

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

February 19, 2003

James Coleman, Jr.
Delaware Correctional Center
1181 Paddock Rd.
Smyrna, DE 19977

RE: State v. Coleman, Def. ID# 9902009031

DATE SUBMITTED: November 13, 2002

Dear Mr. Coleman:

Pending before the Court is the motion of James Coleman, Jr. ("defendant") for postconviction relief pursuant to Superior Court Criminal Rule 61 ("R. 61"). Although defendant requests a hearing, it is unnecessary to hold one in order to dispose of the claims set forth in the motion. This is my decision denying the postconviction relief motion.

On June 30, 1999, a jury found defendant guilty of charges of robbery in the first degree; possession of a deadly weapon during the commission of a felony; conspiracy in the second degree; and criminal impersonation (two counts). On August 13, 1999, defendant was sentenced thereon. Defendant appealed, and the Supreme Court affirmed the judgment of the Superior Court. Coleman v. State, Del. Supr., No. 395, 1999, Steele, J. (December 4, 2000).

On May 29, 2002, defendant filed the pending motion for

postconviction relief. In it, he argues trial counsel and appellate counsel were ineffective. Defendant does digress at one point, set forth what he considers to be inconsistencies in testimony, and argue that there was insufficient evidence to support the jury's verdict. This argument, made almost as an aside, is procedurally barred pursuant to R. 61(i)(3), and defendant makes no attempt to establish an exception to the bar. Consequently, the Court ignores this argument and considers only the ineffective assistance of counsel claims.

In light of defendant's claims of ineffectiveness, the Court instructed trial counsel and appellate counsel to submit affidavits addressing defendant's contentions. After they did so, the Court provided defendant the opportunity to submit an affidavit responding to those contentions. Defendant did not submit a legally valid affidavit and his only response was a general denial that anything the attorneys submitted was not true. Consequently, the Court ignores defendant's submission.

There are no procedural bars to the motion. It is not time-barred since it was brought within three years from the date when the conviction became final. Rule 61(i)(1). See Jackson v. State, 654 A.2d 829, 833 (Del. 1995). In addition, since this is defendant's first motion for postconviction relief, the bar of Rule 61(i)(2) does not apply. The claims of ineffective assistance of counsel are not procedurally barred. State v. Johnson, Del. Super., Cr. A. No. 97-10-0164 (R1), Graves, J. (August 12, 1999) at 2; State v. Gattis, Del. Super., Cr.A. Nos. IN90-05-1017 to 1019,

Barron, J. (December 28, 1995) at 7, aff'd, Del. Supr., 637 A.2d 1174 (1997).

The case of State v. Gattis, supra at 7-9 sets forth the standard to apply to a claim of ineffective assistance of counsel:

This type of claim is normally not subject to the procedural default rule, in part because the Delaware Supreme Court will not hear such a claim for the first time on direct appeal, and therefore as a practical matter the first opportunity to raise this issue is in a collateral attack such as the Rule 61 motion for postconviction relief. [Citations omitted.] For this reason, many defendants ... allege ineffective assistance of trial counsel in order to overcome the procedural default.

However, this path creates confusion for the defendant if he does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards. For example, the United States Supreme Court has stated that

[i]f the procedural default is the result of ineffective assistance of counsel, the Sixth amendment itself requires that responsibility for the default be imputed to the State, which may not `conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' **Ineffective assistance of counsel, then, is cause for a procedural default.**

Murray v. Carrier, 477 U.S. 478, 487 (1986) (emphasis added). A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two-part analysis enunciated in Strickland v. Washington, 466 U. S. 668 (1984) and adopted by the Delaware Supreme Court in Albury v. State, Del. Supr., 551 A.2d 53 (1988).

The Strickland test requires the movant to show first that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness. Strickland at 687. Second, under Strickland the movant must show there is a reasonable degree of probability that but for counsel's unprofessional errors the outcome of the proceedings would have been different, that is, actual prejudice. Id.

at 694. In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate **concrete** allegations of actual prejudice or risk summary dismissal. [Citations omitted.]

Generally, the claim for ineffective assistance fails unless both prongs of the test have been established. Strickland at 687. However, the showing of prejudice is so central to this claim that the Strickland Court stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. at 697. In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.

Furthermore, the defendant must rebut a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance," and this Court must eliminate from its consideration the "distorting effects of hindsight when viewing that representation." Strickland at 689.

I now turn to defendant's claims.

1) Trial counsel failed to meet with defendant "in order to effect proper preparation".

