IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	CRIMINAL ACTION NUMBERS
	)	
v.	)	IN-99-04-0314
	)	through
LUIS G. CABRERA,	)	IN-99-04-0319
	)	
Defendant.	)	ID No. 9904019326

Submitted: April 21, 2008
Decided: August 14, 2008

MEMORANDUM OPINION

Upon Motion by the Defendant for Leave to Take Discovery Without Prejudice - ***DENIED***

Appearances:

Steven P. Wood, Esquire, Loren C. Meyers, Esquire, and Kevin M. Carroll, Esquire, Department of Justice, Wilmington, Delaware, attorneys for the State

Thomas C. Grimm, Esquire, and Rodger D. Smith, II, Esquire, Morris Nichols Arsht & Tunnell, LLP, Wilmington, Delaware, attorneys for defendant Luis Cabrera

HERLIHY, Judge

As part of his amended motion for post-conviction relief, defendant Luis Cabrera moves for leave to take discovery on three matters. He has also filed a separate motion for an evidentiary hearing, a request on which the Court has not yet acted.

Vaughn Rowe and Brandon Saunders were murdered on January 20-21, 1996. Cabrera was convicted of two counts of first degree murder for their deaths and was sentenced to death.[1] His convictions and death sentence were affirmed on direct appeal.[2] Prior to his conviction in this case, Cabrera had been convicted of the first degree murder of Fundador Otero. He was sentenced to life imprisonment in that case. The conviction and sentence were affirmed on appeal.[3]

Otero was murdered in the city of Wilmington in his apartment in January 1995. He was smothered and strangled to death (based on the testimony of his co-defendant, Luis Reyes, who was also his co-defendant in this case). No weapon was used. The record from that case shows Cabrera, and the co-defendant in that case, took Otero's body over to New Jersey where it was placed in a dumpster and set on fire.[4]

As part of the Otero investigation on March 20, 1997, New Jersey State Police and

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[1] *State v. Cabrera*, 2002 WL 484641 (Del. Super.).

[2] *Cabrera v. State*, 840 A.2d 1256 (Del. 2004).

[3] *Cabrera v. State*, 747 A.2d 543 (Del. 2000). There are separate post-conviction proceedings in that matter.

[4] *State v. Cabrera*, 1999 WL 41630 (Del. Super).

authorities from Burlington County came to Delaware. They went to 302 N. Franklin Avenue in Wilmington where Cabrera lived along with his father, Luis Cabrera, Sr. Wilmington Police accompanied them. Cabrera, Sr., gave written consent to the police to search the house. A number of items were seized. According to a police report,[5] Cabrera, Sr., mentioned to the police that there was a gun in the house. The report also states that an unnamed interviewee had told Burlington County authorities that Cabrera, Sr., was depressed and possibly suicidal. Though not connected to the Otero murder, the police seized the gun.

Cabrera, Sr., testified in this murder trial. He recalled the police came to his house on March 20th. He stated Cabrera lived in the basement of 320 N. Franklin Street. Cabrera, Sr., testified he owned a gun which he knew to be a .38 caliber. He did not know the manufacturer.[6] He had owned it since 1976.[7] He turned it over to the police, he testified, since they had not found it during their search of his house.[8] Cabrera, Sr., said he sometimes kept it in the kitchen, sometimes in the living room, and sometimes in his bedroom.[9] On the day the police seized the gun from him, it was in a basket with

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[5] Cabrera Motion, Exhibit C.

[6] Trial transcript, 1/21/2001, at p. 24.

[7] *Id.* at p. 23.

[8] *Id.* at p. 25.

[9] *Id.* at p. 27-8.

clothes in his upstairs bedroom.[10] The police went upstairs with him where he showed them the basket and gun. They took the gun.[11]

Cabrera, Sr., further testified that his son, the defendant, knew he had a gun.[12] But, Cabrera, Sr., also told the jury that the gun which he was shown on the witness stand did not look like his since some scratches were missing.[13]

ATF agent Gregory Klees, however, said this gun[14] fired the bullet[15] which had been recovered from Vaughn Rowe's body at the Medical Examiner's office. The gun was introduced during Klees' testimony without defense objection.

