

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
) Cr. ID No. 1212015998 A & B
)
JOSHUA C. STEPHENSON,)
)
) Defendant.)

Submitted: June 27, 2024
Decided: August 1, 2024

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT ALL
PENDING RULE 61 MOTIONS AND ALL OTHER PENDING MOTIONS
SEEKING TO VACATE, DISMISS OR OTHERWISE SET ASIDE THE
CONVICTION/JUDGMENT SHOULD BE SUMMARILY DISMISSED
AND
ALL RELATED MOTIONS SEEKING EVIDENTIARY HEARINGS,
DISCOVERY AND/OR THE APPOINTMENT OF COUNSEL SHOULD BE
DENIED**

John W. Downs, Esquire and Barzilai K. Axelrod, Esquire, Deputy Attorney
General, Department of Justice, Wilmington, Delaware, Attorneys for the State.

Joshua C. Stephenson, James T. Vaughn Correctional Center, Smyrna, Delaware,
pro se.

PARKER, Commissioner

This 1st day of August 2024, upon consideration of all pending postconviction relief motions, it appears to the Court that:

BACKGROUND, FACTS AND PROCEDURAL HISTORY

1. Defendant Joshua C. Stephenson was indicted for first-degree murder, possession of a firearm during the commission of a felony (“PFDCF”), possession of a firearm by a person prohibited (“PFBPP”), third-degree assault, and endangering the welfare of a child arising out of the shooting and killing of Myron Ashley on Christmas Eve, 2012.¹

2. Stephenson had a long history of mental health issues. After his arrest, a competency evaluation was ordered. Three mental health professionals, including a psychiatrist retained by the defense, opined in five different reports that he was competent to stand trial.²

3. At the time of the shooting, Stephenson’s sister, who was the victim’s girlfriend, was upstairs when she heard the gunshots. Only two individuals were in the living room at the time of the deadly shooting: Stephenson and the victim. Stephenson’s sister rushed downstairs after hearing the gunshots and asked Stephenson what he had done. Stephenson punched her in the face and fled.³ The

¹ *Stephenson v. State*, 2020 WL 821418, *1 (Del); *State v. Stephenson*, 2014 WL 5713305, * 1 (Del.Super.).

² *Stephenson v. State*, 2020 WL 821418, *1 (Del).

³ *Id.*

gun used to kill the victim was on the loveseat and shell casings and a bullet were found in living room.⁴

4. Stephenson was arrested the following day. Swabs taken of Stephenson's hands after his arrest tested positive for gunshot residue. In addition, DNA analysis showed that the blood on Stephenson's jacket was that of the victim.⁵

5. Stephenson was offered a plea to Guilty But Mentally Ill ("GBMI") to Murder in the First Degree. Stephenson rejected the plea. He discussed the plea with counsel and personally decided not to accept a plea to GBMI to Murder in the First Degree.⁶

6. Stephenson proceeded to trial. He worked with his legal team to plan a trial strategy.⁷ The defense strategy was to establish that Stephenson shot Ashley in self-defense. Counsel elicited testimony from various witnesses in an attempt to establish that Stephenson and Ashley had struggled that night and that Stephenson had not gone to the home with any intent to do any harm. The defense objective was to attempt to establish that with Stephenson's mental issues, he believed he was acting in self-defense.⁸

⁴ *Id.*

⁵ *Id.*

⁶ January 7, 2015, Trial Transcript, at pgs. 111-113.

⁷ Superior Criminal No. 1212015998A, D.I. No. 176, Superior Court Order dated April 8, 2019, denying Defendant's Amended Rule 61 Motion, at pg. 27.

⁸ June 9, 2014, Hearing Transcript, at pgs. 50-52.

7. Counsel thought that by using this strategy there was a good chance the jury would return a lesser-included offense verdict. Counsel was correct. The jury did not convict Stephenson of Murder in the First Degree. The jury did, in fact, return a lesser-included verdict. The jury found Stephenson guilty of second-degree murder, a lesser-included offense of first-degree murder.⁹

8. On January 13, 2015, following a six-day trial, a jury found Stephenson guilty of PFDCF, endangering the welfare of a child, and second-degree murder. The jury found Stephenson not guilty of offensive touching. The Superior Court found Stephenson guilty of PFBPP in a separate bench trial.

