

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

STATE OF DELAWARE)
)
 v.) ID No. 9703012700
)
LUIS G. CABRERA,)
)
 Defendant.)

Submitted: May 14, 2008
Decided: August 22, 2008

Decision upon Defendant Luis G. Cabrera’s Second Motion
for Postconviction Relief. **GRANTED.**

OPINION

Luis G. Cabrera, Defendant, *Pro Se*

Loren C. Meyers, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State

JOHNSTON, J.

FACTS AND PROCEDURAL HISTORY

On October 26, 1994, Defendant Luis Guillermo Cabrera and the eventual victim, Fundador Otero, conspired to obtain a false State of Delaware identification card. Otero posed in a photograph as Cabrera's father, Luis Cabrera, Sr., and used Cabrera Sr.'s pedigree information.¹

With Otero portraying Cabrera Sr. and Cabrera acting as interpreter, the two used the false identification to procure a second mortgage on Cabrera Sr.'s home without his knowledge. Cabrera Sr. found the false identification card inside a drawer in his house, where Cabrera sometimes left personal items.

Cabrera Sr. went to the Department of Motor Vehicles ("DMV") on December 23, 1994 to report the falsification. When Cabrera Sr. later confronted Otero about the card, Otero became very upset and apologetic and began to cry. On January 3, 1995, during the course of the ensuing fraud investigation, a DMV investigator met with Otero.

Having become aware of the DMV investigation, Cabrera recruited Luis Eduardo Reyes to "take Otero out." On January 5, 1995, Cabrera and Reyes went to Otero's apartment. Reyes did not know Otero before that night. Otero opened the door slightly, but did not remove the chain.

¹ *State v. Cabrera*, 1999 WL 41630 (Del. Super.).

Cabrera and Otero exchanged words in Spanish. As Otero proceeded to close his door, Cabrera kicked it open. Once inside the apartment, Otero was ordered to sit on the couch between Cabrera and Reyes. Otero began to plead with Cabrera that he had not talked to the police about the fraud.

Cabrera insisted that Otero had.

Reyes, a former high school wrestling star, held Otero down. Otero was sixty-seven and slight in stature. Cabrera placed a wet washcloth and some other unidentified object in Otero's mouth. Cabrera then tied a plastic bag over Otero's head. Otero struggled and pleaded, but died within forty-five minutes to one hour.

Cabrera and Reyes put clothes on the corpse and placed the body in Otero's truck. Cabrera drove Otero's truck and instructed Reyes to follow him in Cabrera's truck from Wilmington to New Jersey. At some point on the New Jersey Turnpike, they removed Otero's corpse and placed it in Cabrera's truck, leaving Otero's truck on the side of the highway. Cabrera drove sixty miles to Burlington County, New Jersey, where they parked in the rear of an empty department store building and placed Otero's body, head first, into a brown dumpster. They poured gasoline over the corpse and set it on fire. It took two years to identify Otero's body.

On April 8, 1997, Cabrera was arrested and charged with Intentional Murder First Degree, Felony Murder First Degree, Conspiracy First Degree, and Burglary First Degree. On May 29, 1998, a Superior Court jury found Cabrera guilty of all four charges. The jury unanimously found that the State had proved beyond a reasonable doubt at least one of the statutory aggravating circumstances. During the penalty phase, seven jurors recommended death and five jurors recommended life imprisonment.

By opinion dated January 29, 1999, the trial Court found sufficient evidence of four statutory aggravating circumstances.² The Court also found that the State established certain non-statutory aggravating factors,³ by substantial and reliable evidence. These aggravating factors were weighed against evidence of mitigating circumstances.⁴

The Court sentenced Cabrera to two consecutive terms of life imprisonment without benefit of probation, parole or any other reduction.

² (1) The victim was over sixty-two years of age; (2) the murder was premeditated and the result of substantial planning; (3) the murder was committed at a time when the victim had provided an investigative agency with information concerning criminal activity; and (4) the murder was committed while the defendant was engaged in the commission of a burglary.

³ Otero's murder deeply traumatized his family; criminal history; the murder was carried out to silence Otero; cruel manner in which victim was killed; depraved disposal of the victim's body; and Cabrera attempted to induce Reyes to change his testimony in court.

⁴ (i) Sentence imposed on co-defendant; (ii) defendant's ability and desire to participate in raising his child; (iii) defendant's amenability to living in a highly structured prison setting without being a threat to himself or others; and (iv) defendant's acceptance of responsibility and remorse.

