

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

v.

RICHARD ROTH, JR.

Defendant.

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ID No. N9901000330

OPINION

Submitted: October 21, 2016

Decided: January 25, 2017

Upon Defendant's Motion for Postconviction Relief, DENIED.
Upon Conflict Counsel's Motion for Appointment of Counsel, DENIED.

Sean P. Lugg, State Prosecutor, Department of Justice, Carvel State Building, 820 N. French Street, 7th Floor, Wilmington, DE 19801, *Attorney for the State*

Richard Roth, Jr., SBI No. 00275478, Sussex Correctional Institute, P.O. Box 500, Georgetown, DE 19947, *pro se*

BRADY, J.

I. INTRODUCTION

Before the Court is a Motion for Postconviction Relief and Motion for Appointment of Counsel filed pursuant to Superior Court Criminal Rule 61 (“Rule 61”) by Richard Roth, Jr., (“Defendant”) on October 21, 2016. The Defendant raises five challenges to the evidence which was used against him: (1) the State produced two forensic witnesses at trial who did not conduct the DNA analysis themselves, (2) the prosecutor committed misconduct by using false identification testimony, (3) the State was allowed to introduce three out-of-court statements from witnesses without laying a proper foundation, (4) there was a violation of a sequestration order, and (5) police provided false testimony at trial.

II. FACTS¹ & PROCEDURAL BACKGROUND

Roth, Jr. and three codefendants were charged in connection with a series of robberies occurring in the Newport and Stanton area in December 1998. The codefendants were Richard Roth, Sr., James Anderson and Moises Ordorica. The first robbery occurred on December 22, 1998 at the Newport Family Restaurant. The owner of the restaurant, Maria Perdikis, was robbed as she closed the business and walked to her car with the night deposit bag. An armed robber, wearing a mask and gloves, grabbed her from behind and threatened to kill her if she did not give him the deposit bag. The robber discharged pepper spray into Perdikis' face, and she fell to the ground. The robber then discharged pepper spray into Perdikis' face again. She heard a second man say, “What are you doing?” The robbers fled with the night deposit bag containing approximately \$3,000. Perdikis told the investigating police officer that she had seen three men in the bushes that night but did not remember making that statement at trial.

¹ The facts are adopted from the Delaware Supreme Court’s mandate affirming the Defendant’s convictions and sentence. *Roth v. State*, 788 A.2d 101, 103–04 (Del. 2001)

The second robbery occurred on December 26, 1998 at Bob's Adult Bookstore on Route 13. At about 10:00 p.m., the manager of the bookstore, Mitchell Watson, stepped outside to investigate the possibility of a break in the cable line since the television had gone blank and the credit card machine stopped functioning. When Watson opened the door, a man entered the store and said, "Hi Mitch." When Watson turned around, the man was wearing a mask and pointed a gun at Watson's face. The gunman ordered Watson to step away from the door. A second masked robber entered holding a shotgun. The two gunmen in the store communicated with a third person outside by using a walkie-talkie. The robbers fled with approximately \$3,000 and several coffee cans that each contained approximately \$100 in quarters or tokens. Mitchell provided a description of the two gunmen to the police. The description given by Mitchell, and the descriptions given by other witnesses to the crimes, were consistent with Roth, Jr. and James Anderson.

The most serious offense occurred during the third armed robbery on New Year's Eve 1998 at the J & R Grocery Store on East Newport Pike. The owner of the store, Jaime Antunez, was working inside the shop with his sister, Marisela Rodriguez. Two gunmen wearing ski masks entered the store. One was armed with a .38 caliber revolver. The other was armed with a sawed-off shotgun and a semiautomatic handgun.

As Antunez struggled with one of the robbers, that gunman's weapon discharged twice. One shot struck that gunman in the hand and the other shot grazed his head. The second robber returned from a back room and fired several shots at Antunez with the semiautomatic handgun. The robbers took money from the cash register, exited the grocery store and entered a getaway car driven by a third person. Antunez survived for fifty-five days before dying from an infection and pneumonia caused by the gunshot wounds that were inflicted during the armed robbery.

A customer arrived at the J & R Grocery Store during the course of the robbery. He could see the masked gunmen inside and did not enter. He provided a description of the gunmen to police. The police found a sawed-off shotgun at the crime scene with a white wood stock and tape on the handle.

On January 4, 1999 the Defendant was arrested and indicted on thirty counts related to the robberies and the shooting. On June 15, 2000, a jury found the Defendant of two counts of Murder in the First Degree, four counts of Robbery in the First Degree, three counts of Conspiracy in the Second Degree, and six counts of Possession of a Firearm During the Commission of a Felony. The Defendant was sentenced to two life sentences, plus 188 years of Level V incarceration. On August 6, 2000 the Defendant filed a direct appeal to the Delaware Supreme Court. On December 21, 2001 the Supreme Court affirmed the Defendant's convictions and sentence.²

On September 13, 2004 the Defendant filed a *pro se* Motion for Postconviction Relief. On March 1, 2005 the Defendant filed a Motion for Appointment of Counsel to assist with his postconviction proceedings. On April 15, 2005 the State filed a response in opposition to the Defendant's Motion for Postconviction Relief. On June 13, 2005 the Court denied the Defendant's Motion for Postconviction Relief and Motion for Appointment of Counsel. The Defendant appealed the Superior Court's denial of his Motions to the Delaware Supreme Court on July 13, 2005. On May 2, 2006 the Supreme Court affirmed the decision of the Superior Court, finding Defendant's Motion to be without merit.³ Reargument was denied on June 7, 2006.⁴

² *Roth v. State*, 788 A.2d 101 (Del. 2001).

