IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	ID# 87007286DI
DAVID T. SCOTT,	)	
	)	
Defendant.	)	

Submitted: January 2, 2002
Decided: February 7, 2002

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

ORDER

This 7th day of February, 2002, upon consideration of Defendant's *pro se* Motion for Postconviction Relief, it appears to this Court that:

1. David T. Scott ("Defendant") has filed this Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61. For the reasons stated below, Defendant's motion is **DENIED**.

2. In November 1987, a grand jury returned an indictment charging Defendant with four counts of Arson First Degree, two counts of Arson Second Degree, and one count of Conspiracy Second Degree. The offenses set forth in the indictment were alleged to have occurred five years earlier, in May 1982. In May 1989, a jury found Defendant guilty on all counts. Following the jury's verdict, the State entered a *nolle prosequi* as to the conspiracy charge. Defendant was sentenced to a total a 28 years of

Level V imprisonment. On direct appeal, the Delaware Supreme Court affirmed Defendant's convictions.[1]

Defendant thereafter petitioned for a writ of *habeas corpus* to the United States District Court for the District of Delaware. That court found that Defendant "raise[d] the same exact argument[s] that he brought to the Delaware Supreme Court," and accordingly denied Defendant's petition.[2] The United States Court of Appeals for the Third Circuit thereafter affirmed the District Court by denying Defendant's request for a certificate of probable cause.[3]

On August 29, 2001, Defendant filed in this Court a two count *pro se* motion for postconviction relief based upon a claim of ineffective assistance of counsel (the "Motion").

3. Defendant argues that his conviction and judgment should be "vacated" because his trial counsel's representation fell below an objective standard of reasonableness and that "but for" his counsel's error, Defendant would not have been convicted; Defendant argues that he therefore satisfies the standard necessary to grant relief for ineffective assistance of counsel.[4]

---

[1] Scott v. State, Del. Supr., No. 299, 1989, Holland, J. (June 7, 1990).

[2] Scott v. Redman and Oberly, D. Del., C.A. No. 91-199-LON, Longobardi, D.J. (December 11, 1992) (ORDER).

[3] Scott v. Redman and Oberly, 3d Cir., C.A. No. 93-7042, Greenberg, C.J. (June 28, 1993) (ORDER).

[4] See Albury v. State, 551 A.2d 53, 58 (Del. 1988) (quoting Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)) (stating that to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different).

Specifically, Defendant claims that his counsel failed at trial to object to the introduction of hearsay evidence, failed at trial to object to the introduction of prior "bad acts" evidence,[5] and failed at trial to object to allegedly improper remarks made by the prosecution during its closing argument. Defendant further argues that he "has demonstrated that the only evidence presented…at trial [ ] that would establish some nexus between the defendant and the offense [ ] was solely hearsay testimony, "[6] and that he is innocent "while the actual culprit remains free."[7]

Defendant acknowledges in his Motion that the time limitation procedural bar contained at Superior Court Criminal Rule 61(i)(1) would normally preclude his Motion.[8] Defendant also implicitly acknowledges the potential applicability of the procedural bar contained at Superior Court Criminal Rule 61(i)(3).[9] Defendant argues, however, that the "fundamental

[5] See Del. R. Evid. 404(b) (stating that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith").

[6] Def.'s Mem. of Law at 6.

[7] Id. at 8.

[8] That rule provides in part that "[a] motion for postconviction relief may not be filed more than three years after the judgment of conviction is final." Super. Ct. Crim. R. 61(i)(1).

[9] Super. Ct. Crim. R. 61(i)(3) provides that "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction…is thereafter barred, unless the movant shows (A) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant's rights."

fairness" exception contained at Superior Court Criminal Rule 61(i)(5)[10] permits the Court to ignore these procedural bars and to reach the merits of his claim because "Constitutional violations [due to ineffective assistance of counsel] so undermined the fundamental fairness of [Defendant's] trial that [these violations] resulted in the conviction of one who is actually innocent."[11]

In response, the State requests that Defendant's Motion be denied under alternative procedural bars contained in Superior Court Criminal Rule 61. The State argues that the time limitation contained in Superior Court Criminal Rule 61(i)(1) bars Defendant's requested relief because the limitation period began to run on June 27, 1990, when the Supreme Court affirmed Defendant's conviction. The State also argues that Superior Court Criminal Rule 61(i)(3) bars Defendant's Motion because Defendant has failed to show both "cause" and "actual prejudice." The State contends that the "fundamental fairness" exception contained in Superior Court Criminal Rule 61(i)(5) does not prevent the application of the procedural bars in the rule because the "fundamental fairness" exception is "extremely narrow" and is only applied in limited circumstances such as when "[a] right has been recognized for the first time after direct appeal,"[12] or when "[a] trial court

---

[10] That rule provides in pertinent part that "[t]he bars to relief in [Superior Court Criminal Rules 61(i)(1) and 61(i)(3)] shall not apply to a claim that the court lacked jurisdiction or to 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." Super. Ct. Crim. R. 61(i)(5).

