

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)

Plaintiff,)

v.)

JAMES H. HENSON,)

Defendant.)

Cr. ID No. 89004837DI

Submitted: June 23, 2017

Decided: August 7, 2017

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S
MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED AND MOTION
FOR APPOINTMENT OF COUNSEL SHOULD BE DENIED.**

Jenna R. Milecki, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

James H. Henson, Sussex Correctional Institution, Georgetown, Delaware, *pro se*.

PARKER, Commissioner

This 7th day of August 2017, upon consideration of Defendant's Motion for Postconviction Relief and Defendant's Motion for Appointment of Counsel, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. On June 8, 1989, Defendant James H. Henson ("Defendant") was arrested and charged with Attempted Unlawful Sexual Intercourse Second Degree, Unlawful Sexual Intercourse Second Degree, and Kidnapping First Degree.
2. During the course of its investigation, the State accumulated physical evidence related to the case against Defendant. However, due to a clerical error, much of the evidence was destroyed prior to trial. Upon learning of the destruction of the evidence, Defendant filed a motion to dismiss. The Superior Court denied the motion without prejudice, thus allowing Defendant to raise the issue at a later time.¹
3. At trial, in October 1990, Defendant once again moved to dismiss the case due to the State's failure to preserve the evidence.² After considering the issue at length, the trial court denied the motion to dismiss. However, pursuant to *Deberry v. State*,³ the trial judge instructed the jury that Defendant was entitled to an inference regarding the lost evidence that the same would have been exculpatory.⁴
4. The Superior Court jury found Defendant guilty of Attempted Unlawful Sexual Intercourse Second Degree and Unlawful Sexual Intercourse Second Degree. The jury acquitted Defendant of the Kidnapping First Degree charge.
5. On January 4, 1991, Defendant was sentenced to life imprisonment.

¹ See, *Henson v. State*, 1992 WL 21120, at *1 (Del.); Superior Court Docket No. 11- Superior Court Opinion dated June 12, 1990 denying motion to dismiss.

² October 31, 1990 Trial Transcript, at pgs. 58-62.

³ *Deberry v. State*, 457 A.2d 744, 754 (Del. 1983)

⁴ *Henson v. State*, 1992 WL 21120, at *1 (Del.); October 31, 1990 Trial Transcript, at pgs. 70-76, and 121.

6. On direct appeal, on February 4, 1992, the Delaware Supreme Court affirmed Defendant's convictions and sentence.⁵ On direct appeal, Defendant contended that the State's failure to preserve potentially exculpatory evidence violated his rights to due process and a fair trial. Following a full and thorough analysis, the Delaware Supreme Court held that the Superior Court's decision to give an instruction to the jury rather than dismissing the case was proper.⁶

7. Also on direct appeal, Defendant contended that the prosecutor committed prosecutorial misconduct in his examination of a witness and by pulling a knife out of its sheath during his closing argument. The Delaware Supreme Court agreed that the prosecutor acted improperly but found that the prosecutorial misconduct resulted in little, if any, prejudice to Defendant.⁷ The Delaware Supreme Court further found that whatever minimal prejudice resulted from the misconduct was mitigated by defense counsel's cross-examination of the witness at issue and by the trial judge's immediate curative instruction to the jury regarding the knife.⁸

8. On December 7, 2016, over 24 years after the Delaware Supreme Court's decision on direct appeal affirming Defendant's convictions and sentence, Defendant filed the subject Rule 61 motion for postconviction relief.

FACTS

9. On June 8, 1989, Defendant met the victim at a bar. He and the victim had several drinks and they eventually left the bar together.⁹ They drove to his apartment complex. Before exiting the car, Defendant allegedly kissed the victim and ripped her blouse. Defendant then grabbed the victim and brought her into his apartment. Once in the apartment, Defendant forced the victim to

⁵ *Henson v. State*, 1992 WL 21120 (Del).

⁶ *Henson v. State*, 1992 WL 21120, at *2 (Del).

⁷ *Henson v. State*, 1992 WL 21120, at *3 (Del).

