

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	I.D. No. 0702002298
v.)	
)	
JOSE BEZAREZ)	
)	
Defendant)	

Submitted: March 18, 2014
Decided: May 12, 2014

Upon Defendant's Second Motion for Postconviction Relief.
DENIED.

ORDER

Michael J. Hendee, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Jose D. Bezarez, Smyrna, Delaware, *pro se*.

COOCH, R.J.

This 12th day of May 2014, upon consideration of Defendant's Second Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Jose Bezarez ("Defendant") filed this Second Motion for Postconviction Relief based on Defendant's apparent belief that his trial counsel was ineffective due to a litany of failures leading up to his plea of *nolo contendere* to one count of Reckless Endangering First Degree on the day of trial.¹ Defendant fired two shots through the floor of an apartment and into the apartment of the family living

¹ Def.'s Memo. of L. in Support of Rule 61 Mot. for Post-Conviction Relief at 3.

below.² Defendant was subsequently sentenced to two years of incarceration at Level V.³

2. Defendant's first Motion for Postconviction Relief was denied on June 22, 2010.⁴ That motion alleged his counsel was ineffective because he failed to investigate and question witnesses as to Defendant's innocence prior to the plea.⁵ The Court found Defendant's *nolo contendere* plea was given "freely and voluntarily" and therefore waived his claims to ineffective assistance before the entry of the plea.⁶ Alternatively, the Court found his claims fell below the test of ineffective assistance of counsel laid out in *Strickland v. Washington*.⁷
3. Defendant's current Motion for Postconviction Relief again relies on ineffective assistance of counsel claims. Defendant asserts four separate grounds for postconviction relief:
 - i. Trial counsel was ineffective for "failing to communicate with him, failing to provide him with discovery, failing to apprise him of the status of the case, and failing to consult with him concerning defense strategy."⁸
 - ii. Trial counsel was ineffective for "failing to investigate and obtain evidence to demonstrate [Defendant's] innocence."⁹
 - iii. Trial counsel provided ineffective assistance during the pretrial stage of the case.¹⁰
 - iv. Trial counsel provided ineffective assistance by "failing to protect [Defendant's] Sixth Amendment rights in the advice and terms of [Defendant's] plea agreement."¹¹

² St.'s Response at 2.

³ *Id.* at 3. Defendant was also sentenced that day on convictions of murder, robbery, and related offenses for an incident that occurred a short time later. Those convictions and the use of the reckless endangering incident during the murder trial were later affirmed by the Supreme Court of Delaware. See *Bezarez v. State*, 983 A.2d 946 (Del. 2009); Sentence Order, Docket # 48, Dec. 5, 2008.

⁴ *State v. Bezarez*, 2010 WL 2573753 (Del. Super. June 22, 2010).

⁵ *Id.* at *1.

⁶ *Id.*

⁷ 466 U.S. 668 (1984).

⁸ Def.'s Memo. at 11.

⁹ *Id.* at 27.

¹⁰ *Id.* at 35.

¹¹ *Id.* at 51.

4. Under the Delaware Superior Court Rules of Criminal Procedure, a Motion for Postconviction Relief can be barred for time limitations, repetitive motions, procedural defaults, and former adjudications.¹² Motions exceed time limitations if they are filed more than one year after the conviction is finalized or they assert a newly recognized, retroactively applied right more than one year after it is first recognized.¹³ A motion is considered repetitive and therefore barred if it asserts any ground for relief “not asserted in a prior postconviction proceeding.”¹⁴ Repetitive motions are only considered if it is “warranted in the interest of justice.”¹⁵ Grounds for relief “not asserted in the proceedings leading to the judgment of conviction” are barred as procedural default unless movant can show “cause for relief” and “prejudice from [the] violation.”¹⁶ Grounds for relief formerly adjudicated in the case, including “proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus hearing” are barred.¹⁷ Former adjudications are only reconsidered if “warranted in the interest of justice.”¹⁸
5. Before addressing the merits of this Second Motion for Postconviction Relief, the court must first apply the procedural bars of Superior Court Criminal Rule 61(i).¹⁹ If a procedural bar exists, then the Court will not consider the merits of the postconviction claim.²⁰
6. All of Defendant’s claims are procedurally barred. First, all four grounds in this motion were filed more than one year after Defendant’s conviction was finalized at his sentencing on December 5, 2008 and are therefore time-barred under Rule 61(i)(1). Defendant claims that his claims are not time-barred because he relies on a newly recognized right established by *Martinez v. Ryan*.²¹ Defendant’s reliance on *Martinez* is misplaced. The holding in *Martinez* “permits a federal court to review a ‘substantial’ ineffective assistance of counsel claim on federal habeas review.”²² It does not apply to state

¹² Super. Ct. Crim. R. 61(i).

¹³ Super. Ct. Crim. R. 61(i)(1).

¹⁴ Super. Ct. Crim. R. 61(i)(2).

¹⁵ *Id.*

¹⁶ Super. Ct. Crim. R. 61(i)(3).

¹⁷ Super. Ct. Crim. R. 61(i)(4).

¹⁸ *Id.*

¹⁹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

²⁰ *Id.*

²¹ 132 S.Ct. 1309 (2012).

