IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
v.	)	ID#: 9604017809
CRAIG ZEBROSKI, Defendant	)	

Submitted: December 8, 2008
Decided: March 19, 2009

ORDER

Upon Defendant's "Motion to Reopen Postconviction Relief Proceedings" – **DENIED IN PART, GRANTED IN PART**

Upon consideration of Defendant's motion to reopen postconviction proceedings and full briefing, it appears:

1. On April 26, 1996, Defendant and Michael Sarro attempted to rob a gas station. During the botched robbery, Defendant murdered Joseph Hammond, Sr., an unarmed gas station attendant. The facts have been set-out in earlier decisions.[1]

2. On January 28, 1997, a jury convicted Defendant on two counts of Murder First Degree (intentional and felony murder), one count of Attempted Robbery First Degree, three counts of Possession of a Firearm During the

[1] *E.g., State v. Zebroski*, 1997 WL 528287 (Del. Super. Aug. 1, 1997).

Commission of a Felony, and one count of Conspiracy Second Degree. After the penalty hearing, Defendant was sentenced to death.[2] The sentence was affirmed on July 28, 1998.[3]

3. Defendant filed a *pro se* motion for postconviction relief on December 10, 1998. After appointment of defense counsel, the motion was amended on April 26, 1999. The motion claimed, among other things, ineffective assistance of counsel. Following an evidentiary hearing and full briefing, the court denied the motion and was affirmed.[4]

4. After postconviction relief was denied, Defendant filed a *habeas corpus* petition in the United States District Court for the District of Delaware. On September 27, 2007, that action was stayed pending *Jackson v. Taylor*,[5] a lethal injection case in that court. That stay has not yet been lifted.[6]

5. On July 1, 2008, Defendant filed this "motion to re-open postconviction proceedings." After preliminary review,[7] the court ordered the State

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[2] *Id*.

[3] *Zebroski v. State*, 715 A.2d 75 (Del.).

[4] *Zebroski v. State*, 822 A.2d 1038 (Del. 2003).

[5] No. Civ. 06-300-SLR.

[6] *Jackson v. Danberg*, --- F.Supp.2d --- (D.Del. March 11, 2009).

[7] Super. Ct. Crim. R. 61(d)(1).

to respond.[8] On July 18, 2008, the court received the State's response, stating that Defendant's claims are barred under Superior Court Criminal Rule 61(i). The court received Defendant's reply on August 18, 2008.

6. The court preliminarily found all but one of Defendant's claims lacked merit. On November 24, 2008, the court ordered the State to respond to the court's preliminary position, while also granting Defendant leave to reply to the preliminary findings and the State's response. Responses from the State and Defendant were received on December 8, 2008, at which point this motion's record closed.

7. Defendant's self-styled caption thinly disguises its true nature. The motion, in essence, is a second motion for postconviction relief. As discussed below, the motion reargues issues already decided, such as ineffectiveness of trial counsel. And, it raises claims that did not exist during the first proceeding, such as ineffective assistance of postconviction relief counsel. The only claim that can honestly be characterized as a basis for reopening, is the one based on *Williams v. State,*[9] which applies retroactively to this case by virtue of *Chao v. State*[10] ("*Chao*

[8] Super. Ct. Crim. R. 61(f).

[9] 818 A.2d 906 (Del. 2002).

[10] 931 A.2d 1000 (Del. 2007).

II").

8. However characterized, Defendant's motion presents a "layered" claim of ineffective assistance of counsel during trial and postconviction proceedings. Out of these "layers," Defendant makes four specific claims:

- trial counsel and postconviction counsel were ineffective in investigating and presenting mitigating evidence. Specifically, Defendant claims counsel failed to: explore Defendant's ADHD diagnosis and its neurological effect; address Defendant's age as it relates to neuro-developmental immaturity; address Defendant's drug use and its effect on his pre-existing brain dysfunction and mental illness; complete a thorough social history and records investigation; present evidence of Defendant's absent father and the resulting neglect; present evidence about Sarro's character; thoroughly investigate Defendant's criminal record; present Defendant's rehabilitation efforts in prison; plea for mercy.

- postconviction counsel failed to call thirteen specific witnesses, including Defendant's elementary school guidance counselor, to present mitigating evidence.

- trial counsel and postconviction counsel failed to object to the court's using a presentence investigation containing mitigating evidence not presented to the jury.

- trial counsel was ineffective by unreasonably and prejudicially stipulating to Sarro's statement and thereby conceding Defendant's guilt to felony murder.