⁸ *Henson v. State*, 1992 WL 21120, at *3 (Del).

⁹ *Henson*, 1992 WL 21120, at *1.

remove her clothes and attempted to have sex with her, but was unable to achieve an erection.¹⁰ Then Defendant forced the victim to perform fellatio on him.¹¹ During the assault, Defendant punched the victim several times and bit her breast.¹²

10. Ultimately, Defendant fell asleep and the victim fled. After leaving Defendant's apartment, the victim flagged down a passing car and was driven to the police station.¹³

11. After obtaining a warrant, the police went to Defendant's apartment and arrested him.¹⁴ At the police station, Defendant stated that: "I met this girl at a bar, took her home, attempted to have sex with her. I couldn't get it up and I passed out. I was too drunk to remember anything from that point."¹⁵

DEFENDANT'S RULE 61 MOTION

12. On December 7, 2016, Defendant filed the subject Rule 61 motion for postconviction relief. All of the claims raised by Defendant relate to trial errors and/or alleged ineffective assistance of counsel claims stemming from his trial which took place in October 1990, and for counsel's alleged failure to raise issues on direct appeal, which was decided in 1992. Consequently, all of the claims raised in the subject motion occurred no later than 1992, decades before Defendant filed this motion. Defendant raises nothing new or recently discovered in support of any of his claims. Indeed, all of the claims raised in the subject motion, and all support for those claims, were known to Defendant decades before he filed the subject motion.

13. Defendant's motion, filed over 24 years after his final order of conviction, is time-barred and otherwise procedurally barred.

¹⁰ *Henson*, 1992 WL 21120, at *1.

¹¹ *Henson*, 1992 WL 21120, at *1.

¹² *Id.*

¹³ *Henson*, 1992 WL 21120, at *1.

¹⁴ *Henson*, 1992 WL 21120, at *1.

¹⁵ *Id.* at *1, fnt. 1.

14. Prior to addressing the substantive merits of any claim for postconviction relief, the court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.¹⁶ If a procedural bar exists, then the claim is barred, and the court should not consider the merits of the postconviction claim.¹⁷

15. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹⁸ (2) any basis for relief must be asserted in the first *timely* filed motion for postconviction relief absent exceptional circumstances (i.e. discovery of new evidence or new rule of constitutional law) warranting a subsequent motion being filed;¹⁹ (3) any basis for relief must have been asserted at trial or on direct appeal as required by the Court rules unless the movant shows prejudice to his rights and cause for relief;²⁰ and (4) any basis for relief must not have been formally adjudicated in any proceeding.²¹ The bars to relief however do not apply to a claim that the Court lacked jurisdiction or to a claim that new evidence exists that movant is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.²²

16. In the subject action, Defendant's motion is time-barred. Rule 61(i)(1) requires the motion to be filed within one year from the final order of conviction.²³ The final order of conviction in this case was in 1992,²⁴ and this motion was filed on December 7, 2016, over 24 years later.²⁵ This

¹⁶ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁷ *Id.*

¹⁸ Super. Ct. Crim. R. 61(i)(1).

¹⁹ Super. Ct. Crim. R. 61(i)(2).

²⁰ Super. Ct. Crim. R. 61(i)(3).

²¹ Super. Ct. Crim. R. 61(i)(4).

²² See Super. Ct. Crim. R. 61 (effective June 4, 2014).

²³ Super. Ct. Crim. R. 61(i)(1).

²⁴ Super. Ct. Crim. R. 61(m)(2).

²⁵ Super. Ct. Crim. R. 61(i)(1).

motion was filed well outside the applicable one year limit. Defendant's claims, at this late date, are time-barred.

