IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID. Nos. 1201018253
	)	1202006406
	)	1402013417
DAVID YARBOROUGH,	)	
	)	
Defendant.	)	

Submitted: April 12, 2024
Decided: July 18, 2024

COMMISSIONER'S REPORT AND RECOMMENDATION ON DEFENDANT'S SECOND MOTION FOR POSTCONVICTION RELIEF

John Downs, Deputy Attorney General, Delaware Department of Justice, Wilmington, DE, Attorney for the State.

David Yarborough, James T. Vaughn Correctional Center, Smyrna, DE, *Pro se*.

O'CONNOR, Commissioner

This 17th day of July, 2024, upon consideration of Defendant's *pro se* Motion for postconviction relief and the record in this matter, the following is my Report and Recommendation.

BACKGROUND

On or about April 2, 2012, Defendant David Yarborough ("Defendant") and his co-conspirator, Kenneth Yarborough, were charged in two indictments with twenty-three counts of theft-related charges. In Case No. 1201018253, Defendant was indicted for twenty-three offenses, including Burglary Second Degree, Theft (felony - greater than $100,000.00), Theft by False Pretense, Selling Stolen Property, and Conspiracy Second Degree.[1] In Case No. 1202006406, Defendant was charged with Burglary Second Degree, Conspiracy Second Degree, and Theft of a Senior.[2] During the police investigation, both defendants made incriminating statements as to their participation in the crimes, as well as the active participation of their co-defendant.[3]

[1] *State v. David Yarborough*, Case No. 1201018253, Docket Item "D.I." 5, Indictment.
[2] *State v. David Yarborough*, Case No. 1202006406, D.I. 4, Indictment.
[3] In Case No. 1202006406, the Adult Complaint and Warrant states: "[b]oth suspects provided confessions that they assisted one another during the commission of these crimes. Kenneth Yarborough also confessed that he had recently acquired a subscription to an internet search service called peoplesmart.com. Kenneth stated he had used the account to research the home addresses of several of his burglary victims. Kenneth stated he had obtained the names of potential targets from David Yarborough, and that David had targeted these subjects because he believed them to be wealthy business owners."

On or about April 28, 2014, while the above referenced charges were pending, Defendant attempted to hire a "hitman" to assault both his then-defense counsel and the prosecutor in at least one of his pending cases. The seminal problem with Defendant's plan was the "hitman" was actually an undercover police officer. As it turned out, during the solicitation, Defendant told the undercover officer he only had money to pay for the assault of one of the two aforementioned targets, so Defendant told the undercover officer to assault his defense counsel to such a degree that defense counsel would be "permanently in a wheelchair."[4] As a result of this scheme, the State indicted Defendant in Case No. 1402013417 for two counts each of Attempted Assault First Degree, Criminal Solicitation Second Degree, and Stalking.[5]

On or about April 9, 2015, Defendant accepted a global plea offer, resolving the three pending cases. Specifically, Defendant pled guilty to two counts of Attempted Assault First Degree and two counts of Burglary Second Degree.[6] As part of the plea, Defendant acknowledged he was eligible to be sentenced as a habitual criminal, and the State agreed to cap its sentence recommendation at twenty years Level V, which was the minimum mandatory sentence.[7]

---

[4] See *State v. Yarborough*, 2019 WL 4954959, at *1 (Del.Super. Oct. 2, 2019), *adopted* 2020 WL 2026701 (Del.Super. Apr. 21, 2020), *aff'd Yarborough v. State*, 2020 WL 5033422 (Del. Aug. 25, 2020).
[5] *State v. David Yarborough*, Case No. 1402013417, D.I. 4, Indictment.
[6] *Yarborough*, 2019 WL 4954959, at *1.
[7] *Id.*

Before beginning the plea colloquy with the Court, Defendant signed the Truth in Sentencing Guilty Plea Form. By executing the form, the Defendant indicated he was freely and voluntarily pleading guilty; nothing was promised to him other than what was provided in the plea agreement; no one forced him to enter the plea; and he was waiving certain constitutional rights.[8] The plea was entered, and sentencing was deferred. On December 10, 2015, this Court sentenced Defendant to an aggregate sentence of thirty-six years Level V, suspended after serving twenty years Level V, followed by probation supervision.[9]

