4) When reviewing the Superior Court’s denial of a postconviction motion pursuant to Rule 61, this Court first must consider the procedural requirements of the rule before addressing any substantive issues.⁴ Rule 61(i)(4), for instance, provides that any ground for relief that was formerly adjudicated is thereafter procedurally barred, unless reconsideration of the claim is warranted in the interest of justice. Conversely, Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is procedurally barred, unless the movant demonstrates “cause for relief from the procedural default” and “prejudice” stemming from the alleged grievance. Furthermore, Rule 61(i)(5) states in pertinent part that the procedural bar of Rule 61(i)(3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation.

(5) To prevail on a claim of ineffective assistance of counsel, Schellinger must show that his counsel’s representation fell below an objective standard of reasonableness and that, but for defense counsel’s errors, there is a reasonable probability that the outcome of the case would have been different.⁵ Although not insurmountable, the standard is highly demanding and

⁴*Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁵*Strickland v. Washington*, 466 U.S. 668 (1984).

leads to a strong presumption that counsel's representation fell within a wide range of reasonable professional assistance.⁶

(6) In his postconviction motion and now on appeal, Schellinger alleges that his defense counsel refused to locate defense witnesses and to investigate the reliability of the prosecution's witnesses. Moreover, according to Schellinger, defense counsel "threatened" him, refused to bring him civilian clothing to wear at trial, "ambushed" him at trial when arguing for a lesser included offense, and refused his request to amend the direct appeal. After carefully reviewing the briefs and the record, however, we conclude that Schellinger's ineffective assistance of counsel claim is without merit. We agree with the Superior Court that Schellinger has not demonstrated that his defense counsel was unreasonable and unprofessional, or that he was prejudiced as a result of his counsel's alleged ineffectiveness.

(7) Next, Schellinger alleges that the prosecutor committed misconduct when he requested that Schellinger wear a restraint during trial. Moreover, according to Schellinger, the prosecutor made inflammatory and inaccurate descriptions of Schellinger's alleged attacks on the victims and otherwise misled the jury as to the results of drug and alcohol tests that were

⁶*Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

administered to Schellinger. The Superior Court determined, however, and we agree, that the prosecutorial misconduct claim is procedurally barred pursuant to Rule 61(i)(3). Schellinger has demonstrated neither cause for his failure to raise the claim nor prejudice from the alleged violation of his rights.⁷ Moreover, without any support in the record for his claim that the prosecutor inflamed or misled the jury or otherwise adversely impacted his right to a fair trial, Schellinger has shown no basis under Rule 61(i)(5) to apply the exception to the procedural bar.

(8) Third, Schellinger alleges that the trial judge committed “judicial misconduct” when he threatened to remove Schellinger from the courtroom and when he failed to address other threats directed to Schellinger by the prosecutor and a corrections officer. Also, Schellinger alleges that the trial judge failed to safeguard Schellinger’s right to wear civilian clothing to trial and failed to provide Schellinger with transcripts. Nonetheless, the judicial misconduct claim is barred as Schellinger could have, but did not, assert the claim on direct appeal from his conviction, and he has shown no cause for relief from the procedural default or prejudice from a violation of his rights.⁸ Moreover, with

⁷Super. Ct. Crim. R. 61(i)(3).

⁸Super. Ct. Crim. R. 61(i)(3).

no support in the record for Schellinger's claim, clearly there is no basis upon which to apply the exception to the procedural bar.⁹

(9) As further evidence of both judicial and prosecutorial misconduct, Schellinger contends on appeal that the trial judge and counsel for the State misrepresented that they received defense counsel's response to the postconviction motion.¹⁰ Schellinger's claim is conclusory, however, and otherwise provides no basis for relief.

(10) Finally, Schellinger argues without success that the evidence used to convict him was either insufficient or inadmissible. To the extent Schellinger challenges the admission of his statements to the police at the scene of a car accident in which Schellinger was involved, the claim is barred as formerly adjudicated.¹¹ The balance of Schellinger's evidentiary claim is procedurally barred as Schellinger has demonstrated neither cause for failing to assert the claim nor prejudice as a result of the alleged error.¹² Furthermore,

⁹Super. Ct. Crim. R. 61(i)(5).

¹⁰Schellinger's claim arises from the Clerk's letter of March 29, 2005 that requested that counsel for the State provide the Court with a copy of defense counsel's response to the postconviction motion when that response was not found in the Superior Court record.

¹¹Super. Ct. Crim. R. 61(i)(4). *See Schellinger v. State*, 2000 WL 1587950 (Del. Supr.) (concluding on direct appeal that Superior Court did not err when admitting Schellinger's statements to police).

¹²Super. Ct. Crim. R. 61(i)(3).

Schellinger has not made a colorable claim of a miscarriage of justice to warrant application of the exception to the procedural default.¹³

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

¹³Super. Ct. Crim. R. 61(i)(5).