He was sentenced to 4 years at Level V for Burglary First Degree and 5 years at Level V for Conspiracy First Degree.

The Delaware Supreme Court affirmed Cabrera's convictions and issued a mandate on March 24, 2000.⁵ On March 17, 2003, Cabrera filed his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61. This Court denied the motion on October 8, 2003. This Court's denial of relief was affirmed by the Delaware Supreme Court on April 26, 2004.⁶

On December 28, 2005, Cabrera filed this second motion for postconviction relief, requesting that the Court vacate his felony murder conviction on the ground that the murder was not committed "in furtherance of" the underlying felony of burglary. The statute under which Cabrera was charged and convicted provided: "(a) A person is guilty of murder in the first degree when: ... (2) In the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person."⁷ The statute now has been amended to read: "(a) A person is guilty of murder in the first degree when: ... (2) While engaged in the commission of, or attempt to commit, or flight

⁵ *Cabrera v. State*, 747 A.2d 543 (Del. 2000).

⁶ *Cabrera v. State*, 856 A.2d 1066 (Del. 2004).

⁷ 11 *Del. C.* § 636(a)(2).

after committing or attempting to commit any felony, the person recklessly causes the death of another person.”

On February 6, 2007, this postconviction motion was stayed pending resolution by the Delaware Supreme Court of the appeal in *Chao v. State*.⁸ In *Chao*, the Supreme Court held that *Williams v. State* should be applied retroactively. The *Williams* Court found that “the Delaware felony murder statute not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony.”⁹

DISCUSSION

Procedural Bars

Before addressing the merits of this motion for postconviction relief, the Court must first consider the procedural bars of Superior Court Criminal Rule 61(i).¹⁰ If a procedural bar exists, the Court will not consider the merits of the individual claims.¹¹

Pursuant to the applicable version of Rule 61(i)(1), a motion for postconviction relief may not be filed more than three years after the

⁸ 931 A.2d 1000 (Del. 2007).

⁹ *Williams v. State*, 818 A.2d 906, 913 (Del. 2003).

¹⁰ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹¹ *Id.*

judgment of conviction is final. If the motion asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, the motion must be filed not more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.¹²

Cabrera's judgment of conviction became final on March 24, 2000. Cabrera's second motion for postconviction relief was filed on December 28, 2005, more than three years after the final judgment time bar. Cabrera argues that the Delaware Supreme Court's holding in *Williams v. State* should be applied retroactively. The amended decision in *Williams* is dated April 1, 2003.

This is Cabrera's second motion for postconviction relief. Rule 61(i)(2) requires that the defendant "specify all the grounds for relief which are available to [him] and of which [he] has or, by the exercise of reasonable diligence, should have knowledge. . . ." Under Rule 61(i)(2), "any ground for relief not asserted in a prior postconviction proceeding . . . is thereafter

¹² Super. Ct. Crim. R. 61(i)(1). If the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, however, the motion must be filed within one year. *See* Super. Ct. Crim. R. 61(i)(1) (July 1, 2005) (amending Super. Ct. Crim. R. 61(i)(1) (May 1, 1996)).

barred, unless consideration of the claim is necessary in the interest of justice.”¹³

Rule 61(i)(5) allows for the consideration of otherwise procedurally defaulted claims.¹⁴ To invoke mandatory application of the rule, Cabrera must advance “a colorable claim that there was a miscarriage of justice because of a constitutional violation....”¹⁵

The State has argued eloquently that retroactivity only applies to constitutional rules, and *Williams* was not based on any constitutional rule. The State contends that the more applicable rule is that set out by the United States Supreme Court in *Fiore v. White*:¹⁶

That same result should be reached in Cabrera’s case. The decision in *Williams*, overruling the decision in *Chao* that had come to the diametrically opposed conclusion, marked a change in the interpretation of the felony murder statute, not simply a clarification. See *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O’Connor, J., concurring in judgment); *Bailey*, 588 A.2d at 1128 (new rule not created when decision “merely clarifies a previous decision”). The interpretation of the felony murder statute in *Williams* is not a constitutional rule, and the retroactivity doctrine of *Flamer* does not speak to Cabrera’s situation. The state supreme court, adopting for state practice the rule announced by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), plainly stated in *Flamer* that the rule

¹³ Super. Ct. Crim. R. 61(i)(2).

¹⁴ *Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991).

¹⁵ Super. Ct. Crim R. 61(i)(5); see *State v. Kirk*, 2004 WL 396407, at *1-2 (Del. Super.), *aff’d*, 2005 WL 3526325 (Del.).