On January 27, 2017, Defendant filed his first motion for postconviction relief.[10] In that motion, Defendant argued: (a) counsel was ineffective for advising him the State's motion to declare him a habitual offender would fail because he did not have enough time, between prior sentences, to be rehabilitated;[11] (b) counsel was ineffective for failing to effectively raise his gambling addiction as a mitigating factor at sentencing;[12] (c) counsel was ineffective for advising him to agree to pay a set amount of restitution without any investigation into or authentication of the

[8] *Id.* at *2. The Court, the prosecutor, the Defendant, and his defense attorneys were acutely aware that the evidence against the Defendant in the 2014 case where he attempted to hire a hitman was "very, very strong" and the Defendant, in that case alone, was facing a fifty-year minimum mandatory sentence. *Id.*
[9] D.I. 102, Case No. 1202006406, Sentence Order.
[10] D.I. 125, Case No. 1201018253, Motion for Postconviction Relief.
[11] *State v. Yarborough*, 2019 WL 4954959, at *5.
[12] *Id.*

amount owed;[13] (d) counsel was ineffective for failing to utilize an affidavit in aid of his defense;[14] (e) prior counsel negotiated a ten-year Level V plea, and counsel failed to secure that same deal;[15] and, (f) counsel was ineffective by not investigating his prior criminal record and recognizing his convictions overlapped, or that thirty-four days was an insufficient time for rehabilitation between convictions.[16] On October 2, 2019, a Superior Court Commissioner recommended that Defendant's motion be denied,[17] and on April 21, 2020, a Superior Court Judge adopted the Commissioner's recommendation, denying Defendant's motion.[18]

DEFENDANT'S SECOND RULE 61 MOTION

On or about March 8, 2024, Defendant filed a second Motion for Postconviction Relief ("Motion"). In the Motion, Defendant presents one claim, asserting the Prosecutor committed prosecutorial misconduct. Defendant contends:

> [The Prosecutor] met with Plaintiff's co-defendant at the Kent County Courthouse and advised him that Plaintiff was present at the courthouse and needed him to testify. Specifically, [the Prosecutor] stated to Plaintiff's co-defendant "without your testimony, David could get off." This Act is coercion and misconduct on many levels and should have disqualified [the Prosecutor] from practicing law in the State of Delaware. Most importantly, it prejudiced Plaintiff and caused him to act in alarm and plead guilty.[19]

---

[13] *Id.* at *6.
[14] *Id.* at *7.
[15] *Id.*
[16] *Id.*
[17] *Id.* at *8.
[18] See *State v. Yarborough*, 2020 WL 2026701, at *5.
[19] D.I. 188, Case No. 1201018253, Motion for Postconviction Relief, ¶ 7.

In support of Defendant's postconviction claim, he submitted an "Affidavit of Truth" ("Affidavit") purportedly signed by his then co-defendant, Kenneth Yarborough. In the Affidavit, Kenneth Yarborough recanted a prior statement he made to the Delaware State Police where he told the police Defendant assisted him with removing a safe from a burglary victim's residence.[20] He also claims Plaintiff was at a funeral home when he committed another burglary, providing Plaintiff a belated alibi.[21] Finally, according to Kenneth Yarborough, the statements he made to the police were done while he "was under the influence of drugs and alcohol and only implemented [sic] Plaintiff to get a low bail."[22]

DISCUSSION

Superior Court Criminal Rule 61 provides an individual with a limited opportunity to seek postconviction relief.[23] The purpose of postconviction relief is "to correct errors in the trial process, not to allow defendants unlimited opportunities to relitigate their convictions."[24] Before considering the merits of any postconviction relief motion, this Court must first apply Rule 61's procedural bars. A motion for postconviction relief can be procedurally barred as untimely filed,

[20] *Id.* at ¶ 3.
[21] *Id.* at ¶ 4.
[22] *Id.* at ¶ 5.
[23] *State v. Washington*, 2021 WL 5232259, at *4 (Del. Super. Nov. 9, 2021), *aff'd, Washington v. State*, 275 A.3d 1258 (Del. 2022).
[24] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013).