[11] Def.'s Mem. of Law at 2.

[12] State's Answer to Def.'s Mot. at 2.

lacked the authority to convict or punish."[13] The State also argues that Superior Court Criminal Rule 61(i)(2)[14] applies to bar Defendant's motion, and that "in a case with multiple repetitive motions such as this," there must be "a definitive end to the litigable aspect of the criminal process."[15]

The State points out that Defendant specifically raised on direct appeal the issue of the allegedly improper prosecutorial remarks, and that Defendant should therefore be prevented from raising that issue now.

4. Before addressing the merits of any claim raised in a motion seeking postconviction relief, the Court must first consider the procedural elements of Superior Court Criminal Rule 61.[16] To protect the integrity of the procedural rules, the Court should not consider the merits of postconviction claims where a procedural bar exists.[17]

Ordinarily, the three-year time limit contained in Rule 61(i)(1) is jurisdictional and cannot be enlarged.[18] In order to avoid procedural default under Rule 61(i)(3), the movant must demonstrate both cause and actual prejudice. Both the procedural bars of Superior Court Criminal Rule 61(i)(1) and 61(i)(3) may potentially be overcome by the "fundamental

---

[13] Id. at 3.

[14] Superior Court Criminal Rule 61(i)(2) provides that "[a]ny ground for relief that was not asserted in a prior postconviction proceeding…is thereafter barred, unless consideration of the claim is warranted in the interest of justice."

[15] State's Answer to Def.'s Mot. at 2.

[16] Younger v. State, 580 A.2d 552, 554 (Del. 1990) (citing Harris v. Reed, 489 U.S. 255, 265 (1989)).

[17] State v. Gattis, Del. Super., Cr.A. No IN-90-05-1017, Barron, J. (December 28, 1995) (citing Younger, 580 A.2d at 554).

[18] Robinson v. State, 584 A.2d 1203, 1204 (Del. 1990).

fairness" exception in Superior Court Criminal Rule 61(i)(5), but that exception is narrow and is applied only in limited circumstances.[19] Additionally, ineffective assistance of counsel claims are not subject to the bar of Superior Court Rule 61(i)(3).[20]

5. The Court will not substantively address Defendant's contention that postconviction relief is warranted due to alleged prosecutorial misconduct in the State's closing argument at trial. Defendant already raised the impropriety of the State's closing argument on direct appeal, and the Delaware Supreme Court ruled against him.[21] Defendant's assertion will therefore not be considered, as that contention is barred by Superior Court Criminal Rule 61(i)(4)[22], and no interest of justice requires its reconsideration.[23]

Regarding Defendant's assertion that his counsel was ineffective at trial due to counsel's failure to object to the introduction of hearsay and prior "bad acts" evidence, Defendant's Motion would normally be

---

[19] Younger, 580 A.2d at 555.

[20] Cobb v. State, Del. Supr., No. 362, 1995, Walsh, J. (January 10, 1996) (ORDER) at 7.

[21] Scott v. State, Del. Supr., 577 A.2d 755, No. 299, 1989, Holland, J. (June 7, 1990), Order at 3-4.

[22] That rule provides that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal *habeas corpus* proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice." Super. Ct. Crim. R. 61(i)(4).

[23] "The interest of justice [exception under Superior Court Criminal Rule 61(i)(4)] has been narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish him." State v. Wright, 653 A.2d 288, 298 (Del. Super. 1994) (citing Flamer, 585 A.2d at 746).

procedurally barred because it was filed more than three years after the judgment of Defendant's conviction became final.[24] Because Defendant raises a claim of ineffective assistance of counsel, however, the Court must proceed to the substance of Defendant's Motion in order to determine whether Defendant presents a colorable claim of a "constitutional violation that undermined the fundamental legality, reliability, integrity, or fairness of the proceeding."[25]

6. To succeed on a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different."[26] In attempting to establish a claim of ineffective assistance of counsel, the defendant must allege concrete allegations of actual prejudice and substantiate them.[27] Conclusory allegations are legally insufficient to substantiate the claim.[28] Defense counsel's performance should be evaluated by eliminating "the distorting effects if hindsight" or speculation about what trial counsel could have done better.[29] Moreover, any "review of counsel's

---

[24] State v. Laws, Del. Super., ID # 30900552DI, Cooch, J. (January 5, 2001), Order at 3; Super. Ct. Crim. R. 61(i)(1).

[25] Super. Ct. Crim. R. 61(i)(5).

[26] Albury, 551 A.2d at 58.

[27] Younger, 580 A.2d at 555-56.

[28] Duffy v. State, Del. Supr., No. 529, 1992, Horsey, J. (January 27, 1993) (ORDER).

