IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANDRE FLETCHER,	)	
	)	
	)	
v.	)	I.D. # 0111002808
	)	
STATE OF DELAWARE,	)	
	)	
Defendant.	)	

Date Submitted: November 4, 2006
Date Decided: May 9, 2006

OPINION

Upon Defendant's Pro Se Motion for Postconviction Relief — **DENIED**

Mark H. Conner, Esquire, Deputy Attorney General, Department of Justice, 820 North French Street, Wilmington, Delaware, 19801, Counsel for the State of Delaware.

James Brendan O'Neill, Assistant Public Defender, Office of the Public Defender, 820 North French Street, Wilmington, Delaware, 19801, Trial Counsel for the Defendant.

William T. Deely, Assistant Public Defender, Office of the Public Defender, 820 North French Street, Wilmington, Delaware, 19801, Trial Counsel for the Defendant.

Andre Fletcher, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware, 19977, Defendant *Pro Se*.

JURDEN, J.

Andre Fletcher (hereinafter the "Defendant") filed the instant Motion for Postconviction Relief alleging ineffective assistance of counsel. For the reasons that follow, the Defendant's Motion is **DENIED**.

I. ***Factual and Procedural Background***

On December 17, 2001, a Grand Jury indicted the Defendant on the following charges: Murder First Degree, Possession of a Firearm During the Commission of a Felony, and Possession of a Deadly Weapon by a Person Prohibited.[1] The charges arose from a November 3, 2001 incident during which the Defendant fatally shot Richard Holland at the intersection of 29th and Tatnall Streets in Wilmington.[2] On December 19, 2002, a Jury convicted the Defendant of the lesser-included offense of Murder Second Degree and Possession of a Firearm During the Commission of a Felony. At the conclusion of the jury trial, the Trial Judge found the Defendant guilty of Possession of a Deadly Weapon by a Person Prohibited.[3] On May 2, 2003, the Court sentenced the Defendant (a) on the count of Murder Second Degree to twenty years at Level V; (b) on the count of Possession of a Firearm During the Commission of a Felony to seven years at Level V, suspended after six years for one year at Level IV; and (c) on the count of

[1] *See* Indictment True Bill, *State v. Fletcher*, No. 0111002808 (Dec. 17, 2001) (D.I. 2).
[2] *Id*.
[3] *See* Sentencing Order, *State v. Fletcher*, No. 0111002808 (May 2, 2003) (D.I. 31).

Possession of a Deadly Weapon by a Person Prohibited to three years at Level V.[4] On September 10, 2003, the Court corrected the Defendant's sentence for Possession of a Deadly Weapon by a Person Prohibited to five years at Level V, suspended after three years.[5]

The Defendant timely appealed his conviction and on July 2, 2004 the Supreme Court affirmed this Court's decision.[6] The Defendant filed the instant Motion on November 4, 2005.

II. ***Summary of the Defendant's Allegations***

In his Motion for Postconviction Relief, the Defendant asserts ineffective assistance of counsel as his ground for relief, alleging that trial counsel: (1) failed to hire a firearms expert to testify at trial that the weapon may have had a hair trigger, (2) failed to hire an expert to testify as to which of the two shots fired by the Defendant was fatal, (3) failed to conduct a pre-trial investigation into the Defendant's self-defense claim by failing to obtain police testimony and other evidence that 29th Street is a "high crime area" where "thugs…put …guns" under cars, in trees or bushes, (4) failed to request an acquittal based on the Defendant's accident/self-defense claim, and (5) failed to "obtain a jury instruction under 11 *Del. C.* § 441(1)," and request a voluntary manslaughter instruction or "other

[4] *Id.*
[5] *See* Corrected Sentence Order, *State v. Fletcher*, No. 0111002808 (Sept. 10, 2003) (D.I. 46).
[6] *See Fletcher v. State*, 2004 WL 1535728 (Del. Supr.).

instructions for self-defense."[7] The Defendant proclaims his innocence by reasserting his self-defense claim, and argues that the ineffectiveness of his trial counsel allowed him to be convicted of Murder Second Degree, without proof beyond a reasonable doubt, resulting in his incarceration.[8]

III. ***The Legal Standard for Ineffective Assistance of Counsel Claims***

Before addressing the merits of claims contained in a Superior Court Criminal Rule 61 Motion for Postconviction Relief, the Court must first determine whether any of the procedural bars under Rule 61 are applicable.[9] After reviewing the Defendant's present Motion, the Court finds that the claims contained therein are not procedurally barred. The Motion was timely filed[10] and alleges only ineffective assistance of counsel claims that have not been previously adjudicated.[11] Accordingly, the Court shall address the Defendant's substantive arguments.[12]

