

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0804025609
)	
CHARLES P. BOHAN,)	
)	
Defendant.)	

Submitted: September 1, 2011

Decided: November 23, 2011

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED.**

Karin M. Volker, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Charles P. Bohan, Delaware Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 23rd day of November, 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. At the end of a three day Superior Court jury trial, on March 26, 2009, Defendant Charles Bohan was convicted of all counts. Defendant was convicted of two counts of Aggravated Menacing, one count of Possession of a Firearm During the Commission of a Felony and one count of Possession of a Firearm by a Person Prohibited. On June 5, 2009, Defendant was sentenced to a total of 17 years at Level V, suspended after 8 years, followed by decreasing levels of probation.

2. Defendant filed a direct appeal to the Delaware Supreme Court. On February 23, 2010, the Delaware Supreme Court affirmed the decision of the Superior Court.¹

3. The facts giving rise to these charges, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal², are as follows: Two New Jersey State Police detectives saw Defendant Bohan and at least two other individuals driving a car in a hotel parking lot. Someone pointed a handgun out the car window toward the detectives and then retracted it. The State charged Bohan with possession of a firearm during the commission of a felony, possession of a firearm by a person prohibited, and two counts of aggravated menacing.³

4. On February 16, 2011, Defendant filed this motion for postconviction relief. Defendant requested, and was granted, leave to file a memorandum in support of his motion for postconviction relief. On May 31, 2011, Defendant filed an amended motion for postconviction relief. In the subject motion, Defendant raises various claims. Defendant contends that his counsel provided ineffective assistance of counsel for: 1)

¹ *Bohan v. State*, 990 A.2d 421 (Del. 2010)

² *Bohan*, 990 A.2d at 422.

³ *Id.*

failing to subpoena Andrew Bingham as a defense witness; 2) failing to properly prepare and investigate; 3) failing to properly review and utilize evidence; 4) failing to file a suppression motion; 5) failing to impeach the State's witness Andrew Redick; and 6) failing to object to the admission of Andrew Redick's prior recorded statements into evidence under 11 *Del. C.* § 3507. Defendant also contends that the trial court abused its discretion by allowing the prior recorded statements of Redick into evidence.

5. Before making a recommendation, the record was enlarged by directing Defendant's counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter the State filed a response to the motion. Although Defendant was given an opportunity to file a reply, for whatever reason, he elected not to do so.⁴

6. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.⁵ In order to protect the procedural integrity of Delaware's rules, the court will not consider the merits of a post conviction claim that fails any of Rule 61's procedural requirements.⁶

7. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;⁷ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (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 must

⁴ Super.Ct.Crim.R. 61(g)(1) and (2).

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁶ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁷ If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to a claim that the court lacked jurisdiction 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.⁸ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”⁹

8. In this case, several of Defendant’s claims are procedurally barred. First, Defendant’s claim that the trial court abused its discretion by allowing the prior recorded statements of Redick into evidence is procedurally barred by Rules 61(i)(2) and (3). Defendant was required to, but failed to, raise this claim on direct appeal. Having failed to do so, this claim is now procedurally barred.

9. Furthermore, Defendant’s allegation that his counsel was ineffective for failing to subpoena Andrew Bingham as a defense witness is procedurally barred pursuant to Rule 61(i)(4).¹⁰ This claim, although now couched as an ineffective assistance of counsel claim, was already adjudicated on direct appeal. The court is not required to re-examine this claim that received “substantive resolution” on direct appeal simply because the claim has now been refined and restated and recouched as an ineffective assistance of counsel claim.¹¹

10. In addition to some of Defendant’s claims being procedurally barred, all of Defendant’s claims are without merit.

⁸ Super.Ct.Crim.R. 61(i)(5).

⁹ Super.Ct.Crim.R. 61(i)(4).

¹⁰ See, Defendant’s Amended Motion for Postconviction Relief, at ¶13.

¹¹ *Johnson v. State*, 1992 WL 183069, at *1 (Del.Supr.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

11. Turning first to Defendant’s ineffective assistance of counsel claims. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.¹² The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.¹³

12. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹⁴ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance.¹⁵ Moreover, there is a strong presumption that defense counsel’s conduct constituted sound trial strategy.¹⁶

13. In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel’s performance should be reviewed from the defense counsel’s perspective at the time decisions were being made.¹⁷ It is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.¹⁸ A fair assessment of attorney performance requires that

¹² *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

¹³ *Id.* at 687-88, 694.

