

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR KENT COUNTY**

<b>STATE OF DELAWARE</b>	)	
	)	
v.	)	RK07-09-1033-01
	)	Attempted Murder in First Degree
<b>TYRONE A. MILES</b>	)	RK07-09-1035-01
	)	Poss. of a Firearm During Comm. of
Defendant.	)	Felony (F)
ID. No. 07090153927	)	

**ORDER**

On this 10th day of November, 2011, upon consideration of the Defendant’s Motion for Postconviction Relief, the Commissioner’s Report and Recommendation and the record in this case, it appears that:

1. The Defendant, Tyrone A. Miles (“Miles”), was found guilty following a jury trial on February 2, 2009, of one count of Attempted Murder in the First Degree, 11 *Del. C.* § 531 and one count of Possession of a Firearm During the Commission of a Felony (“PFDCF”), 11 *Del. C.* § 1447A. The jury found Miles not guilty of one count of Robbery in the First Degree and its companion charge of PFDCF.

2. The State filed a motion to declare Miles an habitual offender. The Court granted the State’s motion and proceeded to sentence Miles to life in prison pursuant to 11 *Del. C.* § 4214(b) plus five years incarceration followed by probation.

3. Miles, through counsel, appealed his conviction to the Delaware Supreme Court. The issues raised on appeal were “. . .that the trial court erred by: 1) denying his motion to suppress his statement to the police; 2) failing to redact a police officer’s comments in a tape recorded interview; and 3) admitting a witness’s out-of-

court statement.”<sup>1</sup> On November 23, 2009, the Supreme Court affirmed Miles conviction and sentence, holding that any error by the trial court was harmless.<sup>2</sup>

4. Miles filed the instant Motion for Postconviction Relief pursuant to Superior Court Rule 61.

5. The Court referred this Motion to Superior Court Commissioner Andrea M. Freud pursuant to 10 *Del. C.* §512(b) and Superior Court Criminal Rule 61 for proposed finding of facts and conclusions of law.

6. The Commissioner has filed a Report and Recommendation concluding that the Motion for Postconviction Relief should be denied because it is procedurally barred and meritless.

7. Defendant filed objections to the Report.

8. The State responded.

**NOW, THEREFORE**, after careful and *de novo* review of, and for reasons stated in, the Commissioner’s Report and Recommendation dated August 18, 2011,

**IT IS ORDERED** that the Commissioner’s Report and Recommendation is adopted by the Court and the Defendant’s Motion for Postconviction Relief is **DENIED**.

/s/ Robert B. Young

J.

RBV/sal

oc: Prothonotary

cc: The Honorable Andrea M. Freud

Counsel

Defendant

File

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<sup>1</sup> *Miles v. State*, 2009 WL 4114385 at \*1 (Del.).

<sup>2</sup> *Id.* at \*3.

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v.	)	RK07-09-1033-01
	)	Attempted Murder in First Degree (F)
<b>TYRONE A. MILES</b>	)	RK07-09-1035-01
	)	Poss. of a Firearm During Comm. of
Defendant.	)	Felony (F)
ID. No. 0709015392A	)	

**COMMISSIONER'S REPORT AND RECOMMENDATION**

**Upon Defendant's Motion for Postconviction Relief  
Pursuant to Superior Court Criminal Rule 61**

Dennis Kelleher, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Tyrone A. Miles, *Pro se*.

FREUD, Commissioner  
August 18, 2011

The Defendant, Tyrone A. Miles (“Miles”), was found guilty following a jury trial on February 2, 2009, of one count of Attempted Murder in the First Degree,

11 *Del. C.* § 531 and one count of Possession of a Firearm During the Commission of a Felony (“PFDCF”), 11 *Del. C.* § 1447A . The jury found Miles not guilty of one count of Robbery in the First Degree and its companion charge of PFDCF. The State filed a motion to declare Miles a habitual offender. The Court granted the State’s motion and proceeded to sentence Mile to life in prison pursuant to 11 *Del. C.* § 4214(b) plus five years incarceration followed by probation.

Miles, through counsel, appealed his conviction to the Delaware Supreme court. The issues raised on appeal were “. . .that the trial court erred by: 1) denying his motion to suppress his statement to the police; 2) failing to redact a police officer’s comments in a tape recorded interview; and 3) admitting a witness’s out-of-court statement.”<sup>3</sup> The Supreme Court, on November 23, 2009, affirmed Miles conviction and sentence and held that any error by the trial court was harmless.<sup>4</sup>

## FACTS

The following are the facts as set forth by the Delaware Supreme Court on appeal:

2) On September 11, 2007, Asmi Patel was shot in the abdomen while working as a cashier at the Duncan Depot, a convenience store in Dover, Delaware. The store’s security cameras videotaped the shooting. Patel survived,

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<sup>3</sup> *Miles v. State*, 2009 WL 4114385 at \*1 (Del.).

