

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

STATE OF DELAWARE)	
)	
)	
)	
v.)	I.D. # 0405000068
)	
JASON E. WALKER,)	
)	
Defendant.)	
)	

Submitted: May 6, 2009
Decided: May 21, 2009

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

Josette D. Manning, Esquire, Department of Justice, Wilmington, Delaware,
Attorney for the State.

Jason E. Walker, Smyrna, Delaware, *pro se*.

PARKINS, J.

This 21st day of May 2009, upon consideration of Defendant's
Motion for Postconviction Relief, it appears to the Court that:

1. In April 2004, two men walked into Tull's Aquarium and Pet Shop, where Joseph Alexander and his uncle, Kenneth Tull, were working. When Alexander went into the back room of the shop to see if the two men needed assistance one of the men pointed a gun at Alexander while the other man duct taped Alexander's hands and feet together. Alexander saw his uncle walking towards the back room and then heard two gun shots. Tull was struck by the shots and died from his injuries several days later.

2. Witnesses observed two black men speeding away from Tull's in a black Cadillac, and one witness was able to write down a partial license plate number. The police arrested Defendant and subsequently conducted a photographic line-up for Alexander. Alexander immediately identified Defendant as the man who shot his uncle.

3. In July 2005, a jury found Defendant guilty of two counts of first degree murder, five counts of possession of a firearm during the commission of a felony, two counts of attempted first degree robbery, one count of unlawful imprisonment, and one count of conspiracy. The Court imposed sentence on all charges, including two terms of life imprisonment on the murder first degree charges. In February 2007, the Delaware Supreme Court affirmed Defendant's convictions on appeal.¹

¹ *State v. Walker*, 2007 WL 1446576 (Del. Supr.).

4. Defendant's *pro se* motion for postconviction relief alleges (1) a denial of his constitutional right to represent himself at trial and (2) ineffective assistance of counsel. The State and Defendant's trial counsel both filed responses to the motion.

5. When considering a motion for postconviction relief, the Court must first apply the procedural bars of Superior Court Criminal Rule 61. If a potential bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim. Rule 61(i)(4) will bar any ground for relief that was formerly adjudicated, unless reconsideration is warranted in the "interest of justice."²

6. Defendant's claim that he was denied his constitutional right to represent himself at trial was previously adjudicated on direct appeal. The Supreme Court rejected the claim "for lack of merit." Therefore, this claim is barred by Rule 61(i)(4) and reconsideration is not warranted in the interest of justice.

7. Defendant's remaining claims are all ineffective assistance of counsel claims and the Court will address the merits. To succeed on an ineffective assistance of counsel claim, Defendant must show both (a) "that counsel's representation fell below and objective standard of reasonableness" and (b)

² Super. Ct. Crim. R. 61(i)(4).

“that there is a real probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.”³ Failure to satisfy one prong will render the claim unsuccessful and the court need not address the remaining prong. Moreover, the “court must indulge a strong presumption that counsel’s conduct falls within the wide range of professional assistance.”⁴

8. Defendant alleges that his counsel was ineffective for failure to investigate an “unconscious transference” defense. Defense counsel’s affidavit, however, contradicts this assertion. The affidavit provides that defense counsel discussed with defense expert Dr. Roy Malpass “whether the eyewitness Joseph Alexander misidentified Walker as the suspect because Walker had been a previous patron of Tull’s.”⁵ Dr. Malpass opined “that the current research in this area had mixed findings and would not be a viable strategy.”⁶ Furthermore, Dr. Malpass thought that evidence of Defendant’s previous trips to the store may reinforce the reliability of Alexander’s identification. Therefore, Defendant’s claim fails to demonstrate that counsel acted unreasonably in his decision not to pursue an unconscious transference defense.

³ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁴ *Id.* at 689.

⁵ Aff., D.I. 197, at 2-3.

