

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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December 6, 2011

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RE: State of Delaware v. Theo R. Dixon
Defendant ID No. 0904013826
Motion for Post Conviction Relief (R1)

Dear Counsel and Mr. Dixon:

Theo Dixon filed his first Motion for Post Conviction Relief on August 8, 2011, pursuant to Criminal Rule 61 ("Rule 61"). On September 13, 2011, Mr. Dixon filed an Amended Motion for Post Conviction Relief.

The Court directed defense counsel and the prosecutor to file responses to the allegations pursuant to Rule 61(g). The Court has had the opportunity to review defense counsel's Rule 61(g) affidavit, the prosecutor's Rule 61(g) affidavit, and finally, the defendant's response to their positions as contained in his submission received on November 16, 2011. The matter is now ripe for decision.

The defendant was charged with Rape in the First Degree, Sexual Extortion, Unlawful Imprisonment in the Second Degree, Coercion, and Official Misconduct. The defendant and the victim in this case were both members of the Delaware National Guard. Periodically, the victim would be assigned to assist the defendant with his administrative responsibilities. The theory of the State's case was that the defendant took advantage of his rank and made threats that he could harm the career and/or military standing of the victim with the National Guard if she did not comply with

his demands. Certain photographs taken by the defendant of the victim in various stages of undress were introduced. The victim testified as to what took place and also testified as to why she waited so long to report the aforementioned conduct. Five additional witnesses testified on behalf of the State. The defense called four witnesses. As was his right, the defendant chose not to testify and the jury was instructed accordingly. The jury found the defendant guilty of Sexual Extortion, Unlawful Imprisonment in the Second Degree, and Coercion. The jury could not reach a decision on the rape offense, and the State entered as Nolle Prosequi as to that charge after sentencing.

Sentencing took place on September 24, 2010. As to the charge of Sexual Extortion, the defendant received five years at supervision level V, with credit for 48 days. After serving 15 months at supervision level V and the successful completion of the Department of Correction Family Problems Program, the balance was suspended for supervision level IV home confinement. As to the charges of Unlawful Imprisonment and Coercion, the defendant received a suspended sentence of supervision level III probation on each.

As to claims by the defendant that his attorney was ineffective in his representation, the defendant must prove that either by mistake, error, or omission, his attorney's performance was objectively deficient and that it fell below the required range of acceptable representation. If the defendant establishes that his attorney made mistakes by error or omission then he must establish that those mistakes probably prejudiced the defendant by impacting the verdict. *Stickland v. Washington*, 466 U.S. 668 (1984). In reviewing the ineffective assistance of counsel claim, the Court must show a certain amount of deference to the decisions made by defense counsel and not attempt to "Monday morning quarterback."

GROUND AND DISCUSSION

The defendant's allegations are what the Court kindly calls a hodgepodge collection of conclusory allegations. In the amended motion the defendant does provide more details as to some of his allegations. Perhaps following his pleadings is not the most organized way of addressing the motion, but the Court shall nevertheless do so.

As to the August 8, 2011, Motion for Post Conviction Relief, the defendant alleges the following:

Ground One: The defendant alleges his attorney was ineffective in representing him because defense counsel failed to argue charges of Unlawful Imprisonment and Coercion, failed to file several requested motions, and failed to cross-examine successfully the State's witnesses, citing "the Judge interrupted me, making me lose my train of thought."

Ground Two: The defendant complains that there was evidence that should have been suppressed in that not all of the information contained on the disc could be retrieved because it had been corrupted. The defendant also complains as to the redactions concerning a pre-trial interview with the victim. Specifically, the defendant complains that the jury did not hear the victim's statement when she was asked whether or not she wished for prosecution to take place, and she replied, "[N]ot sure- just wanted to get it off my chest."

Ground Three: The defendant claims he asked defense counsel to subpoena key witnesses who would have established a pattern of behavior of the State's witness (presumably the victim), and also would have provided testimony that another female soldier who had worked with the defendant was not victimized. Finally, under this ground, the defendant faults his attorney for not having the private investigator who had assisted defense counsel in this case subpoenaed to testify.

