IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	I.D. No. 0104011899
CHRISTIAN K. WASHINGTON,	)	
	)	
Defendant.	)	
	)	

UPON CONSIDERATION OF DEFENDANT'S
MOTION FOR POSTCONVICTION RELIEF
SUMMARILY DISMISSED in part and DENIED in part.

Submitted: July 9, 2007
Decided: August 13, 2007

This 13th day of August, 2007, it appears to the Court that:

1. Defendant Christian K. Washington ("Washington") was convicted by a jury on November 20, 2002 of two counts of Robbery First Degree, two counts of Possession of a Firearm During the Commission of a Felony, one count of Possession of a Deadly Weapon by a Person Prohibited, and one count of Reckless Endangerment First Degree.[1] He was sentenced to ten years imprisonment at

[1] *See* Docket 40; DEL. CODE ANN. tit. 11, §§ 832, 1447A, 1448, 604.

Level V.[2] Following an appeal to the Delaware Supreme Court, Washington's conviction was affirmed on November 3, 2003.[3]

2. The evidence presented by the State at trial established that on the evening of April 18, 2001, Washington was at the house of Latisha Seals ("Seals") when Jamal Miller ("Miller") attempted to visit Seals. Washington, accompanied by a pit bull, approached Miller at the doorway of the house and questioned him about the purpose of the visit. Washington pushed Miller out of the house and pulled out a gun. While holding the gun within inches of Miller's face, Washington made three separate demands for Miller to turn over items. Miller complied with each order, first giving Washington a silver chain, then his leather jacket, and finally his car keys. Between each of these demands, Washington told Miller to leave. As Miller attempted to move away, however, Washington ordered the pit bull to pursue or restrain him, preventing retreat.[4]

3. Washington filed this, his first motion for postconviction relief, on November 2, 2006.[5] He asserts that he received ineffective assistance of counsel,

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[2] *See* Docket 40.

[3] *See Washington v. State*, 836 A.2d 485 (Del. 2003).

[4] For a more complete description of the factual background, see *id.* at 486-87.

[5] Washington also previously filed a motion for sentence modification, which was denied by this Court. *See* Docket 54.

both at trial and on appeal.[6] Specifically, Washington argues that his trial counsel was ineffective in failing to object when the prosecutor and chief investigating officer referred to Miller as a "victim" during the course of the trial and in failing to object to the chief investigating officer's testimony that Seals was "scared." Washington contends that his appellate counsel was ineffective for failing to appeal the admission, over defense counsel's objection, of hearsay statements made by Seals.[7]

4. Before addressing the substantive merits of any claim for postconviction relief, the Court must determine whether the defendant has satisfied the procedural requirements of Superior Court Criminal Rule 61 ("Rule 61").[8] In order to protect the procedural integrity of Delaware's rules, the Court will not consider the merits of a postconviction claim that fails any of Rule 61's procedural requirements.[9]

5. Rule 61(i) establishes four procedural bars to motions for postconviction relief: (1) the motion must be filed within three years of a final

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[6] Washington was represented by the same attorney at trial and on appeal. Nonetheless, the Court will refer to "trial counsel" and "appellate counsel" separately where doing so will provide clarity.

[7] *See* Docket 56.

[8] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). *See also Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *State v. Mayfield*, 2003 WL 21267422, at *2 (Del. Super. Ct. June 2, 2003).

[9] *State v. Gattis*, 1995 WL 790951, at *3 (Del. Super. Ct. Dec. 28, 1995) (citing *Younger*, 580 A.2d at 554).

judgment of conviction;[10] (2) any grounds for relief which were not asserted previously in any prior postconviction proceeding are barred; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules; and (4) any basis for relief must not have been formerly adjudicated in any proceeding. However, a defect under Rule 61(i)(1), (2), or (3) will not bar a movant's "claim that the court lacked jurisdiction or . . . 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."[11] Because an ineffective assistance of counsel alleges a constitutional violation meeting this standard, colorable ineffective assistance of counsel claims are not subject to the procedural bars contained in Rule 61(i)(1), (2), or (3).[12]

6. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part *Strickland* test by showing both: (1) that counsel's

[10] The motion must be filed within three years if the final order of conviction occurred before July 1, 2005, and within one year if the final order of conviction occurred on or after July 1, 2005. *See* Rule 61, annot. *Effect of amendments*. For the purposes of Rule 61, a judgment of conviction becomes final under the following circumstances: "(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review." Super. Ct. Crim. R. 61(m).

