

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

STATE OF DELAWARE,)	
)	
v.)	I.D. # 0212008942
)	
)	
LEON PERKINS,)	
)	
Defendant.)	

Date Submitted: October 19, 2007
Date Decided: June 11, 2008

OPINION

Defendant's Pro Se Motion for Postconviction Relief
DENIED.

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Leon Perkins, Delaware Correctional Center, 1181 Paddock Road, Smyrna,
Delaware 19977, Defendant, *pro se*.

I. INTRODUCTION

Defendant collaterally attacks his convictions for First Degree Murder, Possession of a Firearm During the Commission of a Felony and Possession of a Deadly Weapon or Ammunition by a Person Prohibited. He claims that a Constitutional violation and ineffective assistance of counsel require this Court to grant a new trial. For the reasons set forth below, Defendant's Constitutional claim is **SUMMARILY DISMISSED** and his ineffective assistance of counsel claim is **DENIED**.

II. BACKGROUND

On April 22, 2005, a jury convicted Defendant Leon Perkins ("Perkins") of First Degree Murder, Possession of a Firearm During the Commission of a Felony ("PFDCF") and two counts of Possession of a Deadly Weapon or Ammunition by a Person Prohibited ("PDWPP"). Perkins was sentenced to mandatory life imprisonment on the First Degree Murder charge, plus an additional 16 years on the remaining charges.¹ On July 19, 2005, he filed a motion for judgment of acquittal. This Court denied that motion on November 9, 2005.² He appealed his convictions and

¹ Sentence Order, Docket Item ("D.I.") 78.

² *State v. Perkins*, 2005 WL 3007807 (Del. Super.).

the Delaware Supreme Court affirmed on February 26, 2007.³ On May 23, 2007, Perkins filed this *pro se* Motion for Postconviction Relief.⁴

III. PERKINS' CONTENTIONS

In this motion, Perkins raises six grounds for relief:

Ground One: He claims denial of his right to effective assistance of counsel because his attorneys failed to request missing evidence instructions.

Ground Two: He claims that his right to due process was violated by the State's destruction and suppression of exculpatory *Brady* evidence.

Ground Three: He claims denial of his right to effective assistance of counsel because his attorneys failed to raise proper objections at trial to prosecutorial misconduct.

Ground Four: He claims denial of his right to effective assistance of counsel because his attorneys failed to file a motion to sever the two PDWPP charges.

Ground Five: He claims denial of his right to effective assistance of counsel because his attorneys wrongfully advised him to reject lesser-included offense instructions relating to the First Degree Murder charge.

Ground Six: He claims denial of his right to effective assistance of counsel because his attorneys failed to object to inadequate jury instructions.

IV. DISCUSSION

Under Delaware law, this Court must first determine whether Perkins has met the procedural requirements of Superior Court Criminal Rule 61(i)

³ *Perkins v. State*, 920 A.2d 391 (Del. Super. 2007).

⁴ Mot. for Postconviction Relief ("Postconviction Motion"), D.I. 95.

before it may consider the merits of his postconviction relief claim.⁵ Rule

61(i) provides:

(1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court;

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice;

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows (A) Cause for relief from the procedural default and (B) Prejudice from violation of the movant's rights;

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice;

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction 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.

A. Perkins' Due Process Claim is Procedurally Barred.

Perkins' second ground for relief, that his right to due process was violated by the State's destruction and suppression of exculpatory *Brady*

⁵ Super Ct. Crim. R. 61(i)(1)-(5).

evidence, is procedurally barred under Rule 61(i)(3).⁶ He never raised the issue at trial or on direct appeal and he fails to show either cause or prejudice as required by Rule 61(i)(3)(A) and (B).

Perkins also fails to establish a colorable claim of a constitutional violation to warrant application of the exception to the procedural bar.⁷ Although he claims that the State's destruction and suppression of exculpatory evidence undermined his ability to adequately prepare his defense in violation of *Brady v. Maryland*,⁸ he fails to offer any factual basis for this assertion.⁹ In his memorandum of law, Perkins makes no allegation that the State actually suppressed or destroyed evidence (which would imply that they once had possession of the evidence) rather he argues that the State failed to gather evidence which would have helped him to prove self-defense.¹⁰ In *Lolly v. State*,¹¹ the Delaware Supreme Court ruled that the State has a duty to gather and preserve potentially exculpatory evidence.¹² Perkins fails to establish that the State violated this duty. First, he fails to

⁶ Super. Ct. Crim. R. 61(i)(3).

