IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 9503014206
	)	
JOSEPH CIPOLLA	)	
	)	
Defendant.	)	

Submitted: October 11, 2002
Decided: January 29, 2003

On Defendant's *Pro Se* Motion for Postconviction Relief. Denied.

ORDER

James B. Ropp, Deputy Attorney General, Wilmington, Delaware.

Joseph M. Cipolla, *pro se* Defendant, Sussex Community Correction Center, Georgetown, Delaware.

CARPENTER, J.

On this 29th day of January, 2003, upon consideration of Defendant's *pro se* motion for postconviction relief it appears to the Court that:

1. Joseph Cipolla (hereinafter "Defendant"), has filed this *pro se* motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The State has filed a response and, at the request of the Court, Defendant's trial attorney, Edward C. Pankowski, Jr. ("Counsel") filed an affidavit refuting charges of ineffective assistance of counsel. For the reasons set forth below, Defendant's motion for postconviction relief is **DENIED**.

2. On May 15, 1995, Defendant was indicted by a grand jury on sixteen counts of first degree robbery and sixteen counts of possession of a firearm during the commission of a felony. A jury trial was held in the Superior Court beginning on October 22, 1996. After the defense rested, the State moved to enter a *nolle prosequi* on several counts because of the unavailability of the victims which was granted by the Court. The jury subsequently found the Defendant guilty of six robberies and their associated firearm offenses, not guilty of five robberies and their associated firearm offenses, and were undecided on the remaining two robberies and two firearm offenses. On January 17, 1997, Defendant was sentenced to 42 years incarceration followed by ten years of Level III supervision. Defendant subsequently appealed to

the Delaware Supreme Court who affirmed the judgment of the Superior Court on December 4, 1997.[1]

The Defendant subsequently filed for postconviction relief *pro se*. This motion was returned to the Defendant as a result of his failing to sign the motion. It was subsequently corrected and re-filed by the Defendant approximately two months later. In the motion, the Defendant has alleged three separate claims as grounds for postconviction relief.[2] Within Defendant's claim of ineffective assistance of counsel, he alleges six different bases as grounds for relief. Defendant first alleges that his counsel failed to object to weapons being entered into evidence without the weapons being identified as those specifically used in the robbery. Second, Defendant claims his trial counsel failed to request a mistrial on grounds of evidence tampering. Defendant's third and fourth claims are that his trial counsel withdrew a lawful motion filed on his behalf and that Counsel withdrew the motion at the direction of his supervisor without informing the Court. Fifth, Defendant alleges that his trial counsel introduced a verbal motion to suppress certain items and then argued against his own motion. Finally, Defendant's sixth claim is that his trial counsel made no effort to investigate the case.

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[1] *Cipolla v. State*, 1997 WL 794484 (Del. Supr.).

[2] Defendant's claims of evidence tampering and constitutional rights violations have been subsumed by the Court in his claims of ineffective assistance of counsel.

3. Before addressing the merits of any claim raised in a motion seeking postconviction relief, this Court must first apply the rules governing the procedural requirements of Superior Court Criminal Rule 61(i)[3]. While this is the Defendant's first motion for postconviction relief, it has been filed more than three years after the conviction became final.[4] Therefore, as Defendant is not asserting a newly recognized retroactively applicable right, Defendant's claims would typically be barred by Superior Court Criminal Rule 61(i)(1). However, because the Defendant raises a claim of ineffective assistance of counsel, the Court is required to proceed to the substance of Defendant's motion pertaining to the ineffective assistance of counsel claim in order to determine whether it presented a colorable claim of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings.[5]

4. Superior Court Criminal Rule 61(d)(4) provides that "[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings

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[3] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 264-265 (1989)).

[4] SUPER. CT. CRIM. R. 61(i)(1), stating:

> [a] motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

[5] SUPER. CT. CRIM. R. 61(i)(5); *State v. Scott*, 2002 WL 485790, at *3 (Del. Super. Ct.).

in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified."[6] Claims for postconviction relief, which are entirely conclusory may be summarily dismissed on that basis.[7]

Here, the Defendant's first, third, fourth and fifth arguments within his ineffective assistance of counsel claim are bald accusations unsupported by the evidence presented at trial. The Defendant has not offered any bases for this Court to consider these assertions. Further, the State's response, as well as the affidavit of Mr. Pankowski, clearly establishes that the Defendant's claims are without merit. As such, these claims are summarily dismissed by the Court.

5. Defendant also asserts that his trial counsel provided ineffective assistance of counsel (a) by failing to request a mistrial on evidence tampering issues, and (b) by making no effort to investigate witnesses on Defendant's behalf. An ineffective assistance of counsel claim requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial and resulted in a trial that is

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[6] SUPER. CT. CRIM. R. 61(d)(4).