Ground Four: The defendant argues that defense counsel failed to raise perjury because of inconsistencies of the trial testimony. The defendant argues, that due to those inconsistencies, the witnesses perjured themselves and, therefore, all of the testimony should have been thrown out.

Ground Five: The defendant argues his attorney did not file pre-trial motions. The defendant does not provide any detail as to what motions should have been filed.

In the defendant's September 13, 2011, Amended Motion for Post Conviction Relief, he makes the same claims previously outlined, but additionally states that his attorney was ineffective for failing to introduce any expert witnesses. Presumably that claim relates to the private investigator. It is the defendant's position that the jury should have heard the investigator's opinions about the case.

The defendant also alleges that his attorney was ineffective for failing to introduce the Military Rules and Regulations that persons in the National Guard honor and are bound by.

Finally, the defendant argues his attorney was ineffective for failing to argue "access necessary to accomplish offenses" because he claims he did not have access to the automated systems that would have enabled him to do harm to the victim's military standings.

In a memorandum that was attached to his motion, the defendant argues some of his claims in greater detail. He complains that his defense attorney should have filed a Motion to Suppress and/or a Motion to Dismiss because an initial investigation was conducted by a military individual who viewed the disc in his home. The defendant argues that the removal of the disc from the Armory violates the chain of custody and this violation would have resulted in suppression or dismissal. The defendant argues that the disc was potentially compromised. He argues that a

continuance was granted in April 2010 at the request of the State to allow further research as to the corruption of all or a portion of the disc, but this research was apparently unsuccessful.

The defendant argues that during his final case review he informed his attorney that the State's complaining witness should have been smiling in a few of the pictures. Defendant reports that he and his attorney reviewed the pictures on the computer and/or the disc but were unable to locate the photographs that the defendant believed would show the victim smiling. The defendant states that this is a further basis as to the lack of integrity and authenticity of the disc and why he believes a Motion to Suppress would have been successful.

The defendant further contends that his attorney should not have cooperated with the prosecutor in editing an original telephonic interview of the victim. The defendant believes that if the jury had heard the victim's comment, "[N]ot sure - just wanted to get it off my chest," when asked if she wished for prosecution in this matter, the jury's verdict would have been different.

The defendant argues that his attorney was ineffective because he should have subpoenaed or obtained sworn affidavits from other members of the National Guard who worked with the defendant and the victim. The defendant believes that one witness would have helped establish a pattern of flirtatiousness by the victim and that a second witness would have refuted claims of aggressive or improper behavior by the defendant.

The defendant alleges that defense counsel did not call his private investigator in order to introduce his six-page report as to his findings, nor was the jury allowed to hear his expert opinion as to the truthfulness of the victim.

The defendant alleges his trial counsel was ineffective because he did not introduce the Military Rules and Regulations that govern and protect the rights of all soldiers. He alleges that, in the Army scheme of organization, while he did supervise the victim, he did not really out-rank her. He further argues that the Army's position concerning sexual harassment and its zero-tolerance policy would have refuted her claims of any helplessness or compulsion.

Finally, the defendant complains that his attorney was ineffective because he did not argue that the defendant's lack of access to the automation (presumably computer access) would prevent him from accomplishing any of the threats that the victim testified the defendant made against her.

DEFENSE ATTORNEY'S RULE 61(g) RESPONSE

The defendant's attorney states that the fact that a member of the National Guard took the disc home would not have precluded it from being introduced into evidence. The disc was not then in the custody of the Georgetown Police Department nor was there any evidence found that the photographs were faked.

Defense counsel reports that there was an attempt by the State to unscramble a file in the corrupted disc but those efforts did not compromise the integrity of the disc. He further reports that photographs were viewed with the defendant and that there was one file that would not open, but that neither the State nor their experts were able to open that particular file. Defense counsel reports that the defendant never stated there were any problems with the pictures that could be used. Defense counsel did ask the prosecutor if there were any photographs of the victim smiling that could be found and was told that there were none recovered from the disc.

