

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

| | | |
|--------------------------|---|------------------------|
| STATE OF DELAWARE |) | |
| |) | CRIMINAL ACTION NUMBER |
| v. |) | |
| |) | IN-95-01-0853-R1 |
| HENRY J. ANDERSON |) | |
| |) | |
| Defendant |) | ID NO. 9501003766 |

Submitted: March 26, 2013
Decided: March 28, 2013

MEMORANDUM OPINION

Upon Motion of the Defendant
*for Post-Conviction Relief - **DENIED***

HERLIHY, Judge

Defendant, Henry Anderson has moved for postconviction relief. After a third trial in 1998, he was convicted of attempted robbery. The conviction was affirmed and the mandate was issued April 8, 1999.

To fully appreciate his current motion, some factual background of this case is needed. First, a summary of the events of the crime:

The victim of the attempted robbery, Robert Kyelberg, was attacked from behind. He managed to get away¹ but was unable to identify his attacker. Anderson was arrested a short time later in the vicinity of the incident.

During the attack, Kyelberg fell to the ground where he was kicked by the assailant. Also while on the ground, Kyelberg noted that a glove and screwdriver fell to the street near him. When Anderson was arrested, his boots were seized since they appeared to have blood on them, or at least one did. The police also seized a screwdriver and gloves from him.

These clothing items were sent to the FBI for blood analysis along with known samples of Anderson's and Kyelberg's blood. Human blood was found on the left boot and the gloves, but no further DNA testing was possible. FBI Special Agent Michael Vick testified about all of this testing in all three trials. He explained that further DNA testing was inconclusive because of degradation of the samples. He described such degradation as common. He saw no action or inaction by the Wilmington Police which may have caused the degradation²

Second, in 2002, Anderson filed a motion for relief under a special statute where,

¹ The trial transcript says he went to a Texaco station. The motion says it was at 8th & Walnut. It is and was at A Street and Walnut St. *State v. Anderson*, C.A. No. IN95-01-0853-R1, at 2 (Del. Super. Nov. 25, 2002) (footnote in original).

² *Id.* at 2-3, *aff'd* 831 A.2d 858 (Del. 2003).

if certain conditions were met, he could obtain DNA testing.³ The statute was designed to provide an opportunity to demonstrate innocence. Anderson had counsel for the motion, whom he now claims were ineffective.

To put that claim in perspective, more background information is needed. In the third trial, this testimony was presented:

Special Agent Vick's DNA analysis utilized the RFLP method. During the third trial, in January 1998, the defense asked Vick if he had sought to use the PCR method of testing:

Q: In this case, did you inquire of the PCR technician or someone trained in PCR training in your lab, whether PCR testing could be available in this case?

A: In this particular case there was no sample left to submit for PCR testing. Even PCR requires some kind of sample. I used up all the samples in these tests for RFLP and there was nothing left to do PCR testing.⁴

In 2002, in his motion, Anderson sought PCR/STR testing. About that, this Court held:

The PCR methodology of DNA testing which Anderson now seeks was available when the items at issue were originally examined sometime in 1995. Anderson's counsel was obviously aware of that because he asked Vick about the possibility of PCR testing. Vick, as noted, said that all the blood samples from Anderson's apparel had been used up in his own RFLP testing and that PCR testing (while available) was not feasible in this case.

³ 11 *Del. C.* § 4504.

⁴ *State v. Anderson*, C.A. No. IN95-01-0853-R1, at 3 (Del. Super. Nov. 25, 2002) (citing *State v. Anderson*, C.A. No. IN95-01-0853-R1, at 51 (Del. Super. Jan. 29, 1998) (TRANSCRIPT)).

In addition, Anderson, as the Supreme Court noted in affirming his conviction at the third trial, could have sought additional testing but did not (it is assumed Anderson did not inform the Supreme Court that there were no existing samples to be tested).

