IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-91-09-0956-R3 IN-91-09-0958-R3
JOE L. TRAVIS	)	
	)	
Defendant	)	ID NO. 30109075DI

Submitted: August 17, 2009
Decided: December 7, 2009

MEMORANDUM OPINION

Upon Motion of the Defendant
for Post-Conviction Relief - ***DENIED***

HERLIHY, Judge

Joe Lewis Travis has filed his third motion for postconviction relief. Travis' first motion in 1997 was denied as was his second one in 2008.[1] Both of those denials were appealed. The 1997 denial was affirmed and his appeal of the 2008 was dismissed as untimely.[2]

Travis' latest motion contains four grounds for relief: (1) the Court erred in denying his motion for severance; (2) prosecutorial misconduct for repeatedly using the word "victim;" (3) Court error for failure to sequester the jury during the overnight deliberations. The fourth ground is founded on the case of *Allen v. State*,[3] decided earlier this year. In *Allen* the Supreme Court overturned several prior rulings and clarified Delaware law regarding how the *mens rea* of an accomplice is to be decided. The *Allen* Court relied upon a re-examination of 11 *Del. C.* § 274. Travis argues this Court failed to give the jury the proper instruction under § 274 which the *Allen* decision now indicates needs to be given.

The Court finds these claims lack merit or are procedurally barred.

Factual Background

Travis and co-defendant Lester Anderson were indicted for the first degree murder

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[1] 1997 WL 719342 (Del. Super. Sept. 1, 1997); 2008 WL 308485 (Del. Super. Feb. 4, 2008).

[2] 1998 WL 171091 (Del. Mar. 23, 1998); 2008 WL 836967 (Del. Mar. 31, 2008).

[3] 970 A.2d 203 (Del. 2009).

of Steven Shumate, possession of a deadly weapon during the commission of a felony (PDWDCF), and conspiracy first degree. Prior to trial, the Court dismissed the PDWDCF charge.

The basic facts underlying the remaining two charges are summarized in an earlier opinion of this Court:

> Witnesses testified that after midnight on August 24, 1991, Travis and the victim Steven Shumate [Shumate] had an argument in front of 2213 North Market Street in Wilmington. Words were exchanged and apparently there was some pushing and shoving between the two. Co-defendant Lester Anderson [Anderson] was present during this exchange. Witnesses testified that during the argument, Shumate pulled a gun from his pants and the witnesses heard it discharge. Although both Travis and Anderson initially backed away, someone yelled that the gun was a cap gun and Shumate began to run. Both Travis and Anderson chased Shumate. Some testimony indicated that Travis was directly on Shumate's heels, hitting the victim with his fists. Anderson was close behind carrying a baseball bat. Travis caught up to Shumate and tripped him, causing him to fall. Anderson repeatedly struck Shumate in the head with a baseball bat while Travis repeatedly kicked Shumate about the body. After the beating, the defendants fled taking the gun with them.
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> Shumate died of acute bronchopneumonia brought on by blunt force injuries to the head. Shumate's skull was fractured in four places. The autopsy also revealed the blows to the head were hard and multiple, more than ten. All these injuries were consistent with the blows struck by the baseball bat. The autopsy also reflected non-fatal injuries to the victim's torso consistent with kicking.[4]

Based on this (although summarized here) factual background, the jury was instructed that:

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[4] *State v. Travis*, 1992 WL 147996, at *1 (Del. Super. Jun. 9, 1992).

> There are two defendants in this case. In effect, there are two different cases being tried together. While a criminal offense may be committed jointly by two or more defendants, if you should be satisfied beyond a reasonable doubt that one of the defendants is guilty, this does not prove that the other defendant is also guilty. You must bear in mind at all times that these two defendants are charged here as individuals and you must consider the law that I state to you in the light of the evidence against each defendant. So you must weigh the evidence separately as it applies to each defendant and render a separate verdict as to each defendant and as to each charge.[5]

The jury was also instructed on the elements of murder first degree, murder second degree, and manslaughter; the latter two, of course, as "lesser includeds" of murder first degree.

