

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
Plaintiff,)
)
v.) Cr. ID No. 1501018069
)
KADIR MCCOY,)
)
Defendant.)
)

Submitted: August 26, 2020
Decided: September 28, 2020

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S SECOND MOTION FOR POSTCONVICTION
RELIEF SHOULD BE SUMMARILY DISMISSED**

Periann Doko, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Kadir McCoy, James T. Vaughn Correctional Center, Smyrna, Delaware,
pro se.

PARKER, Commissioner

This 28th day of September 2020, upon consideration of Defendant's Second Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. On April 13, 2015, Defendant Kadir McCoy was indicted on three counts of Robbery First Degree, two counts of Aggravated Menacing, Conspiracy Second Degree, Wearing a Disguise During the Commission of a Felony, Carrying a Concealed Deadly Weapon, two counts of Possession of a Firearm by a Person Prohibited, two counts of Possession of Ammunition by a Person Prohibited, and Resisting Arrest.
2. On August 31, 2015, McCoy was reindicted for the above charges and additional charges including Illegal Gang Participation, two counts of Murder First Degree and multiple firearm and conspiracy offenses. The Illegal Gang Participation charge stemmed from McCoy's membership in the Touch Money Gang, also known as "TMG".
3. One count of Murder First Degree was for the murder of Devon Lindsey. The murder occurred on January 18, 2015 on E. 29th Street in Wilmington, Delaware. The victim was shot in the head after three suspects fired inside a minivan where the victim was a passenger.
4. The second count of Murder First Degree was for the murder of William "Billy" Rollins. The murder occurred on January 24, 2015 at W. 21st

Street and Washington Street, Wilmington, Delaware. The victim was found with eleven gunshot wounds on the left side of his body and his right temple. Fifteen 9mm shell casings were located at the scene. The 9mm shell casings were ballistically matched to a 9mm handgun found in a backpack that had been tossed by McCoy on January 29, 2015, when he was fleeing from a WSFS Bank after committing a robbery. Two projectiles recovered at the homicide scene appeared to be fired by a .357 firearm. A search warrant executed at the residence of McCoy on February 3, 2015 uncovered a .357 Taurus firearm.

5. One of the Robbery First Degree charges stemmed from the robbery on January 29, 2015 at WSFS Bank located at Union Street, Wilmington, Delaware. Two masked suspects showed guns, demanded money, and seized approximately \$15,000 in cash. Officers responded to the crime scene as the suspects were fleeing. After a brief foot chase, McCoy and his co-conspirator (Cordele Stewart) were arrested. McCoy was seen tossing a red backpack. Inside the backpack was the stolen money and a 9mm Ruger P85. The 9mm was matched to shell casings fired at the scene of the William Rollins homicide on January 24, 2015.

6. On March 3, 2017, McCoy pled guilty to two counts of Murder Second Degree (lesser-included offenses of Murder First Degree), two counts of Possession of a Firearm during the Commission of a Felony, two counts of

Conspiracy First Degree, one count of Robbery First Degree, and one count of Illegal Gang Participation.¹

7. In exchange for the guilty plea, the State agreed to dismiss all the other charges in the indictment.² Although McCoy was facing two life sentences if convicted of the Murder in the First Degree charges, and hundreds of years of prison time for the multiple robbery and firearm related charges, as part of the plea, the State agreed to cap its sentence recommendation to the minimum-mandatory period of 39 years of unsuspended Level V time.³

8. On August 10, 2017, McCoy filed a motion to withdraw his guilty plea. The Superior Court denied the motion by Order dated August 17, 2017.⁴ In denying the motion, the Superior Court held that there was no procedural defect in taking the plea; that McCoy knowingly and voluntarily consented to the plea agreement; that McCoy had no basis to assert a claim of legal innocence; and that McCoy had adequate legal counsel throughout the proceedings.⁵

¹ Superior Court Docket No. 61- Plea Agreement of March 3, 2017.