9. On June 17, 2015, the Superior Court sentenced Stephenson to life imprisonment, plus a term of years.

10. In Stephenson's direct appeal¹⁰ and his first Rule 61 motion for postconviction relief,¹¹ his claims revolved around his lack of intent to shoot Ashley and his self-defense strategy.

11. On Stephenson's direct appeal, Stephenson claimed that the Superior Court abused its discretion when it denied his requests to present expert witness testimony from psychiatrist Dr. Rushing and for a self-defense jury instruction. By Order dated

⁹ *Stephenson v. State*, 2020 WL 821418, *1 (Del).

¹⁰ *Stephenson v. State*, 2016 WL 3568170 (Del.).

¹¹ See, as to first Rule 61 motion- Superior Criminal No. 1212015998A, D.I. No. 176, Superior Court Order dated April 8, 2019 denying Defendant's Amended Rule 61 Motion, *affirmed*, *Stephenson v. State*, 2020 WL 821418 (Del.).

June 22, 2016, the Delaware Supreme Court found Stephenson's direct appeal to be without merit and affirmed Stephenson's convictions and sentence.¹²

12. While the direct appeal was pending, Stephenson filed multiple *pro se* motions for reduction of sentence.¹³ In denying Stephenson's first such motion, the Superior Court held that his sentence was appropriate for all the reasons stated at sentencing. The Court noted that it was fully aware of Stephenson's psychiatric problems and discussed them extensively at sentencing. The Court emphasized that "Defendant is a dangerous individual when he does not take his meds. He has failed numerous second chances to take meds when not in custody. The Court has no confidence he will take medications if he is released, and it is highly likely he will kill again."¹⁴

13. In denying the subsequent motions for reduction of sentence, the Superior Court denied those motions as repetitive and noted that the sentence imposed was appropriate for all the reasons stated at the time of sentencing.¹⁵ The Superior Court reiterated that it was aware of, and discussed, Stephenson's psychiatric problems extensively at sentencing.¹⁶

¹² *Stephenson v. State*, 2016 WL 3568170 (Del.).

¹³ Superior Criminal No. 1212015998A, D.I. Nos. 89, 91, 92, 96, 97 & 98.

¹⁴ Superior Criminal No. 1212015998A, D.I. No. 96

¹⁵ Superior Criminal No. 1212015998A, D.I. Nos. 96, 97 & 98.

¹⁶ Superior Criminal No. 1212015998A, D.I. Nos. 96, 97 & 98.

14. Stephenson filed his first Rule 61 motion raising claims which included ineffective of assistance of counsel claims during trial and on the direct appeal, prosecutorial misconduct, and judicial misconduct.¹⁷

15. On Stephenson's first Rule 61 motion, counsel was thereafter appointed to represent Stephenson. Rule 61 counsel, after evaluating Stephenson's *pro se* claims and after thoroughly reviewing the record¹⁸, filed an amended Rule 61 motion. Rule 61 counsel raised the claim that Stephenson's trial counsel was ineffective for failing to advise Stephenson to testify to support his claim of self-defense. In addition to the claim raised by counsel in Stephenson's first Rule 61 motion, Stephenson was permitted to supplement his counsel's briefing and raise additional *pro se* claims on his own behalf.¹⁹ Following a full, careful, and thorough review of the record and submissions, the Superior Court found that trial counsel was not ineffective in her defense of Stephenson.²⁰ On appeal, the Delaware Supreme Court likewise concluded that following a careful review of the record, Stephenson's Rule 61 motion was without merit.²¹

¹⁷ Superior Criminal No. 1212015998A, D.I. No. 118.

¹⁸ See, Superior Criminal No. 1212015998A, D.I. No. 136 ("The record in this case is quite voluminous. . . and I want to be certain that I thoroughly examine the case. . .").

¹⁹ *Stephenson v. State*, 2020 WL 821418, * 2 (Del.).

²⁰ Superior Court Docket No. 176 in ID No. 1212015998A and Superior Court Docket No. 46 in ID No. 1212015998B- Superior Court Order dated April 8, 2019, denying Defendant's Amended Rule 61 Motion, *affirmed*, *Stephenson v. State*, 2020 WL 821418 (Del.).

²¹ *Stephenson v. State*, 2020 WL 821418 (Del.).

