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

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	ID. No. 0407019516
	)	
GARY PIERCE,	)	
	)	
Defendant.	)	

Submitted: July 24, 2008
Decided: July 30, 2008

OPINION ON REMAND

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[1] 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.[2]

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.[3]

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

[2]*Pierce v. State*, 911 A.2d 793 (Del. 2006).

[3]*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 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 rape trial does not constitute reversible error because to law enforcement officers the word "victim" is synonymous

with the complaining witness.[4] The word "victim" should not be used in a case where the commission of a crime is in dispute.[5] 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 have 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[6] 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

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[4] *Jackson v. State*, 600 A.2d 21(1991).

[5] *Id.*

[6] Sexual Assault Nurse Examiner.

whatsoever. This claim is frivolous and presents no justiciable issue.

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

In his first amendment to his motion, Defendant argues that if his appellate attorneys had met with him he would have advised them that his conviction for Rape First Degree[7] was a miscarriage of justice because the charge of Assault Third Degree had been dismissed. In other words, he asserts that because he was charged with Rape First Degree pursuant Del. Code Ann. tit. 11, § 773 (a)(2)b, he had to have been charged with Assault Third. As a legal matter, the opposite is true, and Defendant could not have been tried for both Assault Third and Rape First, because all of the elements of Assault third are subsumed in § 773(a)(2)b.[8] The record shows that the State introduced evidence that there was physical injury to the victim and that Defendant acted intentionally, the two elements of assault third.[9] The record also

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[7]DEL. CODE ANN. tit. 11, § 773 (a)(2)b provides as follows:

> (a) A person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and. . .
> (2) The sexual intercourse occurs without the victim's consent and it was facilitated by or occurred during the course of the commission of attempted commission of:
> b. Any of the following misdemeanors. . . assault in the third degree.

[8]*See Manlove v. State*, 901 A.2d 1284, 1289 (Del. 2006).

[9]DEL. CODE ANN. tit. 11 § 611 provides in part as follows:
A person is guilty of assault in the third degree when:

shows that the trial judge properly instructed the jury as to Rape First Degree, including the elements of assault third listed above. The defendant was properly charged with an offense which contains all the elements of another offense, and he could not be charged with both. This claim has no merit.

In his second amendment, Defendant argues that trial counsel was ineffective for failing to argue that Defendant's right to a speedy trial was violated. He notes that he was arrested and charged on July 23, 2004, and went to trial on November 1, 2005, a 16-month delay. The record shows that Defendant paid his first attorney only a portion of the agreed-upon fee, and this Court therefore granted counsel's motion to withdraw. Defendant's second attorney was granted a continuance because of the voluminous materials he received near just prior to the trial date. Defendant's second chair attorney was permitted to withdraw because of medical issues. Those are the reasons for the 16-month delay, and none of them is attributable to the State. When the reasons for the delay are attributable to the defense, they weigh more heavily against the defendant than if the State was responsible for the delay. In some cases, less time than 16 months passes and in others more time passes without a finding of a speedy trial violation *per se*. and the Court finds that in this case the length of delay

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(1) The person intentionally or recklessly causes physical injury to another person.
. . .

was not in and of itself prejudicial.[10] The length of the delay and the reasons for it are the first two factors to be considered, the remaining factor being the prejudice to the defendant.[11] Defendant asserts prejudice but fails to name witnesses he was unable to call or identify other evidence that was unavailable to him because of the delay. He cannot show prejudice if he cannot give some specific fact that would have or could have made a difference in his preparation for trial. Defendant alleges that the victim's memory faded, but again he does not elaborate on how this prejudiced his case. In addition to the impairment of trial preparations, the factors to be considered in assessing prejudice include oppressive pretrial incarceration and the defendant's anxiety and concern. Defendant objects to his pretrial incarceration, which lasted from July 6 to November 24, 2004, at which time he was able to make bail. Defendant received credit time for this period on his sentence, negating to some degree the impact of the pretrial incarceration. Defendant asserts that the delay resulted in loss of his job, disrupted his family life and forced him to live under a cloud of anxiety and concern. The speedy trial determination is a balancing test. In this case, these final factors listed by the defendant do not outweigh the other factors,

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[10] *Fensterer v. State*, 493 A.2d 959 (Del. 1985) (holding that 26-month delay did not deny defendant speedy trial); *Shockley v. State*, 269 A.2d 778 (Del. 1970)(holding that 10-month delay did not violate right to speedy trial because no prejudice accrued).

[11] *Fensterer* at 965 (citing *Barker v. Wingo*, 407 U.S. (1972).

specifically that the length of time itself was not a *per se* violation and that trial preparation was not impaired, and, in fact, may have been improved by granting defense counsel's motion for a continuance. No witnesses have been identified as having disappeared or become unavailable because of the delay. Balanced against the pretrial detention and pre-trial disruption and anxiety, the Court concludes that the scale tips against Defendant and that he was not denied his right to a speedy trial.

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

It Is So Ordered.

Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw
Original to Prothonotary