

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

STATE OF DELAWARE)	
)	
v.)	RK08-09-0644-01 through
)	RK08-09-0652-01
ERIC COOPER)	RK08-10-0351-01 through
)	RK07-01-0363-01
Defendant.)	
ID. No. 0808019339)	

ORDER

On this 24th day of October, 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, Eric Cooper (“Cooper”), was found guilty, following a jury trial on June 30, 2009 of one Count of Assault in the First Degree 11 *Del. C.* § 613, as a lesser included offense of Attempted Murder in First Degree; ten counts of Possession of a Firearm during the Commission of a Felony 11 *Del. C.* § 1447A; five counts of Attempted Robbery in the First Degree 11 *Del. C.* § 832; one count of Burglary in the First Degree 11 *Del. C.* § 826; three counts of Reckless Endangering in the First Degree 11 *Del. C.* § 604, one count of Wearing a Disguise During the Commission of a Felony 11 *Del. C.* § 1239; and one count of Conspiracy in the Second Degree, 11 *Del. C.* § 512.

(2) On August 27, 2009, Cooper was sentenced to a total of seventy-six years incarceration, suspended after forty-nine years for probation, all forty-nine years of which were minimum mandatory time.

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(3) Cooper, through counsel, appealed his conviction to the Delaware Supreme Court. On April 12, 2010, the Supreme Court affirmed Cooper's conviction and sentence.¹

(4) Cooper then filed the instant Motion for Postconviction Relief pursuant to Superior Court Rule 61.

(5) The Court referred this Motion to the 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 Post Conviction Relief should be denied because it is procedurally barred and also lacks merit.

(7) No objections to the report have been filed.

NOW, THEREFORE, after careful and *de novo* review of, and for reasons stated in the Commissioner's Report and Recommendation dated August 10, 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

¹ *Cooper v. State*, 2010 WL 1451486 (Del.).

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 Defendant.)
 ID. No. 0808019339)

COMMISSIONER'S REPORT AND RECOMMENDATION

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

Kathleen A. Dickerson, Esq., Deputy Attorney General, Department of Justice, for
the State of Delaware.

Eric Cooper, *Pro se*.

FREUD, Commissioner
August 10, 2011

The Defendant, Eric Cooper (“Cooper”), was found guilty, following a jury trial on June 30, 2009 of one Count of Assault in the First Degree 11 *Del. C.* § 613, as a lesser included offense of Attempted Murder in First Degree; ten counts of Possession of a Firearm during the Commission of a Felony 11 *Del. C.* § 1447A; five counts of Attempted Robbery in the First Degree 11 *Del. C.* § 832; one count

of Burglary in the First Degree 11 *Del. C.* § 826; three counts of Reckless Endangering in the First Degree 11 *Del. C.* § 604, one count of Wearing a Disguise During the Commission of a Felony 11 *Del. C.* § 1239; and one count of Conspiracy in the Second Degree, 11 *Del. C.* § 512. A presentence office investigation was ordered by the Court. On August 27, 2009, Cooper was sentenced to a total of seventy six years incarceration, suspended after forty-nine years for probation, all forty-nine years of which were minimum mandatory time.

Cooper, through counsel, appealed his conviction to the Delaware Supreme Court. The three issues raised on appeal were that: the State violated *Brady* by failing to timely disclose (i) a witness's criminal record, (ii) all of that witness's recorded pre-trial statements, and (iii) another witness's alleged agreement with the State. The Supreme Court, on April 12, 2010, affirmed Cooper's conviction and sentence.²

FACTS

Following are the facts as set forth by the Delaware Supreme Court:

On May 22, 2008, two armed "ninja-dressed" individuals entered the apartment of Eric Ross ("Ross") in Dover. (FN2 One intruder held a revolver. The other held a sawed-off shotgun.) Ross was entertaining friends that evening. The armed intruders told the apartment occupants to throw their cell phones and wallets on the floor. After shooting Ian Mason, a guest who tried to reason with them, they fled the apartment.

