

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

August 5, 2008

N440 State Mail
Gary E. Jefferson
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Adam D. Gelof, Esquire
Deputy Attorney General
Department of Justice
114 East Market Street
Georgetown, DE 19947

Ronald D. Phillips, Jr., Esquire
215 East Market Street
P. O. Box 561
Georgetown, DE 19947

RE: State v. Gary Jefferson
Defendant ID No. 0604018844 (R1)
Submitted July 25, 2008

Dear Mr. Jefferson, Mr. Gelof, and Mr. Phillips:

This is the Court's decision denying the Defendant's Motion for Postconviction Relief.

This is the Defendant's first Motion for Postconviction Relief and it raises the single issue of ineffective assistance of counsel. It was timely filed. There are no procedural bars, and therefore, the merits of the Motion are discussed below.

Pursuant to Superior Court Rule 61(g), the record was expanded by requesting the Defendant's attorney to respond to the allegations by way of an affidavit. He did. The Defendant was given the same opportunity. He filed his position but it was not in an affidavit. Nevertheless, as discussed below, the lack of an affidavit is not at all critical as to the decision of the court. The Defendant's reply also addresses the State's position per Mr. Gelof's submission of July 2, 2008.

THE BACKGROUND

_____The Defendant was charged with rape in the first degree, kidnaping in the second degree, and rape in the second degree. While in a cell on the day of his preliminary hearing, he asked a friend and cellmate to find someone to kill the victim of the rape. When the cellmate was released, he went to the authorities and informed them of the Defendant's solicitation to have the victim killed. At that time the cellmate cooperated by having "a wire" placed on him to record any other incriminating statements. The cellmate visited the Defendant at Sussex Correctional Institution when the Defendant's incriminating statements were recorded.¹

Subsequently, the Defendant was indicted for the rape offenses and the solicitation offense.

Defense counsel filed several motions, including a motion to sever the solicitation charge from the rape offenses. The motion to sever was denied.

The Defendant, faced with a rape 1st charge, together with a solicitation to murder the complaining witness charge, decided to plea negotiate.

He pled to rape in the third degree and criminal solicitation. With the benefit of a presentence report, he was sentenced in excess of the State's recommendation. He received a total of nine (9) years in prison, followed by probation. He appealed and the sentence was affirmed.

Mr. Jefferson attacks his former attorney as being ineffective for failing to file a motion to suppress any evidence of the solicitation charge due to a violation of his Sixth Amendment right to counsel. The Defendant argues that his cellmate became an agent of the State when he was "wired" and sent to Sussex Correctional Institution to get a recording of the Defendant's comments on arrangements to have a witness killed.

Defense counsel noted in his response that such a motion would have likely failed because the rights to counsel attached to the Defendant's charges related to the rape. The solicitation matter was uncharged at the time the cellmate was "wired" and sent into Sussex Correctional Institution. Therefore, there would be no violation of the Defendant's Sixth Amendment rights to counsel as to the subsequent separate solicitation charge.

¹The facts are based upon the submissions of the defense attorney and the State. Mr. Jefferson concurs and specifically does not dispute that the cellmate was acting on his own when he reported the Defendant's solicitation request occurring on the date of the preliminary hearing.

Counsel also recognized the problem that even if he had the recorded statements suppressed, his client still had the problem of the cellmate's testimony as to what was solicited on the morning of the preliminary hearing. The cellmate was not an agent of the State as to that conversation. The cellmate initiated the contact with the police after his release from jail and he then told the police what the Defendant wanted done. This is not in dispute.

Strickland v. Washington, 466 U. S. 668 (1984) places the burden of proving ineffective assistance of counsel upon the Defendant. The Defendant must prove that his attorney committed a mistake which actually caused the Defendant prejudice. In this case, the Defendant argues that he would not have pled guilty but for the error or omission of defense counsel in not filing a motion to suppress the cellmate's testimony.

I find that defense counsel's decision was reasonable and appropriate. His analysis that the Sixth Amendment right to counsel had not attached to the solicitation investigation was correct.² But more important is that even if he had prevailed as to the suppression of the recording under the above facts, he could not keep the jury from hearing about the solicitation conversation which occurred before the police became involved.

The Defendant has not established his attorney was ineffective. He has not established an error or omission by his attorney, based upon an objective legal standard, in not filing the Motion to Suppress. Nor can he show prejudice because any Motion to Suppress would have failed as to the cellmate's testimony as to the Defendant's statements on the morning of the preliminary hearing.

Defendant's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

THG/baj

cc: Prothonotary

²*State v. Johnson*, 2005 WL1953066 (Del. Super. June 29, 2005).