IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE, :

I.D. No. 0803007774

v. :

:

APALONIO A. PATTEN,

:

Defendant.

ORDER

On this 9th day of January, 2013, upon consideration of the Defendant's Motion for Postconviction Relief, the Affidavit of prior counsel and appellate counsel, the State's Response, the Commissioner's Report and Recommendation, and the record in this case, it appears that:

The Defendant, Apalonio A. Patten, was found guilty by a jury on February 12, 2009 of one count of Robbery in the First Degree, one count of Felony Theft, and one count of Conspiracy Second Degree. He was found not guilty of Wearing a Disguise During the Commission of a Felony Defendant was sentenced on April 15, 2009 to 29 years at Level 5, suspended after serving 5 years minimum mandatory time, followed by varying levels of probation.

Defendant, through counsel, timely appealed his conviction to the Delaware Supreme Court which was affirmed on February 3, 2010.

Thereafter, Defendant filed a *pro se* motion for postconviction relief. He alleged three grounds for relief, including ineffective assistance of counsel.

The matter was referred to the Court Commissioner for findings of fact and recommendation pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62. Commissioner Freud has filed a Report and Recommendation recommending that

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the Court deny defendant's motion for postconviction relief. The Defendant did not

file an appeal or written objection to the Commissioner's Report.

NOW, WHEREFORE, after careful and *de novo* review of the record in this

action, and for the reasons stated in the Commissioner's Report and Recommendation

dated June 18, 2012,

IT IS ORDERED that the thoughtful and well-reasoned Commissioner's

Report and Recommendation is adopted by the Court and defendant's Motion for

Postconviction Relief is *denied* as procedurally barred by Rule 61(i)(3) for failure to

prove cause and prejudice and as completely meritless.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

xc: Hon. Andrea M. Freud

Gregory R. Babowal, Esquire Mr. Apalonio A. Patten, JTVCC

File

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE OF DELAWARE)	
)	
V.)	RK08-03-0885-01
)	Robbery 1 st (F)
APALONIO A. PATTEN)	RK08-03-0888-01
)	Theft (F)
)	RK08-03-0890-01
Defendant.)	Conspiracy 2 nd (F)
ID. No. 0803007774)	

COMMISSIONER'S REPORT AND RECOMMENDATION

Upon Defendant's Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61

Gregory R. Babowal, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Apalonio A. Patten, Pro se.

FREUD, Commissioner June 18, 2012

The defendant, Apalonio A. Patten ("Patten"), was found guilty on February 12, 2009 by a jury of one count of Robbery in the First Degree, 11 *Del. C.* §832; one count of Felony Theft, 11 *Del. C.* § 841 and one count of Conspiracy Second

Degree, 11 *Del. C.* § 512. He was found not guilty of Wearing a Disguise During the Commission of a Felony. One count of Possession of a Deadly Weapon During the Commission of a Felony and one count of Carrying a Concealed Deadly Weapon were dismissed. On April 15, 2009, Patten was sentenced to a total of twenty-nine years at Level V, suspended after five years minimum mandatory time, followed by varying levels of probation.

A timely Notice of Appeal to the Delaware Supreme Court was filed. Patten's counsel filed a brief and motion to withdraw pursuant to Supreme Court Rule 26(c). In the motion to withdraw, appellate counsel represented that he conducted a conscientious review of the record and concluded that no meritorious issues existed. By letter, counsel informed Patten of the provisions of Rule 26(c) and attached a copy of the motion to withdraw and accompanying brief. Patten was informed of his right to supplement his attorney's presentation. Patten, *pro se*, raised three issues for appeal for the Supreme Court to consider which the Supreme Court classified as follows:

Patten raises three issues for the Court's consideration. First, he contends that the evidence was insufficient to support his convictions. Second, he contends that the jury rendered an inconsistent verdict. Finally, he argues that the State withheld exculpatory evidence.¹

The Supreme Court granted the State's motion to affirm as to all of Patten's

¹ Patten v. State, 2010 WL 424248, at *3 (Del. Feb. 3, 2010).

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claims.² The Court affirmed Patton's conviction on February 3, 2010 and the mandate issued on February 23, 2010.

Next, *pro se*, Patten filed the instant Motion for Postconviction Relief pursuant to Superior Court Rule 61. In his motion, Patten raises three grounds for relief including ineffective assistance of counsel.

FACTS

The following is a summary of the facts as noted by the Supreme Court in its opinion:

- (4) The testimony at trial fairly supports the following version of events: Patten was a student employee at the Delaware State University bookstore. On December 13, 2008, during a book buy-back week when there was \$36,000 in cash in the safe inside the office of the bookstore's accountant, two men wearing hooded sweatshirts robbed the bookstore shortly after 8 a.m. A food service worker saw the two men in hooded sweatshirts run from the bookstore and leave in a red/maroon car.
- (5) Patten, who was scheduled to work at the bookstore at 9 a.m. that morning, failed to report to work. The bookstore manager reviewed a surveillance videotape of the robbery and thought that she recognized Patten and the hooded sweatshirt that he was wearing. When college police interviewed him, Patten acknowledged that he had

² *Id.* at *3.

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been driving his girlfriend's red/maroon car on the morning of the robbery. Patten's alibi, however, was that he had been taking an exam in a music class at the time of the robbery. Patten's music teacher contradicted this alibi, stating that the exam in the class had actually been given the day before, on December 12. Moreover, the teacher indicated that Patten's alleged class notes for December 13 were actually notes from a class that had occurred much earlier in the semester.

