

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**STATE OF DELAWARE**

v.

**LESTER F. ANDERSON**

Defendant

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CRIMINAL ACTION NUMBER

IN-91-09-0956-R3

ID NO. 30109009DI

*Submitted: March 25, 2008*

*Decided: April 9, 2008*

***MEMORANDUM OPINION***

*Upon Motion of Defendant for Postconviction Relief - DENIED*

HERLIHY, Judge

Defendant Lester Anderson has filed his second motion for postconviction relief. It is premised on the Supreme Court opinion in *Williams v. State*,<sup>1</sup> re-interpreting the “in furtherance of” in felony murder and/or *Chao v. State*<sup>2</sup> holding that the re-interpretation is to be retroactively applied.

Anderson was convicted on February 11, 1992 of the intentional murder of Steven Shumate. Anderson beat Shumate to death with a baseball bat. He was found not guilty of conspiring with Joe Travis, his co-defendant at trial, to commit murder. The murder conviction was affirmed on appeal.<sup>3</sup>

The grounds Anderson offers in this second motion which he asserts entitle him to relief are: (1) abuse of discretion, (2) ineffective assistance of counsel, and (3) prosecutorial misconduct. He basically claims he was charged with and convicted of felony murder. The underlying felony, he contends, was possession of a deadly weapon (the bat) during the commission of a felony (murder). Since the Court, prior to the trial’s start, dismissed the possession of a deadly weapon during the commission of a felony charge, Anderson argues that there was no felony to be the predicate felony for felony murder. He also contends that the dismissal of the PDWDCF charge meant the jury should have been given the option to convict him of lesser charges. Ineffective assistance

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<sup>1</sup> 818 A.2d 906 (Del. 2003).

<sup>2</sup> 931 A.2d 1000 (Del. 2007).

<sup>3</sup> *Anderson v. State*, 1993 WL 169121 (Del.).

of counsel arose from trial counsel's failure to object to the first degree murder charge from going to the jury. He gives no details for his claim of prosecutorial misconduct.

The Court finds no merit in any of these claims and this motion is **DENIED**.<sup>4</sup>

### *Discussion*

Prior to reviewing the merits of Anderson's motion, the Court must first determine if there are any procedural bars to doing so.<sup>5</sup> Here there are two. The first is a time bar.<sup>6</sup> The mandate affirming his conviction was issued May 14, 1993, and this motion was filed March 25, 2008. Such a gap would mean this Court could not consider his motion. The time bar has a means for relief which is "(i)f (the motion) asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final. . . ."<sup>7</sup> it can be considered past the three year bar.

Since this is Anderson's second motion for postconviction relief, there is another potential procedural bar:

(2) Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision(b)(2) of this

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<sup>4</sup> This Court recently reached the same result with co-defendant Travis' second postconviction motion which raised identical issues. *State v. Travis*, 2008 WL 308485 (Del. Super.).

<sup>5</sup> *Guinn v. State*, 882 A.2d 1781, 181 (Del. 2005).

<sup>6</sup> Rule 61(i)(1) which was three years at the time of the murder; *Jackson v. State*, 654 A.2d 829 (Del. 1995).

<sup>7</sup> Criminal Rule 61(i)(1).

rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

The two means of relief from the two procedural bars are interrelated in this instance. As indicated earlier, his entire motion, and all its grounds, derives first from *Williams v. State*.<sup>8</sup> In *Williams*, the Supreme Court reversed its prior interpretation of the phrase “in furtherance of” found in the felony murder subsection of the first degree murder statute which read:

- (a) A person is guilty of murder in the first degree when:
  - (2) In the course of and in the furtherance of the commission or attempted commission of a felony. . . ., the person recklessly causes the death of another person.<sup>9</sup>

That subsection of the first degree murder statute was amended after and as a result of *Williams*. But the statute quoted above was as it appeared when Shumate was murdered. And the interpretation which *Williams* reversed was the operative interpretation when this murder occurred.