[11] Super. Ct. Crim. R. 61(i)(5).

representation fell below an objective standard of reasonableness, and (2) that the errors by counsel amounted to prejudice.[13] The defendant faces a "strong presumption that the representation was professionally reasonable" in attempting to meet the first prong.[14] Under the second prong, the defendant must affirmatively demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the proceeding would have had a different result.[15] If either prong is not met, the defendant's claim fails. The same standard governs claims of ineffectiveness raised against both trial and appellate counsel.[16]

A. Failure to Appeal Evidentiary Ruling

7. Applying the procedural bars to Washington's claim of ineffective assistance of appellate counsel, this ground is barred by Rule 61(i)(4). The admissibility of hearsay statements made by Seals was addressed by this Court when it denied Washington's motion to suppress at trial.[17] Rule 61(i)(4) bars any ground for relief which was formerly adjudicated "in the proceedings leading to the

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[12] *See State v. MacDonald*, 2007 WL 1378332, at *4, n.17 (Del. Super. Ct. May 9, 2007).

[13] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

[14] *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996) (citation omitted).

[15] *Strickland*, 466 U.S. at 694. *See also Fletcher v. State*, 2006 WL 1237088, at *2 (Del. Super. Ct. May 9, 2006).

[16] *See Younger*, 580 A.2d at 556; *State v. Nave*, 1998 WL 442932, at *1 (Del. Super. Ct. May 8, 1998).

[17] *See* Docket 42, p. 94.

judgment of conviction . . . unless reconsideration of the claim is warranted in the interest of justice."[18] The interest of justice exception is satisfied only if the defendant presents either subsequent legal developments demonstrating that "the trial court lacked the authority to convict or punish the defendant"[19] or significant factual developments justifying reconsideration of the formerly adjudicated issue.[20] The Court need not reconsider a claim which has received prior "substantive resolution" simply because the defendant has repackaged or restated the same claim as an ineffective assistance of counsel argument.[21]

8. Washington's motion for postconviction relief supports his ineffective assistance of appellate counsel claim by arguing the inapplicability of the present sense impression and excited utterance hearsay exceptions. In other words, the motion for postconviction relief reiterates the same substantive arguments already decided by this Court in denying his motion to suppress at trial. Washington has not shown that legal or factual developments have arisen which merit

[18] Super. Ct. Crim. R. 61(i)(4).

[19] *State v. Fatir*, 2006 WL 3873238, at *3 (Del. Super. Ct. Dec. 12, 2006) (citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)).

[20] *See, e.g., Weedon v. State*, 750 A.2d 521, 526 (Del. 2000).

[21] *See State v. Finocchiaro*, 1994 WL 682434, at *2 (Del. Super. Ct. Nov. 16, 1994) ("Defendant cannot simply restate his claim . . . as one of ineffective assistance of counsel and expect it to be considered anew. The Superior Court is not required to reexamine a claim that has received 'substantive resolution' at an earlier time simply because the claim is refined or restated.") (citing *Johnson v. State*, 1992 WL 183069, at *1 (Del. June 30, 1992)).

reconsideration of this previously adjudicated issue "in the interest of justice." Therefore, Rule 61(i)(4) bars Washington's ineffective assistance of appellate counsel claim.

9. Moreover, even if Washington's ineffective assistance of appellate counsel claim was not procedurally barred, it fails to meet the *Strickland* standard. Appellate counsel is not constitutionally required to raise all meritorious claims on direct appeal.[22] Rather, appellate counsel is expected to review the record, recognize and winnow out non-frivolous but weak arguments, and focus on one or a few central issues which offer, in the attorney's professional judgment, the strongest chance of success.[23] In light of the need for appellate counsel to select from amongst multiple meritorious claims arguably presented by the record in crafting an appeal, simply claiming that appellate counsel failed to raise an issue that was meritorious will not establish ineffectiveness. To show that counsel's

[22] *See Watson v. State*, 1991 WL 181468, at *2 (Del. Aug. 22, 1991) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). A meritorious ground for appeal, as opposed to a frivolous claim, is one which contains legal points which are arguable on their merits. *See Walls v.* State, 2005 WL 4536483, at *1 (Del. Super. Ct. Dec. 29, 2005) (quoting *Penson v. Ohio*, 488 U.S. 75, 84 (1988)). Because the applicability of the present sense impression and excited utterance hearsay exceptions is often a close and highly fact-specific question, the Court will assume for the sake of argument that the omitted claim in this case was meritorious.