⁷ See Super. Ct. Crim. R. 61(i)(5).

⁸ 373 U.S. 83 (1963)(holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

⁹ Postconviction Motion.

¹⁰ Perkins claims that the State failed to obtain a bullet from his ceiling, the gun used to murder the victim, Aunyea Hawkins, and the clothes that he wore on the night of the murder. He also claims that the State failed to compare Hawkins' fingerprints to those found on the ammunition box and to the fingerprints found in Perkins' apartment.

¹¹ 611 A.2d 956 (Del. 1992).

¹² *Lolly v. State*, 611 A.2d 956, 959 (Del. 1992).

establish that the evidence was exculpatory. He baldly claims that the evidence would have helped him to substantiate his claim of self defense. For the reasons set forth more fully below, he fails to establish that any of the “missing” evidence was exculpatory or that he was substantially prejudiced as a result of its absence. Second, defense counsel never requested that the State locate or gather the “missing” evidence therefore the evidence was never discoverable under *Brady* or *Lolly*.¹³ As such, neither the State nor the Wilmington Police Department breached its duty to gather and preserve evidence and thus Perkins was not denied due process. Because Perkins fails to show cause and prejudice under Rule 61(i)(3) and he does not assert a “colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the . . . fairness of the proceedings leading to the judgment of conviction” under Rule 61(i)(5), this claim is **SUMMARILY DISMISSED**.

B. Perkins’ Ineffective Assistance of Counsel Claim Fails the
Strickland Test.

For Perkins’ remaining five grounds for relief, he claims ineffective assistance of counsel. This claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a claim, even when the claim

¹³ See Defense Counsel Aff.

has not been previously raised.¹⁴ To prevail on this claim, Perkins must meet the two-pronged *Strickland* test by showing that (1) counsel performed at a level “below an objective standard of reasonableness,” and (2) “the deficient performance prejudiced the defense.”¹⁵ The first prong requires Perkins to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires Perkins to show “that there is a reasonable probability that, but for defense counsels’ unprofessional errors, the result of the proceeding would have been different.”¹⁶ When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.¹⁷ This standard is highly demanding because there is a strong presumption that counsels’ conduct was reasonable.¹⁸

1. Missing Evidence Instructions

Perkins maintains that his attorneys were ineffective for failing to request missing evidence instructions. In *Deberry v. State*,¹⁹ the Delaware

¹⁴ See *Reynolds v. Ellingsworth*, 843 F.2d 712, 723 (3d Cir. 1988), cert. denied, 488 U.S. 960 (1988).

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¹⁶ *Id.* at 687-88, 694.

¹⁷ *Id.* at 697.

¹⁸ *Flamer*, 585 A.2d at 754.

¹⁹ The Court in *Deberry* adopted a two-part analysis to determine whether a missing evidence instruction is proper. The first three inquiries are: 1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady* 2) if so, did the government have a duty to preserve the material and 3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach. If the Court determines that the State

Supreme Court held that if the State breaches its duty to preserve discoverable evidence, a defendant is entitled to a missing evidence jury instruction. Because Perkins fails to establish that a missing evidence instruction was warranted under *Deberry*, he fails to establish that defense counsels' failure to request such an instruction was objectively unreasonable.

a. The Missing Bullet

Perkins claims that counsel failed to request a missing evidence instruction with respect to a bullet from the ceiling in his apartment. He argues that the bullet (which he claims became lodged in the ceiling after the victim, Aunyea Hawkins, shot at him) would have bolstered his claim of self defense. Defense counsels' decision not to request a missing jury instruction was not objectively unreasonable because the evidence would not have met the requirements of *Deberry*. Specifically, the bullet was never in the possession of the State and defense counsel never requested the State to locate and gather the item.²⁰ Instead, defense counsel made an independent effort to locate the bullet. Defense counsel submits that they sent a defense

breached its duty to preserve the requested material, the Court analyzes three additional factors to determine an appropriate remedy: 4) the degree of negligence or bad faith involved 5) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available and 6) the sufficiency of the other evidence produced at the trial to sustain the conviction.