17. Defendant contends that the limitations period provided by Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")²⁶ should apply to this Superior Court Criminal Rule 61 motion, rather than Superior Court Criminal Rule 61. The AEDPA is applicable in federal habeas corpus proceedings, not to this state court motion. The AEDPA prescribes a one year period of limitations for the filing of federal habeas petitions by state prisoners.²⁷ When a defendant files a habeas corpus petition in federal court, a properly filed state postconviction motion tolls AEDPA's limitation period during the time the action is pending in the state courts, provided that the motion was filed and pending before the expiration of AEDPA's limitations period.²⁸ In this case, the one year limitations period provided by the AEDPA appears to have elapsed about 24 years before the Defendant filed this state court postconviction motion. Consequently, it appears that any federal habeas petition filed in federal court under the AEDPA would, like the subject motion, be time barred. It appears that any such federal claims would also have been time barred for decades. The AEDPA is neither applicable to this motion nor does it remove the procedural time bar.

18. In this state court postconviction proceeding, Superior Court Criminal Rule 61 is controlling and Superior Court Criminal Rule 61(i) provides the procedural bars that govern the subject Rule 61 motion. Rule 61(i)(1), provides for a one-year limitation period in which to file a Rule 61 motion. Defendant filed the subject motion over 24 years after his final order of conviction, well outside the one year limitations period. Defendant's motion is time barred.

²⁶ Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2254.

²⁷ *Id.*

²⁸ See, Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2254; *Allen v. State*, 40 F.Supp.3d 404, 408 (D. Del. 2014)

19. Rule 61(i)(2) further precludes this court's consideration of Defendant's motion since Defendant has not satisfied the pleading requirements for proceeding with this motion. Since Defendant's motion was not timely filed, in order to overcome the procedural hurdles, Defendant must establish that *new* evidence exists creating a strong inference of Defendant's actual innocence or the existence of a *new* rule of constitutional law made retroactive to this case that would render his convictions invalid.

20. Defendant has not pled with particularity that any *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted or that there is a *new* rule of law that would render his conviction invalid. In fact, Defendant does not raise anything new or recently discovered. All of Defendant's claims stem from facts known to him at the time of his trial in 1990 and/or appeal in 1992. Moreover, Defendant does not claim the existence of any new rule of constitutional law that would be applicable in this case. As such, Rule 61(i)(2) precludes the court's consideration of Defendant's motion since he has not satisfied the pleading requirements for proceeding with this motion.

21. Rule 61(i)(4) also precludes Defendant's claims raised herein since some of the claims were already raised and adjudicated in some fashion on Defendant's direct appeal. Both the Delaware Superior Court²⁹ and the Delaware Supreme Court³⁰ have already considered Defendant's claims related to the destruction of evidence, and have also considered Defendant's claims of prosecutorial misconduct and trial errors. The Superior Court has already held, and the Delaware Supreme Court has already affirmed, that these claims are without merit. Defendant's claims which were previously raised are now procedurally barred as previously adjudicated.

²⁹ Superior Court Docket No. 20

³⁰ *Henson v. State*, 1992 WL 21120 (Del.).

22. Rule 61(i)(3) also prevents this court from considering any claims raised by Defendant not previously raised. Defendant's trial was held in 1990 and he was sentenced in January 1991. His direct appeal was decided in February 1992. Defendant filed the subject Rule 61 motion in December 2016, over 24 years later. Defendant was aware of, had time to, and the opportunity to raise all of the claims presented herein in a timely filed motion. All of Defendant's claims stem from facts known to Defendant for decades. Defendant does not raise anything new or recently discovered.

23. Defendant has not established any prejudice to his rights and/or cause for relief. Defendant had time and opportunity to raise any issue raised herein on direct appeal and/or in a timely filed postconviction motion. There is no just reason for Defendant's over 24-year delay in doing so. Having been provided with a full and fair opportunity to present any issue desired to be raised in a timely filed motion, any attempt at this late juncture to raise, re-raise or re-couch a claim is procedurally barred.

24. Although Defendant's motion is time barred and other procedurally barred, for the sake of completeness, it is noted that Defendant's claims are also without merit.

25. As previously discussed, Defendant's claims in the subject motion as to the destruction of the physical evidence and the prosecutorial misconduct have already been raised and considered by the Delaware Supreme Court on direct appeal and found to be without merit.³¹ It will not, at this late date, be revisited yet again.