*Williams* was decided in 2003 and, again, a post-conviction relief motion filed in 2008 would ordinarily be barred as being filed beyond three years. But, in 2007, in *Chao v. State*<sup>10</sup> the Supreme Court held that *Williams*' re-interpretation should be retroactively

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<sup>8</sup> *Supra*.

<sup>9</sup> 11 *Del. C.* § 636(a)(2).

<sup>10</sup> 931 A.2d 1000 (Del. 2007).

applied.<sup>11</sup> Clearly, therefore, when it was held in June 2007 that a right to retroactive interpretation would be recognized, Anderson’s motion filed within a year thereafter is not time barred.

That leads to the second applicable procedural bar. Rule 61(i)(2) bars repetitive motions for postconviction relief, especially where issues were not raised before which should have and could have been raised. Anderson’s first postconviction motion was filed in 1996. This Court denied it.<sup>12</sup> That denial was affirmed in 1997.<sup>13</sup> Anderson did not raise in that prior motion the issues raised in this motion. Nor, based on the sequence described above in the *William’s/Chao* decisions, could he have done so.

Chao had previously litigated “in furtherance of.”<sup>14</sup> Therefore, in 2007 when re-litigating it, the potential bar for her was Rule 61(i)(4), re-litigation of a prior claim. That bar has a means of relief where reconsideration is merited in the “ interests of justice.” The court in *Chao* determined the interest of justice required *Williams* to be applied retroactively.<sup>15</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *State v. Anderson*, 1996 WL 769265 (Del. Super.).

<sup>13</sup> *Anderson v. State*, 1997 WL 346191 (Del.).

<sup>14</sup> *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992). The *Williams*’ reinterpretation reversed the “in furtherance of” holding in *Chao*.

<sup>15</sup> *Chao v. State*, 931 A.2d at 1002.

The “interest of justice” relief language in (i)(4) is identical to Rule 61(i)(2) which is the other bar potentially applicable to Anderson’s claim. There is no reason why the same words should receive different application. That means Anderson could not have known in 1996 and 1997 that in 2007 it would be held that the 2003 *Williams*’ decision had to be retroactively applied “in the interest of justice.”

In sum, there are no procedural bars to consideration of Anderson’s second motion for postconviction relief.

**B**

In order to accomplish consideration of Anderson’s current motion, some context is needed. He, along with co-defendant Travis, was originally charged as follows:

Count I. A Felony

MURDER IN THE FIRST DEGREE in violation of Title 11, Section 636 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, did intentionally cause the death of Steven Shumate by beating him about the head and body.

COUNT II. A FELONY

POSSESSION OF A DEADLY WEAPON DURING THE COMMISSION OF A FELONY in violation of Title 11, Section 1447 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, did knowingly possess a deadly weapon during the commission of a felony by

possessing a bat, a deadly weapon, during the commission of Murder, as set forth in Count I of this indictment, which is incorporated herein by reference.

### COUNT III. A FELONY

CONSPIRACY FIRST DEGREE in violation of Title 11, Section 513 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, when intending to promote the commission of a class A felony, Murder First Degree, in violation of 11 Del. C. Section 636, did agree with each other that they would engage in conduct constituting said felony and did commit an overt act in pursuance of said conspiracy by beating Steven Shumate.<sup>16</sup>

At trial, this Court, over the State's objection, dismissed Count II, the PDWDCF charge holding that a baseball bat was not a deadly weapon. The case was submitted to the jury on the murder and conspiracy counts. Travis and Anderson were found not guilty of the conspiracy charge, but they were found guilty of intentional murder. The State separately appealed the dismissal of the PDWDCF charge. This Court's decision was reversed, holding the bat was a deadly weapon, and remanded to reinstate Count II.<sup>17</sup> Ultimately, the State entered a nolle prosequi on that charge.<sup>18</sup>

Anderson's argument, however, is premised on this Court's dismissal of the PDWDCF charge prior to the case going to the jury. The reinstatement later of Count II

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<sup>16</sup> Indictment dated September 30, 1991.

