IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 0706025356
v.	)	
GEORGE P. JOHNSON	)	
Defendant.	)	

Submitted: February 17, 2015
Decided: May 13, 2015

On Defendant's Second Amended Motion for Postconviction Relief.
DENIED.

ORDER

Susan G. Schmidhauser, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware, Attorney for the State

George P. Johnson, Howard R. Young Correctional Institution, Wilmington, Delaware, *pro se*

COOCH, R.J.

This 13th day of May, 2015, upon consideration of Defendant's Second Amended Motion for Postconviction Relief, it appears to the Court that:

1. Defendant George P. Johnson was found guilty after a trial in April 2008 of Delivery of Cocaine to a Minor, Delivery of Cocaine within 300 Feet of a Park, and Criminal Trespass in the Third Degree.[1] Defendant was sentenced to twenty years at

[1] The State dismissed a third delivery count during trial. The jury found Johnson not guilty of Endangering the Welfare of a Child.

Level V, suspended after a minimum mandatory ten years for three years at Level IV Crest Program, suspended after successful completion for Level III probation. [2] The Delaware Supreme Court affirmed Defendant's convictions on direct appeal.[3]

2. Defendant filed his first Motion for Postconviction Relief in December 2008. That motion was summarily dismissed by this Court and the Supreme Court, upon appeal by Defendant, affirmed this Court's decision.[4] Defendant filed the instant motion, his Second Motion for Postconviction Relief, on April 23, 2014. Defendant also filed several Motions to Amend Motion for Postconviction Relief, one on April 23 (the same day he filed the motion itself) and one on September 18, 2014. Defendant also filed a "Motion to Amend Motion to Vacate Conviction and Sentence Based on Newly Discovered Evidence" on September 18, 2014. These motions will be considered supplements to Defendant's Second Motion for Postconviction Relief.

3. The State filed a Response on July 24, 2014 and then filed an Amended Response on January 26, 2015, after Defendant had filed the Motions to Amend discussed herein. Defendant then had the option to file a Reply, but failed to do so.[5]

---

[2] For additional facts and procedural history not relevant to this motion, see *Johnson v. State*, 2008 WL 4290602 (Del. Sept. 19, 2008) (TABLE).

[3] *See Johnson v. State*, 2008 WL 4290602 (Del. Sept. 19, 2008) (TABLE) (affirming convictions and holding surveillance officers testimony was sufficient to support conviction, prosecutor's opening and closing statements were not improper, and trial court did not err by declining to excuse juror).

[4] *See* Def.'s First Mot. for Postconviction Relief, D.I. # 41 (Dec. 18, 2008); *See also State v. Johnson*, 2009 WL 638511 (Del. Super. Mar. 12, 2009) (summarily dismissing Defendant's First Motion for Postconviction Relief); *Johnson v. State*, 2009 WL 2448237 (Del. Aug. 11, 2009) (TABLE) (affirming summary dismissal of claims that prosecutor's closing argument infringed on Defendant's right not to testify, prosecutor improperly expressed personal opinion regarding Defendant's guilt, and that jury verdict was inconsistent).

[5] Presumably in lieu of a Reply, Defendant filed a Motion for Default Judgment and a Motion for Summary Judgment against the State. This Court denied Defendant's Motion for Default Judgment against the State on February 9, 2015. *See* D.I. #82 (Feb. 9, 2015). Defendant's Motion for Summary Judgment and Motion for Default Judgment are procedurally improper in a criminal case and will not be given consideration.

4. Defendant in his Second Motion for Postconviction Relief and his numerous other filings makes the following claims:

    1. Trial counsel was ineffective for failing to hire a private investigator to show that the vantage point of the police was obstructed;
    2. Police witnesses committed perjury by testifying that they could see clearly from 150 feet away and by identifying Defendant as the individual committing the crime;
    3. The private investigator hired by Defendant produced a report, the results of which contradict the testimony of the police testimony; [6]

5. In subsequent filings, the Defendant also makes the following two claims:

    1. Trial counsel was ineffective for failing to file a motion to dismiss based on differing reports on the weight of the drugs at issue in the case.[7]
    2. Because Farnam Daneshgar, a Delaware Office of the Chief Medical Examiner chemist, testified at his 2008 trial and has been recently charged with several criminal offenses, that testimony should "be removed from his trial" as the testimony is "tainted and untrustworthy."[8]

6. Defendant's Motion for Postconviction Relief is controlled by Superior Court Criminal Rule 61.[9] Before addressing the

---

[6] Def.'s Second Mot. for Postconviction Relief, D.I. #66 (Apr. 23, 2014); The Court notes that Defendant's third argument is nearly identical to his first and is in large part, merely a statement: that the private investigator report, at least to some degree, contradicts police testimony.