[23] *See, e.g.*, *Jones*, 463 U.S. at 751-53 (detailing "the importance of winnowing out weaker arguments on appeal and focusing on one central issue . . . or at most on a few key issues" as a crucial appellate advocacy strategy); *State v. Watson*, 2007 WL 2029302, at *3 (Del. Super. Ct. June 28, 2007) ("Grounds for appeal are left to the discretion of counsel who should determine which grounds will likely prevail."); *Nave*, 1998 WL 442932, at *2 ("[C]ounsel is expected to weed through any non-frivolous issues arguably presented by the record and confine the appeal

failure to present a meritorious claim on appeal was objectively unreasonable, a defendant must show that the nonfrivolous issue counsel did not present was "clearly stronger" than the issue or issues counsel did present.[24]

10. Assuming *arguendo* that the admissibility of Seals's statements to police constituted a meritorious ground for appeal, Washington's claim fails the *Strickland* test because the omitted issue is not clearly stronger than the ground raised on appeal. On appeal, Washington's counsel argued that the second count of Robbery First Degree and the second count of Possession of a Firearm During the Commission of a Felony constituted multiple charges for the same offense and were therefore multiplicitous and in violation of the Federal and Delaware

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to presenting those issues, which in his or her professional judgment, appear to be the strongest.").

[24] *See Fink v. State*, 2006 WL 659302, at *2 (Del. Mar. 14, 2006). This "clearly stronger" standard derives from a three-factor test developed in the Seventh Circuit to determine the objective reasonability of failure to raise a meritorious claim on appeal. The full test considers (1) whether the issue not presented was significant and obvious; (2) whether the omitted issue was clearly stronger than the issues which were presented; and (3) whether the decision not to include the omitted issue lacked an articulable strategic purpose. *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). The first prong of *Strickland* is satisfied if the defendant establishes that all three factors can be answered in the affirmative. *Id.* at 646-47; *see also MacDonald*, 2007 WL 1378332, at *5. The Delaware Supreme Court has held that a defendant failing the second factor cannot establish that the representation was objectively unreasonable, noting that the United States Supreme Court has cited the Seventh Circuit test with approval as to only the second factor. *Fink*, 2006 WL 6509302, at *2 (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). The Delaware Supreme Court has neither rejected nor adopted the full three-factor test. *See id.* Subsequently, this Court has applied all three factors in analyzing an ineffective assistance claim based upon failure to raise issues on appeal. *See MacDonald*, 2007 WL 1378332, at *5-6. Because Washington's claim fails the second factor, the Court need not analyze the remaining two factors in this case.

Constitutions' double jeopardy clauses.[25] Although Washington's appeal was unsuccessful, it presented an argument which was much stronger than the omitted hearsay claim. Appellate counsel exercised reasonable professional judgment in deciding, as his affidavit stated, that the hearsay argument "was ultimately []a loser and would detract from the stronger argument counsel advanced."[26] Therefore, appellate counsel's representation was not objectively unreasonable and Washington's ineffective assistance of appellate counsel claim must be denied.

B. Failure to Object to Use of the Word "Victim"

11. Applying the procedural bars of Rule 61, Washington's two claims for ineffective assistance of trial counsel are not procedurally barred. Washington's motion was timely filed. The procedural bars of Rule 61(i)(1), (2), and (3) will not apply to a colorable claim of ineffective assistance of counsel. An ineffective assistance of counsel claim cannot be raised for the first time on direct appeal,[27] and neither of the grounds have been formerly adjudicated in any other proceeding. Because neither ground is procedurally barred, the Court will address the merits of Washington's ineffective assistance of trial counsel claims.

[25] *See Washington*, 836 A.2d at 487.

[26] *See* Docket 59.

[27] *See, e.g., Duross v. State*, 494 A.2d 1265, 1267-69 (Del. 1985).

12. In the first of his claims for ineffective assistance of trial counsel, Washington alleges that defense counsel was ineffective for failing to object when the prosecutor and chief investigative officer repeatedly referred to Miller as a "victim" throughout the trial. Because Washington testified that he was not at Seals's residence and did not see Miller on the night of the crime, he argues that by referring to Miller as a "victim" in its case in chief, the prosecution deprived Washington of the presumption of innocence and unconstitutionally relieved the State of the burden of proving its case beyond a reasonable doubt.[28] Washington relies on *State v. Jackson*[29] for the proposition that "the word 'victim' should not be used in a case where the commission of a crime is in dispute."[30]

13. Washington's argument that trial counsel should have objected to the prosecution's use of the word "victim" misconstrues *Jackson*. In *Jackson*, the defendant, who was convicted of several crimes including Unlawful Sexual Intercourse in the first degree, had presented consent as his only defense at trial. The Delaware Supreme Court found the prosecution's use of the word "victim" to refer to the complaining witness was inappropriate, although not plain error,

[28] *See* Docket 56.