16. Thereafter, Stephenson filed a second Rule 61 motion and while that motion was pending, he also filed a third Rule 61 motion identical to the second motion. These motions were dismissed because Stephenson failed to satisfy Rule 61's pleading requirements for successive Rule 61 motions.²² Stephenson raised claims that were known to him at the trial and failed to plead that any new evidence existed that created a strong inference that he was actually innocent of the charges for which he was convicted, or that there was a new rule of law made retroactive to cases on collateral review that would render his conviction invalid.²³

17. Stephenson also filed habeas corpus petitions in the Superior Court claiming that he was being illegally detained.²⁴ In denying Stephenson's first habeas corpus petition the Superior Court held that Stephenson is serving a life sentence plus an additional twenty-year prison sentence. He is legally denied.²⁵

18. Stephenson's second, third, fourth and fifth habeas corpus petitions were also denied. Each time the Superior Court reiterated that Stephenson was legally detained.²⁶

19. In addition to the numerous unsuccessful postconviction motions and petitions for extraordinary writs relating to his convictions and sentence filed in the State

²² *State v. Stephenson*, 2021 WL 2211995 (DeLyser.).

²³ *Id.*

²⁴ See, Superior Criminal No. 1212015998A, D.I. Nos. 142, 145, 146, 148, 152, 153, 154, 157, 158, 162, 166.

²⁵ Superior Criminal No. 1212015998A, D.I. Nos. 145 & 146.

²⁶ Superior Criminal No. 1212015998A, D.I. Nos. 148, 152, 153, 157, 158, 162, 166.

Court, Stephenson also filed unsuccessful habeas corpus petitions in the federal court.²⁷

STEPHENSON’S PENDING MOTIONS

20. Pending before the Court are at least nine motions filed by Stephenson seeking the vacation, dismissal or otherwise setting aside his charges and convictions. Stephenson raises the same claims in multiple motions. At least two of the pending motions are Rule 61 postconviction relief motions. Stephenson filed his fourth Rule 61 motion on February 27, 2024²⁸ and his fifth Rule 61 motion on May 28, 2024.²⁹ At least one of the pending motions is a “motion for correction of sentence” in which Stephenson yet again contends that his sentence is illegal and he yet again seeks to have all the charges against him dismissed.³⁰ A number of the pending motions are captioned as “motions to dismiss” in which Stephenson seeks the dismissal of his charges.³¹ For some of the motions, the type of motion is difficult to discern but the relief sought is the vacation, dismissal or otherwise setting aside the convictions.³² Also pending are motions with creative titles, such as a “Motion for 5th Amendment

²⁷ *Stephenson v. May* 2023 WL 2428902 (D.Ed. 2023), *aff’d*, 2023 WL 6442924 (3rd Cir. 2023), *cert. denied*, 144 S.Ct. 505 (2023); *Stephenson v. May*, 2023 WL 3355541 (D.Del. 2023).

²⁸ Superior Criminal No. 1212015998A, D.I. No. 219.

²⁹ Superior Criminal No. 1212015998A, D.I. No. 225.

³⁰ Superior Criminal No. 1212015998A, D.I. No. 218.

³¹ Superior Criminal No. 1212015998A, D.I. Nos. 230, 231 & 232

³² Superior Criminal No. 1212015998A, D.I. Nos. 223, 234

Bill of Rights Violation,”³³ “Motion for Superseding Indictment/Dismissal,”³⁴ and “Motion for Actual Innocence/Jenks Act Dismissal for Exculpatory Evidence.”³⁵

21. Despite all the different types of pending motions and all the creative ways that Stephenson has deployed to seek to set aside his convictions, Superior Court Criminal Rule 61 provides the exclusive remedy for setting aside a judgment.³⁶ Therefore, the only type of motion that can properly be filed to seek the relief that Stephenson requests, the setting aside a judgment after conviction, is a Rule 61 motion for postconviction relief.³⁷

22. All the pending motions must therefore be considered through the lens of Rule 61. Relevant here, Rule 61 contains a number bar that precludes review of “second or subsequent” motions.³⁸ Successive motions must be summarily dismissed unless an exception applies.³⁹ Stephenson cannot seek to avoid the procedural bars of Rule 61 by attempting to attack his conviction with the use of any other type of motion.⁴⁰

23. Because Stephenson has already filed three prior Rule 61 motions, the pending postconviction motions are successive motions and must be summarily

³³ Superior Criminal No. 1212015998A, D.I. Nos. 220 & 221.