On April 4, 1997, the Wilmington Police returned to 320 N. Franklin Street. This time they had a search warrant, which it is argued was based, in part, on the gun seized on March 20th. They were particularly looking for a burgundy bed sheet or sheets and belts. The victims' bodies had been covered in a burgundy sheet and Rowe had a belt buckle-like wound on his torso.

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[10] *Id.* at p. 28.

[11] *Id.* at p. 28-29.

[12] *Id.* at p. 24.

[13] *Id.* at p. 24.

[14] State's Exhibit 22.

[15] State's Exhibit 20.

During the trial Malika Mathis testified she had been Cabrera's girlfriend around the time of Rowe and Saunders' murders. The State presented her to link the a particular belt seized from 320 N. Franklin Street to Cabrera, and, thereby, to the wound on Rowe's torso. The Medical Examiner testified about similarities of the buckle and wound.

While Cabrera's direct appeal was pending, he moved for a new trial based on newly discovered evidence. The Supreme Court remanded the appeal for consideration of the motion. The motion was that Mathis recanted her testimony about the belt. She also accused the Chief Investigating Officer Mark Lemon of subording perjury; and getting her to testify as she did about the belt. At an evidentiary hearing, Mathis declined to testify but the evidence gathering process revealed:

> Shortly after the receipt of the remand, the Court met with counsel. They mentioned that there were letters between Mathis and Cabrera. Several of the letters, counsel indicated, were allegedly from Cabrera to Mathis and, as a result of her alleged recantation of her recantation, contained threats. Cabrera's counsel said, however, that Cabrera denied writing threatening letters to Mathis.
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> All of these representations led to several steps being undertaken. First, it was agreed that Mathis needed her own counsel. There was a suggestion she may recently have had private counsel in a separate proceeding in the Court of Common Pleas. Cabrera's counsel agreed to check into this. They did and informed the Court that contract counsel would be needed. The Court appointed one for her. The other issue involved is the dispute over the authorship of the threatening letters to Mathis.
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> To resolve the dispute, the Court authorized Cabrera's counsel to hire a handwriting expert. That expert concluded that while Cabrera wrote his name on the outside of the envelopes in which the threatening letters were allegedly sent, Mathis actually wrote the threatening letters to herself. The

> State was satisfied with the expert's report and did not seek to or utilize its own expert.
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> Several evidentiary hearing dates were set but had to be postponed for different reasons. An evidentiary hearing was finally held on December 19, 2002. Mathis appeared. She invoked her rights under the Fifth Amendment when asked, "Did you testify truthfully at the trial of Cabrera?" She was not asked any other substantive questions. The police officer whom she, in her recantation statements, had accused of, in effect, suborning her trial perjury denied all of the accusations Mathis had made. By order and agreement, briefing was undertaken on the admissibility of Mathis' statements in light of her choice not to testify.[16]

This Court ultimately held that Mathis' recantation statements were inadmissable. The matter was returned to the Supreme Court. In its decision on direct appeal, the Supreme Court affirmed this Court's decision to not consider Mathis' recantation statements.[17] The Court also said there was no evidence in the record to support the allegation Lemon had coerced or coached Mathis.[18] In the end, the Supreme Court concurred with this Court's opinion that there was little, if anything, to corroborate the trustworthiness of Mathis' recantation statement.[19]

During the trial, Cabrera presented Keith Powell. His testimony contradicted the State's time line for the murders. On cross-examination, the State used his prior

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[16] *State v. Cabrera*, 2003 WL 25763727 (Del. Super.).

[17] *Cabrera*, 840 A.2d at 1266.

[18] *Id.* at 1267-68.

[19] *Id.* at 1268.

statements to the police to undermine his credibility. It had, however, not disclosed these statements to the defense which was unaware of them until that cross-examination. On appeal, Cabrera argued this non-disclosure was a *Brady* violation.[20] The Supreme Court disagreed and found no *Brady* violation.[21]

In his motion for post-conviction relief, Cabrera argues that the State committed additional *Brady* violations. He says the State should have made known to it "exculpatory" statements of Sparkle Harrigan. She did not testify at Cabrera's trial. She testified at Reyes' trial and seemed to offer a time line, like Powell, which contradicted the State's. Harrigan was Brandon Saunders' girlfriend at the time of the murder. She was asked in cross-examination about statements she made to the police and denied making some of the statements the State said she had. There was an inference, too, in her cross-examination testimony of a drug deal in the works the night of the murders.