On May 26, 2008, the Dover Police recovered a 0.22 revolver, a shotgun, and several items of dark clothing from a construction site on Division Street. A ballistic examination established that the revolver was stolen

² *Cooper v. State*, 2010 WL 1451486 (Del.).

earlier that month, during a residential burglary in Dover (“Bicentennial Village Burglary”), FN3 (FN3. Cooper and Josh Reeves were arrested in connection with the Bicentennial Village Burglary.) and that a bullet found in Ross’ apartment “was consistent with being fired” from that revolver. Cooper’s DNA was consistent with a DNA profile collected from the revolver. FN4 (FN4. The State’s expert explained that “Cooper is not excluded as the DNA contributor in the [revolver] swabs,” and that the probability that the DNA profile of an unrelated individual would match the DNA from the revolver is very low.)

On August 15, 2008, Sergeant Gerald Windish, Jr. (“Windish”) of the Delaware State Police informed the Dover Police that he had arrested Christopher Reeves (“Reeves”), who had provided Windish with information about a shooting in Dover. Reeves was arrested for receiving stolen property, including stolen firearms, and was in possession of a shotgun stolen in the Bicentennial Village Burglary. That same day, Reeves was questioned by Detective Jeffery Melvin (“Melvin”) of the Dover Police. Reeves stated that Cooper had told him about the May 22 shooting. On August 18, 2008, Reeves gave a third statement in which he repeated his story about Cooper’s confession, and identified Isaac Pearce as the second intruder.

Cooper was arrested on August 26, 2008 and charged with First Degree Attempted Murder, ten counts of Possession of a Firearm During the Commission of a Felony, five counts of First Degree Attempted Robbery, three counts of First Degree Reckless Endangering, First Degree Burglary, Wearing a Disguise During the Commission of a Felony, and Second Degree Conspiracy.

Reeves testified at Cooper’s trial. The State, however,

did not identify Reeves as a witness until its opening statement. At the end of the first trial day, Cooper's counsel had two conversations with Reeves, in which Reeves told counsel that the State "had it all wrong" and that he told the police on several occasions, that he "just didn't know nothing." The following day, defense counsel raised the issue of Reeves' expected testimony in a chambers conference. Defense counsel complained that he had not received Reeves' full statements to the police, but only a copy of the police report summarizing those statements. FN5 (FN5. It is unclear whether that report also summarized Reeves' August 18 statement.) He also described his conversations with Reeves, and was told by the prosecutor that Reeves' never recanted. The Superior Court ruled that Reeves' conversations with defense counsel raised no *Brady* issue, advised defense counsel to cross-examine Reeves about those conversations, and instructed the State to provide defense counsel with Reeves' recorded statements by the end of the day. FN6 (FN6. When cross-examined, Reeves admitted that he had told defense counsel about several attempts to recant his prior statements. Reeves explained that defense counsel "kept like bugging me, you know, like nagging me, getting on my nerves. So, you know, I didn't say anything." Additionally, defense counsel's partner testified that she was present during the conversations with Reeves, and that Reeves had admitted that what he had told the police was not true.)

Reeves testified that Cooper had told him that he shot an Asian male during a robbery, using a weapon that Cooper obtained in a burglary. Reeves also testified that he was arrested on August 15, 2008, and charged with Receiving Stolen Property (firearms and copper wire) and Possession of Firearm by a Person Prohibited. Portions of Reeves' August 15 statements were played at trial, under 11 *Del. C.* § 3507. Defense counsel extensively cross-examined

Reeves.

During his testimony, Detective Melvin mentioned that Reeves' uncle, Josh Reeves ("Josh"), had been arrested in connection with the Bicentennial Village Burglary, and that after his arrest Josh told the Dover Police that he "wanted to make a deal." Defense counsel objected, and the Superior Court sustained the objection on hearsay grounds.

Cooper, who testified in his own defense, admitted that he had handled the revolver, but denied any involvement in the shooting. The jury found Cooper guilty of First Degree Assault – a lesser included offense of Attempted Murder, and guilty on all remaining counts. FN7. (FN7. Cooper was sentenced to a total of 71 years at Level V, of which 49 years were aggregate minimum mandatory terms.³

COOPER'S CONTENTIONS

Next, Cooper 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: (ineffective Assistance of Counsel.)
- #1 attorney allowed evidence to be used at trial without first or ever reviewing it. The tapes of christopher reeves interegation (sic). (failed to review evidence).
 - #2 attorney failed to call investigator as a key witnes (sic) even though he witnessed the conversation between him and cris.
 - #3 attorneys had evidence that supported defendants innocence (sic) but couldn't testify to it because of his ocupation (sic) as defendants attorney (conflict of interest).