¹⁶ 531 U.S. 225 (2001).

applies only to “constitutional rules of criminal procedure.” 585 A.2d at 749. See *Bailey*, 588 A.2d at 1126 n.5 (similarly reading *Flamer*). Because Cabrera’s case does not involve any constitutional rule, his case thus falls within the general rule articulated in *Clem* – a change in the interpretation of the substantive law does not invalidate a conviction obtained under the previous interpretation. See *Warring v. Colpoys*, 122 F.2d 642, 645-47 (D.C. Cir. 1941); *Harris v. State*, 520 So.2d 639, 640 (Fla. Dist. Ct. App.), review denied, 536 So.2d 244 (Fla. 1988); *People v. Clark*, 405 N.E.2d 450, 452 (Ill. App. 1980); *Bryant v. State*, 309 N.W.2d 401 (Iowa 1981); *Everett v. Brewer*, 215 N.W.2d 244 (Iowa 1974).

* * *

The State is hardly unaware of the seeming harshness of its position in Cabrera’s case. But “while symmetry of results may be intellectually satisfying, it is not required.” *Standefer*, 447 U.S. at 25. See *Moyer v. State*, 452 A.2d 948, 950 (Del. 1982) (holding defendant not entitled to resentencing even though other defendants had successfully obtain resentencing under decision later reversed); *Fountain v. State*, 450 A.2d 385, 388 (Del. 1982) (same).¹⁷

Nevertheless, the issue of whether *Williams* should be applied retroactively was not settled until the Delaware Supreme Court’s June 2007 decision in *Chao v. State*. Therefore, the Court finds that Cabrera’s 2005 second Motion for Postconviction Relief is not time barred. More importantly, the Court has determined to exercise its discretion and address Cabrera’s second motion in the interest of justice.

¹⁷ *State v. Cabrera*, ID No. 9703012700, State’s Answer to Motion for Post-Conviction Relief, 7-8; 13 (Mar. 22, 2006).

Application of Williams v. State

Defendant seeks to vacate his felony murder conviction based solely on the Supreme Court's interpretation of the felony murder statute in *Williams v. State*. In *Williams*, the Supreme Court held that "in furtherance of" as used in the Delaware felony murder statute, requires that the murder occur not only in the course of a felony, but also to help move the felony forward.¹⁸ Cabrera argues that the murder did not help move the felony forward because the burglary was complete when the murder took place.

The issue before this Court is whether there was evidence introduced during the trial to support a finding that the murder of Otero was committed with the intent to assist in the burglary. As in *Williams*:

We hold that where a burglary is alleged to be the felony on which the felony murder charge is predicated, the death that occurs must not only be "in the course of" the burglary but also must be "in furtherance of" the burglary. That is, the burglary must have an independent objective that the murder facilitates. Accordingly, if the intent of the burglary was to commit murder, the death that occurred was not "in furtherance of" the burglary – it was the intent of the burglary, as charged in the indictment here.¹⁹

¹⁸ *Williams*, 818 A.2d at 913.

¹⁹ The *Williams* Court found that Williams burglarized the dwelling with the intent of murdering the victim. The murder was not committed to carry out the commission of the burglary. Had the purpose been to steal jewelry and the victim killed to facilitate the thievery, a case for felony murder would have existed. However, the sole purpose of the burglary was to murder his victim. It just so happened the victim was in a place Williams was not permitted to enter. Thus the murder, although "in the course of" the burglary, was not carried out "in furtherance of" it. *Williams*, 818 A.2d at 913.

Based on the Supreme Court’s interpretation of “in furtherance of” and this Court’s finding of facts, the murder of Otero did not occur to help move forward the felony of burglary. Cabrera and his co-conspirator entered Otero’s apartment by kicking the door open. Their purpose was “to take Otero out.” Once inside, they murdered him. There was no evidence to suggest that the murder was carried out to pursue the burglary. Instead, the burglary was completed before the murder. The burglary was in furtherance of the murder.

CONCLUSION

THEREFORE, Cabrera’s Second Motion for Postconviction Relief is hereby **GRANTED** in that the Felony Murder conviction is hereby **VACATED**. This ruling does not affect Cabrera’s other convictions. The convictions and sentences for Intentional Murder First Degree, Conspiracy First Degree and Burglary First Degree remain as previously imposed.²⁰

IT IS SO ORDERED

The Honorable Mary M. Johnston

²⁰ See *Williams*, 818 A.2d at 913.