Defendant maintains as follows. Trial counsel met with him only three times. Trial counsel never obtained from him any information other than that which trial counsel already had obtained through discovery responses from the State of Delaware ("the State"). Defendant does not specify what more meetings would have accomplished nor does he specify what information trial counsel could have elicited from him which would have resulted in a different outcome of the trial. The absence of concrete allegations precludes consideration of these contentions. Younger v. State, 580 A.2d 552, 555 (Del. 1990); Tice v. State, Del. Supr., No. 346, 1995, Berger, J. (November 13, 1995) at 7.

2) Trial counsel failed "to interview state's witnesses, who

were chief to the defendant's prosecution".

Defendant argues that trial counsel should have checked out his co-defendants' stories individually to discover if each had a propensity for lying and should have discovered if their confessions were voluntary, coerced, or entered into in order to obtain a lighter sentence.

Defendant's co-defendants were Tashyne Strand, Ozella Burton, and Linwood Burton. Tashyne Strand and Ozella Burton, who entered into plea agreements, testified at defendant's trial. Linwood Burton, who apparently was tried separately, did not testify at all. Although the State called Ms. Burton, she was deemed a hostile witness to the State. Her testimony, which was limited in light of her contentions she did not see anything or did not remember certain things, was favorable to defendant.

Trial counsel, in his affidavit, explains as follows. Since co-defendant Linwood Burton was represented by counsel, the public defender's office was not permitted to interview him. Delaware Lawyers' Rules of Professional Conduct, Rule 4.2. The office interviewed Ozella Burton and sent a copy of that interview to defendant. The office could not locate Ms. Strand prior to trial; consequently, she was not interviewed. Trial counsel also explains that he had copies of the co-defendants' prior statements, criminal histories and their plea agreements.

A review of the record shows that trial counsel effectively cross-examined Tashyne Strand by establishing she previously had made numerous statements which were inconsistent with her trial

testimony and by establishing that she received a beneficial plea deal which required her testimony. It also establishes that to have impeached Ozella Burton when she was deemed hostile to the State and when she clearly was testifying in favor of defendant would have been incompetent. Again, Linwood Burton was not called to testify.

Trial counsel's representation in this area was objectively reasonable.

For the foregoing reasons, this claim of ineffectiveness fail.

3) Trial counsel failed "to investigate state's case, or review with the defendant the applicable principles of law for a defense".

Trial counsel sets forth the following information by affidavit. The State produced statements of the co-defendants and police reports. He reviewed all reports and records which the State and his office produced. He sent defendant copies of all correspondence on defendant's case as well as reports from the investigator concerning investigative work done. He met with defendant five times and discussed with him applicable principles of law regarding both the State's case and his defense. The discussion included conspiracy and accomplice liability law. Trial counsel viewed the scene of the crime.

Trial counsel did investigate the case. Defendant fails to specify what it is a further investigation would have established. Defendant's contention is a conclusory allegation, and as such, fails. Younger v. State, supra. In addition, trial counsel

explained the law to defendant. In any case this conclusory allegation fails, also. Id.

For the foregoing reasons, this claim fails.

4) Trial counsel failed "to file a Brady Motion in respect to the state's witnesses [sic] known criminal history for impeachment".

This claim is based upon a misunderstanding of the actual facts. Since trial counsel did have the criminal histories, as well as the plea agreements, this claim fails.

5) Trial counsel failed "to file a motion for expenditure of funds, to secure a translator [sic] to clarify truthfulness of non-speaking English victim"

Defendant argues that if he could have hired his own translator, then he could have interviewed the Spanish-speaking victim before trial. By doing so, he could have mapped out a trial strategy, he could have determined if the victim's testimony was consistent at trial, and he could have determined if the translator used at trial was correctly interpreting.

This claim is meritless. Defendant cannot establish that the victim would have been willing to be interviewed. He does not establish how his trial strategy would have been different had the victim been interviewed. Younger v. State, supra. He furthermore presupposes that the victim would have testified inconsistently and that the translator did not translate as she was sworn to do. Defendant does not present any concrete facts to establish that if the victim had been interviewed before trial, the outcome would

have been different. This claim fails.

6) Appellate counsel failed to raise issues of ineffective assistance of counsel on appeal.

Defendant's final argument is that appellate counsel should have raised claims of ineffective assistance of counsel on appeal. Appellate counsel correctly relates that it is legally inappropriate to raise an issue of ineffective assistance of counsel when it has not been raised before the trial court. The Supreme Court will not consider such a claim for the first time on direct appeal. Fletcher v. State, Del. Supr., No. 397, 2002, Steele, J. (January 16, 2003). This claim fails.

For the foregoing reasons, defendant's motion is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Adam D. Gelof, Esquire
E. Stephen Callaway, Esquire
Anthony A. Figliola, Jr., Esquire