³⁴ Superior Criminal No. 1212015998A, D.I. No. 232

³⁵ Superior Criminal No. 1212015998A, D.I. No. 231

³⁶ *Weber v. State*, 2019 WL 3268813, *3 (Del. 2019); *Alley v. State*, 2015 WL 7188326 (Del.).

³⁷ *Id.*

³⁸ Del.Super.Crim.R.61(d)(2), (i)(2).

³⁹ Del.Super.Crim.R.61(d)(2), (i)(5).

⁴⁰ *Weber v. State*, 2019 WL 3268813, *3 (Del. 2019); *Alley v. State*, 2015 WL 7188326 (Del.).

dismissed unless Stephenson demonstrates an exception to the procedural bars. He cannot.

24. Under Rule 61(d)(2), a successive motion is unreviewable unless the movant 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 that there is a new, retroactively applicable constitutional rule that operates to invalidate the defendant's conviction.⁴¹

25. In the subject pending motions, Stephenson has not invoked the exception of a new constitutional rule or identified any retroactive rules. Stephenson has not alleged that there is a new rule of law made retroactive to cases on collateral review that would render his conviction invalid.

26. We turn therefore to the Stephenson's attempt to invoke the "new evidence" exception to Rule 61's procedural bars.

27. Stephenson claims the existence of new evidence to establish his actual innocence. Stephenson misunderstands what is required to satisfy the actual innocence exception to the procedural bars of Rule 61.

28. Under the "actual innocence" exception to the procedural bars of Rule 61, innocence of the acts underlying the charges requires more than innocence of intent. It requires new evidence that a person other than the petitioner committed the

⁴¹ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i)(2).

crime.⁴² Actual innocence means factual innocence, not legal innocence. The new evidence must be such as to raise a strong inference that the State convicted the wrong person.⁴³

29. In the subject action, it is undisputed that it was Stephenson that shot and killed Myron Ashley on Christmas Eve 2012. The defense was that he acted in self-defense and that he did not come to the residence the night at issue with the intent to kill Ashley.

30. A petitioner who argues only that he lacked the requisite intent to commit a crime fails to establish a strong inference of actual innocence under Rule 61.⁴⁴

31. All of Stephenson's motions are procedurally barred at this late juncture as Stephenson cannot establish that he is actually innocent in fact of the death of Ashley. Specifically, Stephenson cannot establish that someone else committed the acts for which he was convicted, because it is undisputed that he was the shooter and that he killed Ashley.

32. In the pending motions, all of the proffered evidence that Stephenson relies on to support his "actual innocence" exception to Rule 61's procedural bars pertain to alleged new evidence to establish his intent to shoot Ashley, not to whether

⁴² *State v. Riddock*, 2022 WL 17820366, *5 (Del.Super.), *appeal dismissed*, 2023 WL 4875984 (Del.).

⁴³ *Id.*; *State v. Stokes*, 2022 WL 2783813, *3 (Del.Super.).

⁴⁴ *State v. Taylor*, 2018 WL 3199537,*7 (Del.Super.), *aff'd*, 2019 WL 990718 (Del.).

someone other than he shot and killed Ashley. Stephenson offers no evidence that he is factually innocent of Ashley's murder. He does not allege, or offer a reason to believe, that someone else committed his crimes. Nor could he. It is undisputed that Stephenson shot and killed Ashley.

33. Stephenson's "new evidence" claims, proffered to support Stephenson's argument of innocence of intent to commit the murder, fail to meet Rule 61's actual innocence exception.⁴⁵ Accordingly, all of Stephenson's pending motions are procedurally barred under Rule 61(d)(2).

34. For the sake of completeness, in addition to Stephenson's new evidence claims of actual innocence, some of Stephenson's motions raise claims of constitutional violations of his speedy trial rights, double jeopardy violations, plea bargain violations, defective indictment, and ineffective trial strategies.

35. These claims are all procedurally barred at this late juncture. Either Stephenson raised these claims at the time of trial in January 2015, on direct appeal, or in his first timely filed Rule 61, or he did not. He had more than ample opportunity to timely raise these claims. All of these claims are untimely and otherwise procedurally barred at this late date.⁴⁶

⁴⁵ See, *State v. Taylor*, 2018 WL 3199537,*7 (Del.Super.), *aff'd*, 2019 WL 990718 (Del.).

⁴⁶ See, Super.Ct.Crim.R. 61(i).

