

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES P. KALIL,	§
	§ No. 615, 2013
Defendant Below,	§
Appellant,	§ Court Below: Superior Court of
	§ the State of Delaware, in and for
v.	§ New Castle County
	§
STATE OF DELAWARE,	§ Cr. ID No. 1002002075
	§
Plaintiff Below,	§
Appellee.	§

Submitted: March 12, 2014

Decided: June 5, 2014

Before **STRINE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 5th day of June 2014, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. In June 2011, defendant-below/appellant, James P. Kalil (“Kalil”) pled guilty to one count of Manslaughter and one count of Possession of a Deadly Weapon During the Commission of a Felony. Kalil appeals from a Superior Court order denying his motion for postconviction relief. Kalil argues that the Superior Court erred in three respects: (i) by coercing his guilty plea; (ii) by depriving him of his right to counsel of his choice in the underlying conviction proceedings; and (iii) by permitting him to be represented by defense counsel who was ineffective.

Because Kalil's claims are either procedurally barred or meritless, we affirm the Superior Court's judgment.

2. In early February 2010,¹ Kalil and Scott Brooks ("Brooks") both resided at the Oxford House, a facility for recovering substance abusers, in Wilmington, Delaware. On February 3, 2010, the City of Wilmington Police responded to a reported stabbing at the Oxford House. Upon arriving at the scene, the police found Kalil on the front porch with his hands covered in blood. A kitchen knife was found near him, and Brooks was found inside the house, lying in a pool of blood at the bottom of the stairway. Brooks had been stabbed seven times, once in the left side of his neck, the right side of his chest, and the left armpit area, and twice in his left leg and his left wrist. Brooks also suffered a blunt force trauma on his forehead. Brooks later died from his wounds. In contrast, Kalil suffered only minor injuries: a 1 ½ inch long cut on his left wrist, some bruising on his arm, and an abrasion on his head.

3. On the night of the stabbing, Kalil admitted to police that he had stabbed Brooks. Kalil began to cry, and stated that he (Kalil) had "messed up." Kalil explained that he and Brooks had been sharing alcohol, and that Kalil's refusal to continue sharing led Brooks to come after Kalil with a knife. Kalil told

¹ The background facts are drawn from the Commissioner's Report. Ex. B to Appellant's Corrected Op. Br., *Kalil v. State*, No. 615, 2013 (Del. Jan. 13, 2013).

police that Brooks cut Kalil's left hand, and that Kalil grabbed Brooks' knife-wielding hand and struggled to gain control of the knife. Kalil managed to bend Brooks' wrist and then pushed the knife into Brooks' body. In other words, Kalil contended that he had acted in self-defense.

4. Brooks' bedroom door had been stabbed approximately ten times, suggesting that someone had been trying forcibly to gain entry. Inside the bedroom, blood was found on the carpet and the walls. A trail of blood led from the bedroom and down the stairway to the first floor, where Brooks' body was found.

5. Kalil was arrested the next day and later charged by grand jury indictment with Murder in the First Degree² and Possession of a Deadly Weapon During the Commission of a Felony ("PDWDCF").³ Kalil pled not guilty, and a jury trial was scheduled for June 2011. In April, two months before the trial, the State offered Kalil a plea bargain, in which the State would agree to recommend a 12-year prison term if Kalil pled guilty to Manslaughter and PDWDCF. About five weeks before the trial, Kalil attempted to discharge his defense counsel, who then moved to withdraw on May 13, 2011. The Superior Court denied the motion to withdraw. On June 22, 2011—after the jury had been selected and immediately

² See 11 Del. C. § 636.

³ See 11 Del. C. § 1447.

before the trial began—Kalil pled guilty to one count of Manslaughter, and one count of PDWDCF after engaging in a plea colloquy.

6. On December 2, 2011, Kalil was sentenced on the manslaughter charge to 20 years at supervision level 5, suspended after 10 years for decreasing levels of supervision. On the PDWDCF charge, Kalil was sentenced to four years at supervision level 5. Taken together, Kalil was sentenced to serve 14 consecutive years at level 5, two more years than the State had agreed to recommend in its original plea offer. Kalil did not appeal from his conviction. In February 2012, Kalil moved for a reduction of sentence. The Superior Court denied the motion. On November 27, 2012, Kalil moved for postconviction relief under Superior Court Criminal Rule 61. By Report dated June 6, 2013, a Superior Court Commissioner recommended that Kalil's postconviction motion be denied. After considering Kalil's objections to that Report, the Superior Court upheld it and denied Kalil's motion for postconviction relief by order entered July 2, 2013. That order was later rescinded and reissued with an effective date of October 28, 2013. Kalil timely appealed.