<sup>4</sup> *Id.* at \*3.

and testified at trial that Miles walked into the store and asked for a pack of cigarettes. He told Patel that he would pay for the cigarettes when his ride arrived. After a few minutes, Miles removed a gun from his waistband, pointed at Patel, and pulled the trigger. But the gun misfired, and Miles walked away from the counter. He then returned to the counter and shot again. This time the gun fired, and Patel was struck in the stomach.

3) After the shooting, the police released a still photograph of the shooter, taken from the store videotape. The photograph showed a man in a black T-shirt, jeans and a 'do rag'. The police also took a palm print from a door handle that Miles had touched shortly before the shooting. The photo appeared in the newspaper on September 12<sup>th</sup>, and someone tipped the police that the shooter was Miles. Based on that tip, the police requested that the State Bureau of Identification compare the palm print from the crime scene with Miles' prints. The Bureau confirmed that the prints were a match.

4) The police then tried to apprehend Miles where he worked, at Harris Manufacturing in Smyrna. Miles was not at work, but the police got a description of Miles' car and later spotted him in Clayton. A Clayton police officer stopped Miles and brought him to Dover for questioning. Detective Richardson informed Miles of his *Miranda* rights before beginning the interrogation, and Miles waived his rights. The interrogation lasted about 1 1/2 hours, during which time Miles denied being in the store on the day of the shooting. Miles claimed that he had been in the store the day before the shooting. He also claimed that he had worked on the day of the shooting,

and that Linda Robbins, his supervisor, had been at her nearby desk when he clocked in. Miles told Richardson that on the day of the shooting he was wearing a white T-shirt, jeans, and a baseball hat. He said that he rarely wears a 'do rag' on his head.

5) At the end of the interrogation, Miles was placed in an individual cell while the police executed several search warrants. About 5 hours later, Richardson returned to Miles' cell and took him to be booked. During that process, Miles asked Richardson about the strength of the State's case against him. Richardson said he believed it was a very strong case. Miles then said, 'She was in on it.' Richardson responded by suggesting that, if Miles wanted to talk, they could go back upstairs. They did, and during the second interrogation, Miles admitted shooting Patel. He explained that she wanted him to shoot her, because she wanted to commit suicide. He also said that she offered him \$10,000 and provided the gun. Finally, Miles said that Patel put \$400 on the counter as payment after he shot her.

6) Richardson followed up by questioning Robbins about Miles' claim to have been at work on the day of the shooting. Robbins confirmed that Miles came to work, but said that he was wearing the same clothes and 'do rag' seen on the still photograph from the crime scene videotape. At trial, Robbins testified that she did not remember seeing Miles at work that day. She recalled speaking to Richardson, however, and testified that she

answered his questions truthfully.<sup>5</sup>

### **MILES' CONTENTIONS**

Next, Miles filed the instant Motion for Postconviction Relief pursuant to Superior Court Rule 61. In his motion, he raises the following grounds for relief:

- Ground one: Due Process Violation.  
(see attached case law attached) Identification suggestive and done in Prosecutors office out of site (sic) and knowledge of defense counsels.
- Ground two: Due Process Violation.  
Trial Tribunal made evidentiary decision without evidentiary hearing on habitual (see case law attached).
- Ground three: Ineffective Ass. Counsel
- 1.(A) Failure to suppress illegal indictment (Hearsay in Hearsay unidentified caller talked to individual & forwarded to officer to use in indictment. D)].
  1. (B) Failure to file suppression of palm print (door knob evidence lost).
  2. Failure to file suppression of identification.
  3. No effective counsel during view and identification "crucial" stage.
  4. Failure to protect Habitual procedure of Defendant.

### **DISCUSSION**

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<sup>5</sup> *Miles*, at \*1-2 (internal citations omitted).

Under Delaware law, the Court must first determine whether Miles has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.<sup>6</sup> Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.<sup>7</sup> Miles' motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Miles' initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.<sup>8</sup> The bars to relief are inapplicable to a jurisdictional challenge or "to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."<sup>9</sup>

To some extent, each of Miles' claims for relief are premised on allegations of ineffective assistance of counsel. Miles has therefore alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. Miles'

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<sup>6</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

<sup>7</sup> Super. Ct. Crim. R. 61(i)(1).

<sup>8</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>9</sup> Super. Ct. Crim. R. 61(i)(5).



ineffective assistance of counsel claims are not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Miles, allege ineffective assistance of counsel in order to overcome the procedural default. “However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards.”<sup>10</sup> The United States Supreme Court has held that:

[i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that the responsibility for the default be imputed to the State, which may not ‘conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance;’ [i]neffective assistance of counsel then is cause for a procedural default.<sup>11</sup>

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two part analysis enunciated in *Strickland v. Washington*<sup>12</sup> and adopted by the Delaware Supreme Court in *Albury v. State*.<sup>13</sup>

The *Strickland* test requires the movant show that counsel's errors were so

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<sup>10</sup> *State v. Gattis*, 1995 WL 790961 (Del. Super.).