³ *Cooper*, 2010 WL 1451486 at *1-2.

- Ground Two: Prosecutorial Misconduct.
(also ineffective assistance of counsel)
#1 prosecutor argued matters in closing that clearly was not in evidence. prosecutor said defendants DNA was found on bullet in apartment (sic).
#2 personally vouched for Mr. Reeves statements and testimony (sic).
#3 also gave own opinion (sic) of Mr. Reeves truthfulness.
- Ground Three: State court trial court facilitate a compromised verdict when the verdict clearly went against the evidence introduced at trial for not noticing the following problems (ineffective assistance of counsel)(attorney failed to acquittal (sic) this verdict).⁴
The DNA presented a[t] trial specifically on fire arm was inconclusive meaning analysis couldn't be determined. State[']s witness was not a credible witness (purgerd [(sic)] testimony).
- Ground Four: Vire (sic) Dire Questions.
Juror #6 Edward Stewart fail[e]d to disclose #1 information on question #6 on viordire (sic) questionnaire (sic). he answered no to have you ever or know any body that is or has been in police force he said NO. whe[n] he graduated in 72 or 73. defendant asked that juror be removed & was denied fair trial by an impartial jury.
- Ground Five: The defendant [illegible] he can not be by law be convicted of more than one offence (sic) if; one offence (sic) consist of only an attem[p]t to commit

⁴ This ground was difficult to decipher as Cooper was not able to fit all the words on the printed lines.

the other. Reckless endangering charges, Robbery charges and PFDCF all attached to [illegible] are illegal.

DISCUSSION

Under Delaware law, the Court must first determine whether Cooper has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.⁵ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.⁶ Cooper's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Cooper's 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.⁷ 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."⁸

Each of Cooper's five claims are premised on allegations of ineffective assistance of counsel. Cooper has therefore alleged sufficient cause for not having

⁵ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

⁶ Super. Ct. Crim. R. 61(i)(1).

⁷ Super. Ct. Crim. R. 61(i)(3).

⁸ Super. Ct. Crim. R. 61(i)(5).

asserted these grounds for relief at trial and on direct appeal. Cooper's 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 Cooper, 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."⁹ 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.¹⁰

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*¹¹ and adopted by the Delaware Supreme Court in *Albury v. State*.¹²

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

⁹ *State v. Gattis*, 1995 WL 790961 (Del. Super.).

¹⁰ *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

¹¹ 466 U.S. 668 (1984).

¹² 551 A.2d 53, 58 (Del. 1988).

grievous that his performance fell below an objective standard of reasonableness.¹³ 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.¹⁴ 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.¹⁵

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.¹⁶ 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."¹⁷ 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.¹⁸ Furthermore, Cooper must rebut a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance," and this Court must eliminate from its consideration the "distorting effects of hindsight when viewing that representation."¹⁹ Cooper has failed to make any allegations of

¹³ *Strickland*, 466 U.S. at 687; see *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

¹⁴ *Id.*

¹⁵ See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Bughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

¹⁶ *Strickland*, 466 U.S. at 687.

¹⁷ *Id.* at 697.

¹⁸ *State v. Gattis*, 1995 WL 790961 (Del. Super.).

¹⁹ *Strickland*, 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

prejudice arising from his counsel's alleged ineffective representation and has not made any concrete allegations. Therefore his claims are clearly barred by Rule 61(i)(3).

Nevertheless I will briefly address Cooper's contentions for the benefit of the Court. The first ground alleges ineffective assistance of counsel. Cooper claims that his defense attorney, Thomas D. Donovan, Esq. ("Donovan"), allowed evidence to be used at trial without reviewing it (i.e., Christopher Reeves' ("Reeves") interrogation), the attorney failed to call an investigator as a witness and the attorney had evidence that supported Cooper's innocence but failed to testify. His attorney denies that he failed to review evidence prior to trial. Donovan contends that he reviewed all evidence and when a statement from Reeves was provided to him during the trial, by the State, he objected and raised the issue in Cooper's direct appeal. Other than the statement of Reeves, Cooper fails to cite any other examples of defense counsel failing to review evidence prior to trial. As the Supreme Court has reviewed the issue of the timeliness of the receipt by defense counsel of Reeves' statement and upheld Cooper's conviction, this claim is barred by Rule 61(i)(4).