Additionally, as mentioned, Defendant claims his conviction for felony murder should be vacated in light of *Williams* and *Chao II*.

9. Before the court may consider a Rule 61 motion's merits, it must

address Rule 61(i)'s procedural bars.[11] The court must refrain from reviewing a procedurally barred claim's merits.[12] Moreover, "if the defendant was represented by counsel in a prior postconviction proceeding under Rule 61, the bars enumerated . . . shall be strictly enforced."[13]

10. Rule 61(i) enumerates four procedural bars: (1) the motion was untimely,[14] (2) the grounds for relief were not previously asserted in a postconviction proceeding, (3) the grounds for relief were not presented in the proceedings leading to final conviction, and (4) the grounds for relief have been formerly adjudicated in a previous proceeding (or should have been).[15] Under Rule 61(i)(5), Rule 61(i)(1)-(3)'s bars will not apply if the defendant presents "a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice." Also, the defendant may overcome the procedural bars of Rules 61(i)(2) and (4) if the defendant shows "reconsideration of the claims is warranted in the interest of

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[11] *See* Super. Ct. Crim. R. 61(i); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[12] *See Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

[13] *State v. Gattisi*, 2005 WL 3276191, *15 (Del. Super. Nov. 28, 2005) (quoting Admin. Dir. No. 131, Par. C8 (Del. July 11, 2001) (previously Directive 88 (Del. Feb. 5, 1992)).

[14] Super. Ct. Crim. R. 61(i)(1) was amended to require motions be filed within one year from the date of final conviction. Final convictions before July 1, 2005 are subject to a three year limitation.

[15] Super. Ct. Crim. R. 61(i)(1)-(4).

justice." Rule 61(i)(4)'s "interest of justice" provision has been narrowly defined to require the defendant to show a new fact, or the court lacked authority to convict or punish him.[16]

11. Defendant's claim that postconviction counsel was ineffective fails at the threshold. It is settled that Defendant does not have a constitutional right to counsel in a postconviction proceeding.[17] Thus, without an independent right to counsel, there is no right to effective counsel.[18] The fact that Defendant is facing a death sentence does not present a *defacto* exception to the rule.[19]

12. Defendant also makes several claims as to ineffective assistance of trial counsel. These claims are barred by Rule 61(i)(2) and (4). Defendant is barred under Rule 61(i)(4) because the court adjudicated ineffective assistance of counsel claims in Defendant's first postconviction motion. Defendant argued several claims against trial counsel, all of which were dismissed by this court and affirmed

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[16] *State v. Wright*, 653 A.2d 288, 298 (Del. 1994) (citing *Flamer*, 585 A.2d at 746 (Del. 1990)).

[17] *Floyd v. State*, 612 A.2d 158 (Del. 1992) (TABLE) (holding "it is settled law that there is no constitutional right to counsel during postconviction proceedings...absent such a Sixth Amendment right, a defendant may not bring a claim of ineffective assistance of counsel").

[18] *See Coleman v. Thompson*, 501 U.S. 722, 755 (1991) ("We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation."); *Shipley v. State*, 570 A.2d 1159, 1166 (Del. 1990) (holding the "right to *effective* assistance of counsel...is dependent on the right to counsel itself") (emphasis in original) .

[19] *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989).

on appeal. Defendant fails to show that further review is required in the interests of justice. Again, if Defendant presented something truly striking, that would be one thing. Failing that, however, Defendant invites an endless series of motions that mostly second-guess previous motions.

13. By the same token, Defendant is barred under Rule 61(i)(2) because he should have presented all available grounds for relief in his first postconviction relief motion.[20] The claims for ineffective assistance of counsel now presented were known, or should have been known, to Defendant at the time of his first postconviction motion. The fact that Defendant has refined and recast his arguments does not require the court to revisit them.[21]

14. Lastly, Defendant claims his felony murder conviction should be vacated due to insufficiency of evidence and inadequate jury instructions in light of *Williams*.[22] Initially, the State argued that Defendant's *Williams* claim is barred under Rules 61(i)(1) and (2) because the right recognized by *Williams* was announced in 2002, six years before this motion was filed. After the court's preliminary

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[20] *Nicholson v. State*, 582 A.2d 936, 1990 WL 168266, *2 (Del. 1990) (TABLE).

[21] *Id.*; *see also Barr v. State*, 574 A.2d 262, 1990 WL 39081, *1 (Del. 1990) ("[B]ecause an allegation of ineffectiveness of counsel was raised in [the defendant's] prior postconviction motion, he is not free to relitigate that issue further even though he now sets forth new specifications of alleged ineffectiveness.").