Cabrera's Discovery Requests

The Gun and Search of 320 N. Franklin Street

Cabrera seeks discovery on this issue to challenge trial counsel's failure to move to suppress the gun and items seized on April 4, 1997, pursuant to the search warrant. He argues the search warrant is premised on the illegal seizure of the gun. In connection with this request, Cabrera asks this Court to order from the State:

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[20] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

[21] *Cabrera*, 840 A.2d at 1269-70.

- Production of all police and prosecution records and files concerning the search and seizure that took plat at 302 N. Franklin Street, Wilmington, Delaware on or about March 20, 1997, including but not limited to reports, photographs, videotapes, audiotapes, evidence logs, detective's reports, witness statements and physical evidence.

- Production of all police and prosecution records and files concerning any conversations or communications with Luis G. Cabrera, Sr. regarding the gun seized from 302 N. Franklin Street, including any such conversations between Mark Lemon and Luis G. Cabrera, Sr., including but not limited to all notes, reports, interview notes, correspondence or other communications, videotapes, audiotapes, evidence logs, call logs, 911 calls, detective's reports, witness statements and physical evidence.

- Production of all police and prosecution records and files concerning any report that Luis G. Cabrera, Sr. was depressed and possibly suicidal prior to the March 20, 1997 search at 302 N. Franklin Street, including but not limited to all notes, reports, interview notes, correspondence or other communications, videotapes, audiotapes, evidence logs, call logs, 911 calls, detective's reports, witness statements and physical evidence.

- Production of all police and prosecution records and files concerning the search and seizure that took place at 302 N. Franklin Street, Wilmington, Delaware on or about April 4, 1997, including but not limited to all notes, reports, videotapes, audiotapes, evidence logs, detective's reports, witness statements and physical evidence.

- Depositions of Detectives Battaglia and Cuadrado concerning the March 20, 1997 search of 302 N. Franklin Street and the seizure of the gun.

- Depositions of Mark Lemon concerning the March 20, 1997 and April 4, 1997 searches of 302 N. Franklin Street and the seizure of the gun, bed sheet and belts.[22]

The Court declines to go that far. There are several reasons. First, trial counsel have not yet responded to the claims of ineffective assistance. Second, the sworn record

[22] Cabrera Motion pp. 12 - 13.

indicates the gun was not Cabrera's but his father's, was not in his room and voluntarily turned over to the police by Cabrera, Sr. This record suggests an issue of standing may exist, but it is too early to determine that.

The third reason this Court declines to order as much as Cabrera seeks in this motion is that it would be an overuse of discovery. There will be an evidentiary hearing, and the Court and all counsel will have to set out the topics for that hearing. Related to that, there may be things that will have to be produced to the defense prior to the hearing.

There exists no provision in Superior Court Criminal Rule 61 permitting a defendant to obtain additional discovery.[23] The Delaware Supreme Court, however, has recognized that this Court possesses "inherent authority under Rule 61 in the exercise of its discretion to grant particularized discovery for good cause shown."[24] However, "petitioners are not entitled to go on a fishing expedition through the government's files in hopes of finding some damaging evidence."[25] In *Dawson v. State*,[26] the court found the materials requested "[were] not discoverable under a good cause standard because [defendant] has shown no compelling reason for their discovery."[27] Further, the court found that the information

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[23] See Del. Super. Ct. Crim. R. 61.

[24] *State v. Jackson*, 2006 WL 1229684 (Del. Super.).

[25] *Id.*

[26] 673 A.2d 1186 (Del. 1996).

[27] *Id.* at 1198.

sought "was not relevant to any plausible defense theory."[28] Therefore, in order to determine whether defendant's request should be granted, the Court must determine whether defendant has presented a compelling reason for their discovery, i.e. whether the information sought supports the contentions asserted in the post-conviction motion.

Cabrera's first request involving the gun and house search relate to one of his numerous claims for ineffective assistance of counsel. It is well-settled that the test for ineffective assistance of counsel is two fold: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's errors resulted in prejudice to the defendant.[29] As to the first prong of this test, defendant bears the heavy burden of overcoming a presumption "that counsel's conduct falls within the wide range of reasonable professional assistance."[30] In order to show prejudice, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[31]

Based on the record discussed earlier, and the other points, Cabrera has not made a good cause showing to now get all he seeks in this request. And there remains the

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[28] *Id.*

[29] See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[30] *Id.* at 689.