²⁰ The State cannot be faulted for not obtaining the alleged bullet. The record of the preliminary hearing reflects that the State examined the walls and ceiling in Perkins' apartment and no damage was found to indicate that a gunshot had been fired in the apartment. The testimony of several neighbors stating that they heard only one gunshot corroborates the State's finding. 457 A.2d 444 (Del. Supr. 1983).

investigator to the apartment to search for the bullet but he was denied permission to enter by management.²¹ At that point, counsel decided not to secure a court order to enter the apartment. Defense counsel explained their reasoning that “if a bullet were found, [Perkins’] defense would be bolstered, if a bullet were not found, the State would use this fact to seriously undermine the entire defense at trial.”²² Instead they presented the jury with photos of the ceiling (which depicted a bullet hole in the ceiling), the results of gun shot residue testing on Hawkins’ hands and fingernails and the fact that two bullets were missing from the ammunition box in order to substantiate a self-defense claim.²³ Counsels’ decision to forego a court order and rely on more dependable evidence was a reasonable strategic decision.

b. The Missing Gun

Perkins next claims that his attorneys failed to request a missing evidence instruction with respect to the lost gun. He states that if the State had recovered the gun, the “serial numbers could have been proven to be registered to a friend of the deceased whom would have admitted purchasing the gun for the deceased.”²⁴ He also contends that the gun would have

²¹ Defense Counsel Aff., D.I. 104.

²² *Id.*

²³ *Id.*

²⁴ Postconviction Motion at 10.

negated the State's theory that his brother, Kevin Perkins, shot the hole in the ceiling.²⁵ Defense counsel states that Perkins never told them this information²⁶ and to the extent that Perkins intentionally threw the gun into the river in order to prevent the police from finding it, he cannot fault the State for its absence. The Court wholeheartedly agrees. Under the circumstances, counsels' failure to ask for a missing evidence instruction for evidence *that their client intentionally disposed of* was not unreasonable.²⁷

c. Failure to Compare Fingerprints on Ammunition Box

Perkins next claims that his attorneys failed to request a missing evidence instruction with respect to the State's failure to compare Hawkins' fingerprints to those found on the ammunition box. Because the police recovered a print of Perkins' thumb from the box of ammunition on the floor of *his* apartment, he fails to establish how the presence of Hawkins' fingerprints on the box would have exonerated him of Possession of a Deadly Weapon or Ammunition by a Person Prohibited. Furthermore, the record reflects that defense counsel made an issue of the State's failure to compare fingerprints both during cross-examination of Detective Conner²⁸

²⁵ *Id.*

²⁶ Defense Counsel Aff.

²⁷ Perkins argues that the police were negligent for waiting 10 months before they searched the river for the gun. In light of the fact that Perkins admittedly threw the gun into the river so that the police would not find it, his claim is not only meritless, but absurd.

²⁸ Trial Tr. 100:4-8, D.I. 88.

and again during closing argument.²⁹ Therefore, Perkins fails to establish that he was prejudiced by the conduct of his attorneys.

d. Preservation of Hawkins' Fingerprints and Test

Perkins next claims that his attorneys were ineffective because they failed to request a missing evidence instruction with respect to the State's failure to preserve Hawkins' fingerprints for comparison against those found at the crime scene. Because Hawkins' presence at Perkins' apartment was not in contention, such evidence is not relevant and a missing evidence instruction was not warranted.

e. Preservation of Clothing

Perkins claims that his attorneys were ineffective for failing to request a missing evidence instruction with respect to the State's failure to preserve his clothing seized at the time of his arrest. He hypothesizes that his clothing could have tested positive for gunpowder residue which could have helped prove his self defense claim (that Hawkins' shot at him first). He further claims that the absence of blood stains on his clothing would have discredited the State's theory that he shot Hawkins at close range. There is

Q: But at no time in your investigation, did you direct that Aunyea's fingerprints be correlated against the prints that we had, the latents from the cartridge box; is that not correct?