⁶ *Id.*

9. Defendant's next claim is that defense counsel was ineffective for failing to investigate whether Alexander had viewed the composite sketch contained in a wanted poster and circulated in this case. Alexander, the State's eyewitness, testified that he never viewed the composite after it was constructed and before he made his identification of Defendant. The evidence suggested, however that the composite was widely circulated and readily available to Alexander, despite his recollection that he did not view it. In addition, Dr. Malpass testified that repeated viewing of the composite sketch could influence Alexander's memory of the perpetrator. Therefore, despite Alexander's testimony that he did not view the composite, the defense was able to suggest that because the poster was readily available, Alexander could have viewed it, thereby influencing his identification of Defendant. Nothing about the testimony surrounding the composite sketch demonstrates that counsel acted unreasonably. Consequently, Defendant is not entitled to relief on this claim.

10. Defendant also claims that counsel was ineffective for failing to provide Dr. Malpass with all relevant information. Defense counsel's affidavit contradicts this assertion, however, and states that counsel did provide all information to Dr. Malpass. Therefore, there is no factual basis for this claim.

11. Defendant asserts that defense counsel should have investigated whether Tull's widow knew her husband's state of mind before his death. If counsel had done this, Defendant contends certain evidence may have been admissible under the dying declaration exception to the hearsay rule.

Defense counsel did meet Mrs. Tull shortly after being assigned to this case. Not surprisingly, she indicated that she had no intention of discussing the case with the defense team. Furthermore, Defendant provided no indication that Mrs. Tull had any information about her husband's state of mind at the relevant time, or that the sought information would have been admissible. Therefore, Defendant does not demonstrate that counsel acted unreasonably with regard to Mrs. Tull.

12. Defendant next claims that defense counsel failed to investigate the "exculpatory aspects" of witness Justin Durham's statements to the police. Defense counsel's investigator did interview Durham and found his account of the incident to be consistent with what he told police and with one of the State's key witnesses who did testify at trial. In addition, Durham's father told the investigator that he would not allow his son to testify at trial. The State claims that Durham's statement was so inculpatory, it would have called him as a witness but for its deference to Durham's father's wishes. Therefore, defense counsel's decision not to call Durham as a witness at trial

was reasonable as his testimony would have likely buttressed the State's case.

13. Defendant also alleges that counsel was ineffective for failing to measure the back window of Defendant's 1986 Cadillac Fleetwood. During an interview with the police, one witness was shown a picture of a 1984 Cadillac Deville and stated that it looked like the suspect vehicle but that the suspect vehicle had a bigger back window. Defendant's contention that a measurement of his car window would have been exculpatory is unsubstantiated. Moreover, the vehicle was primarily identified by the license number, which was written down contemporaneously with the crime. Defendant purchased the car with that license number and was found driving the vehicle after the crime. He was then immediately identified by Alexander in a photo line-up. Defendant cannot demonstrate that evidence of the size of the vehicle's window would have affected the outcome of the trial.

14. Defendant also claims counsel was ineffective for failing to test the exhaust on his car. He alleges that such an investigation would have cast doubt on the identification of his car. As stated previously, his car was identified using the license plate number. Even if evidence regarding the state of his car's exhaust system would have been admissible, such evidence

would not have overcome the weight of evidence supporting the identification of the car. Defendant's claim regarding his exhaust does not demonstrate that his counsel's performance was unreasonable or that Defendant was prejudiced.

15. Defendant's claims that counsel failed to investigate the "exculpatory statements"⁷ of police witness Michael Wiktorowicz. These statements relate to the fact that an unknown fingerprint was found on a piece of duct tape at the crime scene. The evidence of an unknown fingerprint was elicited at trial and used by the defense on cross-examination and in closing argument. Defendant does not state what additional or exculpatory testimony Wiktorowicz could have offered, nor does Defendant demonstrate that his testimony would have affected the outcome of the trial.

16. Defendant alleges that counsel failed to investigate witnesses who could testify whether Defendant's car had tinted windows. Defense counsel photographed Defendant's car and moved those photos into evidence. Therefore, this claim has no factual basis and does not demonstrate ineffective assistance of counsel.

17. Defendant also claims that defense counsel failed to adequately argue his suppression motion, which sought to suppress the photo-identification.