[29] 600 A.2d 21 (Del. 1991).

[30] *Id.* at 24.

because "commission of a crime [was] in dispute."[31] Upon a motion by the State for clarification, the Court explained that it did not seek to establish a "ban" on the word "victim," and that its holding went only to "a narrow range of cases" in which "consent [is] the *sole* defense, and the principle issue one of credibility."[32] Subsequently, the Delaware Supreme Court has made clear that this "narrow range of cases" does not include all cases in which the commission of a crime is in dispute. Rather, the use of the term "victim" to describe a complainant is only objectionable where commission of a crime is in dispute because consent is the sole defense.[33]

14. *Jackson* is inapposite to this case, which does not involve any consent defense. At trial, Washington testified that he arrived at Seals's house around 11:30 P.M. on April 18, 2001, after Miller reported the robbery to police and officers interviewed Seals at her residence.[34] Washington further stated that he had not seen Miller that night.[35] Washington's alibi defense obviously was

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[31] *Id.*

[32] *Id.* at 25 (denial of motion for rehearing en banc) (emphasis added).

[33] *See Mason v. State*, 1997 WL 90780, at *2 (Del. Feb. 25, 1997) ("Reference to a complainant as a 'victim' is not objectionable in all cases where the commission of a crime is disputed; it is only objectionable in those cases where consent is the sole defense."); *State v. Pandiscio*, 1995 WL 339028, at *5 (Del. Super. Ct. May 17, 1995) (holding that use of the term "victim" was not objectionable where consent was not a defense), *aff'd* 1995 WL 715627 (Del. Oct. 25, 1995).

[34] *See* Docket 42, p. 43-44; Docket 44, p. 25-26.

[35] *See* Docket 44, p. 18.

incompatible with any theory of consent. Furthermore, his testimony, if found credible by the jury, could have been consistent with either non-existence of the crime or mistaken identification. Unlike in *Jackson*, presuming that the complaining witness in this case was a "victim" did not give rise to a corollary presumption that the defendant was a perpetrator.

15. Because Washington did not present a consent defense, the use of the term "victim" by the prosecution and witnesses in this case was not objectionable. Washington's trial counsel was not objectively unreasonable in failing to raise an objection to the use of the word. Therefore, Washington's first ground for ineffective assistance of trial counsel must fail.[36]

C. Failure to Object to Officer's Testimony

16. Washington's second ineffective assistance of trial counsel argument must also fail. Washington claims his trial counsel was ineffective in failing to object to testimony by the chief investigative officer that Seals was "scared" when giving her statement to police and when leaving the room after seeing Washington brandish a gun. The chief investigating officer did not merely state that Seals was

[36] Although Washington failed to prepare the argument as a separate ground, his motion suggests that appellate counsel was ineffective in failing to raise the use of the term "victim" to refer to Miller on direct appeal. Even assuming that the use of the term "victim" at trial could constitute a meritorious ground for appeal, Washington cannot demonstrate that appellate counsel's representation was objectively unreasonable because this ground is not "clearly stronger" than the argument appellate counsel did present, particularly in light of the clear case law establishing that references to a complainant as a "victim" are only objectionable when consent is the sole defense.

scared when speaking to him, but also clarified that he was testifying as to his assessment of her at the time and provided a detailed explanation of the behavior and body language which led him to describe her as scared.[37] Washington makes the conclusory assertion that trial counsel was ineffective "by failing to object to the officer's subjective interpretation of Seals' body language to conclude that she was afraid" without clearly stating why he believes an objection was tenable.[38] In an affidavit filed at the Court's request, trial counsel asserted that he did "not believe the officer's testimony was objectionable."[39]

17. Delaware Rule of Evidence 701 ("Rule 701") permits lay testimony in the form of opinions or inferences if the opinions or inferences are "(a) rationally

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[37] Washington claims the following portion of the officer's testimony was objectionable:

> Q: Can you describe [Seals's] demeanor to the jury? And by demeanor, I mean how she was acting, how she was talking, what her body language was.
> A: She was scared.
> Q: How do you know she was scared?
> A: She was hunched like a ball. She hunched up. She wouldn't make eye contact. She kept looking down and she spoke to me very softly like she was really upset. I think more or less afraid of what had happened.
> Q: Was she shaking?
> A: She was just – her body language was not communicative. Usually when we talk to most people they stand up straight and talk to you eye to eye even about something that happened regardless of how bad it is unless they're afraid or hiding something. She seemed to me she was afraid.