²² *Morrissey v. State*, 2013 WL 2722142, at *2 (Del. June 11, 2013).

court proceedings.²³ *Martinez* “did not create a new right such as to qualify as means of relief from the procedural bar of Rule 61(i)(1). Further, since *Martinez* did not establish a new constitutional right, it cannot be applied retroactively.”²⁴

7. Additionally, Defendant’s first, third, and fourth grounds for postconviction relief can be barred under other sections of Rule 61(i), as they are being asserted here for the first time. These grounds are considered repetitive under Rule 61(i)(2), having not been discussed in his prior Motion for Postconviction Relief. These grounds are also considered barred under the theory of Rule 61(i)(3) procedural default. These claims were “not asserted in the proceedings leading to the judgment of conviction” and Defendant has failed to show, in his lengthy briefing, “cause for relief” and “prejudice from [the] violation.”²⁵
8. Defendant’s second ground for postconviction relief based on ineffective assistance of counsel is essentially the same argument presented in his First Motion for Postconviction Relief.²⁶ As such, this ground is barred as previously adjudicated under Rule 61(i)(4). This argument has already been heard and rejected by this Court.
9. This Court finds the “interests of justice”²⁷ do not require any of the above procedural bars to be reversed.
10. In a more successful attempt to overcome the procedural bars of Rule 61(i) than his misplaced reliance on *Martinez*, Defendant also asserts that he has “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.”²⁸ “This exception to the procedural bars is very narrow and is only applicable in very limited circumstances.”²⁹

²³ *State v. Desmond*, 2013 WL 1090965, at *3 (Del. Super. Feb. 26, 2013); *State v. Rodgers*, 2012 WL 3834908, *2 (Del. Super. Aug. 30, 2012); *State v. Finn*, 2012 WL 2905101, at *2 (Del. Super. July 17, 2012) (“*Martinez* does not change Delaware’s longstanding rule that defendants are not entitled postconviction relief counsel.”); *State v. Smith*, 2012 WL 5577827, at *1 (Del. Super. June 14, 2012), *aff’d*, 53 A.3d 303 (Del. 2012) (TABLE).

²⁴ *State v. Travis*, 2013 WL 1196332, at *3 (Del. Super. Mar. 25, 2013), *aff’d sub nom.*, *Anderson v. State*, 69 A.3d 370 (Del. 2013) and *aff’d*, 69 A.3d 372 (Del. 2013).

²⁵ Super. Ct. Crim. R. 61(i)(3).

²⁶ *Bezarez*, 2010 WL 2573753(Claimed attorney “did not investigate or question [] key witness or other witness that was in key witness home about what was seen or questioned to find out if movant was innocent of charges. Counsel just wanted to movant to sign a plea of nolo contendere.”).

²⁷ Super. Ct. Crim. R. 61(i)(2)&(4).

²⁸ Super. Ct. Crim. R. 61(i)(5).

²⁹ *State v. Wilmer*, 2003 WL 751181 (Del. Super. Feb. 28, 2003), *aff’d*, 827 A.2d 30 (Del. 2003).

However, “[a] claim of ineffective counsel in violation of the Sixth Amendment to the United States Constitution, by its very nature, qualifies as just such an exception.”³⁰ Proceeding to the merits of his ineffective assistance of counsel claims, Defendant’s arguments are unpersuasive.

11. To successfully articulate an ineffective assistance of counsel claim, a claimant must demonstrate first that counsel’s performance was deficient. To prove counsel’s deficiency, a Defendant must show that counsel’s representation fell below an objective standard of reasonableness.³¹ “Mere allegations of ineffectiveness will not suffice. A defendant must make specific allegations of actual prejudice and substantiate them.”³² “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”³³ Secondly, a Defendant must demonstrate that the deficiencies prejudiced the Defendant by depriving him or her of a fair trial with reliable results. A successful Sixth Amendment claim of ineffective assistance of counsel requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³⁴
12. Defendant fails to meet the standards set out by *Strickland* and its progeny. Defendant’s first three individual grounds are not only refuted by trial counsel’s affidavit,³⁵ but Defendant’s allegations of prejudice involve far too much conjecture to establish that counsel’s alleged errors altered the course of the proceedings.
13. Defendant’s fourth ground for postconviction relief, while not discussed in trial counsel’s affidavit, fails the *Strickland* test as well. Defendant maintains that he was provided with incorrect advice when discussing the potential plea and that said plea placed him “in a much worse situation than he was in without the plea.”³⁶ Defendant contends that absent the advice of trial counsel, the shooting incident

³⁰ *Id.*

³¹ *Strickland*, 466 U.S. at 688.

³² *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

³³ *Strickland*, 466 U.S. at 689.

³⁴ *Id.* at 694.

³⁵ Defense counsel asserts that he did communicate with Defendant about his cases, supplied discovery, and met with Defendant on at least four occasions. Defense counsel also asserts he interviewed witnesses through an investigator and in person at the New Castle County Courthouse. Defense counsel takes the position that Defendant’s third ground “is overly broad, conclusory, and lacking in detail” to the point that he was unable to respond. Dade D. Werb Aff. at 4-5.

³⁶ Def.’s Memo. at 53.

would have remained unsolved and would not have been admitted as evidence in his murder trial.³⁷

14. Defendant's motion confuses admissibility of prior convictions versus "prior bad acts."³⁸ Defendant's plea was determined inadmissible, but evidence of the shooting incident appears properly admitted during the murder trial to disprove the defense theory of accident.³⁹ Defendant does not provide any support for his assertion that his failure to understand this distinction was due to trial counsel's representation, or that his representation fell below an objective standard of reasonableness. He also fails to show a reasonable probability that the incident would not have been admitted absent his plea. Defendant's suggestion that the incident would not have been used at trial, "solved" or not, is not enough to establish prejudice under *Strickland*.

Therefore, Defendant's Second Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: The Hon. Jan R. Jurden
oc: Prothonotary
cc: Investigative Services
Dade D. Werb, Esquire

³⁷ Def.'s Reply Br. at 24-25.

³⁸ D.R.E. 404(b) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.").

³⁹ *Bezarez*, 983 A.2d at 949.