

PROCEDURAL HISTORY

The Defendant, Rashid Roy, (“Roy” or “Defendant”) was convicted, following a jury trial that began on March 24, 2011 and lasted nine days, of the charges of Murder in the First Degree, Possession of a Firearm during the Commission of a Felony, Assault in the Third Degree, and Terroristic Threatening. On September 9, 2011, this Court sentenced Roy to Life Imprisonment on the Murder charge, and an aggregate of 12 years of Level V incarceration, suspended after 11 years for decreasing levels of supervision.

Roy filed a timely appeal of the sentence to the Delaware Supreme Court, which affirmed his conviction and sentence on December 12, 2012.

Counsel was appointed for the Defendant upon request, and an initial Motion for Postconviction Relief was filed on November 18, 2013. Subsequently, and, with the Court’s consent, counsel filed a Motion to Withdraw and supporting memorandum indicating that counsel had reviewed the record and could find no meritorious postconviction claims that could be ethically advocated.¹ The Court permitted Defendant to file any response to the motion for the Court to consider in deciding the Motion on the merits. On September 30, 2014, counsel submitted Defendant’s “points” which he wanted the Court to consider. The State filed a response to both the Motion to Withdraw and the defendant’s points on December 2, 2014. The Court received the file from the clerk’s office on April 7, 2015. This is the Court’s decision on the Motion.

Roy makes two claims, both related to the testimony of Paul Kish, who testified regarding the nature of how certain blood located on the Defendant’s clothing came to be there in his opinion, and described the blood as spatter evidence: that trial counsel was

¹ Rule 61(e)(6) provides, “If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw.”

ineffective because he failed to make timely objection to testimony, which the Defendant contends was presented without proper foundation; and that the Court erred in allowing the jury to hear unreliable expert testimony, which deprived him of a fair trial and due process.

FACTS²

The Defendant, wearing tan pants and covered in blood, was taken into custody minutes after a call to 911 regarding an assault and a short distance from the location where Davelle Neal, the victim, was found lying in a snow bank, bleeding to death from nearly 50 stab wounds, several to the neck. The Defendant had a knife in his possession when he was taken into custody. Video surveillance from a nearby building captured the assault of the victim by a man wearing tan pants. Witnesses put the Defendant and victim together, and established that the Defendant was angry because he thought the victim had stolen his drugs. DNA testing of spots from various locations on the Defendant's person and clothing matched that of the victim's blood. The Defendant's explanation was that the pair were attacked by two men, who caused the victim's injuries, and that he got the victim's blood on him either in helping to fight off the attackers or helping the victim.

DISCUSSION

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 61.³ If a procedural bar exists, then the claim is barred,

² These facts are a summary of the case, and do not include citation to the multiple portions of the transcripts in the case.

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). Rule 61 has subsequently been changed. The provisions of the version of Rule 61 in effect at the time of the Defendant's petition govern.

and the Court should not consider the merits of the postconviction claim.⁴ Moreover, if it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.⁵

Rule 61 (i) imposes four procedural criteria: (1) the motion must be filed within one year of a final order of conviction; (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (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 or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do 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.⁶ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”⁷

Ineffective assistance of counsel claims are governed by the two-part test established in *Strickland v. Washington*.⁸ A defendant’s claim of ineffective assistance of counsel is subject to a strong presumption that the representation was professionally reasonable.⁹ To overcome the presumption, the defendant must establish (1) that his trial counsel’s efforts fell below a reasonable objective standard, and (2) that there is a

⁴ *Id.*

⁵ Super.Ct.Crim.R. 61(d)(4) (2013).

⁶ Super.Ct.Crim.R. 61(i)(5) (2013).

⁷ Super.Ct.Crim.R. 61(i)(4) (2013).

⁸ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁹ *Winn v. State*, 705 A.2d 245, 1998 WL 15002, at *2 (Del. Jan. 7, 1998) (citing *Albury v. State*, 551 A.2d 53, 59 (Del. 1988)).

reasonable probability that the outcome of the proceedings would have been different but for counsel's unprofessional errors.¹⁰ The defendant must substantiate concrete allegations of actual prejudice or risk summary dismissal.¹¹ The Court must "evaluate the [defense counsel's] conduct from counsel's perspective at the time," free from the "distorting effects of hindsight."¹²

A. Trial counsel was not ineffective with regard to the expert's testimony regarding blood spatter, and the Defendant cannot establish prejudice.