Defense counsel reports that he did cooperate with the prosecutor in reviewing the victim's interview in order to exclude hearsay and other inadmissible evidence. Defense counsel reports that there was no evidence redacted that would have been helpful to the defendant.

Defense counsel reports that alleged flirtatious behavior by the victim in other circumstances would not have been admissible in Court, and he further states that what these witnesses may have offered was largely based on hearsay.

Defense counsel reports that any efforts to introduce the private investigator as an expert on truthfulness or to introduce his opinions would have been unsuccessful. Defense counsel admitted that he made no effort to introduce the Military Rules and Regulations concerning sexual harassment. He specifically reports that his questioning made it clear that there were policies and procedures in place for the victim to report sexual harassment, and although she knew of them she failed to use them. This questioning was designed to bolster the defense's "late-reporting" argument. Defense counsel reports that he did not explore the military structure or hierarchy because the defendant supervised the victim's work and it was his assessment of her work performance that would have impacted the victim's status within the National Guard.

PROSECUTOR'S RULE 61(g) RESPONSE

In the prosecutor's affidavit he reports that he has no knowledge as to who may have viewed the disc and whether that viewing took place at the Armory or not. The knowledge of the State began when the disc came into the possession of the Georgetown Police Department. Basically, the State was informed that a computer disc was found in a work station in the Georgetown Armory and

when it was opened it contained pictures and/or other information relevant to the accusations. The prosecutor reports that there were some files on the disc that had been corrupted. When defense counsel inquired as to any photographs of the victim smiling the prosecutor viewed all the photographic evidence and was unable to find any such photographs. Furthermore, the prosecutor reports he contacted the victim to inquire whether or not she might be smiling in any of the photographs and she was adamant that she did not smile when the defendant photographed her.

The prosecutor states that the redaction of the victim's interview did include the victim's comment made in response to the question of whether she wished to prosecute. He states that he originally wanted that statement kept in and shown to the jury in order to argue that the victim was not being vindictive. Defense counsel objected because the victim's feelings on whether or not she wished to prosecute was inadmissible and, thereafter, both counsel agreed to redact same.

DEFENDANT'S RESPONSE TO COUNSELS' RULE 61(g) AFFIDAVITS

In the defendant's response he reargues that his attorney was unwilling to file a Motion to Suppress or a Motion to Dismiss as to the issue regarding the disc being taken from the Armory prior to being turned over to the police. The defendant maintains his position that the corrupt file on the disc that could not be opened should have resulted in the entire disc being suppressed, including the pictures of the victim. As to defense counsel's position that the testimony the defendant wished to introduce would have constituted hearsay and thus been inadmissible, the defendant argues that the whole case was based on untruthful hearsay. The defendant argues case law that it is important to call disinterested witnesses regardless of claims of hearsay or extraneous information.

The defendant asserts that his attorney's position that the investigator's opinion would not have been allowed is only his attorney's opinion. The defendant argues that defense counsel's admission that he did not admit the Military Rules and Regulations as evidence should have established a clear constitutional violation. He further argues that his attorney's lack of knowledge about military rank and systems operations meant that he did not understand the proper questions to ask that would have established that the defendant had no control over the victim's military career.

DISCUSSION

When the Court recalls the events at trial and reviews the defendant's allegations and the counsels' affidavits, it is clear that this is a situation in which defense counsel developed a trial strategy based on the information known to him and his discussions with the defendant. That strategy was that whatever may have occurred between the defendant and the victim was consensual.

The present complaints amount to allegations that defense counsel should have approached the cross-examination and presentation of evidence in a different manner. Inferentially, the defendant argues that he would have been found not guilty had his attorney done a better job. This is the specific area that the teachings of *Strickland* direct the Courts to avoid. Defense counsel's decisions, strategy, and questions have a presumption of appropriateness so long as defense counsel's conduct falls within a broad range of reasonable representation of his client. The Court should not be a "Monday morning quarterback." With that in mind, the Court shall review the specific complaints.