<sup>17</sup> *State v. Travis*, Del. Supr., No. 97, 1992, Walsh, J. (October 7, 1992)(ORDER).

<sup>18</sup> Docket #38. June 4, 1993.

does not change the basic issue his motion raises. That issue, nevertheless, lacks merit. He was not convicted of felony murder. He was convicted of intentional murder. There was no felony “imbedded” in the murder charge. *Williams* and *Chao* have no application to this case. Further, possession of a deadly weapon during the commission of a felony is not a predicate felony for felony murder. Murder was the predicate felony for possession of a deadly weapon during the commission of a felony.

Anderson further argues that the murder charge is defective in any event. The basis for that is that the indictment does not specify the particular subsection of § 636 he violated. He is correct, it does not. But a comparison of Count I and the appropriate subsection in § 636 reveals this contention too lacks merit:

- (a) A person is guilty of murder in the first degree when:
  - (1) The person intentionally causes the death of another person.<sup>19</sup>

\* \* \* \* \*

#### COUNT I. A Felony

MURDER IN THE FIRST DEGREE in violation of Title 11, Section 636 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, *did intentionally cause the death of Steven Shumate by beating him about the head and body.*<sup>20</sup>

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<sup>19</sup> 11 *Del. C.* § 636(a)(1).

<sup>20</sup> Indictment dated September 30, 1991. (emphasis added).

The language in Count I clearly indicates that Anderson was indicted under § 636(a)(1). The Court has considered this claim only because of its interrelationship to the underlying *Williams/Chao* claims.

Also tied into that underlying claim are two others. The first is that the Count II's dismissal meant he should have been tried on a lesser included offense. Unrelated to the dismissal, the jury was given the option of finding him guilty of second degree murder or manslaughter, or not guilty. This option was given because of the evidence at trial relating to the circumstances of the killing, not because Count II was dismissed. Nevertheless, the jury's rejection of both of those lesser includeds makes this argument moot. This is aside from the fact that it lacks merit in its own right.

Anderson's final related ground for postconviction relief is that his trial counsel was ineffective for not objecting to the Court's instructions regarding the first degree murder charge. At first blush, this ground would confront several procedural bars: timeliness, failure to raise, etc. But, it too is tied to his *Williams/Chao* claim: the conviction of first degree murder should be vacated due to those decisions.

When making a claim of ineffective assistance of counsel, Anderson must show (1) counsel's representation fell below an objective standard of reasonableness, and that (2) but for counsel's errors, there is a reasonable probability the outcome of the proceedings

would have been different.<sup>21</sup> He must make concrete allegations of ineffectiveness and substantiate those allegations or risk summary dismissal.<sup>22</sup>

This final ground for postconviction relief must also fail. It is premised, as noted, on the *Williams/Chao* ground which is without merit. That means had trial counsel raised the objection Anderson now says she should have, it would have been overruled. It would have been overruled because *Williams/Chao* was not the law in 1992 and Anderson was not charged with or convicted of felony murder. There was not then and there is not now a basis for this objection. Consequently, there could not have been then nor could there now be a basis for counsel error. Failure to satisfy the first prong, that there was counsel error, means counsel was not ineffective.<sup>23</sup>

The claim of prosecutorial misconduct is not tied to anything. On the assumption that it is tied to failure to indict for a violation of § 636(a)(1), it is without merit.

### *Conclusion*

For the reasons stated herein, defendant Lester Anderson's motion for postconviction relief is **DENIED**.

**IT IS SO ORDERED.**

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J.

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<sup>21</sup> *Capano v. State*, 889 A.2d 968, 975 (Del. 2006).

<sup>22</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

<sup>23</sup> *Righter v. State*, 704 A.2d 262 (Del. 1997); *cert. denied* 523 U.S. 1126, 118 S. Ct. 1814, 140 L.Ed.2d 951 (1998).