Anderson has further problems satisfying this criterion. Not only was the technology of PCR testing not new, this Court, in a capital murder case, had accepted PCR evidence as competent evidence in 1997, nearly eleven months prior to his third trial, after conducting a hearing and utilizing the *Daubert* and *Cunningham* and *Nelson* analysis. This bench ruling was promptly transcribed and used as a basis for the admission of PCR DNA testimony in another trial in Sussex County going on about the same time. In addition, Anderson and Crowe were both represented by the Public Defender's Office, albeit different counsel. The Crowe trial was the first in PCR DNA evidence was admitted. The lab analysis was done in 1996.⁵ Assuming, therefore, that these samples were available for PCR testing, the PCR technology was available for testing and admissible as competent evidence in his second trial in November, 1997, and in his third trial in January, 1998.⁶

In affirming this Court's ruling, the Supreme Court, instead, curiously chose to refer back to Anderson's choice prior to his first trial in 1996 not to have his own DNA testing.⁷

Anderson's current claim regarding his 2002 motion counsel alleges they were

⁵ In his motion Anderson cites another decision of the Court in the Crowe case. That is *State v. Crowe*, Del. Super., Cr.A. No. IN95-12-1167 - 1169, Herlihy, J. (February 14, 1997). Crowe sought to exclude DNA evidence because the State allegedly breached certain discovery obligations. This Court noted that PCR evidence had been admitted by court in other states. *State v. Anderson*, C.A. No. IN95-01-0853-R1, at 8 (Del. Super. Nov. 25, 2002) (footnote in original).

⁶ *Id.* at 7-8 (citations omitted).

⁷ *Anderson*, 831 A.2d at 868. This Court most respectfully finds to reasoning more sustainable.

ineffective for failing to challenge the effectiveness of his trial counsel.⁸ His complaint is that trial counsel did not sufficiently question FBI Special Agent Michael Vick to the point of showing more, or sufficient testing that would have “exonerated” him.

He also faults trial counsel for not pursuing STR testing prior to the third trial.

Discussion

Before considering the claims raised in a motion for postconviction relief, the Court must determine if there are procedural impediments to doing so.⁹ The first and obvious impediment is the one year time bar of Superior Court Criminal Rule 61(i)(1). It is more than fourteen years since the mandate was issued affirming Anderson’s conviction after his third trial.

He invokes the recent United States Supreme Court case of *Martinez v. Ryan*¹⁰ as creating a new constitutional right to enable him to challenge prior counsel even if beyond the one year, as the right is to be retroactively applied. While barring claims made more than a year after a conviction is final, Rule 61(i)(1) allows for relief from that bar if either the United States Supreme Court, or the Delaware Supreme Court establishes a “new right.” A “new right” would have retroactive application.

⁸ Anderson raises the issue that the 2002 counsel were also Public Defenders, as was his trial counsel. But it was the Office of Public Defender doing yeoman service for their clients by filing DNA motions, such as Anderson’s, under the special statute.

⁹ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

¹⁰ ___ U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

This Court in *State v. Travis*¹¹ held that *Martinez* did not establish a new constitutional right and it cannot be used as a means of relief from the one year time bar. Additionally, this Court held that *Martinez* did not create a basis for relief from other procedural bars in Superior Court Criminal Rule 61(i)(2) or (3). Further, there being no constitutional violation, this Court held *Martinez* did not provide a means of relief from these bars under Criminal Rule 61(i)(5).

Those holdings apply with equal force here. The Court finds no substance to Anderson's claims of ineffectiveness of either trial counsel or counsel representing him in his 2002 motion, for the reasons the Delaware Supreme Court used in its 2003 opinion, and those this Court used in its preceding opinion to that of the Supreme Court.

Anderson also seeks appointment of counsel to represent him. His motion was filed *pro se* along with hundreds of others seeking to take advantage of *Martinez*. This Court would have appointed counsel had it seen any hint of validity to his claim. His request to have counsel appointed is **DENIED**.

Conclusion

For the reasons stated herein, the motion for postconviction relief of defendant, Henry Anderson is **DENIED**.

IT IS SO ORDERED.

¹¹ C.A. No. IN91-09-0956-R4 (Del. Super. Mar. 28, 2013).

/s/ Jerome O. Herlihy

J.