⁷ Def. Mot., D.I. 189, at 12.

There is no factual or legal support for Defendant's contention. Therefore, Defendant is not entitled to relief on this ground.

18. Defendant alleges in conclusory fashion that counsel failed to adequately cross-examine Alexander. Defendant, however, fails to in any way substantiate this claim. Therefore, his contention cannot support a claim for ineffective assistance of counsel.

19. Defendant also contends that counsel failed to adequately cross-examine Ashley Durham during trial. Ashley Durham, who was fourteen at the time of trial, testified on behalf of the state that she was able to write down the license plate number of the getaway car. Defense counsel's affidavit states that her trial testimony was consistent with her pretrial statements. Furthermore, Durham seemed somewhat intimidated by the courtroom and the jury appeared sympathetic towards her. Therefore, defense counsel believed that "any minimal benefit gained by pointing out minor discrepancies in her testimony would only serve to antagonize the jury to the detriment of Mr. Walker's overall case."⁸ Defense counsel's strategic choice not to cross-examine the witness under these circumstances was not unreasonable. Moreover, Defendant does not explain what additional testimony could have been elicited that would have helped his case.

⁸ Aff. at 9-10.

Therefore, Defendant's claim regarding Ashley Durham does not state a claim for ineffective assistance of counsel.

20. Defendant claims defense counsel failed to impeach Detective Armstrong on cross-examination. Defendant fails, however, to demonstrate that Armstrong's testimony was in fact inconsistent. Moreover, there is no showing that had counsel's alleged failure to impeach him had any impact on the outcome of the trial. Therefore, Defendant is not entitled to relief on this ground.

21. Defendant asserts that defense counsel was ineffective for failing to call Defendant's mother as an alibi witness. Before trial, defense counsel interviewed Shirley Walker through his investigator. Ms. Walker stated that Defendant had stopped by after work on the day of the incident and stayed about an hour. She was not sure of specific times, but thought he left by at least 7:30 p.m. or when it was just getting to be dusk. State witnesses testified that the sun was going down during and right after the crime was committed. After obtaining the time of sunset on the night of the incident and measuring the time it would take to get from Defendant's mother's house to Tull's Aquarium, counsel determined that Ms. Walker's imprecise recollection would not be an alibi. Therefore, defense counsel's decision not to present the alleged alibi testimony was not unreasonable.

22. Defendant additionally claims that defense counsel was ineffective for failing to object to alleged improper remarks made during the State's summation. Specifically he claims that the State mischaracterized a witness' testimony that a vehicle had an exhaust problem where the actual testimony was that the vehicle smelled like burning oil. Counsel are allowed to argue inferences from the evidence in their closing arguments. Furthermore, to the extent that this statement mischaracterized the testimony, the Court specifically instructed the jury that arguments of counsel are not evidence. Defendant cannot demonstrate that defense counsel's failure to object in this situation was unreasonable or that defendant was consequently prejudiced by the lack of objection.

23. Defendant claims counsel failed to call Mr. Williams as a defense witness "to testify about several occasions that he had been to Tull's aquarium with the defendant."⁹ Defendant asserts that this testimony would have supported the misidentification defense. Defense counsel states in his affidavit, however, that during interviews with his investigator, Williams was never able to give any specific dates or times when he was in Tull's. Therefore, it was not unreasonable for defense counsel to decide not to call Williams as a witness. Moreover, there is no showing Williams' testimony

⁹ Def. Mot. at 15.

would have supported a misidentification theory or that his testimony would have affected the outcome of the case.

24. Despite Defendant's numerous claims, he cannot demonstrate that trial counsel acted unreasonably at any point during his representation. Moreover, given the weight of the evidence against Defendant in this case, Defendant is unable to show that there is a reasonable probability that the outcome would have been different but for counsel's alleged errors. Therefore, Defendant has not made the requisite showing to sustain an ineffective assistance of counsel claim and his motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

oc: Prothonotary
cc: John S. Edinger, Jr., Esquire