¹⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁵ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

¹⁶ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¹⁷ *Stickland*, 466 U.S. at 688-89.

¹⁸ *Stickland*, 466 U.S. at 688-89.

every effort be made to eliminate the distorting efforts of hindsight. Second guessing or “Monday morning quarterbacking” should be avoided.¹⁹

14. The United States Supreme Court recently reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v. Richter*,²⁰ the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.²¹ The challenger’s burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel’s errors must be so serious as to deprive the defendant of a fair trial.²²

15. The United States Supreme Court explained that a defendant is not guaranteed perfect representation, only a reasonably competent attorney. There is no expectation that competent counsel will be a flawless strategist or tactician. A defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.²³

16. The United States Supreme Court further explained that there are countless ways to provide effective assistance in any given case. Even the best criminal defense

¹⁹ *Stickland*, 466 U.S. at 688-89.

²⁰ *Harrington v. Richter*, 131 S.Ct. 770 (2011).

²¹ *Id.*, at * 791.

²² *Id.*

²³ *Id.*, at *787-792

attorneys would not defend a particular client in the same way. Consequently, defense counsel must be given wide latitude in making tactical decisions.²⁴

17. The United States Supreme Court reasoned that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicates active and capable advocacy.²⁵ Counsel's representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.²⁶

18. Turning now to the subject case, whether or not defense counsel was a flawless strategist, it is clear from a review of the record that defense counsel provided active and capable advocacy. When reviewing the entire proceeding, the record reflects counsel's overall performance as being active, thorough and capable advocacy.

19. Defendant first contends that his counsel was ineffective for failing to subpoena Andrew Bingham as a defense witness. As previously discussed, this claim is procedurally barred because it was already adjudicated on direct appeal.²⁷ Andrew Bingham exercised his Fifth Amendment right not to testify and therefore was legally unavailable. On direct appeal, the Delaware Supreme Court considered the issue as to whether Defendant was unfairly prejudiced as a result of Andrew Bingham's exercising his Fifth Amendment right not to testify. At trial, Defendant's counsel had told the jury, during his opening statement, that Andrew Bingham would testify that the third

²⁴ *Id.*, at *788-789.

²⁵ *Id.* at 791.

²⁶ *Id.* at 787-88.

²⁷ *Bohan v. State*, 990 A.2d 421 (Del. 2010).

individual-not Bohan- had pointed the handgun out the window.²⁸ Andrew Bingham, however, asserted his Fifth Amendment right against self-incrimination and declined to testify. The Delaware Supreme Court on Defendant's direct appeal held that Defendant was not unfairly prejudiced because Andrew Bingham had a basis to invoke his right against self-incrimination that made him legally unavailable, and the trial judge issued three curative instructions designed to allay unfair prejudice to Defendant.²⁹

20. Defendant now contends that his counsel was ineffective for failing to subpoena Andrew Bingham. Whether or not defense counsel subpoenaed Andrew Bingham, he would not have testified. Andrew Bingham asserted his Fifth Amendment right not to testify and was, therefore, legally unavailable. Consequently, Defendant cannot establish that but for his counsel's alleged deficient conduct the outcome of the proceeding would have been different. Because Defendant cannot establish actual prejudice, his claim must fail.

21. Defendant contends in his next two claims that his counsel was ineffective for failing to properly prepare and investigate,³⁰ and for failing to properly review, utilize and preserve evidence.³¹ Defendant alleges with broad strokes a whole litany of alleged failings of his counsel. Defendant contends that his counsel was unprepared and failed to properly cross-examine and otherwise properly try the case. Defendant contends that his counsel failed to subpoena Andrew Bingham to testify; failed to file a pre-trial motion to suppress; failed to properly communicate with him; failed to properly review crime scene photographs and other evidence; failed to request specific jury instructions about witness

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, Defendant's Amended Motion for Postconviction Relief, at ¶ 14-15.

³¹ Defendant's Amended Motion for Postconviction Relief, at ¶ 16-19.

Andrew Redick's credibility; and otherwise failed to properly defend Defendant. However, contrary to Defendant's contentions, following a thorough and exhaustive review of the record, it is apparent that defense counsel provided adequate and capable representation.

