SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

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

September 14, 2009

Joseph M. Bernstein, Esquire
10354 Flat Stone Loop
Bonita Springs, FL 34135

David Hume, Esquire
Department of Justice
114 East Market Street
Georgetown, DE 19947

RE: Jerrin Wright
Defendant ID No. 0507022890 (R-1)

Dear Mr. Wright:

On March 30, 2009, the Defendant filed an Amended Motion for Postconviction Relief. There are no procedural bars.

The Court expanded the record pursuant to Criminal Rule 61(g) and the Defendant's trial and appellate counsel filed an affidavit addressing the claims involving ineffective assistance of counsel. Briefing followed with the Defendant's reply brief being received on August 27, 2009. After considering the respective positions of the parties, as well as reviewing the Court's files, the Motion is denied.

The Defendant acknowledges the trial testimony established that he fired a handgun at Roland Harris repeatedly while at a night club parking lot. The club was closing and there were people coming out of the club, and in the parking lot. Harris was not struck by any of the bullets that whizzed by him, but Scott Lubitz, one of several bystanders, was struck and killed.

The Defendant was indicted for one count of reckless endangering in the first degree in regard to Mr. Harris, and one count of murder in the first degree, i.e., felony murder. The State alleged the reckless causation of the death of Mr. Lubitz while engaging in recklessly shooting at Mr. Harris. Finally, this indictment included a firearms offense for each of the above charges.

At trial, the jury found the Defendant guilty of reckless endangering for shooting at Mr. Harris; murder in the second degree for causing the death of Mr. Lubitz, with criminal negligence during the commission of the crime of reckless endangering (i.e., shooting at Mr. Harris), and both firearms counts. The Defendant was found to be a habitual offender. The Defendant received a total sentence of 100 years.

Following trial, the defense filed a Motion attacking the second degree murder conviction as being barred by double jeopardy. This was denied.

On appeal, the only issue raised was whether the refusal to give an accident instruction was in error. It was not. *Wright v. State,* 953 A.2d 144, 151 (Del. 2008).

GROUND ONE

The Defendant argues appellate counsel, who was also trial counsel, should have appealed this Court's denial of the Motion to Acquit on double jeopardy grounds.

The defense must establish that appellate counsel committed error as to the decision not to appeal an adverse trial ruling and that the Defendant was prejudiced, i.e., had he appealed, he would have prevailed. *Strickland v. Washington*, 466 U.S. 668 (1984).

Appellate counsel informed the Court that he determined that because there were multiple victims of a "person crime" as opposed to a "property crime", he did not pursue the double jeopardy issue on appeal. I agree. *Handy v. State*, 803 A.2d 937 (Del. 2002) does not support Defendant's double jeopardy theory. *Handy* involves an arson and whether there can be a separate charge for each person in the building that was set on fire. Because arson is a property crime, only one charge is appropriate, regardless of the number of people in the building.

Reckless endangering is a "person crime". Each person that was "down range" from Mr. Wright's multiple firings was a potential victim of his reckless conduct. Each time he pulled the trigger, he was committing another offense. The State did not overcharge as to Mr. Wright's conduct. If anything, the State was conservative by charging only one reckless endangering as to Mr. Harris although the gun was pointed in his direction and fired multiple times. Also there were other people "down range" besides Mr. Lubitz. Those people were also just as vulnerable to becoming victims each time a shot was fired as was Mr. Lubitz.

For the life of me, I just do not get the defense theory that conduct consisting of at least five shots fired in the direction of two or more persons constitutes a single course of conduct and a single offense of reckless endangerment in the first degree.

Appellate counsel committed no error in choosing not to appeal this issue because he was correct in concluding there was no merit in pursuing the double jeopardy claim in the Supreme Court.

GROUND TWO

The Defendant alleges he could not be sentenced as a habitual offender pursuant to 11 *Del. C.* §4214(a) because the felony conviction of conspiracy in the second degree was invalid. . Defendant argues that trial counsel should have investigated the basis of the conspiracy conviction and found it wanting. Interestingly, there has been little done in the present Motion to support this ground even though the defense had a "heads up" from the Court.[1]

In its Motion to have the Defendant declared a habitual offender, the State included a certified copy of the Defendant's conviction for felony conspiracy in Kent County, Delaware on June 4, 1997. The conviction was based on a guilty plea.

This Court may rely upon the certified records of a Defendant's conviction occurring in the State of Delaware. No transcript is necessary as may be the case when an out-of-state conviction is offered as a predicate felony. *Morales v. State*, 696 A.2d 390, 395 (Del. 1997).

As noted in this court's initial decision on this Motion, the Defendant had not then and has not now attacked his Kent County conviction. The Court and County in which the conviction lies is the place to attack same. Nor has the Defendant chosen to even get a copy of the transcript of the guilty plea.

The Defendant merely states that based on the police report, he was alone when he was stopped by the police and ultimately charged with the felony of possession with the intent to deliver. Therefore, the Defendant argues he cannot be guilty of conspiracy.

This ground is denied because the Defendant has the burden to attack his conviction in the county in which the conviction occurred. Further, even if he could attack the conviction in this motion, at this time he still has the burden of providing transcripts to review his claim.

Also, as previously noted, the Defendant was charged with possession with the intent to deliver. The plea documents evidence an agreement by the State and defense to amend the offense to the less serious charge of conspiracy. That plea agreement was signed by the Defendant and his attorney. He and his attorney successfully negotiated a guilty plea to conspiracy and the Defendant, with new counsel, cannot now complain about the negotiations, nor the plea that was entered thirteen (13) years ago. This was part of the plea negotiation process which occurs every day. "I won't plead to "x" but I will plead to "y". *Downer v. State*, 543 A.2d 309 (Del. 1988).

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[1]When the Rule 61 Motion was initially filed, I denied it as being conclusory. I subsequently permitted an amended Motion.

The Defendant cannot now complain about the beneficial plea agreement and plea entered in 1997.

GROUND THREE

In Ground Three, the Defendant argues that the ballistic expert, who expressed an opinion at trial that the five cartridge casings found at the crime scene were all fired from the same 9 mm weapon, was employed by the Maryland State Police and he subsequently committed suicide on March 1, 2007, several months after the trial. It was learned that he did not hold the college degrees he claimed he had received. The defense argues that this should be considered as newly discovered evidence of perjury by this expert and a new trial should be granted.

First, it is not newly discovered evidence as the Defendant notes the Maryland State Police issued a press release concerning this on March 8, 2007.

Second, the Defendant testified and confirmed that he had discharged the weapon multiple times.

Based upon his testimony that he pulled the trigger, as well as other witnesses testifying about how many times he fired the hand gun, any possible perjury as to the education of the expert witness was harmless. This ground is denied.

In conclusion, the Defendant's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

baj
cc: Prothonotary