

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

<b>STATE OF DELAWARE,</b>	)	
	)	IK98-05-0510-R1
v.	)	IK98-05-0511-R1
	)	IK98-07-0092-R1
<b>WILLIAM M. SCOTT,</b>	)	IK98-07-0096-R1
	)	
Defendant.	)	ID No. 9805012033

Submitted: August 17, 2009  
Decided: December 30, 2009

**On Defendant's Second Motion for Postconviction Relief - DENIED**

**ORDER**

Dennis Kelleher, Esquire, Department of Justice, 102 West Water Street, 3<sup>rd</sup> Floor,  
Dover, DE 19904. Attorney for State of Delaware.

William M. Scott, Sussex Correctional Institution, Georgetown, DE 19947. *Pro*  
*Se* Defendant.

**CARPENTER, J.**

On this 30<sup>th</sup> day of December 2009, upon consideration of Defendant's Second Motion for Postconviction Relief, it appears to the Court that:

1. William Scott ("Defendant" or "Scott"), has filed a Second Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). For the reasons set forth below, Defendant's Motion will be DENIED.

2. On March 26, 1999, Defendant was found guilty of Murder First Degree (Felony Murder); Robbery First Degree; Burglary Second Degree; and Conspiracy Second Degree. Defendant was found not guilty of four counts of Possession of a Firearm During the Commission of a Felony and Murder in the First Degree (Intentional Murder). The Defendant's conviction was subsequently affirmed by the Supreme Court. Defendant then filed his First Motion for Postconviction Relief in 2004. This motion was referred to a Commissioner for a report and recommendation. The Commissioner's March 19, 2007 report recommended that Defendant's postconviction motion be denied and it was adopted by the Court. Scott subsequently filed an appeal of that decision to the Supreme Court and the decision was affirmed on October 28, 2008. Defendant has now filed his Second Motion for Postconviction Relief in light of the Supreme Court's recent decision in *Allen v. State*.<sup>1</sup>

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<sup>1</sup> 970 A.2d 203 (Del. 2009).

3. Before the Court may consider the merits of a Rule 61 motion, it must first address the procedural bars set forth in Superior Court Criminal Rule 61(i).<sup>2</sup> Although the current motion is procedurally barred for being untimely, the Court believes that based on the Supreme Court's decision in *Allen v. State*<sup>3</sup>, the "interest of justice" exception under Rule 61(i)(4) has been triggered here.

4. In essence, *Allen* provided guidance to the trial court regarding how the jury should be instructed when a defendant is prosecuted under a theory of accomplice liability and that offense is divided into degrees.<sup>4</sup> Under *Allen*, the jury is to determine the Defendant's culpability based upon that defendant's "individual mental state and accountability for an aggravating fact or circumstance."<sup>5</sup> It is this "accountability" language in the *Allen* decision that the Defendant now asserts was not properly instructed to the jury in his case with regard to Burglary Second Degree and Robbery First Degree and as these were the underlying predicate offenses for the felony murder conviction, all three convictions must be reversed and retried.

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<sup>2</sup> This section of Rule 61 sets forth certain parameters governing the proper filing of a motion for postconviction relief: (1) the motion must be filed within one year of the final judgment of conviction; (2) any ground for relief not raised in a prior postconviction motion will be barred if raised in the instant Motion; (3) any claims which the Defendant failed to assert in the proceedings leading to his conviction are barred, unless he is able to show cause and prejudice; and (4) any ground for relief raised in this Motion must not have been formerly adjudicated in any proceeding leading to the conviction, unless the interest of justice requires reconsideration.

<sup>3</sup> 970 A.2d 203 (Del. 2009).

<sup>4</sup> *Allen*, 970 A.2d at 213-14.

<sup>5</sup> *Id.* at 214.

5. This Court has previously concluded that the *Allen* decision is not retroactively applicable.<sup>6</sup> While the Court is inclined to follow these decisions, it believes there is still a requirement to review the unique facts of this case to determine whether “holding a new decision non-retroactive would clearly result in an egregious injustice” to this Defendant.<sup>7</sup> It is within this context that the jury’s decision will be reviewed.