7. This Court reviews the Superior Court's denial of a Rule 61 motion for postconviction relief for abuse of discretion.⁴ Constitutional questions are reviewed *de novo*.⁵

8. Kalil claims entitlement to postconviction relief on three separate grounds. First, Kalil contends that the trial judge coerced him into entering a guilty plea rather than proceeding to trial. As a result, Kalil argues, his guilty plea was not voluntary and his conviction should be vacated. Second, Kalil claims that in the underlying conviction proceedings, the trial court erroneously denied his defense counsel's motion to withdraw, thereby violating Kalil's right to counsel of his choice and tainting all subsequent proceedings. As a consequence, Kalil claims, he is entitled to a new trial. Third, Kalil claims that his defense counsel was ineffective because counsel failed to: (i) prepare Kalil to testify on his own behalf; (ii) preserve exculpatory evidence; and (iii) provide certain discovery to Kalil until jury selection began.

9. This appeal presents several issues: (a) is Kalil's plea coercion claim procedurally barred under Rule 61(i)(3); (b) is Kalil's choice of counsel claim procedurally barred under Rule 61(i)(3)? We conclude that Kalil's first two claims are procedurally barred, and therefore do not reach the merits of those claims. The

⁴ *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362, 382 (Del. 2011)).

⁵ *Id.*

third issue is whether defense counsel's representation of Kalil fell below an objective standard of reasonableness under *Strickland v. Washington*.⁶ We conclude that the defense counsel's representation was not "ineffective," and therefore do not reach the question of whether Kalil suffered any prejudice from any alleged attorney ineffectiveness.

10. Kalil's claim that the trial judge coerced him into entering a guilty plea is barred under Rule 61(i)(3) and does not fall within any relevant Rule 61 exception. When reviewing the denial of a postconviction relief motion, this Court must apply the procedural requirements of Rule 61 before considering the merits of a claim for postconviction relief.⁷ Rule 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 . . . [c]ause for relief from the procedural default and . . . [p]rejudice from violation of the movant's rights."⁸ To establish cause, the movant must demonstrate that an external

⁶ 466 U.S. 668 (1984).

⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ DEL. SUPER. CT. CRIM. R. 61(i)(3).

impediment prevented him from raising the claim earlier.⁹ To establish prejudice, the movant must show actual prejudice resulting from the alleged error.¹⁰

11. After Kalil was sentenced on December 2, 2011, he could have—but did not—challenge the voluntariness of his plea either on a motion to withdraw his guilty plea or on direct appeal from the judgment of conviction. As a result, Kalil’s claim is barred by Rule 61(i)(3), unless Kalil demonstrates “cause” and “prejudice.”¹¹ He has not. Even if (as Kalil claims) his “broken” attorney-client relationship¹² were found to establish cause for failure to raise the plea coercion claim on direct appeal,¹³ Kalil has not shown any resulting prejudice. The evidence establishes that Kalil’s plea was voluntary. Therefore, Kalil’s plea coercion claim would not have been successful even if it had been raised earlier. Before the trial began, the trial judge engaged in a colloquy with Kalil to ensure

⁹ *Hardwick v. State*, 2012 WL 1067150, at *1 (Del. Mar. 27, 2012) (citing *Younger*, 580 A.2d at 556).

¹⁰ *Id.* “To succeed under the element of prejudice, [the movant] must show that there was a ‘substantial likelihood’ that, if he had pressed the [barred] claim during his appeal, the outcome of his case would have been different.” *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

¹¹ See *Benge v. State*, 945 A.2d 1099, 1101 (Del. 2008) (explaining that a postconviction challenge to a guilty plea was procedurally defaulted because it had not been raised on direct appeal); *Flamer*, 585 A.2d at 747 (explaining that a claim not raised on appeal is procedurally barred absent a showing of cause and prejudice).

¹² Appellant’s Corrected Op. Br. at 1, *Kalil v. State*, No. 615, 2013 (Del. Jan. 13, 2013).