[22] 818 A.2d 906.

findings, however, the State conceded that Defendant's felony murder conviction must be vacated. In the interest of justice, the court will consider this claim's merits.

15. Before *Williams*, *Chao v. State,*[23] ("*Chao I*"), was the leading interpretation of Delaware's felony murder statute. *Chao I* held the felony murder statute's "in furtherance of" language to mean the "killing need only accompany the commission of an underlying felony. . .[and] is solely [meant] to require that the killing be done by the felon, him or herself."[24] In 2002, *Williams* overruled that, holding the "statute not only requires that the murder occur during the course of the felony, but also that the murder occur to facilitate the felony."[25] In 2007, *Chao II*[26] held that *Williams* applies retroactively.

16. Defendant was convicted in 1997 under *Chao I* and the felony murder instruction was substantially based upon that holding. Specifically, for a felony murder conviction, the jury was instructed to find: (1) Defendant caused Joseph Hammond's death, (2) Defendant acted recklessly, and (3) the killing occurred during an attempt to commit another felony. The instruction used here is problematic

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[23] 604 A.2d 1351 (Del. 1992).

[24] *Id*. at 1363.

[25] *Williams*, 818 A.2d at 913 (holding "[T]he felony murder language requires not only that the defendant, or his accomplices, if any, commit the killing, but also that the murder helps to move the felony forward.").

[26] *Chao v. State*, 931 A.2d 1000 (Del).

because, although consistent with *Chao I*, it nonetheless failed to instruct that the murder must have helped move the underlying robbery forward. Because the instruction failed to properly address felony murder's "in furtherance of" requirement, as called for by *Williams* and *Chao II*, it was defective.

17. Moreover, it was reasonably possible, if not probable, that the jury would not have found felony murder. After the shooting, Defendant and Sarro fled without taking any money. It seems, therefore, that a jury could find that the murder did not facilitate the robbery. Rather, the murder ended the robbery. Based upon the problematic jury instruction and the possible lack of evidentiary support for a felony murder finding, the felony murder conviction must be vacated.

18. Defendant's murder convictions were merged at sentencing. And so, the court turns to the sentencing implication attendant to the felony murder conviction's fall.

19. Knocking-out Defendant's felony murder conviction has no bearing on Defendant's intentional murder conviction and death sentence. Although the jury was instructed to automatically find an aggravating factor after a guilty felony murder finding, the jury was further instructed to decide separately whether there was a statutory aggravating factor for Defendant's intentional murder conviction. The jury unanimously found Defendant's attempted robbery to be an

aggravating factor to Defendant's intentional murder conviction. Based on the evidence at trial and the trial's verdict, i.e., guilty of attempted robbery, the jury's finding a statutory aggravator was fated and it is unassailable.

20. Furthermore, the State proved beyond any doubt that Defendant's seminal intent was the robbery. Defendant admitted as much. Accordingly, while it is possible that the intentional murder here was not "in furtherance of" the robbery and, therefore, the felony murder is out, it is beyond dispute that the murder occurred "while Defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of . . . robbery . . . ."[27]

21. In other words, viewing the evidence in the light most favorable to Defendant, there is no reasonable way for a jury not to have found Defendant guilty of attempted robbery and that the murder occurred during the attempted robbery. The difference between this case and *Williams* is that, in *Williams*, the State failed to prove the underlying burglary, whereas here, the State proved (and Defendant admitted) the underlying robbery.

22. So, even if it might have been said that Defendant was not guilty of felony murder because the murder was not "in furtherance of" the robbery, no one could say that the intentional murder did not occur during the course of an attempted

[27] 11 *Del. C.* § 4209(e)(1)(j).

robbery. Assuming the State truly failed to prove felony murder, the jury's finding of a statutory aggravating factor is still beyond cavil.

23. Finally, had the jury found Defendant not guilty of felony murder because the killing was not in furtherance of the robbery, that would not have sparred Defendant the death penalty for the intentional murder. To the contrary, it would bring the murder's senselessness and cold-bloodedness into sharper focus. In the end, if the murder was not in furtherance of a robbery, what was it?

For the foregoing reasons, Defendant's "motion to reopen postconviction proceedings" is **DENIED**, except that Defendant's felony murder conviction is **REVERSED** and **VACATED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (criminal)
Loren Meyers, Deputy Attorney General
Jennifer-Kate Aaronson, Esquire