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[7] *See* Mem. of Law in Supp. of Movant's Postconviction Mot., *State v. Fletcher*, No. 0111002808 (Nov. 4, 2005) (D.I. 48).
[8] *Id*.
[9] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[10] Super. Ct. Crim. R. 61(i)(1) bars motions filed more than three years after the judgment of conviction is final. Effective July 1, 2005, an amendment to this subdivision reduced the three year time limit to one year. The amendment applies to cases where a judgment of conviction became final after July 1, 2005. In this case the three year limitation remains in effect for purposes of postconviction review because the Supreme Court Mandate in the Defendant's direct appeal issued on July 20, 2004.
[11] Super. Ct. Crim. R. 61(i)(2) bars relief on any ground not asserted in a prior postconviction proceeding, as required by subdivision (b)(2). Likewise, subdivision (i)(3) bars relief on any ground not asserted in the proceedings leading to the judgment of conviction and subdivision (i)(4) bars relief on any ground formerly adjudicated. However, the procedural bars set forth in Rule 61(i)(1)-(4) may be overcome if a defendant establishes a "colorable claim" that there has been a "miscarriage of justice" under Super. Ct. Crim. R. 61(i)(5). *State v. Wilmer*, 2003 WL 751181, at *3 (Del. Super.), *aff'd*, 827 A.2d 30 (Del. 2003). A "colorable claim of miscarriage of justice occurs when there is a constitutional violation that undermines the fundamental legality, reliability, integrity, or fairness of the proceedings leading to the judgment of conviction." *Id*. This is a "very narrow" exception to the Rule 61

Under the standard set forth in *Strickland v. Washington*, a defendant claiming ineffective assistance of counsel must establish two factors in order to prevail: (1) counsel's representation fell below an "objective standard of reasonableness," and (2) counsel's actions were prejudicial to his defense, creating a reasonable probability that but for counsel's error, the result of the proceeding would have been different.[13] The *Strickland* standard is highly demanding.[14] Under the first prong there is a "strong presumption that the representation was professionally reasonable" and, under the second prong, a defendant must affirmatively prove prejudice.[15]

The record in this case clearly demonstrates that the instant Motion is without merit. As explained below, the Defendant fails to satisfy either prong of the *Strickland* test. The Defendant has not shown Trial Counsels' representation was unreasonable or that their actions prejudiced his defense.

Initially, the Defendant claims Trial Counsels' representation was ineffective because they failed to hire firearms and weapons/forensic medicine experts to

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procedural bars that is "only applicable in very limited circumstances." *Id.* "A claim of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, by its very nature, qualifies as such an exception." *Id*. Under this exception, "the defendant bears the burden of proving that he has been deprived of a 'substantial constitutional right.'" *Id.*

[12] The Court does not reach the Defendant's assorted, conclusory constitutional arguments offered, at the conclusion of his Motion, apparently to justify consideration under the Rule 61(i)(4) and (i)(5) exceptions, because the Defendant's ineffective assistance of counsel claims are sufficient to overcome the procedural bars set forth under Rule 61. *See supra* notes 11-12.

[13] *Strickland v. Washington*, 446 U.S. 668, 693-94 (1984); *State v. Flonnory*, 2003 WL 22455188, at *1 (Del. Super.).

[14] *Flonnory*, 2003 WL 22455188, at *1, *citing Wilmer*, 2003 WL 751181, at *4.

support his accident/self-defense claim and cast doubt on the State's Case in Chief.[16] The Court finds both of these claim are without merit.

In support of his claim that Trial Counsel rendered ineffective assistance by failing to hire a firearms expert, the Defendant offers only a conclusory assumption that a firearms expert could or would have provided an admissible, exculpatory opinion to aid his defense. However, this conclusion overlooks a key fact that Mr. O'Neill points out in his affidavit: no gun was in evidence in this case.[17] Consequently, no gun existed that an expert could test for a hair trigger.[18] The State made no attempt to introduce a gun into evidence.[19] Thus, the Court finds that "the strong presumption of professionally reasonable representation leads to the conclusion" that Trial Counsels' assessment that a firearms expert was not necessary to the defense was reasonable.[20] Furthermore, given the fact that the gun was unavailable to both the State and the Defendant in this case (because of the Defendant's actions), the Court finds this conclusory claim insufficient to satisfy

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[15] *Flonnory*, at *1, *citing Albury v. State,* 551 A.2d 53, 59-60 (Del.1988).
[16] Mem. of Law, D.I. 48, at 5.
[17] *See* Aff. of O'Neil at ¶ 5, *State v. Fletcher*, No. 0111002808 (Jan. 6, 2006) (D.I. 49). The Court notes that this is largely because of the Defendant's own actions. Apparently, after the shooting, the Defendant left the gun in the apartment of a friend, who later threw the gun in a nearby dumpster. However, the police did not find the gun because the dumpsters near the apartment had been emptied prior to their search.
[18] *See* Aff. of O'Neil, D.I. 49, at ¶ 5.
[19] *Id*.
[20] *Andrus v. State*, 2004 WL 691922, at *3 (Del. Supr.).