A. Burglary Second Degree

6. A person is guilty of burglary in the second degree where: “... the person knowingly enters or remains unlawfully in a dwelling with intent to commit a crime there in.”<sup>8</sup> The evidence at trial illustrated the existence of a conspiracy between the Defendant and co-defendant Justin Burrell to rob the home of Dolly Fenwick where they believed a safe containing drug proceeds was located. Furthermore, the evidence was overwhelming as to Defendant’s own “individualized” intent to commit the burglary. He solicited his co-defendant for the sole purpose of breaking into the victim’s mobile home to steal cash from a safe located in the victim’s bedroom. Defendant also aided and assisted the burglary by drawing a map of the interior of the home; advised his co-defendant where the money would be located; and circumstantial evidence suggested that Scott provided the weapon used in the burglary.

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<sup>6</sup> See *State v. Bartley*, 2009 WL 2883055, at \*7 (Del. Super. Sept. 8, 2009); *State v. Richardson*, 2009 WL 2854745, at \*5 (Del. Super. June 23, 2009).

<sup>7</sup> *State v. Chao*, 2006 WL 2788180, at \*8 (Del. Super. Sept. 25, 2006).

<sup>8</sup> 11 *Del. C.* § 826.

In light of these facts, the Defendant's accountability argument fails as to this offense since the only difference between Burglary Second and the lesser included offense of Burglary Third is the nature of the building unlawfully entered. Since there is no dispute the victim's mobile home meets the definition of "dwelling," Burglary Second is the only offense that the jury was properly instructed on. In essence, there is no "aggravating" factor that would warrant an additional instruction of lesser offenses under *Allen*.

B. Robbery First Degree

7. Robbery in the First Degree is based upon the underlying offense of Robbery Second Degree.<sup>9</sup> Robbery Second Degree occurs when in the course of committing a theft, the individual uses or threatens to use force upon another person with the intent to overcome that person's resistance to taking property.<sup>10</sup> The "aggravating factor" that distinguishes Robbery in the First Degree and Robbery in the Second Degree is whether physical injury to a non-participant occurred or whether a deadly weapon was displayed during the course of the robbery. There is no dispute that the victim was shot and killed during this robbery, and thus it appears that if *Allen* had been in effect at the time of this trial that some additional instruction would have been needed as to the Defendant's individual accountability for this factor. But a review

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<sup>9</sup> 11 *Del. C.* § 832.

<sup>10</sup> 11 *Del. C.* § 831.

of the evidence easily establishes that no injustice occurred here. It is beyond dispute that the Defendant masterminded a plan to burglarize the mobile home and Defendant not only knew Burrell possessed a gun the morning of the burglary but circumstantial evidence also suggests that Scott was the one who provided the weapon. Trial testimony also indicates that Scott and Burrell were aware that an individual would be home during the burglary and discussed what would happen if the individual had a gun.<sup>11</sup> Scott had recruited Burrell because he knew that he would do whatever was necessary to complete the theft including shooting the victim if that became necessary. The evidence supports the jury's conclusion that it was reasonably foreseeable not only that physical injury would occur during the robbery but it was likely to occur.

Based on the evidence, the Court believes no reasonable jury would have found Defendant guilty of anything less than Robbery First Degree, even if the aggravating language of *Allen* had been instructed to the jury. As such, the Court finds no "miscarriage of justice" in failing to instruct as now required by *Allen* to the jury.

In addition, even if the jury had been instructed as required by *Allen* and subsequently found the Defendant guilty of the lesser included offense of Robbery Second Degree, it would have had no effect on the felony murder offense for which the Defendant was also convicted. As long as the convicted underlying offense remained a felony, it would be sufficient as the predicate offense to support the felony

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<sup>11</sup> Trial Tr. 22, Mar. 24, 1999.

murder conviction. Therefore, even if the Court accepted the Defendant's argument that he may have been convicted of Robbery Second Degree and not Robbery First Degree, it would have no effect on the Murder conviction for which he is now serving a life sentence.

For the foregoing reasons, Defendant's Second Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.  
Judge William C. Carpenter, Jr.