

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

STATE OF DELAWARE,)	
)	
v.)	
)	
ANDRE NORWOOD,)	ID No. 0808007826A
)	
Defendant.)	

Submitted: March 8, 2012
Decided: June 28, 2012

On Defendant's Motion for Postconviction Relief – DENIED

ORDER

Andre L. Norwood. James T. Vaughn Correctional Center, Smyrna, DE 19977.
Pro se.

Martin B. O'Connor, Esquire. Department of Justice, 820 North French Street,
Wilmington, DE 19801.

CARPENTER, J.

Just before sentencing, the State realized one of Norwood's convictions was a lesser included offense of another. Consequently, they moved to merge the two offenses, and Norwood was sentenced only for the greater offense. Norwood now argues that this oversight violated the Fifth Amendment's prohibition against double jeopardy and his Sixth Amendment right to effective assistance of counsel.

For the reasons discussed below, Andre L. Norwood's Motion for Postconviction Relief is hereby DENIED.

BACKGROUND

In May 2009 a jury found Norwood guilty of Robbery First Degree, Aggravated Menacing, two counts of Possession of a Firearm during the Commission of a Felony, and Conspiracy Second Degree. Additionally, the Court found Norwood guilty of Possession of a Firearm by a Person Prohibited. Prior to his sentencing, the State requested the Court merge Norwood's Aggravated Menacing charge with his Robbery First Degree charge consistent with the ruling in *Poteat v. State*.¹ The Court granted the State's request and Norwood was ultimately sentenced for Robbery First Degree, one count of Possession of a Firearm during the Commission of a Felony, Conspiracy Second Degree, and Possession of a Firearm by a Person Prohibited.

¹ 840 A.2d 599 (Del. 2003).

The Supreme Court of Delaware affirmed Norwood's conviction in March 2010. Norwood filed and was denied his first motion for postconviction relief in July 2011. In this, Norwood's second motion for postconviction relief, Norwood advances three claims: First, he argues ineffective assistance of counsel at trial for counsel's alleged failure to investigate whether the charges against Norwood violated double jeopardy.² Second, Norwood argues ineffective assistance of counsel on appeal for counsel's failure to raise the same double jeopardy issue. Finally, Norwood argues the trial court abused its discretion by sentencing Norwood in such a way that violated double jeopardy.

DISCUSSION

1. Rule 61's Procedural Bars

Delaware Courts apply the rules governing procedural requirements before considering the merits of a motion for postconviction relief.³ No less than three procedural bars apply to Norwood's motion. It is time-barred by Rule 61(i)(1) because Norwood filed this motion more than a year after his conviction became final.⁴ It is a repetitive motion because Norwood already submitted, and was

² See U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁴ See Super. Ct. Crim. R. 61(i)(1) (barring the Court from considering motions for postconviction relief filed more than one year after a judgment becomes final), Super. Ct. Crim. R. 61(m)(2) (providing that a conviction is final for purposes of postconviction relief when the Supreme Court of Delaware issues an order finally determining the case on direct review). The Supreme Court affirmed Norwood's conviction on March 1, 2010. *Norwood v. State*, 2010 WL 703107 (Del. March 1, 2010).

denied, a previous motion for postconviction relief, in which he raised none of the claims asserted in the present motion despite the fact that he's had knowledge of the grounds for relief set forth in his present motion since his sentencing date.⁵ Finally, Norwood's motion is procedurally defaulted under Rule 61(i)(3), which bars the consideration of any ground for relief that was not asserted in the proceedings leading to conviction.⁶ Norwood should have presented his double jeopardy claim on direct appeal to the Supreme Court, but he did not.⁷

Notwithstanding these procedural bars, the Court may consider the merits of Norwood's motion if he advances a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability or fairness of the proceedings leading to the judgment of conviction.⁸ In essence, Norwood alleges that the Court and counsel violated his Fifth Amendment protection against double jeopardy and that counsel's failure to raise this violation infringed on Norwood's Sixth Amendment right to effective

⁵ See Super. Ct. Crim. R. 61(i)(2) (barring consideration of any ground for relief not asserted in a prior postconviction proceeding), Super. Ct. Crim. R. 61(b)(2) (requiring motions for postconviction relief to "specify all the grounds for relief which are available to the movant and of which the movant has or, by the exercise of reasonable diligence, should have had knowledge").

⁶ Super. Ct. Crim. R. 61(i)(3).