² Superior Court Docket No. 61- Plea Agreement of March 3, 2017.

³ Superior Court Docket No. 61- Plea Agreement of March 3, 2017.

⁴ Superior Court Docket No. 65- Order dated August 17, 2017 denying Motion to Withdraw Guilty Plea.

⁵ *Id.*

9. The Superior Court in denying McCoy's motion to withdraw his plea ruled that McCoy had failed to set forth any basis to warrant the withdrawal of his plea.⁶

10. On August 18, 2017, McCoy was sentenced to the minimum-mandatory period of 39 years of unsuspended Level V time, followed by probation.

11. McCoy did not file a direct appeal to the Delaware Supreme Court.

12. On October 16, 2018, McCoy filed his first motion for postconviction relief. In his first Rule 61 motion for postconviction relief, McCoy raised a number of claims including ineffective assistance of counsel claims.

13. The undersigned Superior Court Commissioner conducted a full, thorough and detailed review of McCoy's claims raised in his first Rule 61 motion. The record was expanded and trial counsel filed an affidavit in response to the allegations of ineffectiveness, the State filed a response to McCoy's motion, and McCoy was given an opportunity to file a reply thereto. Following that careful review, the undersigned Superior Court Commissioner recommended the denial of McCoy's first Rule 61 motion.⁷

⁶ *Id.* at 4.

⁷ *State v. McCoy*, 2019 WL 3247174 (Del.Super. 2019).

14. After conducting a careful and *de novo* review of the record and the Commissioner's Report and Recommendation recommending the denial of McCoy's first Rule 61 motion, the Superior Court adopted the Commissioner's Report and Recommendation and denied McCoy's first Rule 61 motion.⁸

MCCOY'S SECOND RULE 61 MOTION

15. On July 20, 2020, McCoy filed the subject Rule 61 motion. In the subject motion, McCoy contends that his trial counsel provided ineffective assistance stemming from his alleged lack of communication both before and after McCoy's plea. McCoy's remaining claim is that there is "newly discovered evidence" stemming from the Commissioner's July 17, 2019 Report and Recommendation on McCoy's first Rule 61 motion, in which that report stated that McCoy was developed as a suspect to one of the murders through "video surveillance footage of the homicide and witness statements."⁹ McCoy contends that there was no incriminating video footage of this homicide.

⁸ Superior Court Docket No. 84- Superior Court Order dated August 5, 2019 denying McCoy's first Rule 61 motion.

⁹ *State v. McCoy*, 2019 WL 3247174, *1 (Del.Super. 2019).

16. McCoy must first satisfy the pleading requirements before he is entitled to proceed with this motion.

17. Rule 61 mandates that in second or subsequent postconviction motions, the motion shall be summarily dismissed unless the defendant establishes: 1) that *new* evidence exists that creates a strong inference that the defendant is actually innocent of the charges for which he was convicted, or 2) the existence of a *new* rule of constitutional law made retroactive to cases on collateral review rendered his convictions invalid.¹⁰ If it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.¹¹

18. In this case, McCoy has not pled with particularity that any *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted or that there is a *new* rule of law that would render his conviction invalid. McCoy's first two claims of attorney ineffectiveness are simply reiterations of the claims previously made in his first Rule 61 motion. He does not even allege the existence of any new facts as to these two claims.

¹⁰ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i) (effective June 4, 2014).

¹¹ Super.Ct.Crim.R. 61(d)(5).

19. As to McCoy's third claim, he contends only that there was no video surveillance footage of the homicide at issue. It is important to note that McCoy pled guilty to having committed this murder and that prior to admitting his guilt his attorney reviewed the evidence and discovery that had been produced and the elements of this offense.¹²

20. At the time of the plea, McCoy not only admitted his guilt to having committed the murder at issue, but he also acknowledged that as a result of his plea he was waiving any rights he had to contest the sufficiency of the State's evidence on this charge.¹³

21. In order to overcome the procedural barrier for proceeding with a second Rule 61 motion, McCoy must establish (1) new evidence and (2) that the new evidence creates a strong inference of his actual innocence.

