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

STATE OF DELAWARE,	)	
	)	
	)	
Plaintiff,	)	
v.	)	I.D.No. 0312008370
	)	
ALBERT J. SMITH,	)	
	)	
Defendant.	)	

Submitted: September 28, 2008
Decided: October 2, 2008

OPINION

Defendant's Motion for Postconviction Relief.
Motion Denied.

Appearances:

Karin Volker, Esquire, Deputy Attorney General, Department of Justice.
Attorney for the State of Delaware.

Albert James Smith, *Pro Se.*

JOHN E. BABIARZ, JR., JUDGE.

Defendant Albert Smith was convicted of two counts of Attempted Murder First Degree, two counts of Possession of a Firearm During the Commission of a Felony, and one count of Attempted Robbery First Degree. These crimes were committed when Smith and Co-defendant Keith Campbell devised a plan to rob a liquor store in Claymont, Delaware. They cajoled two acquaintances, Dustin Hare and Austin Dilks, into driving them to the Claymont train station. Upon arrival in the deserted parking lot, Smith told Hare, the driver, where to stop the car. Smith then pulled a gun and shot Hare in the back of the head at point blank range. Miraculously, Hare was not killed and did not even lose consciousness. He fled the vehicle without further injury. Hare's friend Dilks saw the shooting and also fled as he too was shot at by Smith but not hit. Smith and Campbell tried to steal the car, but it rolled into a ditch. The two men left the scene on foot and were apprehended later that evening. Hare, Dilks and Campbell all identified Smith as the shooter. After having been tried and convicted of the crimes related to this incident, Smith was sentenced to life in prison plus 45 years.

Smith's convictions and sentence were affirmed on appeal.[1] Smith has now filed a motion for postconviction relief, alleging ineffective assistance of counsel. He

[1] *Smith v. State*, 902 A.2d 1119 (Del. 2006).

seeks either an evidentiary hearing or a reversal of his convictions.[2] As explained below, his arguments are without merit, and the motion is denied.

To prevail on a claim of ineffective assistance of counsel, a defendant must meet both prongs of the two-part test set forth in *Strickland v. Washington*.[3] Defendant must show that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different.[4] The Court need not address both prongs if the defendant makes an insufficient showing on one.[5] The same standard applies to appellate counsel, and appellate counsel is not obligated to raise every conceivable constitutional claim.[6] In fact, a strategy of raising arguments more likely to succeed on appeal is not indicative of incompetence but rather is the hallmark of effective appellate advocacy.[7]

Defense counsel's failure to retain experts and explore Defendant's

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[2]Defendant has submitted two letters asking whether the Court has received pages 7 and 8 of Defendant's memorandum of law. The answer is yes.

[3]466 U.S. 668 (1984).

[4]*Id.* at 688, 694.

[5]*Id.* at 697(explaining that either performance or prejudice may be addressed first).

[6]*Flamer v. State*, 585 A.2d 736, 758 (Del. 1990).

[7]*Id.*

competence. Defendant asserts that he had a right to an expert witness to rebut the testimony of Dr. Rastogi, the physician who operated on the victim after the shooting, and Detective Ubil, the officer who testified about the size of the bullet. Even if such experts had testified, little could have been said on Defendant's behalf. Dr. Rastogi is a neurosurgeon who had operated on 20 – 25 people with gunshot wounds to the head. He described the victim's wound, the surgery and its aftermath. A defense expert could hardly rebut the treating surgeon's testimony about a bullet lodged in a man's head. Detective Ubil testified to the size of the bullet fragments and his deduction that the bullet was a small caliber bullet. Defendant does not suggest how a ballistics expert could have refuted this testimony.

Defendant also objects to Det. Ubil's testimony about the alleged blood found in the car where the shooting took place. Det. Ubil stated that he observed and photographed several blotches of a red substance, the appearance of which was consistent with blood. This is not expert testimony. Defendant has not shown attorney error in not hiring an expert nor has he shown anything meaningful that an expert could have said. The gun was fired at close range, the wound and the surgery were explained by the surgeon. The victim himself, as well as the two other eyewitnesses, identified Defendant as the person who shot Austin Dilks in the back of his head. Defendant's argument as to expert witnesses has no merit.

Defendant claims that defense counsel failed to retain a psychiatrist, neurologist and psychologist to evaluate the effect of a 2001 car accident on Defendant's competence to stand trial. He suggests that he was entitled to a competency hearing because the car accident caused brain damage that affected his attention and memory. This claim fails for two reasons. First, the record shows that by the time the car accident took place in 2001, Defendant had already accrued an extensive criminal record and that he continued to engage in criminal acts after the accident. Thus there is no suggestion that the car accident affected his ability or desire to commit crimes.

Second, as to competence to stand trial, a defendant is incompetent when he is "unable to understand the nature of the proceedings against [him], or to give evidence in [his] behalf or to instruct counsel on his behalf. . . ."[8] To go forward with a trial, a defendant must be able to consult rationally with counsel, to assist in preparing his defense, and to have both a rational and factual understanding of the proceedings against him.[9] In this case, Defendant addressed the judge at trial more than once with lengthy discourses showing that he fully understood the charges against him, the trial process and the adversarial nature of the proceedings. His numerous *pro se* submissions to the Court show the same degree of understanding. His conduct made

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[8]DEL. CODE ANN. tit. 11, § 404(a).

[9]*State v. Shields*, 593 A.2d 986, 1010 (Del. Super. Ct. 1990).

clear that Defendant had a rational understanding of the charges against him and that he was able to assist counsel in his defense. Defense counsel told the Court that in his professional opinion there was nothing in Defendant's records that supported the need for a psychological expert. Christopher Tease, Esquire, who was Defendant's attorney, is a seasoned criminal defense attorney, and the Court accepted his opinion then and now on the subject of a psychological expert. Defendant has not met either prong of the test for ineffective representation on this issue.