In addition, as to accomplice liability, the jury was instructed:

> LIABILITY FOR THE CONDUCT OF ANOTHER
>
> In this case, the defendant Joe Lewis Travis is charged in Counts I with the offense of murder in the first degree, the elements of which, according to the State's contention, were actually performed by Lester Anderson. You may find the defendant Joe Lewis Travis guilty of that offense or of the lesser-included offenses in this case only if you are satisfied beyond a reasonable doubt that:
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> 1. Defendant Lester Anderson performed all of the elements of any of the offenses as I have defined them for you; and
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> 2. Defendant Joe Lewis Travis intended, that is, it was his conscious object or purpose, to promote or facilitate the commission of the offense; and
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> 3. Defendant Joe Lewis Travis aided, counseled, agreed or attempted to aid defendant Lester Anderson in committing the offense.

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[5] Jury Charge by Herlihy, J., dated February 10, 1992.

> Where there is a crime committed and there are two people present, though one may take no particularly active part in the crime, yet if he or she is present at or near the scene of the crime, aiding or counseling the other under the law of this State, he or she is equally guilty with the person who actually commits the crime. On the other hand, mere presence at the scene of the crime is not sufficient.
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> If you determine, after considering the evidence, that defendant Joe Lewis Travis was merely present at or near the scene of the crime, without aiding, abetting, counseling or participating in the crime, then it is your duty to find him "not guilty". Furthermore, aiding, as used in the statute, refers to assisting and helping in the actual commission of the crime. It does not refer to participating after the offense is actually committed.[6]

On the charge of conspiracy first degree, the Court instructed the jury that if it acquitted the defendants of that charge, it could consider its lesser included offense of conspiracy second degree as it related to the "lessers" murder second degree or manslaughter.[7]

Finally, the Court instructed the jury as follows regarding the charges and each defendant:

> You should consider each count separately and must reach a separate verdict as to each count, uninfluenced by your verdict in any other count.
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> As to each count, if after a careful and conscientious consideration of the evidence in the case, you believe beyond a reasonable doubt, as I have explained that expression to you, that a particular defendant committed the crime for which he stands charged in a particular count as that has been

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[6] *Id.*

[7] The jury was further instructed regarding: (1) justification - use of force in self-protection; (2) justification - use of deadly force; and (3) justification - use of deadly force in self-protection.

defined to you, your verdict should be "guilty as charged" of that count for that defendant.

However, if you do not find that all of the elements have been proved beyond a reasonable doubt, or if you have a reasonable doubt concerning the guilt of a defendant as to a particular count, your verdict must be "not guilty" of that count for that defendant.

Each verdict must unanimous.

As to Lester Anderson:

As to Count I, you verdict may be guilty of murder in the first degree, or guilty of the lesser-included offense of murder in the second degree, or guilty of the lesser-included offense of manslaughter, or not guilty.

As to Count II, your verdict may be guilty of conspiracy in the first degree, or guilty of conspiracy second degree, or not guilty.

As to Joe Lewis Travis:

As to Count I, you verdict may be guilty of murder in the first degree, or guilty of the lesser-included offense of murder in the second degree, or guilty of the lesser-included offense of manslaughter, or not guilty.

As to Count II, your verdict may be guilty of conspiracy in the first degree, or guilty of conspiracy second degree, or not guilty.

I will now review for you a special verdict sheet. I have just explained to you the range of verdicts you have as to each defendant. As to defendant Joe Lewis Travis, there is an additional instruction I need to review with you. As to Count I, or any of the lesser-included offenses I have defined for you, you may find defendant Joe Lewis Travis guilty as a principal or guilty as an accomplice. Of course, you may find defendant Joe Lewis Travis not guilty of the original charge or any of the lesser-included offenses.

Whatever your verdict is, it must be unanimous. Specifically, and without in any way indicating what your verdict should be, if you are debating between whether defendant Joe Lewis Travis is guilty as a principal or an

> accomplice, you must be unanimous on whether he is guilty as a principal or as an accomplice. Again, you may find defendant Joe Lewis Travis not guilty of any charge under Count I.
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> Each verdict must be unanimous.[8]

During its deliberations, the jury sent out this note:

> (1) "Can a defendant be found guilty as an accomplice to a lesser included offense than that of the principal defendant [sic] was found guilty?" and (2) "Does being an accomplice required the Defendant to have concious [sic] intent to commit the crime committed by the principal?"

The Court answered "Yes" to both questions.

On January 11, 1992, the jury returned a verdict of not guilty of conspiracy (any degree) and that both defendants were guilty of murder first degree. It found that Anderson was the principal and Travis the accomplice.