<sup>11</sup> *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

<sup>12</sup> 466 U.S. 668 (1984).

<sup>13</sup> 551 A.2d 53, 58 (Del. 1988).

grievous that his performance fell below an objective standard of reasonableness.<sup>14</sup> Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.<sup>15</sup> In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.<sup>16</sup>

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.<sup>17</sup> However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."<sup>18</sup> In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.<sup>19</sup> Furthermore, the defendant must rebut a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional

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<sup>14</sup> *Strickland*, 466 U.S. at 687; see *Dawson*, 673 A.2d at 1190.

<sup>15</sup> *Id.*

<sup>16</sup> See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Bughner v. State*, 1995 WL 466465 at \*1 (Del. Supr.)).

<sup>17</sup> *Strickland*, 466 U.S. at 687.

<sup>18</sup> *Id.* at 697.

<sup>19</sup> *Gattis*, 1995 WL 790961 at \*4.

assistance," and this Court must eliminate from its consideration the "distorting effects of hindsight when viewing that representation."<sup>20</sup> Miles has made no allegations of prejudice arising from his counsel's alleged ineffective representation and certainly has not made any concrete allegations. Therefore his claims are clearly barred by Rule 61(i)(3). Miles' claims are also meritless.

Nevertheless I will briefly address Miles' contentions for the benefit of the Court. Miles claims in ground one that his due process rights were violated because the victim's in court identification of him may have been tainted because during trial preparation in the prosecutor's office prior to trial, the victim was shown a video of the crime which clearly shows Miles' face, as well as a still photograph of Miles taken from the video which was published in the newspaper. As the record reveals, the victim was initially unable to identify Miles' photo when shown a photo array by the police shortly after the shooting as she lay in her hospital bed recovering from her injuries. As the victim explained at trial, she was not wearing her glasses when shown the photo line-up in the hospital and was medicated because of the pain she was suffering.

This issue was not raised by Miles at trial or on direct appeal. As stated above Superior Court Criminal Rule 61(i)(3) bars any ground for relief that was not asserted in the proceedings leading to the judgment of conviction unless the movant shows: a) cause for relief from the procedural default; and b) prejudice from violation of the movant's rights. Miles has made no attempt to show either.

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<sup>20</sup> *Strickland*, 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

As defense counsel states in his affidavit, he cross examined the victim at length regarding her identification of Miles and its reliability. Furthermore, despite any issues with the victim's initial failure to identify Miles as her shooter, the video of the crime offered into evidence by the State clearly shows Miles shooting the victim. Moreover, Miles confessed to shooting the victim, claiming she paid him to shoot her in order to commit suicide. Miles' claim is clearly meritless in addition to being procedurally barred by Superior Court Criminal Rule 61(i)(3).

Miles' second ground for relief in addition to being procedurally barred, as stated above, is also entirely meritless. As defense counsel points out in his affidavit, prior to sentencing, the State filed a motion to declare Miles a habitual offender. Attached to the motion were certified copies of the convictions for the predicate felonies required to establish that Miles qualified to be sentenced as a habitual offender under 11 *Del. C.* § 4214(b). Prior to sentencing Miles, the Court addressed the State's motion. Miles admitted that he was the person who was convicted of the two predicate felonies despite being given an opportunity by the Court to challenge them. Based on his admission, the Court declared him a habitual offender and sentenced him accordingly. This issue is barred by Superior Court Criminal Rule 61(i)(3) and is meritless.

In ground three, Miles claims that counsel failed to suppress illegal indictment. Defense counsel points out in his affidavit, that there was no legal basis to dismiss the Indictment. The charges were supported by sufficient probable cause and there were no jurisdictional or other defects which would have supported a

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dismissal of the Indictment. As noted above this claim is barred by Rule 61(i)(3). It is also meritless.

Miles also claims in Ground 3 that counsel failed to move to suppress his palm print found on a door handle. As defense counsel points out in his affidavit, there was no legal basis to suppress Miles' palm print. After a review of the record I concur with counsel's opinion and find Miles's argument meritless.

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## CONCLUSION

After reviewing the record in this case, it is clear that Miles has failed to avoid the procedural bars of Rule 61(i). A review of his counsel's affidavit clearly shows that counsel represented Miles in an exemplary fashion and was in no way ineffective. Consequently, I recommend that Miles' motion be denied as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and as completely meritless.

/s/ Andrea Maybee Freud

Commissioner

AMF/dsc

oc: Prothonotary  
cc: Hon. Robert B. Young  
R. David Favata, Esq.  
Robert A. Harpster, Esq.  
Tyrone A. Miles, VCC  
File