

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

STATE OF DELAWARE

v.

VERNON ABNER,

Defendant.

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ID#: 9701021889

Submitted: July 18, 2003
Decided: August 12, 2003

ORDER

Upon Defendant's Motion for Postconviction Relief – *DENIED*

After preliminary consideration under Superior Court Criminal Rule 61(d), it plainly appears from the motion for postconviction relief and the record of prior proceedings that movant is not entitled to relief, for the following reasons:

1. After Defendant was found guilty by a jury on February 16, 1999 of Burglary second degree, and related misdemeanors, he filed a motion for judgment of acquittal and a new trial. The court denied Defendant's post-trial

motion by written order on April 20, 1999. After that, Defendant filed a direct appeal, and his conviction was affirmed on June 29, 2000. The mandate was returned and the case was closed on July 18, 2000.

2. Defendant's motion for postconviction was filed on July 18, 2003. Arguably, the motion was filed more than three years after the judgment of conviction was final. The question is so close, however, that the court will consider the motion as timely.

3. Nevertheless, postconviction relief is barred by Rule 61(i)(4) because the two grounds for postconviction relief, discussed below, should have been presented during Defendant's direct appeal.¹ Furthermore, assuming that Rule 61(i)(4) is moderated by Rule 61(i)(3), Defendant has not attempted to show cause for relief from his procedural default, and prejudice from violation of his rights.

4. Defendant offers two grounds for postconviction relief. First, he challenges the jury instructions. Specifically, he claims that he was entitled to an accomplice liability instruction. Second, Defendant alleges newly discovered evidence. He continues to claim that the burglary victim's "roommate" gave

¹ *Flamer v. State*, 585 A.2d 736,745 (Del. 1990).

Defendant permission to be present in the apartment and to move the victim's belongings.

5. The court cannot find in the transcript any request for an accomplice liability instruction. Defendant seems to concede that tacitly by referring to the court's failure to give an accomplice liability instruction as "plain error." Defendant, however, was obliged to challenge the trial court's errors, plain or otherwise, in his direct appeal. In any event, Defendant continues to ignore his own defense at trial. Defendant denied that he was ever in the victim's apartment. He was found in the building because he was knocking on another tenant's door. Meanwhile, according to Defendant, the property he was accused of trying to steal did not belong to the victim, nor even to the victim's "roommate." It was another inmate's property. In other words, if Defendant had requested an accomplice liability instruction, the court would not have given one. An accomplice liability instruction was not supported by the evidence.

6. The court addressed Defendant's newly discovered evidence, at length, in its April 20, 1999 decision denying Defendant's post-trial motions. Again, Defendant's new evidence, if it can be called evidence, flatly contradicts Defendant's own version of events. In any event, the court's decision about

Defendant's evidence also should have been raised on direct appeal.

7. Other than the issue concerning the failure to testify at trial, which was the direct appeal's focus, the case was not close. Basically, Defendant was caught in the act. The victim's reaction when she arrived at the scene provided the basis for admitting her statements that she had been burglarized. The victim's statements were corroborated by circumstantial evidence. And by the same token, the circumstantial evidence readily supported the jury's finding that Defendant was the burglar.

Thus, the motion for postconviction relief is procedurally barred and substantially meritless. The court will enter an order for the motion's summary dismissal. The Prothonotary shall cause the movant to be notified.

IT IS SO ORDERED.

Judge

cc: Prothonotary
Paul Wallace, Deputy Attorney General
Vernon Abner, *Pro Se* Defendant