(6) A childhood friend of Patten's, Marion Lott, gave a videotaped statement to police relating that Patten had confessed to him that he had committed the bookstore robbery with James Durham and William Peterson, and that the men had used Patten's girlfriend's car as the getaway vehicle. At trial, Lott attempted to disavow this statement. The prosecution was permitted to show Lott's prior out-of-court videotaped statement to the jury. The jury convicted Patten of robbery, theft, and conspiracy, but acquitted him of wearing a disguise during the commission of a felony.³

PATTEN'S CONTENTIONS

In his motion, he raises the following grounds for relief:

Ground One: Actual Innocence.

Ground Two: Ineffective Assistance of Trial

Counsel.

³ Patten, 2010 WL 424248, at *1-2.

Ground Three: Ineffective Assistance of Appellate

Counsel.

DISCUSSION

Under Delaware law, this Court must first determine whether Patten has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.⁴ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.⁵ Patten's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Patten's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for the procedural fault and (2) prejudice from a violation of the movant's rights. The bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim of miscarriage of justice stemming from a constitutional violation that "undermine[s] the fundamental legality, reliability, integrity or fairness of the proceedings leading

⁴ Bailey v. State, 588 A.2d 1121, 1127 (Del. 1991).

⁵ Super. Ct. Crim. R. 61(i)(1).

⁶ Super. Ct. Crim. R. 61(i)(3).

to the judgment of conviction."⁷

Each of Patten's claims are based to some extent on an allegation of ineffective assistance of counsel. These types of claims are not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Patten, allege ineffective assistance of counsel in order to overcome the procedural default.

However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards. The United States Supreme Court has held that:

[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." Ineffective assistance of counsel, then, is cause for a procedural default.⁸

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a

⁷ Super. Ct. Crim. R. 61(i)(5).

⁸ Murray v. Carrier, 477 U.S. 478, 488 (1986) (second alteration in original) (citation omitted).

movant must engage in the two-part analysis enunciated in *Strickland v. Washington*⁹

and adopted by the Delaware Supreme Court in Albury v. State. 10

The *Strickland* test requires the movant to show that counsel's errors were so

grievous that his performance fell below an objective standard of reasonableness.¹¹

Second, under Strickland, the movant "must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different," that is, actual prejudice. 12 In setting forth a claim of

ineffective assistance of counsel, a defendant must make and substantiate concrete

allegations of actual prejudice or risk summary dismissal.¹³

Generally, a claim for ineffective assistance of counsel fails unless both

prongs of the test have been established.¹⁴ However, the showing of prejudice is so

central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect

⁹ 466 U.S. 668 (1984).

¹⁰ 551 A.2d 53, 58 (Del. 1988).

¹¹ Strickland, 466 U.S. at 687-88; see also Dawson v. State, 673 A.2d 1186, 1190

(Del.1996).

¹² Strickland, 466 U.S. at 694; see also Dawson, 673 A.2d at 1190.

¹³ Outten v. State, 720 A.2d 547, 557 (Del. 1998).

¹⁴ *Strickland*, 466 U.S. at 687.

will often be so, that course should be followed."¹⁵ "In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone."¹⁶ "Furthermore, the defendant must rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the distorting effects of hindsight when viewing that representation.'"¹⁷

In the case at bar, Patten raises several categories of ineffective assistance of counsel. First he claims he is innocent in his first ground for relief and in his second and third grounds for relief he claims his attorneys were ineffective for not demonstrating this to the jury and raising the issue on appeal.

While Patten lists three grounds for relief they are all intertwined and revolve around his claim that he is innocent and his attorneys were ineffective for failing to get him acquitted. For this reason I will address all his claims together. I find that Patten's attorney did argue before the jury that Patten was innocent. Patten has listed a number of items he claims defense counsel should have put in to evidence and witnesses that Patten argues should have been called and would have proven his innocence. I have thoroughly reviewed the evidence in this case, all of Patten's

¹⁵ *Id.* at 697.

¹⁶ Gattis, 1995 WL 790961, at *4.

¹⁷ *Id.* (quoting *Strickland*, 466 U.S. at 689).

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submissions, the affidavits filed by both Patten's trial and appellate counsel along

with the State's reply and conclude that Patten has failed to demonstrate that he was

actually innocent or that his lawyers were ineffective. I accept counsels' strategic

reasoning for why certain evidence and witnesses were not presented to the jury.

I find counsel made reasonable strategic decisions and were not ineffective.

Furthermore I find that Patten suffered no prejudice from counsels' failure to

present the evidence Patten now contends would have exonerated him. The

evidence presented by the State was clearly sufficient for a jury to have found him

guilty thus these claims are meritless.

CONCLUSION

After reviewing the record in this case, it is clear that Patten has failed to

avoid the procedural bars of Rule 61(i). Consequently, I recommend that Patten's

postconviction motion be denied as procedurally barred by Rule 61(i)(3) for failure

to prove cause and prejudice and as completely meritless.

/s/Andrea Maybee Freud

Commissioner

AMF/dsc

oc:

Prothonotary

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cc: Hon. William L. Witham, Jr. Gregory R. Babowal, Esq. Alexander W. Funk, Esq. Michael G. Rushe, Esq. Apalonio A. Patten, VCC File