26. In the subject motion, Defendant raises various ineffective assistance of counsel claims. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective

³¹ *Henson v. State*, 1992 WL 21120 (Del.).

standard of reasonableness” and that; (2) the deficient performance prejudiced the defense.³² The first prong requires Defendant to show by a preponderance of the evidence that counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceedings would have been different.³³

27. Mere allegations of ineffectiveness will not suffice; instead, Defendant must make and substantiate concrete allegations of actual prejudice.³⁴ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance.³⁵ Moreover, there is a strong presumption that defense counsel’s conduct constituted sound trial strategy.³⁶

28. Defendant first claims that defense counsel was ineffective in his failure to challenge the credibility of the victim on direct appeal related to her trial testimony that she saw a knife in Defendant’s car on the night of the incident. First, as previously stated, the trial was held in 1990, and the direct appeal was decided in February 1992. If Defendant genuinely believed this claim had any merit he could have raised it in a timely filed Rule 61 motion. He did not.

29. Moreover, counsel did object to the introduction of that knife at the time of trial.³⁷ After the motion was denied, counsel cross-examined the victim and emphasized that the victim only mentioned that knife for the first time on the day before trial.³⁸ Counsel then moved to dismiss the charges based on the credibility of the victim, in part based on her credibility regarding her

³² *Strickland v. Washington*, 466 U.S. 688, 687–88, 694 (1984).

³³ *Id.* at 687–88, 694.

³⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

³⁵ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. Oct. 31, 2008).

³⁶ *Strickland*, 466 U.S. at 689.

³⁷ See, October 30, 1990 Trial Transcript, at pg. 81.

³⁸ October 30, 1990 Trial Transcript, at pgs. 88-90, 99-101.

testimony about that knife.³⁹ The court held that the victim's testimony regarding the knife goes to weight rather than admissibility and that the victim could testify about the knife and the jury would determine what weight to afford her testimony.⁴⁰

30. There is a deferential standard of review on appeal from evidentiary rulings of the trial court.⁴¹ At trial, defense counsel opposed the introduction of that knife and cross-examined the victim extensively on her credibility as related to the knife. It was for the jury to determine the weight to give the victim's testimony as to the knife. Defendant fails to state on what grounds defense counsel could have appealed the credibility of the victim, especially in light of the deferential standard of review on appeal to trial court evidentiary rulings, and has also failed to thereafter establish that there was any likelihood of Defendant prevailing on appeal on this issue. Defense counsel's conduct does not appear to be deficient in any regard nor has Defendant established any actual prejudice as a result thereof.

31. Defendant claims that his counsel was ineffective for failing to prevent the testimony of the FBI agent who was called as a witness for the State. Defendant fails to specify any basis on which defense counsel could have precluded the testimony of the State's FBI witness in this case. An ineffective assistance of counsel claim based on the failure to object to testimony is without merit if defense counsel lacked a legal or factual basis to object to the testimony.⁴² Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.⁴³

³⁹ October 31, 1990 Trial Transcript, at pgs. 60-62.

⁴⁰ October 30, 1990 Trial Transcript, at pg. 88-89.

⁴¹ See, *Richardson v. State*, 43 A.3d 906, 911 (Del. 2012).

⁴² *State v. Exum*, 2002 WL 100576, at *2 (Del. Super. Jan. 17, 2002), *aff'd*, 2002 WL 2017230, at *1 (Del. Aug. 29, 2002).