On appeal, Travis initially challenged the Court's affirmative answers to both questions. At one point during the appeal, however, he agreed that the affirmative answer to the first question was correct. He maintained his dispute as to the second question. In its Order addressing Travis' argument about both questions, the Supreme Court stated:

> At trial, defense counsel argued that the first question should be answered in the negative and had no comment on the second one. The trial court disagreed. Specifically, it determined that the accomplice liability instructions did not address the jury's present concerns and that 11 *Del. C.* § 274 compelled an affirmative answer to both questions.

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[8] *Id.*

> In this case, the trial court's response to the jury's written questions did not affect the substantial rights of Travis. As Travis now concedes, the trial court's affirmative answer to the first question was correct. Under Delaware law, an accomplice may be found guilty of a lesser offense than that of the principal. *See* 11 *Del. C.* §§ 271(c), 274. Further, although the trial court's answer to the second question is incorrect under Delaware law, it caused Travis no prejudice. Indeed the trial court's statement of the law worked to Travis' advantage. Under 11 *Del. C.* § 271, the inquiry is not whether an accomplice had the specific intent to commit murder. Rather, a defendant is guilty as an accomplice if he or she intended to promote or facilitate the principal's conduct constituting the offense, and the result was foreseeable. *Hooks v. State*, Del. Supr., 416 A.2d 189, 197 (1980). In the present case, if Travis intended to aid Anderson, and the result - - murder - - was foreseeable consequence of his aiding Anderson's conduct, Travis is guilty of murder as an accomplice, regardless of whether Travis also specifically intended to kill Shumate. By answering the jury's second question in the affirmative, the trial court instructed the jury that to find both Travis and Anderson guilty of First Degree Murder, they had to find that they both had the specific intent to kill Shumate. This erroneous instruction actually placed a higher burden on the State than it had under 11. *Del. C.* § 271. Thus, since the trial court's incorrect instruction actually aided, rather than prejudiced, Travis, there is no plain error.[9]

The convictions were upheld. The mandate was issued January 7, 1994. Travis' first motion for postconviction relief was filed in 1997. The Court considered his belated motion (beyond the three year cut-off from the date of the mandate) to raise a question of a miscarriage of justice. The motion presented alleged "new" evidence supposedly exonerating Travis. The Court found the "new" evidence to lack credibility and that there was no miscarriage of justice. This meant the then three year time bar applied barring

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[9] *Travis v. State*, 637 A.2d 829 (TABLE), 1993 WL 541923, at *2 (Del. Dec. 22, 1993).

consideration of his motion.[10] *Travis v. State*, Del. Super., March 23, 1998. As noted earlier, this Court's denial was affirmed.[11]

Travis filed his second motion in 2007. At first blush, that motion was clearly time barred.[12] But his second motion was premised on the Supreme Court's decisions in *Williams v. State*[13] and *Chao v. State*.[14] *Williams* was a reinterpretation and an overruling of earlier Supreme Court cases dealing with the interpretation and application of the phrase "in furtherance of" found in felony murder provision of first degree murder.[15] *Williams* was decided in 2003 but in 2007 the Supreme Court held *Williams* was to be applied retroactively. Travis' second motion, therefore, was not time barred because he filed it within a year of the *Chao* decision.

Yet Travis' second motion lacked merit. It was based on a claim he had been convicted of a felony first degree murder. He was not. This Court denied his second motion.[16]

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[10] *State v. Travis*, 1997 WL 719342 (Del. Super.).

[11] *Travis v. State*, 1998 WL 171091 (Del.).

[12] *Chao*, 931 A.2d at 1002.

[13] 818 A.2d 906 (Del. 2003).

[14] 931 A.2d 1000 (Del. 2007).

[15] 11 *Del. C.* § 636(a)(2) - since amended.

[16] *State v. Travis,* 2008 WL 308485 (Del. Super).