³ *Roth v. State*, 901 A.2d 120 (Del. 2006) (reargument denied (June 07, 2006)).

⁴ *Id.*

On October 21, 2016 the Court received the instant Motion for Postconviction Relief filed by the Defendant. The Court did not request any briefing from the State, the Defendant's trial counsel, or the Defendant, and took the matter under advisement. This is the Court's decision.

IV. DEFENDANT'S CONTENTIONS

The Defendant contends that he did not receive a fair trial because two forensic analysts were allowed to testify about the accuracy of test results and that proper protocols were followed, but did not actually conduct the analysis of the DNA evidence in the Defendant's case. The Defendant contends that the prosecutor allowed false identification testimony to be elicited by a State witness. The Defendant also contends that the Court erroneously allowed the State to introduce out-of-court statements of three witnesses without inquiring about the truthfulness of their statements. The Defendant contends that the State violated a sequestration order by allowing the co-defendant, James Anderson, who testified for the State, to see his wife before testifying. The Defendant lastly contends that a police officer provided false testimony which corroborated the State's theory that the Defendant was the one who shot and killed Jaime Antunez.

V. DEFENDANT'S REQUEST FOR APPOINTMENT OF COUNSEL

Rule 61(e)(4) provides that the judge may appoint counsel for a defendant's second or subsequent filed postconviction motion, only if the if the judge determines that the movant plead with particularity either, "that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underling the charges of which he was convicted," or "a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the

United States Supreme Court of the Delaware Supreme Court, applies to the movant's case and renders the convictions or death sentence invalid."⁵

The Court finds no such grounds in this matter, as discussed. The Defendant has not alleged new evidence which creates a strong inference of his actual innocence, nor has he claimed that a new rule of constitutional law has been made retroactive which applies to his case. The Defendant's Motion for Appointment of Counsel is, therefore, **DENIED**.

VI. PROCEDURAL BARS

Before addressing the merits of Defendant's claims, the Court must determine if any procedural bar precludes Defendant's Motion. Defendant's Motion is governed by the version of Rule 61 which took effect on June 1, 2015.⁶ The Rule as applied in this case provides,

[a] second or subsequent motion shall be summarily dismissed, unless the movant was convicted after a trial and the motion either:

(i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or

(ii) pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.⁷

The Defendant's filed his first Motion for Postconviction Relief on September 13, 2004, which was denied by this Court on June 13, 2005. That decision was affirmed by the Supreme Court, finding Defendant's Motion to be without merit.⁸ The Defendant must, therefore, meet the pleading standard enumerated in Rule 61(d)(2). The Defendant has not claimed, with any particularity, the existence of new evidence which creates a strong inference of his actual

⁵ Super. Ct. Crim. R. 61(e)(4).

⁶ See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (the Court must first address any procedural bars set forth in Superior Court Criminal Rule 61(i) in effect at the time the motion was filed).

⁷ Super. Ct. Crim. R. 61(d)(2).

⁸ *Roth v. State*, 901 A.2d 120 (Table).

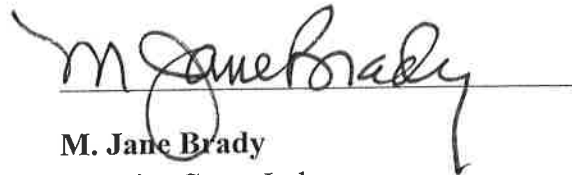
innocence of the crimes to which he was found guilty. In fact, the Defendant's Motion does not even contain a claim of actual innocence as to the crimes for which he was convicted. Rather, the Defendant's claims of alleged errors which prejudiced his trial, discussed *infra*, relate to the credibility of testimony and physical evidence which was used to convict him. It has long been Delaware law that the jury is the sole judge of the credibility of the witnesses and *responsible for resolving conflicts in the testimony*.⁹

Further, the Defendant has failed to identify a retroactively applicable right that has been newly recognized that would render his conviction invalid, so that exception is inapplicable.

VII. CONCLUSION

For the reasons stated above, the Defendant's Motion for Postconviction Relief is **SUMMARILY DISMISSED**. Further, the Defendant's Motion for Appointment of Counsel is **DENIED**.

IT IS SO ORDERED.



M. Jane Brady
Superior Court Judge

⁹ *Washington v. State*, 4 A.3d 375, 381 (Del. 2010).