

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

STATE OF DELAWARE,

v.

GARY PIERCE,

Defendant.

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ID. No. 0407019516

Submitted: October 24, 2007

Decided: February 4, 2008

**OPINION**

*Defendant's Motion for Postconviction Relief.  
Summarily Dismissed.*

*Appearances:*

Gary D. Pierce, Pro Se.

Timothy Donovan, Esquire, Wilmington, Delaware.  
Deputy Attorney General.

**JOHN E. BABIARZ, JR., JUDGE.**

Defendant Gary Pierce has filed a motion postconviction relief seeking a new trial for two counts of Attempted First Degree Rape, two counts of First Degree Rape and one count of theft. He alleges three instances of ineffective assistance of counsel. For the reasons explained below, Defendant's motion is summarily dismissed.

Emily Hoffner<sup>1</sup> worked alone as a leasing agent in a model-apartment office. One day Defendant Gary Pierce arrived for a tour of the apartment. He then grabbed, punched her in the face and forced her into the bathroom. He bent her over the bathtub and tried unsuccessfully to rape her vaginally from behind. He moved her to the toilet and tried again to penetrate her vagina. He then forced her into the bedroom and succeeded in raping her. Before fleeing, he stole her driver's license. Pierce was convicted as charged and sentenced to 80 years in prison. His convictions and sentence were affirmed on appeal.<sup>2</sup>

In his postconviction relief motion, Pierce alleges that the representation of counsel was not up to constitutional standards. To prevail on this claim, Pierce must show that counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, the outcome of the trial would have been different.<sup>3</sup>

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<sup>1</sup>This name is the pseudonym adopted by the Supreme Court in its decision affirming Pierce's conviction. *See* Supr. Ct. R. 7(d).

<sup>2</sup>*Pierce v. State*, 911 A.2d 793 (Del. 2006).

<sup>3</sup>*Strickland v. Washington*, 466 U.S. 668, 697 (1986).

Pierce alleges that Richard Weir, Jr., Esquire, and Edmund Hillis, Esquire, of the Public Defender's Office, were representing him at the same time, and the docket sheet shows some overlap for a short period of time. Mr. Weir entered his appearance on August 18, 2004, and Mr. Hillis filed a motion for reduction of bail on August 25, 2004. Mr. Weir filed a motion for reduction of bail on October 13, 2004, and withdrew from the case on January 20, 2005. Pierce asserts that he retained Mr. Weir because he did not want to be represented by a public defender and he asserts that the situation is inherently prejudicial. It is not, and Pierce has not shown any prejudice that he suffered because of it.

Pierce asserts that the docket sheet establishes that he was not present at the arraignment, but the docket shows which proceedings occurred, and when, not who was present. The record includes a form documenting Pierce's decision to forego being present at his arraignment and to enter a plea of not guilty to the charges against him. Under Super. Ct. Crim. R. Rule 43, a defendant is required to be present at all stages of the proceedings unless he defendant enters a written pleading under Rule (10 ( c )). This is what occurred in Pierce's case, and he was not prejudiced by it.

Pierce alleges that trial counsel was ineffective for failing to move to suppress charges on the indictment that were different from what is listed on the probable cause affidavit. There is no requirement that the Attorney General's Office charge a defendant

with the same conduct that a police officer presented on a probable cause sheet. Defense counsel's conduct did not fall below a reasonable professional standard in not moving to suppress any portion of the indictment.

Defendant argues that his attorney was ineffective failing to object to the State's use of the phrases "crime scene," "sexual assault" and "victim" during the trial. He alleges that use of these phrases deprived him of the presumption of innocence and a fair trial. He identifies two places in the trial transcript where the phrase "crime scene" is used. The first is a police officer's summary of his activities when he is called to a crime scene, a reference which posed no risk to Defendant. The second is a question posed by defense counsel, who asked the chief investigating officer a series of questions calculated to show that the victim's driver's license had not been found among Defendant's possessions. At another point in the trial, the prosecutor asked a police officer "At some point [the victim] describes to you that this sexual assault, some of the actions took place in the bedroom?" The prosecutor was referring to the victim's version of the incident, which was nothing if not a sexual assault. This phrase caused no prejudice. Defendant points to three times the word "victim" was used. The first two occurred in the testimony of two police officers. Use of the word "victim" in a rape trial does not constitute reversible error because to law enforcement officers the word "victim" is synonymous

with the complaining witness.<sup>4</sup> The word “victim” should not be used in a case where the commission of a crime is in dispute.<sup>5</sup> In this case, the evidence left no room for doubt that a crime had been committed in the model apartment: the victim had a bruised face, a cut lip, a bruised thigh and external genital injuries. The other reference to a victim occurred during the State’s closing argument, when the prosecutor was explaining the elements of the crime of rape in the first degree. In other words, this reference was an abstraction. The Court finds nothing that called for an objection from counsel, and this claim is without merit.

Lastly, Defendant alleges there were inconsistencies in the State’s case to which defense counsel should objected. Defendant asserts that the victim and the examining nurse gave inconsistent testimony about the knife. Although the victim did not see a knife, she stated at trial that he had said he a knife, and the SANE<sup>6</sup> nurse read from the report that the victim had told her that Defendant had a knife. This is not inconsistent testimony that defense counsel should have objected to or that caused prejudice. Defendant also argues that the prosecutor’s statement about the victim urinating in her pants because she was so frightened was inconsistent with the victim’s testimony on that topic. In fact, the transcript shows no inconsistency or inaccuracy whatsoever. This

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<sup>4</sup>*Jackson v. State*, 600 A.2d 21(1991).

<sup>5</sup>*Id.*

<sup>6</sup>Sexual Assault Nurse Examiner.

claim is frivolous and presents no justiciable issue.

Defendant alleges that other inconsistencies exist in the testimony. Any such inconsistencies are for the jurors to resolve, and they did.

Defendant Gary Pierce's motion for postconviction relief is summarily dismissed.

*So ordered.*

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Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw  
Original to Prothonotary