[7] *See, e.g.*, *Jordan v. State*, 1994 WL 466142 (Del. Supr.); *Anderson v. State*, 2002 WL 187509, at *4 (Del. Super. Ct.) (citing *State v. Brittingham*, 1994 WL 750341, at *3 (Del. Super. Ct.) (citing *Younger v. State*, 580 A.2d 552, 556 (Del. 1990) (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel))).

unreliable.[8] In order for a movant to prevail on a claim of ineffective assistance of counsel he must satisfy the two-prong test of *Strickland v. Washington*.[9] *Strickland* requires that a defendant show: 1) that counsel's representation fell below an objective standard of reasonableness; and 2) that counsel's actions were prejudicial to him in that there is a reasonable probability that, but for counsel's unprofessional error, the result of a trial would have been different.[10] Under the first prong of the *Strickland* test, there is a strong presumption that counsel's representation was professionally reasonable.[11] Although this is not insurmountable, *Strickland* mandates that this Court must "eliminate the distorting effects of hindsight" when reviewing counsel's representation.[12] Delaware has additionally held that a defendant must make "concrete allegations of actual prejudice and substantiate them or risk summary dismissal" in claims of ineffective assistance of counsel.[13] The

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[8] *See State v. Talmo*, 2002 WL 1788111, at *1 (Del. Super. Ct.) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

[9] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[10] *See Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (quoting *Strickland*, 466 U.S. at 688, 694).

[11] *See Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689); *see also Larson v. State*, 1995 WL 389718, at *4 (Del. Supr.); *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

[12] *See Strickland*, 466 U.S. at 689.

[13] *See State v. Wilson*, 2001 WL 392357, at *2 (Del. Super. Ct.)(citing *Younger*, 580 A.2d at 556; *Skinner v. State*, 1994 WL 91138 (Del. Supr.)).

Defendant's allegations fail to meet this test.

6. The Defendant first asserts that his counsel failed to request a mistrial because evidence was tampered with during the trial. The Defendant contends that Officer LeMarche's application of gun oil to one of the weapons after the weapon had already been entered into evidence constituted evidence tampering and that trial counsel's failure to request a mistrial unduly prejudiced Defendant. The record indicates that two of the four handguns subsequently entered into evidence by the State had been "frozen" and that the safety of at least one was of concern because it could not be established whether the weapon was still loaded because the action was frozen shut. As Detective Steven Lawrence testified, after the weapons were collected the 22-caliber weapon was not test-fired because "[the police] couldn't get it to unfreeze. It was frozen shut."[14] Therefore, the jury was aware that the weapon was frozen when it was collected by the police. Before beginning the trial the following day, the State informed the Court and the defense that Officer LeMarche was able to open the frozen weapon, presumably to assure that the weapon was no longer loaded. Several days later, when Detective LaMarche testified about the condition of the weapons and their overall exterior, LaMarche testified that "[t]his is the .22 caliber semi-automatic handgun that was recovered from the residence. The

[14] Transcript, October 22, 1996, at pages 113-114.

general overall condition, *other than the oil which was applied to open the weapon*, appears to be fairly rusted and pitted."[15] Thus, the jury was fully aware that the weapon was not in the same condition as well as the reason why the oil was applied. The Court fails to see how this prejudiced the Defendant and further finds that the action of the officer was appropriate to insure the safety of those in the courtroom. The Court also notes that the State does not need to prove the weapon was operable to obtain a conviction for an offense involving a deadly weapon;[16] and further, Delaware courts have held that for a robbery conviction, the defendant is merely required to display "what appears to be a deadly weapon" for the State to obtain a conviction.[17] Consequently, whether the gun was operable or not is irrelevant and thus, the Defendant was not prejudiced by this action.

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[15] Transcript, October 29, 1996, at pages 65-66 (emphasis added).

[16] *O'Neil v. State*, 691 A.2d 50 (Del. 1997); *Desmond v. State*, 654 A.2d 821 (Del. 1992).

[17] *Harrigan v. State*, 447 A.2d 1191 (Del. 1982); *State v. Smallwood*, 346 A.2d 164 (Del. 1975).

7. The Defendant's final basis for ineffective assistance of counsel is that his counsel made no effort to investigate the case on Defendant's behalf. In support of this, he asserts that he was unduly prejudiced when Mr. Pankowski failed to pursue a particular witness who would testify that he was in the Veteran's Hospital at the time of the first robbery, where he was having his vital signs taken, thereby placing him in a different location at the time of the crime. The Court finds this contention legally insufficient to prove ineffective assistance of counsel.[18] Mr. Pankowski's affidavit reflects that he had "interviewed [the Defendant] several times before trial, interviewed police officers and civilians, and viewed the physical evidence in June, 1996, at Delaware State Police Troop 2."[19] Other than the Defendant's conclusory comments, there is nothing in the record to suggest that he ever advised Mr. Pankowski of this alibi evidence. It appears defense counsel interviewed all relevant witnesses that he was aware of before trial and based on this, the Court is not prepared to say that trial counsel's performance falls below the *Strickland* standard.

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[18] *See State v. Jordan*, 1994 WL 637299 (Del. Super. Ct.), aff'd, 1994 WL 466142 (Del. Supr.); *Anderson v. State*, 2002 WL 187509 (Del. Super. Ct.) (citing *State v. Brittingham*, 1994 WL 750341 (Del. Super. Ct.)).

[19] Affidavit of Edward C. Pankowski, Jr. at ¶ 4.

8. Therefore, based upon the above reasoning, the Defendant is not entitled to postconviction relief and the motion is hereby **DENIED**.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.