[29] Gattis v. State, 697 A.2d 1174, 1178 (1997).

representation is subject to a strong presumption that the representation was professionally reasonable."[30]

Here, Defendant argues that his attorney failed to make objections to hearsay testimony Defendant believes led to his conviction, and which Defendant believes to be "the only tantamount [sic] evidence presented by the State in this case." Specifically, Defendant objects to the testimony of Carol Moon, Defendant's first cousin and a witness who recanted her out of court statements recorded during a police interview after first having taken the stand at trial; Jessica Miller, a former lover and mother of three of Defendant's children; and Raymond Coleman, a person who described himself at trial as Defendant's "friend". Although Ms. Moon apparently refused to testify to her out of court statements inculpating Defendant, Lieutenant Penoza of the City of Newark Police Department testified at trial as to the statements that Ms. Moon made to him.

The Court notes that the testimony of Ms. Moon, Ms. Miller, and Mr. Coleman regarding Defendant's culpability largely coincides. Lieutenant Penoza testified that Ms. Moon told him on two occasions using the same words (despite a lapse of six year in between those interviews) that Defendant had told Ms. Moon that "I burned the damn houses down, but the only reason I'm sorry is because of the two old ladies that live there."[31] Ms. Miller testified at trial that Defendant had told her that he "soaked [rags with gasoline] and that he burnt it."[32] Finally, Mr. Coleman testified that

---

[30] Flamer, 585 A.2d at 753.

[31] R. at 212-213.

[32] R. at 198-199.

Defendant told him prior to the arson that Defendant was "going to burn it up."[33]

Despite Defendant's arguments to the contrary, the Court finds that the testimony inculpating Defendant and to which he objects was properly admitted at trial. The proposed testimony of Ms. Moon that ultimately was introduced by Lieutenant Penoza qualifies as a prior out of court statement admissible under section 3507 of Title 11, and the testimony of both Ms. Miller and Mr. Coleman qualifies as the admission of a party-opponent under Delaware Uniform Rule of Evidence 801(d)(2)(A), and is therefore not hearsay at all.

Section 3507 of Title 11 of the Delaware Code provides:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.[34]

This statutory section is directed to the problem of the "turncoat witness.[35]"

Ms. Moon had previously given a statement implicating the Defendant to Lieutenant Penoza as he was investigating the arsons for which Defendant was ultimately charged. Despite her assurances that she would testify in accordance with those statements, Ms. Moon recanted on the stand when she

---

[33] R. at 182-183.

[34] Del. Code Ann. tit. 11, § 3507 (2001).

[35] Johnson v. State, 338 A.2d 124 (1975).

stated "the part that's in my statement, [Defendant] did not say."[36] Ms Moon remained on the stand following this testimony, and was available for cross-examination. The testimony that Lieutenant Penoza ultimately gave concerning Defendant's statements to Ms. Moon was therefore admissible, and no prejudicial error

Likewise, the testimony of both Ms. Miller and Mr. Coleman is admissible because it qualifies as the admission of a party-opponent, and is therefore not hearsay at all. Delaware Rule of Evidence 801 provides:

> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> ….
>
> (2) Admission by party opponent. The statement is offered against a party and is (A) his own statement….

Thus, the statements that Defendant made to Ms. Miller and Mr. Coleman, who testified at trial and were available for cross-examination, were properly admitted and there was no prejudicial error.

Having found no prejudicial error in counsel's failure to object to the those statements that Defendant argues form the basis of his ineffective assistance of counsel claim, this Court will not examine counsel's

---

[36] R. at 129.

performance[37] to determine whether that performance fell below an objective standard of reasonableness.[38] Likewise, the Court will not examine Defendant's claim of ineffective assistance of counsel as that claim relates to the introduction of prior "bad acts" evidence, as Defendant has failed to substantiate his claim beyond allegations such as "[e]vidence of prior bad acts by a defendant is not admissible, to prove that the defendant is a bad person and therefore committed the crime."[39]

7. Based on the above, this Court finds that counsel's Defendant has failed to establish a colorable claim of ineffective assistance of counsel. The Court therefore finds an absence of constitutional violations that would so undermine the fundamental fairness of Defendant's trial that the relief Defendant now seeks would be warranted. The procedural bars of Superior Court Criminal Rule 61 otherwise apply, and for all those reasons,

---

[37] The Court requested an affidavit from Anthony A. Figliola, Jr., Esquire, Defendant's counsel at trial and on appeal, in order to assist with the Court's resolution of Defendant's Motion, but Mr. Figliola responded in his affidavit that because the Delaware Supreme Court affirmed Defendant's conviction in 1990 and it was not until 2001 that Defendant filed his Motion, counsel's file had in the interim been destroyed and no transcripts, notes or independent recollection otherwise existed.

[38] See Strickland v. Washington, 466 U.S. 668, 697 (1984) (stating that there is no need for a court deciding an ineffective assistance of counsel claim to address both components of the inquiry if defendant makes an insufficient showing of one).

[39] Def.'s Mem. of Law at 7.

Defendant's Motion is **DENIED**.

IT IS SO ORDERED.

_____

cc: Prothonotary
Victoria R. Witherell, Esquire, Deputy Attorney General
Anthony A. Figliola, Jr, Esquire
David T. Scott
Investigative Services