22. Defendant's contention that his counsel was ineffective for failing to subpoena Andrew Bingham has already been addressed. Andrew Bingham was legally unavailable to testify. The jury instructions were fair and accurate and the jury was adequately instructed on how to consider and assess the credibility of witnesses. Defendant has not set forth any legal or factual basis to support a meritorious suppression motion. Moreover, defense counsel represents that he did not believe there was any good faith basis to file a motion to suppress.³² Defense counsel was familiar with the crime scene.³³ Defense counsel reviewed all discovery including photographs that were taken in conjunction with the investigation prior to trial.³⁴ At trial, the State put some of the photographs from the crime scene on a disk. Defense counsel had previously seen all of the photographs from the crime scene but did not know which of those photographs the State had chosen to place on the disk.³⁵ At trial, defense counsel requested that the State's presentation of the crime scene photographs be streamlined and that only the relevant and important photographs be shown.³⁶ Defendant misconstrues his counsel's conduct in this regard. Defendant contends that his counsel failed to properly review the discovery because defense counsel did not know which of the photographs were on the disk. However, defense counsel had reviewed each and every one of the photographs.

³² Affidavit of Peter N. Letang, at ¶ J.

³³ *Id.*

³⁴ *Id.*

³⁵ See, March 24, 2009 Trial Transcript, at pgs. 138-140.

³⁶ *Id.*

He just did not know which of the photographs he had reviewed were placed on the disk and were intended to be shown to the jury. Defense counsel's request for the State to streamline its presentation was adhered to. Defendant has not established that his counsel failed to provide capable and adequate advocacy. Defendant has also not established actual prejudice. Defendant has not established that but for his counsel's alleged deficient conduct in any specific regard the outcome of the proceeding would have been different.

23. Defendant next claims that his counsel was ineffective for failing to file a motion to suppress. Defense counsel represents that he did not file a motion to suppress because there was no merit to filing a suppression motion that related to the charges in this case.³⁷ Moreover, Defendant has failed to set forth any legal or factual basis to support a meritorious suppression motion. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.³⁸ Trial counsel does not have to file meritless motions; in fact, counsel has an obligation not to do so. Defendant's contention that his trial counsel was somehow ineffective for failing to file a motion with no apparent legal or factual basis is without merit.

24. Defendant claims that his counsel was ineffective for failing to request a specific jury instruction as to Andrew Redick's credibility. A defendant, however, does not have a right to have a jury instructed in a particular form.³⁹ The defendant is entitled to have the jury instructed with a correct statement of the substantive law.⁴⁰ The primary function

³⁷ Affidavit of Peter N. Letang, at ¶ J.

³⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del. Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

³⁹ *Stones v. State*, 1996 WL 145775, at *3 (Del.)

⁴⁰ *Guy v. State*, 913 A.2d 558, 563 (Del. 2006).

of jury instructions is to inform the jury of the law and its application of the facts as the jury finds them.⁴¹ Each case should be viewed on its own facts and each set of jury instructions must be viewed in its entirety.

25. In this case, the jury instructions as given were adequate. The Court instructed the jury on how to consider conflicting testimony of witnesses, to assess the credibility and the weight to be given their statements, to assess the motivations and interests of the witnesses, and all other significant parameters that should be considered when evaluating the testimony of witnesses.⁴² Indeed, on the issue of credibility, the court instructed:

You are the sole judges of the credibility of each person who has testified and of the weight to be given to the testimony of each . . .⁴³

In considering the credibility of witnesses and considering any conflict in testimony, you should take into consideration each witness' means of knowledge; strength of memory and opportunity and for observation; the reasonableness or the unreasonableness of the testimony; the motives influencing the witness; the fact, if it is a fact, that the testimony has been contradicted; the witness' bias or prejudice or interest in the outcome of the litigation; the ability to have acquired the knowledge of the facts to which the witness testified; the manner and demeanor upon the witness stand; and the apparent truthfulness of the testimony; and all other facts and circumstances shown by the evidence which affect the credibility of the testimony.⁴⁴

Counsel was not ineffective for failing to request any additional instruction on the credibility of a specific witness. Moreover, there is no showing that had any such request been made it would have been granted. Defendant has not established that his counsel was deficient or that he suffered actual prejudice as a result thereof.

⁴¹ *Garden v. State*, 815 A.2d 327, 341 (Del. 2003)(superseded by statute on other grounds).