36. As discussed above, the only way at this late juncture for Stephenson to overcome the procedural bars to Rule 61 to proceed with any of his outstanding motions is to meet the pleading threshold requirement that new evidence exists that he is factually innocent of Ashley's murder. A threshold that Stephenson cannot overcome because it is undisputed that he is not factually innocent. It is undisputed that he, not someone else, shot and killed Ashley. All of Stephenson's motions are procedurally barred and should be denied.

37. Moreover, in addition to Stephenson not having satisfied the threshold requirement that new evidence exists to establish Stephenson's actual innocence, he has also failed to establish the existence of any "new evidence". In none of the pending motions has Stephenson alleged the existence of any evidence that could not have been discovered ever before.

38. The evidence Stephenson proffered in the pending motions to support his claims of "new evidence of actual innocence" is not "new". Evidence is "new" if it was discovered after trial and could not have been discovered before trial with due diligence.⁴⁷ Evidence provided by declarants or witnesses who testified at trial or were known to the parties before trial does not constitute newly discovered

⁴⁷ *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987); *State v. Riddock*, 2022 WL 17820366, *5 (Del.Super.), *appeal dismissed*, 2023 WL 4875984 (Del.).

evidence.⁴⁸ Also, evidence already raised in a previously adjudicated postconviction motion cannot constitute newly discovered evidence.⁴⁹

39. The evidence that Stephenson has proffered in the pending motions stem from witnesses and facts known at the time of trial, direct appeal and during his timely filed first Rule 61 motion. Stephenson was represented by counsel at trial, direct appeal and for his first Rule 61 motion. He had time and opportunity to timely raise any issue he desired if it truly had any merit.

40. In the pending motions, Stephenson alleges the existence of “new evidence” stemming from the failure to call fact witnesses (known at the time of trial); failing to call a forensic evaluator (known at the time of trial); and failing to call witnesses identified in a police report (known at the time of trial). Stephenson also complains of alleged violations of his speedy trial rights (known to Stephenson at the time of trial); alleged double jeopardy violations (known to Stephenson at the time of his conviction and sentence); alleged defective indictment (known at the time of trial); discovery violations (known at the time of trial), and alleged plea bargain violations (known to Stephenson at the time of trial). Stephenson raises ineffective assistance

⁴⁸ *State v. Riddock*, 2022 WL 17820366, *5 (Del.Super.), *appeal dismissed*, 2023 WL 4875984 (Del.).

⁴⁹ *State v. Clay*, 2022 WL 893744, *3 (Del.Super.).

of counsel claims stemming from counsel's conduct and trial strategies at trial (known at the time of trial).

41. Stephenson has not raised any new evidence that was not already known at the time of trial or that could not have been discovered with due diligence. There is no just reason for Stephenson's delay in raising any of the claims in any of the pending motions at the time of trial, on direct appeal, or in his first timely filed Rule 61. Having been provided with a full and fair opportunity to present any issue desired to be raised in a timely filed postconviction motion, any attempt at this late juncture to raise, re-raise or re-couch a claim is procedurally barred. Stephenson has not satisfied the pleading requirement of the existence of "new evidence" to proceed with any of the pending motions.

42. Stephenson has not satisfied the pleading requirements for proceeding with any of the pending motions. In accordance with the mandates of Rule 61, Stephenson's pending motions should all be dismissed as they all fail to meet the pleading requirements for proceeding with a successive Rule 61 motion. Stephenson has not established the existence of any "new evidence" let alone the existence of new evidence that creates a strong inference that someone other than Stephenson shot and killed Ashley.

43. In connection with the pending motions, Stephenson has also requested the appointment of counsel, discovery and evidentiary hearings.⁵⁰ For the reasons discussed above, Stephenson has failed to meet the pleading requirements allowing him to proceed with his pending motions. As such, his request for the appointment of counsel, discovery, and evidentiary hearings are also denied.

For the reasons set forth herein, all of Stephenson's pending motions should be summarily dismissed, and all of his related requests for the appointment of counsel, discovery and evidentiary hearings related to those motions should be denied.

IT IS SO RECOMMENDED.

/s/ Lynne M. Parker
Commissioner Lynne M. Parker

cc: Prothonotary
Kathryn A.C. Van Amerongen, Esquire

⁵⁰ Superior Criminal No. 1212015998A, D.I. Nos. 217, 219, 223, 226, 233 & 235.