See Docket 42, p. 102-03. Washington also argues that the officer's testimony that Seals was "afraid" when she saw Washington hold Miller at gunpoint was objectionable. *See* Docket 42, p. 103; Docket 56.

[38] *See* Docket 56.

[39] *See* Docket 59.

based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."[40] Rule 701, like its federal counterpart, permits a lay witness to testify as to his own impressions when they are based on personal observation and "form a collection of facts that can most effectively be communicated in the 'shorthand' version of an opinion."[41] Subject to the limitations of lay opinion evidentiary rules, a lay witness generally may give his opinion as to the mental state of another in connection with the facts on which that opinion is based and may testify as to personal observations of the person whose mental condition is in question.[42]

18. The chief investigative officer's testimony that Seals was scared at the time she spoke to him was lay opinion testimony admissible under Rule 701. The officer testified as to the personal observations which provided the foundation for his statement. His testimony was rationally based on his perception of Seals, as it entailed drawing reasonable inferences from her tone, body language, and behavior. The officer's description of Seals as scared aided the jury's understanding of his testimony by summarizing and clarifying his observations of

[40] D.R.E. 701.

[41] BARBARA E. BERGMAN & NANCY HOLLANDER, 3 WHARTON'S CRIMINAL EVIDENCE § 12.2 (15th Ed. 2006) ("Testimony in the form of opinion as to . . . mental state . . . fall[s] within this 'collective facts' exception.").

her demeanor. His assessment of her state of fear did not require any scientific, technical, or other specialized skill or knowledge. The officer's use of the words "scared" and "afraid" in connection with his personal observation of Seals is precisely the type of "shorthand" Rule 701 is intended to admit for the benefit of juries.

19. The testimony as to Seals's state of fear upon seeing Washington point a gun at Miller appears to be based upon Seals's hearsay statements to the officer, which the Court ruled admissible under the present sense impression and/or excited utterance exceptions.[43]

20. Because there was no basis for trial counsel to object to the officer's testimony, Washington cannot demonstrate that the representation fell below an objective standard of reasonability, as required by the first prong of the *Strickland* test. Washington also has not established that trial counsel's failure to object resulted in prejudice, as failure to raise a groundless objection cannot affect the outcome of a case.

21. Moreover, even had the officer's testimony been excluded, the excised testimony would not have affected the outcome. Washington correctly notes that the officer's assessment of Seals as "scared" at the time she spoke to him may have

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[42] *See* 31A AM. JUR. 2D *Expert and Opinion Evidence* § 145.

[43] *See supra* A.8.

supported the admissibility of her statements under the excited utterance rule.[44] Washington does not demonstrate, however, that the outcome of the case would have been different absent the admission of Seals's hearsay statements or the officer's descriptions of Seals as "scared" and "afraid." Washington claims that Seals's hearsay statements, to the extent that they coincide with Miller's recounting of the facts, tend to "bolster" Miller's credibility and damage Washington's. Whatever corroborative effect the officer's testimony as to Seals's mental state and hearsay statements may have had does not equate with prejudice. Seals's statements to the officer identified Washington and described him pulling out a gun. Seals lacked personal knowledge of the full sequence of events which included the robbery, and her hearsay statements did not purport to recount those events. Miller gave testimony at trial detailing Washington's actions which a rational jury could have found credible in establishing Washington's guilt independent of the officer's testimony as to Seals's hearsay statements or her mental and emotional condition during and after the crime.

22. Because the officer's testimony as to Seals's fear after seeing Washington pull out a gun and while speaking with police was not objectionable, trial counsel did not provide ineffective assistance in failing to object. Washington's second claim of ineffective assistance of trial counsel therefore fails.

[44] *See* Docket 56.

23. Based on the foregoing, Washington's Motion for Postconviction Relief is **SUMMARILY DISMISSED in part and DENIED in part**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Michael W. Modica, Esq.
Edmund M. Hillis, Esq.
Marsha J. White, Esq.