Defendant's letter to Co-defendant Alston. Defendant argues, as he did at trial, post-trial and on appeal, that the letter he wrote Alston, who was not present at the shooting, should not have been admitted into evidence and that counsel was ineffective for failing to consult a handwriting expert to dispute its authenticity. At trial, defense counsel objected to admission of the letter, both on grounds of authenticity and as a discovery violation. The objection was overruled by the trial judge because Alston testified that he recognized Defendant's handwriting and because the letter contained statements that tied it directly to Smith.

On a motion for new trial, Defendant argued that if the letter had been timely produced, he could have found a handwriting expert to refute Alston's testimony that Smith had written the letter. This Court ruled that there was a substantial basis for a

jury to reject an expert's opinion.[10] The Court noted that the letter writer used the nicknames for all three major players and referred to events that only they had in common. In addition, the Court found that the evidence against Defendant was strong, including identification of Defendant as the shooter by the victim and two other eyewitnesses. Assuming that there was a discovery violation, Defendant cannot show prejudice because Defendant was identified as the shooter by the victim, a witness and the do-defendant; thus there was "significant evidence, independent of the [letter]. . . before the jury."[11] This claim has no merit. For the same reasons, Defendant's related argument that defense counsel should have sought sanctions against the State must also fail.

Presence during jury selection. Smith argues that his attorney was ineffective for not insisting that Defendant be present for a portion of jury selection. The following procedure was used at trial in determining which veniremen were unable to serve on the jury. In open court, the judge asked the entire jury pool a series of questions about whether they had personal knowledge of the case or the parties, the lawyers, the police officers, whether the panelists or their family or friends had been

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[10] *State v. Smith*, Del. Super., I.D. Nos. 0312008370 and 0401021784, Babiarz, J. (June 8, 2005).

[11] *Fuller v. State*, 2007 WL 812752 (Del. Supr.) (holding that although the State did not comply with discovery rule in burying reference to taped statement in lengthy report, defendant did not show substantial prejudice from violation and reversal was not warranted).

victims of crimes, whether the panelists had any physical or mental condition that would affect their ability to give service, and other similar questions. Individuals who had affirmative responses to any of the questions were ushered to a smaller room where each person individually explained to the judge his or her reason for seeking to be excused. Counsel were present, and the proceedings were on the record. The alternative process, still followed by some judges, is to remain in the courtroom and have each individual speak to the judge at side bar with counsel but not the defendant present. When appropriate, the judge releases individuals from further service.

In other words, individuals were excused, but no one was selected to serve on the jury. Pursuant to Super. Ct. Crim. R. 43(a), a defendant "shall be present at the arraignment, at the time of the plea, at every stage of the trial **including the impaneling of the jury** and the return of the verdict. . . ." (Emphasis supplied.) The Delaware Supreme Court has said that Rule 43 is mandatory and that a defendant need not show prejudice as part of establishing a violation the Rule.[12] With regard to the jury, a defendant's right to be present refers to the "impaneling" of the jury, that is, selecting individuals to sit on the jury panel, not excusing those who cannot serve.[13]

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[12]*Shaw v. State*, 282 A.2d 608, 610 (Del. 1971).

[13]*See also Dutton v. State*, 452 A.2d 127 (Del. 1982) (holding that Rule 43 was not violated when judge questioned jurors outside defendant's presence about allegations of jury irregularity during trial, but counsel was present and proceedings were on the record).

The Court finds no violation of Defendant's "privilege of presence."[14] This argument is without merit.

Prison garb. Defendant argues that defense counsel was ineffective for failing to obtain street clothing for him to wear at trial and failing to ensure that the restraints worn by two inmate witnesses were removed while they were in court. Defense counsel had no control over what the two inmates wore in the courtroom. Furthermore, both inmates acknowledged on the stand that they were prisoners, so Defendant suffered no prejudice from their clothes. As for Smith's clothing, he wore prison clothes during jury selection and opening statements, but street clothes for the duration of the trial. Making proper and timely arrangements was Defendant's responsibility, and he did succeed in getting street clothes by the time the evidence started.

A Defendant cannot be forced to stand trial before a jury while dressed in identifiable prison clothes,[15] and in this case there is no evidence that anyone forced Smith to appear in prison garb or refused his request for other clothes. Moreover, Defendant's claim falls short on the prejudice prong of the *Strickland* standard. The assertions regarding Smith's clothes and the apparel of two defense witnesses provide no basis for relief.

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[14] *Id.* at 609.

[15] *Smith v. State*, 1998 WL 736382 (Del. Supr.) (citing *Estelle v. Williams*, 425 U.S. 501, 512 (1976)).

Appellate issues. Defendant makes similar arguments regarding appellate counsel, the same attorney who represented him at trial. Defendant claims that appellate counsel should have argued that the letter was inadmissible, should have argued that Defendant had a right to experts in both ballistics and psychiatry, should have argued that the State failed to connect the bullet in the victim's head with the weapon used to shoot the victim, should have argued for street clothes and removal of inmate witnesses' restraints. Defendant raised these issues as errors at the trial level and that is how they have been resolved. They will not be revisited as appellate issues. As stated previously in this Opinion, one of the hallmarks of effective appellate representation is knowing which issues are best raised on appeal and which are best laid to rest.[16]

For all these reasons, Defendant's motion for postconviction is ***Denied.***

It Is So ORDERED.

Judge John E. Babiarz, Jr.

Original to Prothonotary
JEB,jr/ram/bjw

[16] *Flamer v. State*, 585 A.2d at 758.