¹³ See *Younger*, 580 A.2d at 556 (“Attorney error short of ineffective assistance of counsel does not constitute ‘cause’ for a procedural default even when that default occurs on appeal rather than at trial.”).

that Kalil's decision to proceed to trial was voluntary and informed.¹⁴ The trial judge's statements during that colloquy were in no way coercive. The trial judge made no threats or promises about what sentence would be entered if Kalil accepted the plea; moreover, Kalil represented that he was not being forced to enter the plea.¹⁵ Because Kalil's plea coercion claim is barred under Rule 61(i)(3), the Superior Court did not abuse its discretion by denying the postconviction motion on that ground.

12. Kalil next claims that the trial court's denial of his counsel's motion to withdraw (after Kalil had attempted to discharge defense counsel) violated his Sixth Amendment right to counsel of his choice.¹⁶ To reiterate, Rule 61(i)(3) bars any claim that could have been (but was not) raised in the conviction proceedings, unless the movant can establish cause and prejudice.¹⁷ Under Rule 61(i)(5), a claim otherwise barred by Rule 61(i)(3) may be considered if it involves a

¹⁴ During the plea colloquy, the trial judge explicitly told Kalil that "[i]f you looked at it rationally, you come to the same conclusion [to go to trial] without emotion, I am 100 percent with you. That is all I need to know." Plea Colloquy Transcript at 15, *State v. Kalil*, Cr. ID No. 1002002075 (Del. Super. June 22, 2011) (Appellant's App. at A101). The trial judge continued, "[a]ll I have to do is make sure your decision is knowing and voluntary. After that point, I have no dog in the fight until the end." *Id.* at 16 (A102).

¹⁵ See *Edwards v. State*, 2007 WL 4374237, at *1 (Del. Dec. 17, 2007) ("In the absence of clear and convincing evidence to the contrary, [the defendant] is bound by the statements he made during his plea colloquy.") (citing *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)).

¹⁶ "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

¹⁷ DEL. SUPER. CT. CRIM. R. 61(i)(3).

colorable claim that there was a miscarriage of justice due to a constitutional violation that undermined the integrity of the conviction proceedings.¹⁸ Neither requirement is satisfied here.

13. As with his plea coercion claim, even if Kalil could establish cause, he has not demonstrated any resulting prejudice arising from the procedural default, because Kalil cannot show that his “right to counsel of choice” claim would have succeeded had it been earlier raised. As the U.S. Supreme Court has recognized, “a trial [court has] wide latitude in balancing [a defendant’s] right to counsel of choice against the needs of fairness, and against the demands of its calendar.”¹⁹ Kalil attempted to discharge his defense counsel, who had represented him for 15 months, only five weeks before his trial was scheduled to begin. The apparent reason was that Kalil disagreed with counsel’s advice that a claim of self-defense would not succeed. Defense counsel nonetheless advised Kalil that, if Kalil chose to proceed to trial, counsel would “go to court with [Kalil] and try [the] case in the best way that I can.”²⁰ Given the timing of, and the reasons for, the motion to withdraw, the Superior Court committed no error by denying that motion. Moreover, Kalil’s voluntary guilty plea constituted a waiver of his “right to

¹⁸ *Id.* 61(i)(5).

¹⁹ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (citations omitted).

²⁰ Letter from defense counsel to James P. Kalil (Apr. 21, 2011) (A47).

counsel of choice” claim.²¹ For these reasons, Kalil has not established a colorable claim of a miscarriage of justice. Because Kalil’s plea coercion claim is barred under Rule 61(i)(3), the Superior Court did not abuse its discretion by denying the postconviction motion on that ground.

14. Finally, Kalil claims that he is entitled to postconviction relief because his defense counsel was ineffective. To prevail on an ineffective assistance of counsel claim, a defendant must satisfy the familiar two-part test of *Strickland v. Washington*.²² First, the defendant must demonstrate that defense counsel’s representation fell below an objective standard of reasonableness.²³ Second, in the context of a guilty plea, the defendant must show a reasonable probability that, but for counsel’s unprofessional errors, the defendant would have rejected the plea and gone to trial.²⁴

²¹ *Benge v. State*, 945 A.2d 1099, 1101 (Del. 2008).

²² 466 U.S. 668, 687 (1984).

²³ *Id.* at 688. A strong presumption exists, for purposes of ineffective assistance claims, that the attorney’s conduct was professionally reasonable. *Albury v. State*, 551 A.2d 53, 59 (Del. 1988). That presumption is designed to eliminate hindsight’s distorting effects. *Strickland*, 466 U.S. at 689.

