

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

STATE OF DELAWARE	)	
	)	
v.	)	I.D. # 0107010230
	)	
ROBERT GARVEY	)	
	)	
Defendant	)	
	)	

Submitted: February 12, 2009  
Decided: April 8, 2009

Upon Defendant's Third Motion for Postconviction Relief.  
**DENIED.**

**ORDER**

Martin B. O'Connor, Esquire, Department of Justice, Wilmington,  
Delaware, Attorney for the State.

Robert Garvey, Smyrna, Delaware, *pro se*.

COOCH, J.

This 8<sup>th</sup> day of April, 2009, upon consideration of Defendant's Third  
Motion for Postconviction relief, it appears to the Court that:

1. In the early morning of July 15, 2001, Defendant, Robert Garvey, killed Donald Jordan during the course of a robbery gone awry. Defendant ambushed Jordan and Jordan's cousin on a stairwell inside of an apartment building, located at Brandywine Hills Apartments. A struggle ensued, during which struggle Defendant's firearm discharged, and Jordan was shot in the chest. Jordan died minutes later. Defendant then chased Jordan's cousin out of the apartment building and into a dumpster area of the complex. There, Defendant pistol-whipped the cousin before taking his jewelry and threatening to kill him. The cousin escaped, and was picked up by the police down the road from the apartment building.

2. On October 22, 2003, a jury found Defendant guilty of Murder First Degree, Robbery First Degree, Attempted Robbery First Degree, Possession of a Firearm During the Commission of a Felony (two counts), Carrying a Concealed Deadly Weapon (two counts), and Conspiracy Second Degree. The jury found by an 8-4 verdict that Defendant had committed the robbery for pecuniary gain; however, the jury found by a 9-3 verdict that the aggravating factors of Defendant's case did not outweigh the mitigating factors, thus finding against the imposition of the death sentence. Defendant received a life sentence on the Murder First Degree conviction, 10 years at Level 5 for the Robbery First Degree conviction, 5 years at Level 5 for the

Attempted Robbery First Degree conviction, 10 years at Level 5 for each Possession of a Firearm During the Commission of a Felony convictions, 1 year at Level 2 (concurrent) for each Carrying a Concealed Deadly Weapon conviction, and 1 year at Level 2 (concurrent) for the Conspiracy Second Degree conviction.

3. Defendant took a direct appeal to the Delaware Supreme Court, “claiming that the trial judge abused his discretion by denying a pretrial motion to suppress [Defendant’s] post-arrest statement and a motion to declare a mistrial. [Defendant] also [contended] for the first time on appeal that the jury’s findings at the guilt and penalty stages were inconsistent.”<sup>1</sup> The Supreme Court upheld the trial court’s decisions denying both Defendant’s motion to suppress and Defendant’s motion for a mistrial. The Supreme Court held that Defendant had unambiguously waived his *Miranda* rights, and thus the trial court did not abuse its discretion in holding that suppression of his post-arrest statements was unnecessary. Additionally, the Supreme Court opined that the trial court did not abuse its discretion when it denied Defendant’s motion for a mistrial despite the fact that a witness “improperly commented on the redacted status”<sup>2</sup> of Defendant’s videotaped statement to the police; the curative instruction given to the jury sufficiently

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<sup>1</sup> *Garvey v. State*, 873 A.2d 291 (Del. 2005).

<sup>2</sup> *Id.* at 301.

limited any prejudice to Defendant. Finally, the Supreme Court held that the jury's verdicts at the guilt stage and the penalty stage, though arguably inconsistent, were nonetheless explicable as the product of jury lenity.