repetitive, formerly adjudicated, or procedurally defaulted.[25] The bars to relief also do not apply to claims which are raised after a trial resulting in a conviction that (a) this Court lacked jurisdiction, or (b) that is pled with particularity that new evidence exists that creates a strong inference of actual innocence.[26]

a. Procedural Bars

First, pursuant to Rule 61(i)(1), a motion for postconviction relief may not be filed more than one year after the judgment of conviction is final.[27] Here, the Defendant was sentenced on December 10, 2015, and filed a Notice of Appeal in the Delaware Supreme Court on January 9, 2016. On September 28, 2016, the Delaware Supreme Court affirmed Defendant's conviction and sentence, and Defendant's conviction became final when the Delaware Supreme Court issued its mandate on October 14, 2016.[28] For this Motion to be timely filed, Defendant would have had to file it no later than October 14, 2017.[29] Defendant's Motion is untimely by more than six years.

To the extent Rule 61(i)(1) provides a mechanism whereby a Defendant can avoid the aforementioned procedural bar, a defendant must assert a retroactively applicable right that was newly recognized after the judgment of conviction became

[25] *Washington*, 2021 WL 5232259, at *4.
[26] Super. Ct. Crim. R. 61(d)(2).
[27] Super. Ct. Crim. R. 61(i)(1).
[28] D.I. 111, Case No. 1202006406, Mandate.
[29] Super. Ct. Crim. R. 61(m)(2).

final.[30] Defendant did not do so here. Therefore, Defendant's Motion is procedurally barred as untimely filed.

Second, Rule 61(i)(2) prohibits the filing of repetitive motions for postconviction relief. Pursuant to Rule 61, a defendant cannot file repetitive motions for postconviction relief unless, under Rule 61(d)(2)(i) and (ii), the movant was convicted after a trial and the motion either (a) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or (b) a defendant pleads with particularity that a new rule of constitutional law, made retroactive to cases on collateral review, applies to the movant's case.[31] If a movant fails to do so, Rule 61(d)(2) provides that the second or subsequent motion "shall be summarily dismissed."

This is Defendant's second, or successive, postconviction motion. And, Defendant cannot avail himself of the relief found in Rule 61(d)(2), because in 2015 he resolved his multiple cases with a plea. He was not convicted after a trial. Therefore, pursuant to Rule 61(i)(2) and Rule 61(d)(2), Defendant's Motion is procedurally barred as successive.

[30] Super. Ct. Crim. R. 61(i)(1).
[31] Super. Ct. Crim. R. 61(i)(2). Defendant has not availed himself of the exception noted in Rule 61(d)(2)(ii).

Third, Rule 61(i)(3) prohibits the filing of "any ground for relief not asserted in the proceedings leading to the judgment of conviction . . . unless the movant shows (A) cause for relief from the procedural default, or (B) prejudice from a violation of the movant's rights."[32] Pursuant to Rule 61(i)(3), Defendant's claim is procedurally defaulted because he did not assert it in the proceedings leading to the judgment of conviction, and he has not demonstrated cause for relief from the procedural default nor prejudice from an alleged violation of his rights. Defendant's Motion is procedurally defaulted.

Finally, Rule 61(i)(5) provides relief from the procedural bars when a defendant claims this Court lacked jurisdiction or to a claim that satisfies the pleading requirements of Rule 61(d)(2)(i) or (ii).[33] Defendant has not raised a challenge to this Court's jurisdiction, and as noted *supra*, he cannot avail himself of the potential relief from the aforementioned procedural bars pursuant to Rule 61(d)(2), because he was not convicted after trial. Again, Rule 61(d)(2) directs that his claim "shall be summarily dismissed."[34]

As this Court has repeatedly and consistently held, "to protect the procedural integrity of Delaware's Rules, this Court will not consider the merits of a

[32] Super. Ct. Crim. R. 61(i)(3).
[33] Super. Ct. Crim. R. 61(i)(5).
[34] Super. Ct. Crim. R. 61(d)(2).

postconviction claim that fails *any* of Rule 61's procedural hurdles."[35] Therefore, I recommend Defendant's Motion be summarily dismissed as procedurally barred.

b. Defendant's "New" Evidence

To the extent this Court were to reach the merits of Defendant's claim, his Motion nonetheless fails. First, the Affidavit is not "new" evidence. In the context of a motion for postconviction relief, "new" evidence is evidence discovered after trial which could not have been discovered before trial with due diligence.[36] A defendant "shoulders a heavy burden in establishing that the existence of 'new evidence' creates a strong inference of his actual innocence."[37] And, a defendant "cannot successfully navigate the 'actual innocence' standard with evidence that is 'merely cumulative or impeaching.'"[38] Here, the undated Affidavit merely serves to impeach inculpatory statements Kenneth Yarborough made about Defendant's participation in the burglaries, crimes for which Defendant knowingly and voluntarily pled guilty with the assistance of counsel.

