

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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|--------------------|---|-----------------------|
| STATE OF DELAWARE, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Cr. ID No. 0512013537 |
| |) | |
| IDYLL ALLISON, |) | |
| |) | |
| Defendant. |) | |
| |) | |

Submitted: May 27, 2009

Decided: June 5, 2009

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED.**

Joseph S. Grubb, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Michael Heyden, Esquire, 1201 King Street, Wilmington, Delaware 19801.

Idyll Allison, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 5th day of June, 2009, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court as follows:

I. FACTS AND PROCEDURAL HISTORY

On July 21, 2006, a Superior Court jury found Defendant Idyll Allison guilty of Possession of a Deadly Weapon by a Person Prohibited and Conspiracy Second Degree. The jury was hung on the charges of Robbery First Degree and Possession of a Firearm During the Commission of a Felony. On September 12, 2006, Defendant went to trial on the remaining charges of Robbery First Degree and Possession of a Firearm During the Commission of a Felony. The jury returned a guilty verdict on these charges on September 15, 2006.

Defendant was sentenced on December 1, 2006 to incarceration for the balance of his natural life for Robbery First Degree, 5 years incarceration, minimum mandatory, on Possession of a Firearm During the Commission of a Felony, 5 years incarceration, minimum mandatory, on Possession of a Deadly Weapon by a Person Prohibited, and to probation on Conspiracy Second Degree.

Defendant appealed his conviction which was affirmed by the Delaware Supreme Court on January 31, 2008.¹

The facts giving rise to this action reveal that on December 19, 2005, two men entered an Audio Works store in Newark, Delaware. The first man, later identified as John Chavous, pointed a gun at Paul Myhre, the store manager, and demanded money. The second man, later identified as Defendant Allison, stood in the middle of the store with his gun aimed at Myhre. Defendant Allison told Myhre not to move or "try

¹ *Idyll Allison v. State*, 2008 WL 308230 (Del.).

anything funny.” Chavous took the \$88 that was in the cash drawer. Chavous and Allison then walked out of the store.

While the robbery was underway, Henry Dalecki, the store owner, was in a room in back of the store. As soon as Chavous and Allison left the store, Dalecki and one of his employees, Matt Keebler, followed the two robbers. Dalecki saw both men get into a red Plymouth Neon. One got into the front passenger side and the other got into the rear passenger side. Keebler was able to read the license plate on the car, and also got a close look at the person in the rear seat of the Neon, whom he identified as Allison.

Officer Morris Larue, of the Newark Police Department, responded to the report of the robbery at the Audio Works store. Larue spotted the red Neon, stopped the car, and ordered the three occupants out. Chavous was in the front passenger seat, armed with a gun. Allison was in the back seat. The police found the second gun on the floor of the front passenger side of the car. The third occupant was Mark Watson, the driver.

Chavous and Allison were tried together in the first trial. During the first trial, both co-defendants, Chavous and Watson, testified against Allison. The jury convicted Allison of Possession of a Deadly Weapon By a Person Prohibited and conspiracy. The jurors were unable to reach agreement on the remaining charges.

Two months later, Allison was retried without any co-defendants. He testified that he had nothing to do with the robbery. He said that he lost sight of Chavous and Watson when he went to order a slice of pizza at the Newark Shopping Plaza. Allison then returned to the back seat of the red Neon and waited for his companions. He claimed to have no idea what they had been doing while he was getting his pizza and

while waiting in the car for their return. The jury found him guilty of first degree robbery and Possession of a Firearm During the Commission of a Felony.

On February 3, 2009, Defendant Allison filed a motion for postconviction relief pursuant to Rule 61. In the motion he alleges three grounds as the basis for relief: 1) Ineffective Assistance of Counsel; 2) Impeachment Evidence; and 3) Actual Innocence.

II. DISCUSSION

Defendant raises three grounds as the basis for his Rule 61 motion for postconviction relief, each of these grounds is discussed below.

A) GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.² If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.³

Defendant's ineffective assistance of counsel claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a claim, even when it has not been previously raised.⁴

Turning then to the substantive merits of this claim, to prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense."⁵ The first prong requires the defendant to show by a preponderance of the evidence that defense

² *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

³ *Id.*

⁴ *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁵ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

counsel was not reasonably competent, while the second prong requires him to show “that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the result of the proceeding would have been different.”⁶

Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.⁷ There is a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance.⁸ Moreover, there is a strong presumption that defense counsel’s conduct constituted sound trial strategy.⁹

When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.¹⁰

Here, Defendant fails to satisfy either prong of the *Strickland* test.

Defendant Allison first claims that his counsel was ineffective because the State did not present a case against him on the theory of accomplice liability. Yet, the issue of the State not proceeding on a theory of accomplice liability was already addressed by the Delaware Supreme Court in Defendant’s direct appeal¹¹ and will not be re-examined simply because the claim is now refined or restated and relabeled as an ineffective assistance of counsel contention.¹² The Delaware Supreme Court already held that the jury was properly instructed that Defendant could be found guilty only if it found, among other things, that Defendant Allison, personally, displayed what appeared to be a deadly

⁶ *Id.* at 687-88, 694.

⁷ *Younger*, 580 A.2d at 556.

⁸ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

⁹ *Strickland*, 466 U.S. at 689.

¹⁰ *Strickland*, 466 U.S. at 697.

¹¹ *Allison*, 2008 WL 308230 at *2-3.

¹² *Johnson v. State*, 1992 WL 183069 at *1 (Del.Supr.)

weapon while committing a theft. Consequently, there was nothing improper about the State's course of proceeding, the State did not proceed on a theory of accomplice liability, and there was nothing deficient about Defendant's counsel's conduct related thereto.

Defendant also contends that his counsel was somehow ineffective because he was convicted even though there was a lack of physical evidence against him. However, the jury made its decision based on the evidence presented, which included the testimony of the store clerks, co-defendants (during the first trial) and the defendant. The jury reached its verdict based on the weight and credibility of the evidence produced at trial. The weighing of the evidence in the case is within the province of the jury.

Defendant appears to be contending that his counsel must have been ineffective because he was convicted. Defendant fails to explain what his counsel should have done but did not do, or what his counsel did but should not have done. Defendant has pointed to nothing in the record to demonstrate a lack of diligence on behalf of his counsel. Defendant has failed to make concrete allegations of actual prejudice and substantiate them. Conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel.

Defendant also claims that his counsel was ineffective because he failed to address the legal principles, facts and circumstances involved in the case. Defendant does not provide any concrete allegations as to what facts, legal principles or circumstances were not addressed and how the outcome would have differed if such an alleged disclosure had been made. Defendant's counsel, in his affidavit, asserts that the facts and legal principles were discussed during the case. Again, Defendant's allegations

are merely conclusory which are insufficient to establish a claim of ineffective assistance of counsel.

The Defendant claims that trial counsel was ineffective for not requesting a lesser included offense instruction of robbery in the second degree. At trial, the evidence was uncontradicted that the robbers were armed with guns and therefore the crime would be a robbery in the first degree. The defense at trial was that the Defendant was not involved in the robbery; not that he committed a lesser included offense. An instruction on a lesser included offense is appropriate only if there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of a lesser-included offense.¹³ Here, if the jury believed the Defendant, they would not have convicted him of any crime. On the other hand, if they believed the other witnesses that testified against Defendant, they would have found that Defendant was armed with a gun during the commission of the robbery and therefore the crime would be robbery in the first degree. Since there was no rational basis in the evidence for a request of a lesser included offense of robbery in the second degree, Defendant's counsel was not ineffective for failing to make such a request.

Defendant has failed to establish either prong of the *Strickland* test, and therefore, his claims of ineffective assistance of counsel fail.