⁴² March 26, 2009 Trial Transcript, at pgs. 147-161.

⁴³ March 26, 2009 Trial Transcript, at pg. 156.

⁴⁴ March 26, 2009 Trial Transcript, at pg. 157.

26. Defendant claims that his counsel was ineffective for failing to impeach Andrew Redick, who gave multiple and conflicting stories.⁴⁵ Redick testified at trial he did not remember anything about the incident for which Defendant was charged.⁴⁶ Redick testified that was high on Xanax on the day at issue⁴⁷, that he had no present knowledge of what took place in the parking lot of the motel which lead to the charges involving Defendant⁴⁸, and that he did not remember what he told the police on the day at issue.⁴⁹ Redick further testified that even after watching his previously recorded statement he still had no independent recollection of anything having to do with the incident involving the Defendant in the parking lot of the motel.⁵⁰ Redick also testified at trial that it was possible he gave a number of different stories to the police.⁵¹

27. Defendant contends that his counsel was ineffective because he failed to impeach Redick. The decision as to whether or not to call a witness, and how to examine and/or cross-examine witnesses who are called are tactical decisions.⁵² Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.⁵³ Defendant has failed to overcome this strong presumption. Defendant has not provided any specific details as to how defense counsel should have more effectively conducted his cross-examination. Defendant has not established that his counsel's conduct was deficient in any regard in the cross-examination of Redick nor has he established actual prejudice as a

⁴⁵ See, Defendant's Amended Motion for Postconviction Relief, at ¶ 21.

⁴⁶ March 25, 2009 Trial Transcript, pgs. 61-63, 66-75.

⁴⁷ March 25, 2009 Trial Transcript, pgs. 49-50, 61-63, 69-70.

⁴⁸ March 25, 2009 Trial Transcript, pgs. 61-63, 66-75.

⁴⁹ March 25, 2009 Trial Transcript, pgs. 69-75.

⁵⁰ March 25, 2009 Trial Transcript, pgs. 60, 69-75.

⁵¹ March 25, 2009 Trial Transcript, pgs. 68-70.

⁵² *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

⁵³ *Strickland v. Washington*, 466 U.S. 668, 689 (1984); ⁵³ *Harrington v. Richter*, 131 S.Ct. 770 (2011).

result of any alleged deficiency. Defendant has failed to establish that the outcome of the trial would have been different as a result of any alleged shortcoming of defense counsel in the cross-examination of Redick.

28. Defendant also claims that Redick's prior recorded statement should have been played in its entirety in order to discredit him. Redick's prior recorded statement was not played in its entirety by the agreement of counsel because the redacted portions of the statement addressed other events that occurred on the day at issue which did not involve Defendant and the charges Defendant was facing.⁵⁴ Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy. Here, there is no showing that counsel's conduct was deficient or that Defendant suffered actual prejudice as a result of counsel's alleged deficiency. Defendant's ineffective assistance of counsel claim on this issue fails to meet either prong of the *Strickland* standard and is denied.

29. Finally, Defendant contends: 1) that the trial court abused its discretion when it admitted the prior recorded statement of Redick into evidence; and 2) that his counsel was ineffective for failing to object to the admission of Redick's prior recorded statement into evidence. Defendant contends that Redick's prior recorded statement should not have been admitted into evidence at trial because it lacked a proper foundation.

30. First, as to Defendant's contention that court abused its discretion when it admitted the prior recorded statement, as previously discussed, this claim is procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), for Defendant's failure to raise the claim on direct appeal.

⁵⁴ March 25, 2009 Trial Transcript. pgs. 59-60.

31. Second, a proper foundation was laid for the admission of the prior recorded statement into evidence. Consequently, Defendant's claims that his counsel was ineffective and that the court abused its discretion for allowing the prior recorded statement into evidence are without merit.

32. Redick repeatedly testified at trial that he could not remember either the events at issue nor could he remember his out-of-court statements.⁵⁵ Redick testified that he recalled speaking to the police and to his father but not what he told them.⁵⁶ Redick testified that he agreed to talk to the police.⁵⁷ When asked on cross-examination if his prior out-of-court statement was truthful, Defendant reiterated that he had no independent knowledge of the events at issue or his out-of-court statement.⁵⁸

33. 11 *Del. C.* § 3507 provides that prior voluntary out-of-court statements of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive testimonial value.⁵⁹ This rule applies regardless of whether the in-court testimony is consistent with the prior statement or not.⁶⁰

34. Prior out-of-court statements are properly admitted at trial when the witness testifies on direct examination concerning both the events perceived and the out-of-court statements.⁶¹ Under Section 3507, there is no requirement that the witness affirm the truthfulness of the out-of-court statement or offer consistent trial testimony.⁶² Prior out-

⁵⁵ March 25, 2009 Trial Transcript, pgs. 49-75.