Defendant's first claim is not procedurally barred. It was brought within one year, and addresses an issue appropriate for postconviction review - that defense counsel was ineffective at trial. The specific claim is that trial counsel failed to make a timely objection during *voir dire* to the admissibility of the testimony of the expert regarding blood spatter evidence. It further appears the Defendant claims that serological testing was inadequate to support the expert's testimony or that, because the expert did not do the testing or examine the items directly, that his testimony should have been excluded. The claim is without merit. In fact, defense counsel did make timely objection to the expert's opinion evidence, by filing a motion and requesting *voir dire* before the expert was permitted to testify before the jury.¹³ It was based on defense counsel's timely objection to the admissibility of the expert's opinions that *voir dire* was held. During the *voir dire*, trial counsel for both the State and the Defendant questioned the witness. Based

¹⁰ *Strickland*, 466 U.S. at 689.

¹¹ *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

¹² *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997).

¹³ D.R.E. 705(b) permits the trial judge discretion to order, but does not mandate, limited *voir dire* of a proffered expert upon motion by that adverse party. See, e.g., *Graves v. State*, 817 A.2d 804 (Table), 2003 WL 261796, *2 (Del. Feb. 3, 2003).

upon that testimony, the Court determined that the expert could testify before the jury and that the challenge went to the weight of the evidence, not its admissibility.¹⁴ Defense counsel's effort did not fall below a reasonably objective standard. He acted appropriately to challenge the expert. The Defendant cannot sustain a claim of ineffective assistance of counsel on this ground.

B. Defendant's Claim It Was Error for the Court to Admit the Testimony of the Expert is Procedurally Barred

Next, Defendant asserts that the Court erred in permitted the jury to hear the testimony of the expert, which Defendant contends was unreliable and that the Court's ruling, therefore, deprived him of a fair trial and due process.

As noted previously, Rule 61 does not permit a Defendant to bring a claim in a postconviction proceeding which has been previously adjudicated.¹⁵ The Trial Court ruled on the admissibility of the opinion evidence, which adjudicated the issue. Further, the Defendant did not challenge that ruling in his direct appeal to the Delaware Supreme Court, the venue in which he could have challenged any error of law by the Trial Court.¹⁶

Since Defendant's claim is procedurally barred, Defendant must meet one of the exceptions to overcome the bars to relief. In this case, Defendant has failed to overcome any of the procedural bars "by presenting 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

¹⁴ Trial Transcript (Apr. 4, 2011) at 88-89.

¹⁵ Super.Ct.Crim.R. 61(i)(4) (2013).

¹⁶ See, e.g., *State v. Laboy*, 2003 WL 21517974, *1 (Del. Super. Ct. July 1, 2003).

conviction.”¹⁷ “The miscarriage of justice or fundamental fairness exception contained in Rule 61(i)(5) is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after a direct appeal.”¹⁸ The Defendant bears the burden of proving that he has been deprived of a “substantial constitutional right,” such as could have resulted in actual prejudice.¹⁹

The Defendant has failed to provide any basis to find, and the record is devoid of any evidence of, manifest injustice. It is clear from Defendant’s motion that Defendant’s claim does not meet the high standard that the fundamental fairness exception requires. The Court does not find that the interests of justice require it to consider this otherwise procedurally barred claim for relief.

NOW, THEREFORE, after careful consideration of the record in this matter, and finding that all of Defendant’s claims for relief are without merit,

IT IS HEREBY ORDERED the Motion for Postconviction Relief is **DENIED**.

/s/
M. JANE BRADY
Superior Court Judge

¹⁷ *Id.* at *3 (citing Super.Ct.Crim.R. 61(i)(5) (2013)).

¹⁸ *Id.* (internal citation, quotations omitted). See *People v. Ikerd*, 47 Ill.2d 211, 212, 265 N.E.2d 120, 121 (1970) (holding that the fundamental fairness exception applies “where the right relied on has been *298 recognized for the first time after the direct appeal”). Similarly, a fundamental fairness objection has been found as to claims that the defendant asked his counsel to raise upon direct appeal but his counsel failed to raise. *People v. Hamby*, 32 Ill.2d 291, 294–295, 205 N.E.2d 456, 458 (1965). It is well-established that a Rule 61 motion should not simply be a rehearing of claims that have already been fairly adjudicated.

¹⁹ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990). See, e.g., *People v. Goerger*, 52 Ill.2d 403, 406, 288 N.E.2d 416, 418 (1972) (holding that improper instruction on reasonable doubt “does not constitute such fundamental unfairness as to obviate the res judicata and waiver doctrines”).