the Defendant's "burden of substantiating specific allegations of actual prejudice on this issue."[21]

Similarly, the Defendant argues that Trial Counsel provided ineffective assistance by failing to hire a weapons/forensic medicine expert, claiming that such an expert would resolve the "legal question" of which of his two shots was fatal.[22] Apparently, this claim arises from the Chief Medical Examiner's testimony at trial.[23] During direct examination, Dr. Sekula-Perlman (a forensic pathologist) indicated she was unable to tell which of the two gunshots came first or which killed the victim.[24] However, as Mr. O'Neill notes, Dr. Sekula-Perlman also testified that victim suffered from "two very serious" gunshot wounds, one in his chest and the other in his back.[25] The record further reflects that she testified that both wounds "contributed equally" to killing the victim, whose cause of death she ultimately determined to be the result of multiple gunshot wounds.[26]

Mr. O'Neill explains in his affidavit that given Dr. Sekula-Perlman's testimony, it "seems likely that a second opinion about the sequence of the gunshots and their effect on the victim would be speculative" and, even if a differing expert opinion could be found it, "would have no bearing on [the

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[21] *Andrus*, 2004 WL 691922, at *3 (Del. Supr.).
[22] Mem. of Law, D. I. 48, at 5.
[23] *See* Aff. of O'Neil, D.I. 49, at ¶ 6; Mem. of Law, D. I. 48, at 5.
[24] Tr. Trial at 77-78, 84, 87, *State v. Fletcher*, No. 0111002808 (Dec. 11, 2002) (D.I. 39).
[25] *See* Aff. of O'Neil, D.I. 49, at ¶ 6; Tr. Trial, D.I. 39, at 82-85.

Defendant's] hybrid claim of accident/self-defense."[27] The Court agrees with this assessment and finds Trial Counsels' determination that a weapons/forensic medicine expert was unnecessary to the Defendant's case reasonable. Furthermore, detecting no conflict between the Chief Medical Examiner's findings and the Defendant's own trial testimony that two shots were fired "as quick as you can blink,"[28] the Court finds that the Defendant's conclusory claim does not affirmatively prove prejudice sufficient to meet the second prong of the *Strickland* standard.

Next, the Defendant claims that Trial Counsel provided ineffective assistance by failing to conduct a pre-trial investigation into his self-defense claims. In support of this allegation, he maintains Trial Counsel failed to obtain (1) police testimony that 29th Street is a high crime area where "thugs" hide guns to avoid possession charges or (2) an investigator to find evidence supporting his view that an armed victim in such an area was "up to no good, attempting to rob …or kill" the Defendant.[29]

These conclusory assertions contradict the record and Mr. O'Neill's affidavit, and therefore the Court finds them without merit. Mr. O'Neill's affidavit documents eleven (11) pre-trial visits with the Defendant, during which they

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[26] *Id.* at 84-85, 96.
[27] *See* Aff. of O'Neil, D.I. 49, at ¶ 6.
[28] Tr. Trial at 189, *State v. Fletcher*, No. 0111002808 (Dec. 17, 2002) (D.I. 41).

discussed, among other things, discovery, witnesses, and the particulars of the Defendant's hybrid accident/self-defense claim.[30] Mr. O'Neill further details how both he and Mr. Deely attempted to follow-up on every lead relating to potential defense witnesses provided by the Defendant.[31] Pursuant to the Defendant's instructions, they even enlisted the Defendant's mother to assist in the locating and contacting witnesses.[32] Unfortunately, most of the Defendant's potential witnesses could not be contacted, and those who were contacted provided no information helpful to the Defendant's case.[33]

In addition, the record shows that Trial Counsel elicited testimony at trial about the volume and nature of criminal activity in the area of 29th Street. Specifically, over the State's objection, the following exchanges took place between Mr. Deely and Patrolman Robert Cassidy during cross examination:

> Q: You were on routine patrol that night?
> A: Yes.
> Q: From that area of 29th and Market, 29th and Tatnall, that particular area, that is a pretty high drug and crime area; is that correct?
> A: Correct.
> Q: So you try to patrol it pretty intensely; is that correct?
> A: Correct.
> Q: Have you ever been involved with a shooting incident before?
> A: Have I ever responded before?
> Q: How many?