⁵⁶ March 25, 2009 Trial Transcript, pgs. 50-60.

⁵⁷ March 25, 2009 Trial Transcript, pgs. 52-53.

⁵⁸ March 25, 2009 Trial Transcript, pgs. 71-75.

⁵⁹ 11 *Del. C.* § 3507(a).

⁶⁰ 11 *Del. C.* § 3507(b).

⁶¹ *Moore v. State*, 1995 WL 67104, at 2 (Del.).

⁶² *Moore v. State*, 1995 WL 67104, at 2 (Del.).

of-court statements are properly admissible even where the witness cannot remember either the events of the alleged crime or the out-of-court statements.⁶³

35. To be admissible, Section 3507 does require that the out-of-court declarant be subject to cross examination, it does not require any specific quality of cross-examination or key the admission of the out-of-court statement to any particular recall in court on the part of the witness.⁶⁴ To the contrary, the draftsmen of the statute expressly contemplated that the in-court testimony might be inconsistent with the prior out-of-court statement. One of the problems to which the statute is obviously directed is the turncoat witness who cannot recall events on the witness stand after having previously described them out-of-court.⁶⁵ There is nothing in the statute or its intent which prohibits the admission of the statements on the basis of limited courtroom recall.⁶⁶

36. A two part foundation must be established by the State during its direct examination before a witness' prior statement can be admitted under 11 *Del. C.* § 3507.⁶⁷ The two-part foundation requires that the witness testify about both the events and the accuracy of the prior recorded statement.⁶⁸ The two prong test is satisfied when the witness testifies that he cannot remember either the events at issue or his prior out-of-court statements.⁶⁹

37. Thus, the two part foundation was properly laid in the subject action when Redick testified about the events at issue (that he did remember any of the events) and the

⁶³ *Moore v. State*, 1995 WL 67104, at 2 (Del.).

⁶⁴ *Johnson v. State*, 338 A.2d 124, 126-127 (Del. 1975).

⁶⁵ *Johnson v. State*, 338 A.2d 124, 126-127 (Del. 1975).

⁶⁶ *Johnson v. State*, 338 A.2d 124, 126-127 (Del. 1975).

⁶⁷ *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010).

⁶⁸ *Blake v. State*, 3 A.3d at 1083.

⁶⁹ *Moore v. State*, 1995 WL 67104, at 1-2 (Del.).

accuracy of his prior recorded statement (that he did not remember the substance of any of his out-of-court statements).

38. This case closely resembles *Moore v. State*.⁷⁰ Both in *Moore*, as well as the subject action, the witness testified at trial that he could no longer remember the events at issue and could not remember the substance of his prior out-of-court statements. In *Moore*, the Delaware Supreme Court recognized that the out-of-court statements are admissible even where the witness cannot remember either the events of the alleged crime or the out-of-court statements.⁷¹

39. The Delaware Supreme Court has adopted and has since followed a case-by-case approach in determining whether a prior statement has been properly admitted into evidence under Section 3507.⁷² In the subject action, the court did not abuse its discretion in admitting Redick's prior out-of-court statements and defense counsel was not deficient in his handling of this issue.

40. In this case, for those claims that are procedurally barred, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances."⁷³ The defendant bears the burden of proving that she has been deprived of a "substantial constitutional right."⁷⁴ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The

⁷⁰ *Id.*

⁷¹ *Moore v. State*, 1995 WL 67104, at 1-2 (Del.).

⁷² *Blake v. State*, 3 A.3d. at 1082-83; *Johnson v. State*, 338 A.2d 124, 127-28 (Del. 1975).

⁷³ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

⁷⁴ *Id.*

Court does not find that the “interests of justice” require it to consider the otherwise procedurally barred claims for relief.⁷⁵

For all of the foregoing reasons, Defendant’s Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
cc: Peter N. Letang, Esquire

⁷⁵ *Id.*