Cooper contends that Donovan's representation was ineffective because he failed to call an investigator with pertinent information to the witness stand. Donovan's affidavit states that he called his associate, Melissa Hopkins, Esq., as a witness instead of the investigator for "strategic reasons." Ms. Hopkins and the investigator were privy to the same information as both were present during the questions conversation with Reeves. Cooper fails to explain how the investigator's testimony would have impacted the outcome of the trial. Based on the affidavit provided by Donovan, it does not appear that the investigator could have provided any additional information to the jury. Thus, Cooper's conclusory claim that

defense counsel was ineffective for failing to call the investigator as a trial witness should fail.²⁰

Cooper claims that Donovan had evidence that he was innocent but did not testify because of a conflict of interest. Donovan denies having any knowledge of Cooper's innocence. The attorney made strategic decisions regarding the "use and introduction of evidence" in an attempt to gain an acquittal. Furthermore, Cooper denied, under oath, that he was involved in the robbery and shooting at Apartment 425A Country Drive, Dover, Delaware but after conviction changed that story, telling the Presentence Officer that he was in the car outside of the apartment at the time of the shooting. Thus, his protestations of innocence must be taken with a proverbial grain of salt. Again, Cooper claims that his trial counsel was ineffective but fails to point to any supporting evidence. Therefore, this conclusory claim of ineffectiveness of counsel should fail.

Cooper's second ground asserts that there was prosecutorial misconduct because the prosecutor argued in closing that Cooper's DNA was on the bullet in the apartment, vouched for the witness and opined about a witness's truthfulness. Donovan denies a failure to object to a supposed statement about DNA because he neither recalled the remark nor could he find it in the record. He also denies failing to object to alleged vouching by the prosecutor as "[t]here are no facts alleged which require a further response." As to the third item in this ground by Cooper, Donovan denies that he failed to object to any prosecutorial misconduct because the defense strategy was to attack Reeves' credibility and the State's strategy was to argue that Reeves' statement was credible because it was "consistent with and corroborated by the other evidence." All three claims by Cooper fail to detail with

²⁰ *State v. Broadnax*, 2006 WL 1679583 (Del. Super.).

any specificity the violation he alleges. Assuming, *arguendo*, that the remarks were made, Cooper's claim should be summarily dismissed as procedurally defaulted by Rule 61(i)(e). Furthermore, Cooper fails to provide any cause for relief or any showing of prejudice.

The third ground for relief is unclear. It appears that Cooper claims that there was insufficient evidence of guilt. Specifically, Cooper claims that the DNA on the firearm was "inconclusive." The testimony at trial counters Cooper's claim. Paul Gilbert, from the Office of the Chief Medical Examiner, testified about the DNA profiles collected from Cooper and key pieces of evidence. His analysis was able to tie Cooper to some of the evidence, although the exclusion rates varied. The defense witness, Dr. Thomas McClintock, concurred with much of Gilbert's testimony. As Donovan stated, Dr. McClintock's expertise was used to provide an alternate explanation as to how Cooper's DNA could be found on evidence linked to the crime. Thus, Cooper's memory of the DNA testimony is contradictory to the record. Cooper also claims that the State's witness was "not a credible witness." This claim fails to provide any supporting information and should be dismissed as conclusory. Furthermore, claims by Cooper in this category are procedurally defaulted under Rule 61(i)(3).

Cooper's fourth ground is unclear. He appears to object to the service of Juror #6. Cooper fails to provide any facts to support his claim or to explain how he was supposedly denied a fair trial. This claim is not only conclusory but barred by Rule 61(i)(3).

Ground 5 appears to be another conclusory claim by Cooper. He appears to allege that he could not be convicted of Reckless Endangering, Robbery and Possession of a Firearm During the Commission of a Felony because they are

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related. This claim is barred by Rule 61(i)(3).

CONCLUSION

After reviewing the record in this case, it is clear that Cooper has failed to avoid the procedural bars of Rule 61(i). A review of his counsel's affidavit clearly shows that counsel represented Cooper in an exemplary fashion and was in no way ineffective. Consequently, I recommend that Cooper's motion be denied as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and as previously adjudicated and barred by Rule 61(i)(4).

/s/ Andrea Maybee Freud

Commissioner

AMF/dsc

oc: Prothonotary
cc: Hon. Robert B. Young
Kathleen A. Dickerson, Esq.
Thomas D. Donovan., Esq.
Eric Cooper, VCC
File