22. McCoy's claim is deficient at the outset because he has only alleged that there is "new evidence" of the lack of video surveillance. McCoy has not even alleged, let alone established, that the alleged new evidence somehow creates a strong inference of his actual innocence. Indeed, he cannot because he has admitted that he committed the murder at issue.

¹² March 3, 2017 Trial Transcript, at pgs. 4-9.

¹³ March 3, 2017 Trial Transcript, at pgs. 11-17; Truth-in-Sentencing Guilty Plea Form dated March 3, 2017.

23. McCoy has failed to meet the pleading requirements allowing him to proceed with this Rule 61 motion. McCoy has not met his burden to establish that any new evidence exists that creates a strong inference that he is actually innocent of the charges at issue. In accordance with the mandates of Rule 61, McCoy's Rule 61 motion should be summarily dismissed.¹⁴

24. McCoy's motion also falls short of other procedural requirements that must be met in order to proceed with the merits of his claims. If a procedural bar exists, then the claim is barred and the court should not consider the merits of the claim.¹⁵

25. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹⁶ (2) any basis for relief must be asserted in the first timely filed motion for postconviction relief absent exceptional circumstances (ie. discovery of *new* evidence that creates a strong inference of defendant's actual innocence or *new* rule of constitutional law that would render the conviction invalid) warranting a subsequent motion being filed; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief

¹⁴ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i).

¹⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁶ Super.Ct.Crim.R. 61(i)(1).

must not have been formally adjudicated in any proceeding. The bars to relief however do not apply to a claim that the court lacked jurisdiction or to a claim that new evidence exists that movant is actually innocent or that there is a new law, made retroactive, that would render the conviction invalid.¹⁷

26. In the subject action, Rule 61(i)(1) precludes this Court from considering McCoy's claims raised herein because McCoy's motion is time-barred.¹⁸ To be timely, a motion for postconviction relief must be filed within one year after the judgment of conviction is final.¹⁹ McCoy's conviction became final on or about September 17, 2017.²⁰ This motion was filed on July 20, 2020, outside the applicable one-year limit. McCoy's claims, at this late date, are time-barred.

27. Rule 61(i)(2) and Rule 61(i)(5) further preclude this Court's consideration of McCoy's motion since, as previously discussed, McCoy has not satisfied the pleading requirements for proceeding with this motion. McCoy has not established that *new* evidence exists that creates a strong inference of his actual innocence or that the existence of a *new* rule of constitutional law made retroactive to this case would render his conviction

¹⁷ Super.Ct.Crim.R. 61.

¹⁸ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁹ Super.Ct.Crim.R. 61(i)(1).

²⁰ Super.Ct.Crim.R. 61(m)(1).

invalid. Indeed, McCoy admitted to having committed the murder at issue as well as having committed all the other charges comprising the plea agreement.

28. In the subject motion, McCoy is unable to overcome the procedural hurdles of Rule 61(i)(3) by showing an exception to Rule 61(i)(5) applies. McCoy has not established that the court lacked jurisdiction, that any new evidence existed to create a strong inference that he is actually innocent of the underlying charges, or that a new rule of constitutional law exists that would render his conviction invalid. As such, McCoy has failed to meet the pleading requirements allowing him to proceed with his Rule 61 motion.

29. Finally, Rule 61(i)(4) precludes this Court's consideration of the claims presented herein since the ineffective assistance of counsel claims have already been formally adjudicated in McCoy's first motion for postconviction relief.

30. McCoy has failed to meet the pleading requirements for proceeding with the subject motion and, therefore, this motion should be summarily dismissed. McCoy's motion is also time-barred and otherwise procedurally barred.

For all of the foregoing reasons, McCoy's Second Motion for Postconviction Relief should be SUMMARILY DISMISSED.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc: Prothonotary
Andrew J. Witherell, Esquire