Additionally, the submission of an affidavit by a co-defendant, who was known to the parties before trial, in support of a co-defendant's postconviction motion is not newly discovered evidence of Defendant's actual innocence.[39] Such

---

[35] *State v. Page*, 2009 WL 1141738, at *13 (Del. Super. Apr. 28, 2009) (emphasis added).
[36] *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987).
[37] *State v. Madison*, 2022 WL 3011377 (Del. Super. July 29, 2022), *aff'd, Madison v. State*, 2022 WL 17982946 (Del. Dec. 29, 2022).
[38] *Id.* (citing *Purnell v. State*, 254 A.3d 1053, 1100 (Del. 2021)).
[39] *State v. Riddock*, 2022 WL 17820366, at *5 (Del. Super. Dec. 19, 2022).

affidavits are neither persuasive nor credible.[40] And, this Court "may consider how the timing of the submission [of actual innocence] and the likely credibility of the affiant [] bear on the probable reliability of that evidence."[41] Here, Kenneth Yarborough submitted an undated affidavit prepared more than twelve years after his arrest, and more than eight years after Defendant entered a plea. The affidavit is neither credible nor reliable.

Defendant's Affidavit also includes recantation evidence, which this Court properly views "with great suspicion."[42] Recantation evidence upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves to only impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction."[43]

Finally, Defendant knowingly and voluntarily pled guilty with the assistance of counsel to the burglary offenses, and his statements during the plea colloquy are presumed truthful.[44] Under these circumstances, Defendant has failed to present newly discovered evidence.

---

[40] See *State v. Clay*, 2022 WL 893744, at *2 (Del. Super. Mar. 25, 2022), *aff'd Clay v. State*, 2022 WL 42295417 (Del. Sept. 16, 2022).
[41] *State v. Sykes*, 2017 WL 6205776, at *5 (Del. Super. Dec. 7, 2017) (citing *Schlup v. Delo*, 513 U.S. 298, 324 (1995)), *aff'd Sykes v. State*, 2018 WL 4932731 (Del. Oct. 10, 2018).
[42] *Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34 (1984). Delaware Courts also view recantation evidence with suspicion. *State v. Washington*, 2021 WL 5232259, at *6 (Del. Super. Nov. 9, 2021), *aff'd Washington v. State*, 2022 WL 1041267 (Del. Apr. 7, 2022).
[43] *Id.*
[44] *State v. Smith*, 2024 WL 1577183, at *6 (Del. Super. Apr. 11, 2024), citing *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

c. Defendant's Prosecutorial Misconduct claim

Finally, even assuming, *arguendo*, that the Affidavit constituted newly discovered evidence, the prosecutor's alleged statements to David Yarborough are not evidence of prosecutorial misconduct. Telling one co-defendant that "without your testimony, David could get off" is not improper. There is no indication Kenneth Yarborough was threatened or coerced by the Prosecutor, nor is there evidence the prosecutor's statement to Kenneth Yarborough had any effect on Defendant's decision to knowingly and voluntarily plead guilty. In fact, Defendant knowingly and voluntarily accepted a very generous plea,[45] making any purported testimony by Kenneth Yarborough moot. When Defendant entered the plea, he made representations to the Court that he knowingly and voluntarily was pleading guilty, creating a "formidable barrier in any subsequent collateral proceedings."[46] Defendant cannot demonstrate prejudice by the conduct of the prosecutor, and his Motion is meritless.

[45] Defendant was facing a mandatory sentence of fifty years in prison if convicted of the Attempted Assault First Degree case alone (Case No. 1402013417), and the evidence against him was overwhelming.

[46] *Id.*, quoting *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977).

CONCLUSION

For all of the foregoing reasons, I recommend Defendant's second Motion for Postconviction Relief be **SUMMARILY DISMISSED**.

IT IS SO RECOMMENDED.

/s/ *Martin B. O'Connor*
Commissioner Martin B. O'Connor

oc: Prothonotary