Det. Conner: That's correct, I did not.

²⁹ Trial Tr. 75:18-23, D.I. 91. “. . . the police never bothered to compare the fingerprints they found on this box against the known fingerprints they found on this box against the unknown fingerprints of Aunyea Hawkins. What would that do to the State's case if her fingerprints, in addition to his, were found on the box?”

no factual basis to support this claim. As defense counsel points out, there is no evidence that the clothing would have had any evidentiary value after two days of continuous wear. Defense counsel states that they had some of *Hawkins'* clothes tested for gunpowder residue and the results were negative.³⁰ The fact that *Hawkins'* clothing tested negative for gunpowder residue undermines Perkins' claim that *Hawkins'* shot at him first. Moreover, Perkins fails to explain how the alleged absence of close range blood stains corroborates his claim of self defense. This claim is unsubstantiated and therefore unavailing.

f. Hawkins' Hand and Fingernail Clippings

Perkins next claims that his attorneys were ineffective for failing to request a missing evidence instruction with respect to the State's failure to test *Hawkins'* hands and fingernails for gunpowder residue. Defense counsel had this testing performed and the positive results were introduced at trial via the testimony of Dr. Bokowska.³¹ Thus, this claim is without merit.

2. Prosecutorial Misconduct

Perkins argues that his attorneys were ineffective for failing to object to several improper prosecutorial remarks. According to Perkins, the

³⁰ Defense Counsel Aff.

³¹ *Id.*

prosecutor's comments regarding the absence of evidence, the defendant's evidence, and the credibility of Perkins' brothers were improper. This claim is unavailing. A prosecutor is permitted to comment on the evidence and to explain all legitimate inferences that logically flow from the evidence.³² A prosecutor is not permitted to give his or her opinion or belief regarding a witness' credibility.³³ However, if the evidence supports the prosecutor's contentions regarding a witness' truthfulness, then the statement is not improper.³⁴ In this case, the prosecutor's comments were supported by the evidence presented at trial. The comment with respect to the photographs depicting a bullet hole in Perkins' apartment ("They're junk or they're worse,"³⁵) is the only potentially objectionable statement, but it, too, is arguably supported by the evidence. Kevin Perkins, defendant's brother who took the pictures of the ceiling, denied that he shot a hole in the ceiling but conceded on cross examination that he had the opportunity to do so.³⁶ The prosecutor's argument that Perkins' brother was responsible for shooting the hole in the ceiling was a reasonable inference. Because the

³² *State v. Yoder*, 541 A.2d 141, 143 (Del. Super. 1987).

³³ *Clayton v. State*, 765 A.2d 942, 43 (Del. 2001).

³⁴ *Id.* at 943.

³⁵ Trial Tr. 37:12-13, D.I. 91.

³⁶ See Trial Tr. 141:18-142:1, D.I. 89.

prosecutor's comment was based on evidence presented at trial, it was proper and defense counsel was not ineffective for failing to object.³⁷

Perkins also claims that the prosecutor's remarks suggesting that he had a gun prior to December 2002 violated the stipulated agreement and misled the jury to believe that the gun he previously possessed was the same gun used to kill Hawkins. This argument fails for several reasons. First, the remarks did not unequivocally refer to his prior conviction for carrying a concealed weapon and therefore, the Court's *Getz* ruling was not violated.³⁸ Second, because Perkins testified that he had a gun prior to December 2002, he fails to establish any prejudice resulting from the comment.³⁹ Finally, counsels' decision to avoid calling further attention to the reference at trial was tactical and not objectively unreasonable.

3. Failure to Sever PDWPP Charge

Perkins argues that his attorneys were ineffective for failing to file a motion to sever the two Possession of a Deadly Weapon or Ammunition by a Person Prohibited charges. This claim is without merit because the underlying charge that made him a person prohibited (carrying a concealed

³⁷ After the State concluded its closing arguments, the Court discussed with both parties whether a curative instruction was necessary with respect to the State's characterization of the photographs. After considerable discussion, the Parties agreed that the State's comment was "minimally damaging, if at all." Trial Tr. 58:15, D.I. 91. The Court remains satisfied that the State's comments did not render the result of the trial fundamentally unfair or unreliable. See Trial Tr. 55:21-58:18, D.I. 91.