4. On September 20, 2005, Defendant filed his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61, alleging four grounds for ineffective assistance of counsel: “(1) counsel for Defendant failed to raise a violation of Defendant's right to speedy trial on direct appeal, (2) counsel on direct appeal failed to challenge the Superior Court's June 9, 2003, denial of Defendant's motion to suppress that challenged Defendant's arrest as lacking probable cause, (3) counsel on direct appeal failed to raise Defendant's claim that the search of his gym bag, which contained the probable murder weapon, violated Defendant's Fourth Amendment rights, and (4) counsel failed to appeal the Court's December 4, 2003, denial of Defendant's Motion for Judgment of Acquittal.”<sup>3</sup> This Court denied his motion, holding that the defense “Counsel's conduct did not fall below an objective standard of reasonable professional conduct” in any of the instances Defendant cited.<sup>4</sup> The Supreme Court affirmed the Superior Court's decision on appeal.<sup>5</sup>

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<sup>3</sup> *State v. Garvey*, 2006 WL 1495786 (Del. Super.).

<sup>4</sup> *Id.*

<sup>5</sup> *Garvey v. State*, 2007 WL 1221136 (Del. Supr.).

5. Defendant filed his second motion for postconviction relief on August 20, 2007, which he later amended on September 13, 2007. Defendant therein alleged two grounds for postconviction relief: (1) that his right to be present while the Court questioned jurors during the trial was violated (which was couched in an ineffective assistance of counsel claim), and (2) that since the State had failed to prove that the death of Donald Jordan “furthered” the commission of the robbery, that his felony murder conviction should be vacated under *Chao v. State*<sup>6</sup> and *Williams v. State*.<sup>7</sup> This Court denied Defendant’s second motion for postconviction relief on February 13, 2008, finding that Defendant’s claims were time barred by Rule 61(i)(2) and that Defendant’s arguments were not meritorious.<sup>8</sup>

6. On November 5, 2008, the Supreme Court affirmed this Court’s order denying Defendant’s Second Motion for Postconviction Relief.<sup>9</sup>

7. In this, Defendant’s Third Motion for Postconviction Relief, Defendant again contends that the Court did not properly comply with *Williams* by providing a jury instruction incorporating the *Williams* definition of “in furtherance of;” rather, Defendant contends that “the correct way [to incorporate the “in furtherance of” language into Defendant’s case]

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<sup>6</sup> *Chao v. State*, 931 A.2d 1000 (Del. 2007).

<sup>7</sup> *Williams v. State*, 818 A.2d 906 (Del. 2003).

<sup>8</sup> *Garvey v. State*, 2008 WL 1952159 (Del. Super.).

<sup>9</sup> *Garvey v. State*, 962 A.2d 917 (Del. 2008) (Table).

would of [*sic*] been to allow the grand jury the opportunity to reindict Garvey under the new, substantive ‘in furtherance of’ felony murder language.”<sup>10</sup>

8. Before addressing the merits of this third motion for postconviction relief, the Court must first apply the procedural bars of Superior Court Criminal Rule 61.<sup>11</sup> If a procedural bar exists, then the Court will not consider the merits of the postconviction claim.<sup>12</sup>

9. Rule 61(i)(4) provides that “[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.”

10. Defendant has already raised an argument pursuant to *Williams* and is therefore barred from reasserting it. In affirming this Court’s order denying Defendant’s Second Motion for Postconviction Relief the Supreme Court noted:

The record reflects that the trial judge was aware of the import of the *Chao* and *Williams* decisions and gave a jury instruction incorporating the then-required “in furtherance of” language. The record further reflects that the evidence presented by the State at trial amply supported the jury’s finding that the killing of Garvey’s victim was “in furtherance of” the robbery.

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<sup>10</sup> Mot. for Postconviction Relief, D.I. 222 at 6.

<sup>11</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>12</sup> *Id.*

Garvey's further contention that only a conviction of an intentional killing can support a finding by the jury that the killing was "in furtherance of" the robbery is incorrect as a matter of law. In the absence of any evidence that Garvey's conviction of felony murder constituted a miscarriage of justice, we conclude that the Superior Court also correctly denied Garvey's second claim as time-barred.<sup>13</sup>

Thus, it is clear that Defendant's claim for relief has already been addressed and that reconsideration is not warranted.

11. For the reasons stated, Defendant's Motion for Postconviction Relief is **DENIED**.

**IT IS SO ORDERED.**

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oc: Prothonotary  
cc: Investigative Services

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<sup>13</sup> *Garvey*, 962 A.2d 917, at \*1.