The Court is satisfied that the defendant's complaints that his attorney did not file appropriate motions, including suppressions motions and/or motions to dismiss, must fail. There is nothing in the record that suggests that the viewing of the disc by other military personnel prior to the Georgetown Police Department becoming involved gives rise to a basis for suppression or dismissal.

Defense counsel had to deal with the photographs of the victim in which she was partially naked. The fact that not every file on the disc could be opened does not prevent the State from presenting the photographs taken of the victim by the defendant in various stages of undress. A Motion to Dismiss or a Motion to Suppress would not have been successful.

Any attempt by trial counsel to subpoena witnesses and have them testify as to a pattern of flirtatiousness on the part of the victim would have been unsuccessful. Flirtatious behavior is not a defense for sexual extortion.

The defense attorney was not ineffective for failing to have the charges dismissed because of inconsistencies in the trial testimony. In trials there usually are disagreements concerning what took place, and there usually are inconsistencies in the evidence that is introduced. It is the jury's obligation to listen to all of the evidence, to weigh credibility, and then make a decision, if possible, as to what took place. The jury did this. It is noted that the jury was unable to reach a decision concerning the rape charge, which was later dropped.

Had defense counsel attempted to introduce the investigator's report and the investigator's opinions concerning the truthfulness of the State's witnesses, he would have failed. Witnesses are not expert witnesses as to the truthfulness of other people.

The defendant is incorrect in his assessment of his attorney's representation concerning the redaction of the victim's statements. It is the attorney's job to review the potential evidence from recorded statements and to communicate with the prosecutor concerning what should come out and what should stay in. Whether the evidence comes from a witness testifying from the stand or by way of a pre-trial recorded statement (11 *Del.C.* 3507), what the jury hears must still be screened for its

relevance and admissibility. Whether or not the victim was uncertain as to pressing charges was not relevant. The fact that the defendant now disagrees with his attorney's decisions does not establish that his attorney was ineffective.

The defendant argues that his attorney's failure to enter into evidence the Military Rules and Regulations, as well as the hierarchy in military rank, establishes his attorney was ineffective. This is more "Monday morning quarterbacking" in an effort to establish that the victim knew military policy concerning sexual harassment and that if she felt threatened she could have blown the whistle. Regardless of the defendant's present arguments concerning military structure and military regulations, the simple fact of the matter is that this was not a military trial. This was a trial in a civilian court concerning conduct occurring in Georgetown, Delaware. The trial was fact-intensive as to what occurred in Georgetown, Delaware, between the defendant and the victim. It was a factual battle as to whether or not certain conduct was forced or consensual. While it was inescapable that this conduct occurred in a National Guard office, there is nothing to support that, had the military regulations been introduced into evidence, they would have undermined the confidence of the trial verdict.

SUMMARY

Upon reviewing each of the allegations, the file, and the affidavits presented, the Court does not find that the defendant has established in any way that his attorney was ineffective. The reality is that the defendant was zealously represented by trial counsel in a manner that resulted in a hung jury as to the lead charge of rape, resulting in that charge being dropped by the State.

Based on the evidence presented at trial, nothing has been presented by the defendant in his present motion that would have been admissible or would have created a probability that the verdict was in error. The defendant has not established prejudice.

In the analysis of this post conviction motion, much of what the defendant believes to be error or ineffectiveness on the part of his attorney is incorrect. There are certain areas of a trial over which the defendant has total control, such as whether or not to testify, but his attorney gets to decide which questions to ask which witnesses. The defense attorney also is entitled to use his professional opinion as to whether a Motion to Suppress or a Motion to Dismiss has potential merit or is groundless.

The remaining portions of the defendant's arguments are based on the defendant's opinion that had other evidence come in it would have impacted the trial verdict. The attorneys have opined on same, but ultimately it is the Court's opinion. The defendant has failed to establish that his attorney's representation fell below an objective standard of representation required by the Sixth

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Amendment of the United States Constitution. The defendant has failed to show by error or omission any prejudice which undermined the confidence in the verdict.

The defendant's motion must be denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

THG:pac
cc: Prothonotary