²⁴ *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Prejudice is also established if “but for the ineffective advice of counsel there is a reasonable probability . . . that the defendant would have accepted the plea . . . that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

15. Kalil argues three reasons why his counsel was ineffective. None have merit. First, Kalil argues that because counsel did not believe his self-defense justification, counsel did not zealously prepare him to testify at trial. But, Kalil overlooks the fact that defense counsel met with him repeatedly and reviewed both the substance of his planned direct examination, as well as anticipated cross-examination questions.²⁵ In a letter to Kalil, counsel refers to their having worked together to prepare Kalil's testimony.²⁶ Moreover, Kalil entered a guilty plea before the State had even begun to present its case. It is possible, if not likely, that defense counsel would have engaged in further preparations had the case in fact proceeded to trial. The record demonstrates that defense counsel was not ineffective in this regard.

16. Kalil next claims that defense counsel was ineffective by failing to preserve exculpatory evidence—specifically, evidence of the injuries Kalil sustained during his confrontation with Brooks. Specifically, Kalil contends that

²⁵ More generally, defense counsel stated in his affidavit that he: 1) prepared this case as thoroughly as possible; 2) obtained and reviewed all discovery materials and shared them with Kalil; 3) secured two necessary expert witnesses for trial; 4) filed all appropriate motions including a motion to suppress; 5) was in frequent communication with the State; 6) communicated with Kalil and his family; and 7) “did everything that he possibly could to prepare the defendant to be an effective witness on his own behalf.” Affidavit in Response to Defendant’s Motion for Post-Conviction Relief at 2, 4, State v. Kalil, Cr. ID No. 1002002075 (Del. Super. Feb. 4, 2013) (A40, 42).

²⁶ Defense counsel wrote to Kalil, saying “if you testify as you did in speaking with me the other night, it will be clear that you are fashioning your testimony to fit the autopsy report that was previously provided to you.” Letter from defense counsel to James P. Kalil (Apr. 21, 2011) (A46).

defense counsel should have taken photographs of Kalil's injuries rather than sending an associate to observe and document them. That claim fails, because the evidence of Kalil's injuries was adequately preserved. Defense counsel's associate was prepared to testify about the nature of Kalil's injuries, which were minor when compared to Brooks' fatal injuries. Defense counsel's performance was not deficient in this regard either.

17. Finally, Kalil claims that defense counsel was ineffective for failing to provide crime scene and autopsy photographs for Kalil to review before jury selection. Kalil claims that if he had seen the photographs before that time, then he would have accepted the plea earlier and would have been sentenced to at least two fewer years in prison.²⁷ Because this claim was not raised in Kalil's postconviction motion before the Superior Court,²⁸ this Court need not address it for the first time on appeal.²⁹ In any event, the claim is meritless. Although defense counsel was unable to bring the photographs to Kalil in prison, counsel provided Kalil with information about the evidence that had been found at various locations in Oxford House. Counsel also shared the photographs with Kalil during a break in jury

²⁷ The State's original plea offer (two months before trial) was for 12 years. In the plea offer Kalil accepted (as trial was about to start), the State agreed to recommend no more than 15 years. Kalil was sentenced to 14 years.

²⁸ Before the Superior Court, Kalil argued that had he seen the photographs earlier, he would have proceeded to trial and presented his self-defense theory.

²⁹ *Hardwick v. State*, 2012 WL 1067150, at *3 (Del. Mar. 27, 2012); DEL. SUPR. CT. R. 8.

selection. In addition, defense counsel repeatedly advised Kalil to accept the State's plea offer, precisely because of the strength of the evidence against Kalil and its corresponding effect on the likelihood that a jury would embrace Kalil's contention that he acted only in self-defense.³⁰

18. Because Kalil has not shown that his defense counsel's representation was deficient, Kalil's ineffective assistance of counsel claim fails.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

³⁰ Kalil also argues, in his Corrected Opening Brief on Appeal, that ineffectiveness is presumed under *United States v. Cronin*, where (as here, Kalil claims) defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing" 466 U.S. 648, 659 (1984). That argument is unavailing. First, Kalil failed to make this *Cronin* claim in the postconviction proceedings before the Superior Court. Second, *Cronin* is inapplicable here, because Kalil's case never proceeded to trial, and as a result, the prosecution did not present any case for the defense counsel to "test." Moreover, the record discloses that defense counsel made reasonable efforts to prepare for trial. See *supra* note 25.