⁷ See *Folks v. State*, 2007 WL 1214658, at *1 (Del. Feb. 26, 2007) (finding defendant's double jeopardy claim in a motion for postconviction relief barred because he failed to present this claim in his direct appeal).

⁸ Super. Ct. Crim. R. 61(i)(5).

counsel. The Court will touch upon these allegations only to illustrate that no miscarriage of justice occurred in this case.

2. Alleged Constitutional Violations

a. *The Fifth Amendment Protection Against Double Jeopardy*

The Fifth Amendment protects defendants against multiple punishments for the same offense.⁹ In Delaware the prosecution of multiple criminal offenses arising out of the same occurrence is governed by 11 *Del. C.* § 206, which states, “When the same conduct of a defendant may establish the commission of more than 1 offense, the defendant may be prosecuted for each offense. . . . The defendant may not, however, be convicted of more than 1 offense if . . . [o]ne offense is included in the other” Simply stated, to punish a defendant for two offenses arising out of the same occurrence, each offense must require a proof of fact which the other does not.¹⁰

It seems Norwood became aware of a potential double jeopardy violation when the State requested the merger of his convictions for Robbery First Degree and Aggravated Menacing per *Poteat*. In *Poteat*, the Supreme Court of Delaware held that Aggravated Menacing is a lesser included offense of Robbery First Degree.¹¹ But consistent with *Poteat*’s holding and the State’s request,

⁹ *Ex parte Lange*, 85 U.S. 163 (1873).

¹⁰ *Poteat v. State*, 890 A.2d 599, 605 (Del. 2003).

¹¹ *Id.* at 606.

Norwood—although convicted of Aggravated Menacing—is not being punished at all for this crime. His only punishment is for Robbery First Degree and related firearms and conspiracy offenses. In essence, the Court removed the double jeopardy issue before sentencing. For this reason, Norwood cannot argue that his conviction violates double jeopardy.

Neither can Norwood argue that his sentences for any of the other charged crimes violates double jeopardy. Delaware courts have “consistently rejected the claim that concurrent convictions of robbery and weapon violations constitute a violation of double jeopardy.”¹² In addition, Delaware’s legislature clearly intended to make the crime of conspiracy separate and distinct from the substantive offense conspired to.¹³ If Norwood is implying that his sentences for Possession of a Firearm by a Person Prohibited and Possession of a Firearm during the Commission of a Felony violates double jeopardy, that argument must fail too.¹⁴ In short, none of Norwood’s punishments violates double jeopardy, and therefore the Court’s sentencing order evinces no abuse of discretion.

¹² *Folks v. State*, 2007 WL 1214658, at *1 (Del. Feb. 26, 2007).

¹³ See *State v. Vouras*, 351 A.2d 869, 878 (Del. Super. 1976) (“In Delaware, there is clear evidence of a legislative intent to make the crime of conspiracy separate and distinct from the substantive offense.”).

¹⁴ See *Westcott v. State*, 2009 WL 3282707, at *3 (Del. Oct. 13, 2009) (finding that PFDCF and PFPP each have at least one element that the other offense does not).

b. The Sixth Amendment Right to Effective Assistance of Counsel

The conclusion just reached undercuts Norwood's allegations of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by counsel's unprofessional errors.¹⁵ To be prejudiced, a defendant must show that the proceedings below were fundamentally unfair or unreliable on account of counsel's errors; to merely illustrate a different possible outcome of the proceedings is not enough.¹⁶ Norwood's allegations are subject to the strong presumption that counsel's representation was professionally reasonable.¹⁷

Norwood's argument is that he was prejudiced by counsel's failure to allege a double jeopardy violation at trial and on appeal. As previously discussed, the only double jeopardy allegation with any merit to it concerns Norwood's dual conviction for Robbery First Degree and Aggravated Menacing. But even if Norwood's attorney had raised this issue, at trial or on appeal, the outcome of the proceedings against Norwood would not be any different. He would still be in the position he is now: serving a sentence for Robbery First Degree—and only Robbery First Degree—and its related firearms and conspiracy offenses.

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

¹⁶ *Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993).

¹⁷ *Dawson v. State*, 673 A.2d 1186, 1196 (Del. Super. 1996).

CONCLUSION

While perhaps the parties and the Court should have recognized the merger issue before trial, the situation was rectified prior to sentencing. This oversight did not prejudice the defendant's rights at trial nor result in an illegal sentence. The defendant's motion is procedurally barred from consideration, but even if considered, there has been no miscarriage of justice. For these reasons, Norwood's Motion for Postconviction Relief is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.