[7] Def.'s Mot. to Amend Second Mot. for Postconviction Relief at 2-5, D.I. #75 (Sept. 18, 2014).

[8] Def.'s Mot. to Amend Second Mot. for Postconviction Relief at 5. Daneshgar was charged with two counts of Falsifying Business Records, one count of Possession of Marijuana, and one count of Possession of Drug Paraphernalia. *See* Case I.D. No. 1405018689. A *nolle prosequi* was entered as to the two counts of Falsifying Business Records on February 19, 2015, and a *nolle prosequi* was entered as to the two remaining drug charges on May 1, 2015.

[9] *See* Super. Ct. Crim. R. 61. Rule 61 has undergone a number of changes in recent months, but the version of the Rule in effect at the time Defendant filed his original Motion is controlling.

merits of this Motion for Postconviction Relief, the Court must address any procedural requirements of Superior Court Criminal Rule 61(i).[10]

7. Under Superior Court Criminal Rule 61(i), a Motion for Postconviction Relief can be potentially procedurally barred for time limitations, successive motions, procedural defaults, and former adjudications.[11] If a procedural bar exists, then the Court will not consider the merits of the postconviction claim unless the Defendant can show that, pursuant to Rule 61(i)(5), the procedural bars are inapplicable.

8. Rule 61(i)(5), provides that consideration of otherwise procedurally barred claims is limited to claims 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."[12]

9. This Court finds that all of Defendant's claims are time-barred pursuant to Rule 61(i)(1) as Defendant's motion was filed more than one year after Defendant's conviction was finalized on direct appeal.[13] Further, assuming *arguendo* that Defendant's claims are not time-barred, the Court finds they are either procedurally defaulted or without merit.[14] For clarity, this Court will first take up the claims in Defendant's Second Motion for Postconviction Relief. The Court will then take up the claims set forth in subsequent filings.[15]

---

[10] *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[11] *See* Super. Ct. Crim. R. 61(i)(1)-(4).
[12] Super. Ct. Crim. R. 61(i)(5).
[13] *See* Super. Ct. Crim. R. 61(i)(1) (barring postconviction motion filed more than one year after judgment of conviction is final); *Felton v. State*, 945 A.2d 594 (Del. 2008) (measuring start of filing period from date direct Supreme Court mandate was issued and direct appeal process concluded). The Supreme Court mandate was issued in Defendant's case on September 19, 2008. *See Johnson v. State*, 2008 WL 4290602 (Del. Sept. 19, 2008) (TABLE).
[14] Super. Ct. Crim R. 61(i)(3)-(4).
[15] The Court does not suggest that arguments made in supplemental filings will be considered in every case. However, in the interest of judicial economy, in this specific

10. To successfully articulate an ineffective assistance of counsel claim, a claimant must demonstrate: 1) that counsel's performance was deficient, and 2) that the deficiencies prejudiced the Defendant by depriving him or her of a fair trial with reliable results.[16] To prove counsel's deficiency, a Defendant must show that counsel's representation fell below an objective standard of reasonableness.[17] Moreover, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.[18] "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[19] 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."[20]

11. Defendant's contention that trial counsel was ineffective for failing to hiring a private investigator does not satisfy either prong of *Strickland*. Trial counsel states that the witnesses were cross-examined regarding what they saw. Trial counsel specifically affirms that the witnesses were questioned regarding "distance, lighting . . . attendant circumstances, [and the] number of people present wearing similar clothing . . . ."[21] Both officers testified that they had the use of binoculars and had an "unobstructed view of the drug transaction."[22] Trial counsel's line of questioning is sufficient to demonstrate that her actions did not fall below an objective standard of reasonableness. Moreover, assuming *arguendo* that Defendant could show that his argument survives the first prong of *Strickland*, Defendant has failed to set forth any facts to show that had an investigator been hired, that there is a reasonable probability that the outcome

---

instance, the Court will consider and address all of Defendant's outstanding claims in this one Order.

[16] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[17] *Id.*

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

[19] *Strickland*, 466 U.S. at 689.

[20] *Id.* at 694.

[21] Aff. of Deborah L. Carey, Esquire at 2, D.I. #73 (Jul. 2, 2014).

[22] *Id.*

of the trial would have been different. Defendant's first claim fails as it does not survive either prong of *Strickland*.

