IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	I.D. No. 0608011014
v.	)	
TERRELL A. GEE	)	
Defendant	)	

Submitted: October 19, 2009
Decided: November 3, 2009

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

Diane C. Walsh, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Terrell A. Gee, Smyrna, Delaware, *pro se*.

COOCH, J.

This 3rd day of November, 2009 upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. Defendant, Terrell Gee, was charged with committing five counts of Rape Second Degree. The alleged victim in the case was Defendant's minor cousin, who lived with Defendant and other family members in a small home located in Wilmington. After a jury trial in March 2007, Defendant was found guilty of three counts of Rape Second Degree and was subsequently sentenced on June 22, 2007

to forty-eight years of Level V incarceration suspended after thirty years of Level V incarceration. Each count of Rape Second Degree required a minimum mandatory 10 year sentence.

2. On June 3, 2009, Defendant filed the present motion for postconviction relief alleging ineffective assistance of his trial counsel, Kester I.H. Crosse, Esquire. Defendant alleges that counsel failed to perform basic functions including: (1) adequately conferring with Defendant; (2) seeking proper discovery; (3) investigating the crime; (4) interviewing necessary and important witnesses, and; (5) failing to object to discriminatory treatment by the State of jurors under *Batson v. Kentucky*.[1]

3. In response to Defendant's allegations, Mr. Crosse filed a particularly detailed affidavit stating as follows:

> 11. These allegations are specifically denied . . . I have a specific clear recollection of this case and the computer record of a number of contacts between Defendant and counsel and investigators from the office of the Public Defender is available and these records support counsel's position.
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> 12. Counsel conferred with the Defendant on several occasions during the case review process and prior to the trial of the case. In addition, our office investigator interviewed several family members including those that occupied the residence. These contacts occurred on 3/08/07, 3/07/07, 3/05/07 (FCR), 2/11/07 (mother), 2/05/07 Rhonda Carter and Sheena Carter, 2/01/07 (mother) Chicka Wilks, 1/22/07 (Defendant), 1/04/07 (Latoya Gee and Tracy Gee), 12/19/06 (mother Tracy Gee and Latoya Gee), 12/19/06 (Kelvin Bush mother's boyfriend), 12/18/06, (Defendant) 12/11/06 (Defendant-Case Review).
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> 13. The dates listed in the previous paragraph are not the total list of contacts as many were not recorded . . . .
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> 14. Counsel did not visit the residence where the incident took place. However, after speaking to the various family members, I was convinced that due to the small size of the house and the excessive number of people living there, it was very unlikely that this rape had occurred. There were too many people in the residence for Defendant to have done the rape and kept the occurrence secret.

[1] 106 S.Ct. 1712 (1986).

15. There was sufficient pretrial investigation. The witnesses were interviewed and counsel was prepared for trial. There was no problem with discovery as the usual exchanges were made. This was a late reported rape so there was no DNA or any medical evidence that was introduced at trial.

16. Defendant claims that counsel failed to interview his mother. This is totally incorrect. Defendant's mother was interviewed by both counsel and the investigator. There was also telephone contact. Counsel did not interview his probation officer Michelle Rollins and this is the first time that I have heard her name; therefore, I do not know what additional or relevant information she could offer.

17. The Defendant recognizes that his mother was a particularly important witness in this trial. Ms. Gee was called to describe the house, the layout, the occupants, who slept where etc. However, when she as [sic] asked a simple question regarding a fact that everyone accepted as true, she answered incorrectly. Ms. Gee was asked if her niece, the alleged victim, had ever lived at Ms. Gee's residence and she said no. This clearly was not the case as several witnesses had testified that the girl lived there. I attempted to correct her statement but she insisted that the child did not live there. This was totally contrary to the evidence in the case and was damaging to her son the Defendant.[2]

4. Although Defendant was permitted to file a reply by September 30, 2009, Defendant failed to do so. All that was filed by Defendant by September 30, 2009 was a document entitled "Amended," filed on August 28, 2009, which stated in its entirety:[3]

> In support of Defendent postconviction – Ineffective assistance of counsel. Defendent Asserts that Counselor, Kestor Crosse, was Ineffective when fail to advise the defendent of desirability of and nature of plea agreement; of 10 year's, and to discuss the strength of the state's case and chances of acquittal, constitutes Ineffective assistance of counsel. Thus, prejudice was established where the defendent received a 25 mandatory year sentence as oppose to the 10 year plea bargain offer.

On October 21, 2009 Defendant filed a letter with the Court that this Court will deem a Reply. The letter filed by Defendant on October 21, 2009 reasserts Defendant's innocence because there was no DNA evidence in the case. Additionally, Defendant asserts, once again, that he was confused by

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[2] Aff. of Kester I.H. Crosse, ¶ 11-17.