⁴³ *Younger*, 580 A.2d at 556; *State v. Brown*, 2004 WL 74506, at *2 (Del. Super. 2004) (conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

32. Defendant argues that this FBI witness should not have been able to testify based on a lack of forensic evidence provided for his analysis and that his testimony was exaggerated and misleading. The court provided the jury with a curative instruction in regards to the destruction of evidence as to eliminate prejudice to Defendant.⁴⁴ The FBI agent's testimony neither helped nor hurt the Defendant. The FBI agent testified that buttons located in the car had frayed threads attached and it was possible that the buttons could have been forcibly removed. On cross-examination the FBI agent testified that he had no idea what garment(s) the buttons came from or how long the buttons were in the car.⁴⁵ Further, he testified that no hairs located in the Defendant's car belonged to the victim.⁴⁶ Defendant does not specify how defense counsel could have prevented the FBI agent from testifying, how counsel's conduct was deficient in any regard, or that Defendant suffered any actual prejudice as a result thereof. Defendant is unable to demonstrate that defense counsel's representation fell below an objective standard of reasonableness or that there exists a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the trial would have been different. This claim is without merit.

33. Defendant's next claim of ineffective assistance of counsel relates to defense counsel's failure to challenge the alleged prejudice created by the presentation of a chart depicting evidence collected in the case and for counsel's failure to raise this issue on direct appeal.

34. Defendant does not provide the legal or factual grounds on which this chart should have been excluded by the court. As such, Defendant fails to demonstrate how defense counsel's failure to object to the chart was deficient in any regard. Defense counsel zealously advocated for the Defendant related to the destroyed evidence. Counsel filed a motion to dismiss and sought to have

⁴⁴ October 30, 1990 Trial Transcript, pgs. 223-24; October 31, 1990 Trial Transcript, pgs. 75-76, 104-105, 121.

⁴⁵ October 31, 1990 Trial Transcript, at pg. 46.

⁴⁶ October 31, 1990 Trial Transcript, at pgs. 37-39.

the evidence suppressed. Additionally, a jury instruction related to the destroyed evidence was read to the jury. The language of that instruction and issues related to the destroyed evidence were raised by defense counsel on appeal. The Delaware Supreme Court affirmed the Superior Court's decision to give the curative instruction.⁴⁷ Defense counsel's conduct was not deficient in any regard.

35. Defendant claims that his counsel was ineffective for failing to object to the unrecorded sidebar conferences. This claim must fail as Defendant asserts no actual claim of prejudice. Further, Defendant admits that a number of these conferences were summarized on the record. In fact, they were.⁴⁸ As previously stated, conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel. Without a concrete allegation of prejudice, Defendant's claim is without merit.

36. Defendant's final claim is that the prosecutor committed prosecutorial misconduct by taking the knife out of its sheath during closing arguments and that defense counsel was ineffective for not raising this issue on direct appeal. This claim is without merit as defense counsel did raise this issue on direct appeal and the Delaware Supreme Court did address the issue of the prosecutorial misconduct on direct appeal.⁴⁹ This claim is without any factual support and is without merit.

37. Defendant has failed to make any concrete allegations of actual prejudice and substantiate them. Defendant has failed to meet his burden to establish that defense counsel's conduct was deficient in any regard and he has failed to establish actual prejudice as a result of any alleged deficiency. Defendant's ineffective assistance of counsel claims are without merit.

⁴⁷ *Henson*, 1992 WL 21120, at *5-6.

⁴⁸ October 29, 1990 Trial Transcript, pgs.58-62; October 30, 1990 Trial Transcript, pgs. 111-112, 169-172 213-218.

⁴⁹ *Henson*, 1992 WL 21120, at *3.

38. For the reasons discussed above, Defendant's claims are time barred, otherwise procedurally barred and are without merit.

39. Defendant's request for the appointment of counsel is denied. Rule 61, as amended effective June 4, 2014, provides that for an untimely filed first postconviction motion, such as the subject motion, counsel is to be appointed only in certain limited exceptional situations.⁵⁰ Having fully, thoroughly and carefully considered Defendant's motion and the evidentiary record, none of the exceptional circumstances giving rise to the entitlement to the appointment of counsel exist in this case.⁵¹ Since Defendant has failed to overcome the procedural hurdles warranting the appointment of counsel in this untimely filed postconviction motion, the appointment of counsel is denied.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc. Prothonotary
James A. Bayard, Esquire

⁵⁰ Super. Ct. Crim. R. 61(e)(3).

⁵¹ Super. Ct. Crim. R. 61(e)(3).