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[29] Mem. of Law, D. I. 48, at 1, 5-6.
[30] *See* Aff. of O'Neil, D.I. 49, at ¶ 4, Exhibit 1.
[31] *Id.* at ¶ 7.
[32] *Id*.
[33] *Id.*

A: I would say over 50.[34]

Q: In your patrol of this area, have you ever made any drug busts?
A: Yea.
Q: You have arrested drug dealers?
A: Yes.
Q: And how many, approximate, arrests of drug dealers have you made?
A: Probably 100. [35]

Q: In your experience there are times, although not one hundred percent of the time, there are a good number of time when guns are involved; is that correct?
A: At times, yes.
Q: Violence as a result of drug sales; is that correct?
A: Correct.
Q: One of the things that you and officers on the force do when you are involved in drug situations is you pretty much come into it with the assumption there may be weapons there; whether they have been seen or not; is that correct?
A: Yes. [36]

The Court finds no evidence in the record that Trial Counsels' representation during the pre-trial investigation fell below an objective standard of reasonableness or that any alleged errors by Trial Counsel prejudiced the Defendant.[37] The trial transcript refutes the Defendant's conclusory claim that Trial Counsel failed to obtain police testimony. Moreover, the Court is satisfied that Trial Counsel conducted a thorough investigation into the circumstances surrounding the Defendant's self-defense claims.

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[34] Tr. Trial, D.I. 39, at 43.
[35] *Id*. at 56.
[36] *Id*. at 62.
[37] *See Summers v. State***,** 2002 WL 31300028, at *1 (Del. Supr.).

The Defendant's remaining two ineffective assistance of counsel claims, alleging that Trial Counsel "should have requested an acquittal" and failed to obtain jury instructions related to his self-defense claims, are also without merit.[38] The Defendant offers no evidence to support his conclusory assertions or to show that the alleged ineffective assistance resulted in any prejudice. These claims are merely an attempt to re-assert his self-defense claims, which the Jury rejected when it convicted him.

Further, the record contradicts the Defendant's allegations that Trial Counsel failed to obtain Manslaughter and Self-Defense instructions.[39] The trial transcript shows that the Court instructed the jury on the lesser-included offense of Manslaughter and the Defendant's Justification Defense.[40] Therefore, as "[o]ver-broad and generalized accusations, which are wholly conclusory, do not support entitlement to relief" under Superior Court Criminal Rule 61(d)(4) and the Defendant fails to "support the ineffective assistance of counsel claims with concrete allegations of actual prejudice," the Court finds he has failed to satisfy his burden as to these claims.[41]

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[38] Mem. of Law, D. I. 48, at 5-6.
[39] The Court notes that on appeal, the Defendant claimed the Court erred as a matter of law by instructing the jury on the lesser-included offense of Manslaughter. *See Fletcher v. State*, 2004 WL 1535728 (Del. Supr.).
[40] *See* Jury Instructions, *State v. Fletcher*, No. 0111002808 (Dec. 18, 2002) (D.I. 19); Tr. Trial at 138-40, 143-46, *State v. Fletcher*, No. 0111002808 (Dec. 18, 2002) (D.I. 35).
[41] *Austin v. State,* 2002 WL 32071647, at *3 (Del. Super. 2002), *citing Younger,* 580 A.2d 552, 556 (Del. 1990) and *State v. Mason*, Cr. A. No. IN93-02-0279-R1, Barron, J. (Del. Super. Apr. 11, 1996)

Lastly, the Defendant contends that Trial Counsel allowed him to be convicted of the lesser-included offense of Second Degree Murder without proof beyond a reasonable doubt. This claim is wholly without merit. First, the Court's findings explained above in this Opinion belie assertion. Second, as Mr. O'Neill explains in this affidavit, the Jury acquitted the Defendant of the Murder First Degree.[42] This result is most likely attributable to the plausible defense presented on the Defendant's behalf by Trial Counsel. Third, the fact that a Jury convicted the Defendant of Murder Second Degree indicates the State met its burden of proving the Defendant's guilt beyond a reasonable doubt. Finally, the record shows that Trial Counsel vigorously objected to the jury instructions on the lesser-included offenses of Murder Second Degree and Manslaughter.[43] Trial Counsel also timely appealed the Defendant's conviction, arguing in part that these instructions were given in error. Nevertheless, the Supreme Court affirmed this Court's decision to instruct the Jury as to the lesser-included offenses.[44]

Thus, absent any other specific allegation or evidence to the contrary, the Defendant has failed to show that Trial Counsels' conduct of his defense was unreasonable or that the alleged ineffective assistance resulted in any prejudice to him.

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[42] *See* Aff. of O'Neil, D.I. 49, at ¶ 7.
[43] Tr. Trial, D.I. 35, at 20-35.
[44] *Fletcher v. State*, 2004 WL 1535728, at *3-4 (Del. Supr.).

IV. ***Conclusion***

The Court finds that the Defendant failed to satisfy the *Strickland* standard with regard to any of his ineffective assistance of counsel claims. For the aforementioned reasons, the Defendant's Motion for Postconviction Relief is hereby **DENIED.**

IT IS SO ORDERED.

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Judge Jan R. Jurden