Travis' third and latest motion is premised on yet another Supreme Court decision clarifying, re-interpreting and/or overruling many of its prior decisions, this time dealing with accomplice liability. The decision upon which Travis relies for relief is *Allen v. State*.[17] In *Allen* the Supreme "held":

> Assuming arguendo that Allen's mental state as an accomplice was the same as the principal perpetrator of each act of robbery, burglary and menacing, the difference in the degree of each offense depended on Allen's "own accountability for an aggravating fact or circumstances," i.e., the gun. Therefore, as to each of the charged offenses that is divided into degrees, we hold that the Superior Court's failure to comply with the unambiguous statutory mandate of section 274 to instruct the jury to determine Allen's individual "mental state" and "accountability for an aggravating fact or circumstance" constituted reversible error. To the extent that our prior panel decisions are inconsistent with this holding, they are overruled. (Footnotes omitted).[18]

Allen was decided February 17, 2009. Travis filed this third motion on August 4, 2009.

Travis' Claims

Travis relies upon *Allen* to argue the jury was not properly instructed that it had to separately determine his *mens rea* as an accomplice. Arguing the Court's failure to do that is error warranting relief.

His other claims are that the Court erred when it denied his motion to sever his trial from that of Anderson. He claims the defenses of the two of them were antagonistic.

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[17] 970 A.2d 203 (Del. 2009).

[18] *Allen* at 214.

Travis also contends the repeated use of the word victim was prejudicial error. Finally, he asserts judicial error for not sequestering the jury while it was deliberating.

Discussion

Before undertaking a review of Travis' motion, the Court is required to determine if there any procedural impediments to doing so.[19] Several of Travis' new claims the are clearly barred from consideration. Those claims are: (1) claimed judicial error in denying his motion to sever; (2) prosecutorial error and ineffective assistance of counsel for not objecting to the prosecutor's repeated use of the word "victim" to describe Shumate; and (3) failure to sequester the jury during its deliberations. Travis' fourth ground for postconviction relief is that based on *Allen*, the jury was not properly instructed to separately determine his *mens rea* and because it was not and did not, he is entitled to a new trial. The ability to consider that claim has more complex sub-issues to it and will be addressed as part of the interconnected review of the merits of the claim itself.

A

When Travis filed his original motion for postconviction relief in 1997, this Court's rule as to such motions was that they had to be filed within three years that the conviction became final.[20] Since that date the window to file such a motion has been changed to one

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[19] *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

[20] Super. Ct. Crim. R. 61(i)(1); *Jackson v. State*, 654 A.2d 829 (Del. 1995).

year.[21] That was the time frame when Travis filed his second motion in 2007.

As this Court said in its 2008 opinion denying his second motion, whether a three year or one year time bar applies, that second motion would be denied on its merits (or lack thereof).[22]

As to the first three of four of Travis' current claims, it does not matter which time bar applies, these three claims are barred as untimely. The mandate making his conviction final was issued January 7, 1994. There are potential reliefs to this time bar if (1) Travis can show a newly recognized right after that finality[23] or that he can show (2) this Court lacked jurisdiction, or a (3) a colorable claim of miscarriage of justice, due to a constitutional violation that undermined the integrity of his trial.[24]

None of these three claims meets those tests for relief from the procedural bars enabling him to overcome the time bar to consideration.

There is an additional bar to these three claims. As noted, this is Travis' third postconviction relief motion. Under the applicable Rule, Travis was required to include

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[21] Super. Ct. Crim. R. 61(i)(1).

[22] *Travis*, 2008 WL 308485 at *4.

[23] Super. Ct. Crim. R. 61(i)(1).

[24] Super. Ct. Crim. R. 61(i)(5).

these first three claims in his first or even second motion.[25] He did not. His failure to do so also bars this Court's consideration of them.[26] To obtain relief from this procedural bar, Travis has to show consideration is warranted in the interest of justice.[27]

Travis has made no showing or hinted at a showing why he could not have raised these claims within three years of January 7, 1994, or in either subsequent postconviction motion. He has not offered an iota of a reason why seventeen-and-a-half years later an interest of justice warrants consideration. Nor has he shown that the additional relief to this particular procedural bar meets the criteria of Superior Court Criminal Rule 61(i)(5).[28] Consideration of these three claims is, therefore, barred.

B

The analysis of Travis's fourth claim, that his *mens rea* was not properly submitted to and/or determined by the jury is not as straight-forward.

At first, this claim would seem to be time barred. But such a conclusion is too facile. This claim is founded on a case decided earlier in 2009, namely *Allen v. State*.[29]

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[25] Super. Ct. Crim. R. 61(b)(2).

[26] Super. Ct. Crim. R. 61(i)(1).