[31] *State v. Drummond*, 2008 WL 2224105 (Del. Super.) at *3.

standing issue as to the request regarding seizure of the gun and items seized later at 320 N. Franklin Street, his motion is **DENIED** without prejudice.

Malika Mathis

In connection with claims about Mathis, Cabrera seeks:

- Production of all police and prosecution records and files concerning Mileka Mathis (aka Aria Chappelle or Aria Prada), including but not limited to all notes, reports, interview notes, correspondence or other communications with Ms. Mathis, photographs, videotapes, audiotapes, detectives' reports, witness statements and physical evidence.

- Production of the personnel records and files for Mark Lemon.

- Production of all police and prosecution records and files concerning any internal affairs investigation regarding Mark Lemon, including but not limited to any internal affairs investigation of Mark Lemon with respect to any relationship or involvement with Mileka Mathis (aka Aria Chappelle or Aria Prada).

- Deposition of Mark Lemon concerning any relationship or involvement with Mileka Mathis (aka Aria Chappelle or Aria Prada), her testimony at Mr. Cabrera's trial, and her failure to testify at the hearing on Mr. Cabrera's new trial motion.

- Deposition of Mileka Mathis (aka Aria Chappelle or Aria Prada) concerning Mark Lemon, Luis Cabrera, and her testimony at Mr. Cabrera's trial.[32]

At this point, again, this request is over broad. One reason is that this Court has held a hearing on the issues involving Mathis. Its decision about her and her alleged recantation were affirmed. Nothing new is presented to warrant granting such a sweeping

[32] Cabrera Motion pp. 15-16.

request. Again, trial counsel have not responded to Cabrera's clams about Mathis. But the door to re-opening this issue is closer to being shut than it is about the gun and items seized pursuant to the search warrant. The Court and counsel will have to further explore how to approach this issue.

The ultimate burden for defendant is whether he is entitled to a new trial. "A trial court should grant a new trial based on a witness' recantation only if (1) the court is 'reasonably well satisfied that the testimony given by a material witness is false,' (2) without the evidence the jury might have reached a different conclusion, and (3) the false testimony took the party seeking the new trial by surprise and the party was unable to meet it, or the party did not know of its falsity until after the trial."[33] Even if defendant were successful in establishing element (1), it is less than clear that he will be able to satisfy element (2), that the jury might have reached a different conclusion, essentially without the belt evidence. At any new trial, Mathis' trial testimony could or would be offered. Cabrera has not established that the requested discovery is relevant to his ultimate burden - that he is entitled to a new trial based on Mathis' recantation. Therefore, as good cause is not present, defendant's request with regards to Mathis is **DENIED**.

Sparkle Harrigan and Keith Powell

Cabrera's final discovery request relates to Harrigan and Powell:

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[33] *Blankenship v. State*, 447 A.2d 428 (Del.1982).

- Production of all police and prosecution records and files concerning Sparkle Harrigan, including but not limited to all notes, reports, interview notes, correspondence or other communications with Ms. Harrigan, photographs, videotapes, audiotapes, detective's reports, witness statements and physical evidence.

- Production of all police and prosecution records and files concerning Keith Powell, including but not limited to all notes, reports, interview notes, correspondence or other communications with Mr. Powell, photographs, videotapes, audiotapes, detectives' reports, witness statements and physical evidence.[34]

The State's response to this request only covered Powell. As seen earlier, the issue involving Powell has already been adjudicated on direct appeal. There is, therefore, a significant question of whether it can be raised again under Rule 61.[35] That discreet question, however, has not been fully explored, but since it was involved in the direct appeal, the Court sees no current basis to order any discovery regarding Powell.

In its response to this motion, on the other hand, the State made no argument about Harrigan. It did respond broadly to Cabrera's underlying Rule 61 motion concerning Harrigan. Here, too, we do not have trial counsel's response to the claim involving Harrigan. Nevertheless, what Cabrera seeks now is over broad. What, if anything, may have to be produced at a later point must await further consultation with counsel.

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[34] Cabrera Motion p. 17.

[35] Superior Court Criminal Rule 61(i)(4).

Conclusion

For the reasons indicated, defendant Luis Cabrera's Motion for Leave to Take Discovery is **DENIED**, without prejudice.

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J.