12. This Court finds that Defendant's second and third claims regarding police perjury and a private investigator are procedurally defaulted for failure to raise them in an earlier proceeding.[23] Defendant has neither shown cause for relief from the procedural default nor prejudice from violation of Defendant's rights sufficient to survive the procedural bar of 61(i)(3), and this Court declines to address them further.[24] This Court further finds that Defendant fails to demonstrate, pursuant to 61(i)(5), that his second and third claims are exempt from the procedural bars.[25]

13. Finally, regarding the conflicting drug weights and alleged tampering by chemist Farnam Daneshgar, this Court finds Defendant's arguments unavailing. Defendant suggests that some form of tampering occurred because a field test of the drugs gave a weight of 0.1 grams, and the medical examiner's office test of the drugs showed the weight was 0.12 grams. As support for this argument, Defendant notes that the chemist who testified at his trial, Mr. Daneshgar, is now facing criminal charges for falsifying business records and several other drug charges. The Defendant argues that "it's clear that [the drugs were] added to" and suggests that the chemist's testimony was unreliable at the time of trial in 2008.[26] The Court is not persuaded by this argument, and agrees with the State's argument set forth in its response, provided here in relevant part:

> 1. The defendant is claiming that the drugs in this case were tampered with since the officer weighed the crack cocaine as 0.1 grams and the medical examiner's office weighed the crack cocaine as 0.12 grams. The defendant argues that since the weight of the crack cocaine increased two hundredths of a gram that the drugs were added to.
> 2. Two hundredths of a gram is an inconsequential amount which could be explained by the fact that two different

[23] *See* Super. Ct. Crim. R. 61(i)(2)-(3);
[24] *See* Super. Ct. Crim. R. 61(i)(2)-(3); *See also Younger v. State*, 580 A.2d 552 (Del. 1990) (further explaining procedural default standard).
[25] *See* Super. Ct. Crim R. 61(i)(5).
[26] Def.'s Resp. at 4, D.I. # 76 (Sept. 18, 2014).

scales were used. The testimony by the officer was that the drug field tested positive as crack cocaine. The medical examiners report confirmed that the drug was in fact crack cocaine.

3. Additional there was testimony that the medical examiner routinely breaks the one rock into smaller pieces when testing it. So the fact that at trial there was more than one rock is expected.
4. The defendant also alleges tampering because the chemist, Farnam Daneshgar, was indicted in 2014 for falsifying business records. While it is true that the chemist was charge[d], the allegation is that he falsified records between 2010 and 2014. In the case before the Court, the defendant's trial occurred in 2008. Here, the drug weight by the police officer and the medical examiner are substantially the same. Furthermore, the drug that was field tested as crack cocaine was confirmed by the medical examiner as crack cocaine.
5. Since there is no evidence that the drugs were tampered with, the Defendant's motion should therefore be denied.[27]

14. The Court agrees with the State and finds that the difference of two-hundredths of a gram (0.1 in the field vs. 0.12 at the drug lab) is inconsequential. The Court further finds that trial counsel was not ineffective for failing to file a motion to dismiss based on this inconsequential difference in weight. Defendant has not shown that failing to file a motion to dismiss fell below a level of reasonable professional assistance, nor has the Defendant shown that if counsel had filed a motion to dismiss, that there was any reasonable probability it would have been granted, or that the outcome of the proceedings would have otherwise been different. The Court finds that the claim does not survive either prong of *Strickland*.

15. Regarding Defendant's claims that Daneshgar's testimony is "tainted and untrustworthy," the Court finds them to be without merit. The allegations against Daneshgar are that he falsified records between 2010 and 2014. There are no allegations that the chemist was involved in any criminal activity at or around the time the drugs in this case were tested or the time of this trial

[27] *See* St. Resp. to Def.'s Amended Mot. for Postconviction Relief at ¶¶ 1-5, D.I. #78 (Jan. 26, 2015). Again, as discussed *supra*, all charges against Daneshgar have been dropped as of May 1, 2015.

in 2008. Daneshgar's charges were based on actions which allegedly occurred well after Defendant's trial, and the State has entered a *nolle prosequi* as to all of Daneshgar's charges.[28] Defendant has simply not set forth sufficient evidence to show that Daneshgar's testimony in this case was untrustworthy, nor has Defendant convinced this Court that his case falls within the universe of cases affected by the mismanagement and alleged criminal conduct within the OCME. Accordingly, Defendant's Motion for Postconviction Relief is **DENIED.**

IT IS SO ORDERED.

_____

Richard R. Cooch, R.J.

oc: Prothonotary (Kent County)
cc: Investigative Services (Kent County)
Susan G. Schmidhauser, Esquire
George P. Johnson

[28] A *nolle prosequi* was entered as to the two counts of Falsifying Business Records on February 19, 2015, and a *nolle prosequi* was entered as to the two remaining drug charges on May 1, 2015. *See* Case I.D. No. 1405018689.