B) GROUND TWO: IMPEACHMENT EVIDENCE

It appears that Defendant is contending that his counsel was ineffective for not calling the co-defendants to testify in the second trial and because the testimony of "other witnesses" were inconsistent between the two trials. As to the co-defendants, defense counsel tactically chose not to call them in the second trial because they had testified

¹³ *Ward v. State*, 575 A.2d 1156, 1159 (Del. 1990).

against Defendant in the first trial. As noted in *Strickland*, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.¹⁴ Defendant has not overcome that strong presumption.

As to the inconsistencies of "other witnesses", Defendant has made only conclusory allegations and has provided no specifics as to which witness or witnesses he is referring to, what inconsistencies existed between the two trials, and how his counsel was deficient with respect to any alleged inconsistencies. Moreover, there are no concrete allegations of actual prejudice as a result of any alleged deficiencies. The fact that there are inconsistencies in testimony does not mean that counsel was deficient. The weighing of the strength or weakness of the testimony of witnesses is within the province of the jury.

Defendant has therefore failed to establish either prong of the *Strickland* test, and his claims of ineffective assistance of counsel related to the second ground for relief of his Rule 61 motion must fail.

To the extent that Defendant's second ground for relief, impeachment evidence, were not intended as an ineffective assistance of counsel claim, but instead was intended as an independent, separate claim for which Defendant is seeking the reversal of his convictions, the claim is procedurally barred.¹⁵ Although ineffective assistance of counsel claims do not have to be raised on direct appeal, this type of claim, if not an ineffective assistance of counsel contention, would have to be raised on direct appeal to be procedurally preserved. Because this ground was not previously raised on direct appeal as required by the court rules, if not an ineffective assistance of counsel claim, it is

¹⁴ *Strickland*, 466 U.S. at 689.

¹⁵ Super.Ct.Crim.R. 61(i)(2) & (3).

procedurally barred. In order to overcome the procedural bar, Defendant must show a “colorable claim that there was a miscarriage of justice”.¹⁶ The miscarriage of justice exception is a narrow one and has been applied only in limited circumstances.¹⁷ Defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”¹⁸ Defendant has failed to provide any basis upon which this Court could conclude that it is in the interests of justice to consider this otherwise barred claim for relief.

Even if Defendant’s claim was not procedurally barred, it is without merit. The fact that there are inconsistencies in testimony does not mean that the trial was tainted or that Defendant was somehow deprived of a substantial constitutional right. It was the duty of the jury to weigh the testimony of witnesses, to consider any inconsistent statements, to determine the weight and credibility to give to each witness’s testimony and to render a verdict. The weighing of the strength or weakness of the testimony of each respective witness is squarely within the province of the jury. Defendant’s “impeachment evidence” claim is factually unsubstantiated.

C) GROUND THREE: ACTUAL INNOCENCE

To the extent that Defendant’s third ground for relief, actual innocence, is an ineffective of counsel contention, Defendant’s claim fails the *Strickland* standard because he fails to identify with particularity the defects in counsel’s performance nor does he make concrete allegations of actual prejudice with respect to this claim.

To the extent that Defendant’s third ground for relief is not an ineffective of counsel contention, this ground for relief is procedurally barred. This ground for relief

¹⁶ Super.Ct.Crim.R. 61(i)(4).

¹⁷ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

¹⁸ *Id.*

was not previously raised on direct appeal as required by the court rules. Defendant has failed to provide any basis upon which this Court could conclude that it is in the interests of justice to consider this otherwise barred claim for relief.

Even if Defendant's third ground for relief was not procedurally barred, it is without merit. The guilt or innocence of the Defendant is exclusively within the province of the jury. The jury is the sole finder of fact. The jury reached a unanimous verdict based on the weight and credibility of the evidence produced at trial.

III. CONCLUSION

For the reasons stated above, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

cc: Prothonotary