[3] The following is quoted verbatim from Defendant's response entitled "Amended."

the State's plea offer and that he would have accepted the offer had he understood the nature of that offer.

5. Defendant's claims of ineffective assistance of counsel are governed by the United States Supreme Court's decision in *Strickland v. Washington*.[4] Under *Strickland*, Defendant bears the burden of proof in showing that counsel's efforts "fell below an objective standard of reasonableness" and that, but for counsel's alleged error there was a reasonable probability that the outcome would have been different.[5] Allegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel; the defendant must allege concrete allegations of actual prejudice and substantiate them.[6] Furthermore, when evaluating counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance."[7]

6. Defendant's contention that his guilty plea was a product of ineffective assistance of counsel is contradicted by the factual record (including Mr. Crosse's detailed affidavit) and does not meet the burden of proof established in *Strickland*. Mr. Crosse's affidavit gives a thorough account of all the preparations taken in advance of trial. Counsel interviewed numerous witnesses (including Defendant's mother, a crucial witness), discussed trial strategies with Defendant, and informed Defendant that this was ultimately a case governed by credibility of witnesses

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[4] 466 U.S. 668 (1984).
[5] *Id.* at 688, 694.
[6] *Jordan v. State*, 1994 WL 466142 (Del.) (citing *Younger v. State*, 580 A.2d 552 (Del. 1990)).
[7] *Albury v. State,* 551 A.2d 53, 59 (Del. Super Ct. 1998).

rather than physical evidence. The strong presumption in favor of trial counsel rendering effective assistance is not overcome by Defendant's conclusory allegations, and Defendant's motion does not allege any facts in sufficient detail to demonstrate a reasonable probability that counsel's assistance at trial was "ineffective."

7. Moreover, Defendant's contention of a *Batson* violation is also without merit. Defendant alleges that counsel failed to object to the prosecution's discriminatory use of preemptory challenges to unfairly strike black jurors from the jury panel. Once again, Defendant's allegation is conclusory and does not allege in detail that any violation occurred. Mr. Crosse stated via affidavit that he had no recollection of any *Batson* violation occurring at jury selection. Additionally, Defendant has done nothing to substantiate a potential *Batson* violation because he has not alleged in detail how many potential black jurors were struck from the jury panel, if any. There is simply no evidence to support Defendant's contention of a *Batson* violation in the present case.

8. Finally, Defendant's letter entitled "Amended," and his subsequent letter filed with the Court on October 21, 2009 are entirely without merit. Defendant alleges he did not understand a potential plea offer, and, therefore, his conviction should be overturned. Additionally, Defendant asserts he should have been found innocent because of a lack of DNA evidence against him. Defendant did not argue that he misunderstood a potential plea offer in his initial Motion for Postconviction Relief, and the seven-line document entitled "Amended" is entirely conclusory

with no legal argument. Notably, the Court engaged in a thorough colloquy with Defendant immediately prior to jury selection in the trial:[8]

> The Court: Do you understand that the State has offered you a plea bargain in this case to plead guilty to one count of rape second degree and it would nolle pros or drop the other four charges? Do you understand that?
> The Defendant: Yes, sir.
> The Court: Do you understand that – I just want to make a record of the fact that you've chosen not to accept this plea offer; is that correct?
> The Defendant: Yes, sir.
> The Court: Do you understand that you'll not be able to come back at any later time to seek to claim that you wanted to plead guilty to it but, for some reason, you were prevented from doing so? Do you understand that?
> The Defendant: Yes.
> The Court: Do you understand that, if you were convicted of all five charges – I'm not saying you will be or won't be. You, your lawyer and the prosecutor know the evidence better than me – Court would have to impose a minimum-mandatory two year on each of the five rape second degree charges.
> Mr. Roberts: Ten, your Honor.
> The Court: Excuse me?
> Mr. Roberts: It's a ten-year minimum mandatory.
> The Court: Of course. So, multiplied by that, you'd receive ten years on each of the charges. Do you understand that?
> The Defendant: Yes, sir.
> The Court: Do you have any questions of me?
> The Defendant: No, sir.

Furthermore, there is nothing in the letter filed on October 21, 2009 that indicates a lack of DNA evidence should exculpate Defendant. Mr. Crosse's affidavit made it clear that DNA testing would have been futile given the facts of the case. There is no need for the Court to further investigate the conclusory allegations set forth in either the document entitled "Amended" or in the Reply received by the Court on October 21, 2009.

[8] The following is quoted verbatim from Tr. of Mar. 13, 2007 Trial at 4-5.

9. For the reasons stated above, there is no evidence that counsel's conduct fell below any objective standard of reasonableness as required by *Strickland* or any evidence of a *Batson* violation. Therefore, Defendant's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Kester I.H. Crosse, Esquire