SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

May 13, 2009

N440 - State Mail
Donald L. Dailey
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State of Delaware v. Donald L. Dailey
Defendant ID No. 0210012813

Dear Mr. Dailey:

In January, 2003, the grand jury indicted you for six (6) counts of rape in the first degree against one minor son, and two (2) counts of rape in the first degree as to your second son.

Each count alleged that there was intentional sexual intercourse with a child who could not legally consent and that you participated pursuant to 11 Del. C. §773 (a)(4) which incorporates responsibility under the principal-accomplice relationship as set forth in 11 Del. C. §271.

The allegation is that you arranged for your girlfriend to have sexual intercourse with your sons, and you would either watch or participate by way of a sexual act with your girlfriend.

In April, 2003, you pled guilty to four counts of rape in the third degree. In that colloquy, you acknowledged that your attorney had thoroughly explained accomplice liability to you.

Subsequently, you moved to withdraw your guilty plea and the motion was granted.

On August 6, 2003, you entered a no contest (guilty) plea to three counts of rape in the third degree.

There was an acknowledgment that the evidence the State would present at trial through your girlfriend and your sons would support a guilty finding of all eight of the rape in the first degree charges which would result in a mandatory 120 years.

Therefore, you accepted the plea offer of three rape in the third degree offenses. You again acknowledged you had reviewed accomplice liability concerning your girlfriend.

The proffer of evidence for the no contest guilty plea was that Debra Bemiller, your girlfriend, would testify that you directed her to have oral and vaginal intercourse with your sons, and that you watched this take place. Also, that on one occasion, she had oral intercourse with you while having vaginal intercourse with one of the victims.

The victims each gave a taped statement at the Children's Advocacy Center which corroborated the girlfriend's testimony.

At the time of your plea, Ms. Bemiller had pled guilty to two counts of rape in the third degree and was sentenced to prison.

The next day I sentenced you to fourteen (14) years at Level 5 followed by probation.

On appeal you attacked the sentence because the State had recommended seven years. The sentence was affirmed by the Supreme Court. Dailey v. State, 843 A.2d 695, 2004 WL 439855 (Del. Mar. 04, 2004) (TABLE).

You have filed two Motions for Postconviction Relief, both of which were denied. You appealed the Court's dismissal of your second Motion to the Supreme Court. The decision was affirmed. Dailey v. State, 918 A.2d 1170, 2007 WL 328831 (Del. Feb. 05, 2007) (TABLE).

In this third Motion for Postconviction Relief, you argue that the Delaware Supreme Court's recent decision in Allen v. State, 2009 WL377164 (Del. Feb. 17, 2009) requires that the Court hold a hearing to determine if the requirements of 11 Del. C. §274 could be proven by the State.

You argue that the procedural bars of Rule 61(i) are not applicable because this is a newly recognized right that must be retroactively applied.

The Court does not have to determine whether Allen is retroactive because it would not be applicable to the facts in this case.

Your conviction was based upon a guilty plea and not a trial where the jury would have to determine if all of the necessary elements were proven beyond a reasonable doubt. In your guilty plea, you acknowledged the State's evidence was, if found credible by the jury, sufficient to prove each of the elements of the offense against you. As noted by your attorney at the time of the plea on August 6, 2003, the evidence was sufficient to establish your guilt as an accomplice to the elements of rape in the first degree. Therefore, your complaint that there was no hearing to establish your accomplice liability to rape in the third degree fails.

Under 11 Del. C. §271 and §274, the proffer by the State for the no contest guilty plea established your culpability for directing your girlfriend to have sexual intercourse with your boys while you watched and, on occasion, participated.

This claim is denied.

You raise a second claim which in a nutshell argues you should have had a hearing under 11 Del. C. §3507 before the State was allowed to make the proffer of the contents of their Child Advisory Center tapes. You claim you were denied your right to confront the boys and address the potential of recantation.

This claim is procedurally barred as it comes more than three (3) years after the Supreme Court affirmed your conviction in 2004. Rule 61(i)(1). There is no reason to revisit it under Rule 61(i)(5). You could have gone to trial and enjoyed your right to confront your boys but you chose to plead guilty. There is no requirement that the Court conduct an evidentiary hearing to establish that testimony under 11 Del. C. §3507 would be admissible, as a requirement or precondition to a guilty plea.

Finally, I note that your claims of recantation were discussed in the Court's denial of your first Rule 61 Motion. You knew about the potential of using alleged recantations at any trial prior to entering your guilty plea. This claim is procedurally barred under Rule 61(i)(4).

Your third Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

baj
cc: Prothonotary
Paula T. Ryan, Esquire