[27] *Id.*; *Robinson v. State*, 562 A.2d 1184 (Del. 1989).

[28] "Bars Inapplicable. The bars to relief in paragraphs (1) and (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."

[29] 970 A.2d 203 (Del. 2009).

Until *Allen* was decided it was unclear, if not ambiguous, at best, that Travis' *mens rea* claim could have been presented. At worst this claim, based on the precedents cited in *Allen* may have been rejected. A quote of a portion of *Allen* highlights why:

> We are deciding Allen's case *en Banc* to reconcile our prior inconsistent panel decisions. Although sections 274 includes language relating to both culpable mental states and *aggravating circumstances*, in the past several of our panel decisions have only focused on the mental state of the alleged accomplice to a robbery and not on the accomplice's "accountability for an aggravating fact or circumstance." Consequently, we have previously held that section 274 only applies when the underlying offense can be divided into degrees with different mental states for each degree. Therefore, we have concluded that a lesser-included offense instruction would be appropriate if the jury is required to distinguish between degrees of homicide, but not robbery. Indeed, on numerous occasions we have explicitly stated that there is no basis for a section 274 instruction when the offense in question is robbery, because "the offenses of first degree robbery and second degree robbery require proof of the same mental state.[30] (Footnotes omitted).

Indeed the Supreme Court's Order affirming Travis' conviction on direct appeal is one of those cases which, by saying this Court's affirmative answer to the jury's second question was wrong, is in the line of cases now overruled by *Allen* (though not cited as such in *Allen*).

The analysis cannot stop there. It started with *Allen* overturning a number of prior Delaware Supreme Court rulings. That part is clear. What is less clear, and basically unknown at this point is whether *Allen* is to have retroactive application. *Allen* neither explicitly says so nor offers any clues in that regard. This Court, therefore, is left in a

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[30] *Allen*, 970 A.2d at 210-211.

quandry which only the Delaware Supreme Court can resolve. But, there is precedent on which this Court can reliably predict that, when asked to hold so, the Delaware Supreme Court will say *Allen* is to have retroactive application.

That precedent comes from the saga of *Williams v. State*[31] and *Chao v. State*.[32] Williams reinterpreted the phrase "in furtherance of" as it found in the statute defining one of the ways a person can commit murder first degree.[33] *Williams* overturned years of contrary precedent or interpretations by the Supreme Court. *Allen* did the same thing, overturning precedents or reinterpreting prior Supreme Court rulings. But like *Allen*, *Williams*, did not say that new holding, or latest reinterpretation, was to be retroactively applied. Four years later in *Chao* the Supreme Court said *Williams*' holding was to be retroactively applied.

Williams involved a statutorily reinterpretation. So does *Allen*. Based on the reasoning in *Chao*,[34] this Court holds *Allen* is to be retroactively applied. *Mens rea* is a quintessential element of the offenses charged in here and most offenses. If Travis' own *mens rea* were not properly considered and established, that right is too fundamental to be ignored.

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[31] 818 A.2d 906 (Del. 2003).

[32] 931 A.2d 1000 (Del. 2007).

[33] 11 *Del. C.* § 636(a)(2).

[34] *Chao*, 931 A.2d at 1002.

Therefore, there is a right which became known or, to use the language of Rule 61(i)(1), in a most strained way, is "newly recognized" more than year following Travis' conviction becoming final in 1994. In short, there is no procedural bar to consideration of Travis' fourth claim relating to determination of his culpability.

All of this discussion, however, is still to no avail to Travis. The Supreme Court in its Order affirming his conviction said this judge, when considering the jury's two questions, was concerned about the role of § 274. This judge was prophetic, prescient, lucky, or otherwise, when his answer in the affirmative to the jury's second question, "Does being an accomplice require the Defendant to have concious [sic] intent to commit the crime committed by the principal?", predicted or presaged *Allen* by seventeen years.

In sum the jury instructions as originally given and this Court's affirmative answer to the jury's two questions manifest that the "new right" as enunciated in *Allen* was properly considered by the jury. Its verdict shows, too, that it understood what it had to do about Travis' own *mens rea*.

Therefore, while *Allen* established a "new" right, that is a right, nevertheless Travis enjoyed at his trial in 1992. There is, consequently, no merit to Travis' fourth claim for postconviction relief.

Conclusion

For the reasons stated herein, Joe Lewis Travis' motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

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J.