³⁸ See Trial Tr. 6:11-7:16, D.I. 90.

³⁹ See Trial Tr. 135:18-23, D.I. 67.

weapon) was removed from the indictment.⁴⁰ Therefore, the nature of Perkins' prior felony conviction was not disclosed to the jury, and Perkins fails to show that failure to sever the two PDWPP charges prejudiced his defense.⁴¹

4. Lesser-Included Offenses

Perkins argues that his attorneys were ineffective for failing to adequately advise him on the parameters of lesser included instructions. He claims that counsel did not explain the consequences of not having the jury instructed on the lesser included offenses of First Degree Murder. This claim is unsupported by the record. The record clearly reflects that the Trial Court conducted the following independent colloquy with Perkins regarding *his decision* not to seek instructions on lesser included offenses:

Court: Do you feel that you've had ample opportunity to talk with your counsel about the implications of not having this jury charged on lesser-included offenses?

Defendant: Yes.

Court: And you feel confident that this is a decision that you are making and it's in your best interest to proceed to the jury with only the charge of murder in the first degree?

Defendant: Yes.

⁴⁰ See Trial Tr. 5:9 -6:14, D.I. 85.

⁴¹ See *Bates v. State*, 386 A.2d 1139 (Del. 1978) (holding that "mere hypothetical prejudice is not sufficient" for defendant to carry burden of demonstrating prejudice from refusal to grant a severance).

Court: Did counsel explain to you the statutory penalties associated with the lesser includeds?

Defendant: Yes.

Court: Did they explain to you the statutory penalty associated if you're convicted of murder first degree?

Defendant: Yes.

Court: And, you're confident, again, that you wish to go forward and charge the jury on no – no lesser included offenses of murder first degree?

Defendant: Yes.

Based on this colloquy, it is clear that Perkins was informed of the potential ramifications of *his* decision to not ask for instructions on lesser-included offenses of First Degree Murder. Moreover, defense counsel warned Perkins of the danger of an “all or nothing” strategy and had discussions about lesser includeds at least three times.⁴² Defense counsel felt that “a strict interpretation of the requested jury instruction devoid of a lesser included offenses should lead the jury to find movant did not have the requisite intent for Murder in the First Degree or the related charges and felt that absent such intent, the jury must legally acquit the defendant. Movant

⁴² Defense Counsel Aff.

and his counsel felt this approach was risky but worth the effort.”⁴³

Counsels’ decision was tactical and not objectively unreasonable.

5. Inadequate Jury Instructions

Perkins argues that his attorneys were ineffective for failing to object to inadequate jury instructions. Specifically, he claims that given the three different theories of liability (intentional murder, accidental killing and self defense), defense counsel should have requested a specific unanimity instruction that the jury must agree unanimously upon the criminal act or acts. This claim is availing because Perkins fails to show that the Trial Court’s general jury unanimity instruction was inadequate. Perkins’ reliance on *Probst* is misplaced.⁴⁴ In *Probst*, “a specific unanimity instruction was desirable since there was one charge (assault) and evidence of two separate incidents (Probst’s shots and Miller's shots) to support a conviction on alternate theories of liability.”⁴⁵ Unlike in *Probst*, the fatal shooting of Hawkins involved a single individual with a single gun and not simultaneous actions by two individuals each firing separate weapons at the same victim. Although three different theories of liability were asserted, they were not so complicated as to require a particularized instruction. Therefore, Perkins fails to establish that the general jury unanimity instruction was inadequate

⁴³ *Id.*

⁴⁴ *Probst v. State*, 547 A.2d 114 (Del. 1998).

⁴⁵ *Id.* at 124.

or that his attorneys were ineffective for failing to request a specific instruction.

Because Perkins does not present the Court with evidence that defense counsels' conduct fell below that of reasonable professional standards or that he was prejudiced as a result of their conduct, he fails to meet the *Strickland* test and his claim of ineffective assistance of counsel is **DENIED**.

* * *

For the above mentioned reasons, Perkins' Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61, is hereby **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge