

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	ID#: 0410023811
)	
LAMAR COMER,)	
Defendant.)	

Submitted: May 14, 2010
Decided: August 31, 2010

ORDER

Upon Defendant's Motion For Postconviction Relief – *DENIED*

1. In May 2006, a jury convicted Comer of felony murder and other offenses. The jury acquitted Comer's co-defendants, Clifford Reeves and Derrick Williams, of all charges except conspiracy.

2. On direct appeal, Comer's felony murder conviction was reversed.¹ The State, however, was given the option of accepting entry of conviction of manslaughter, as a lesser-included offense of felony murder.² The State accepted the manslaughter conviction, and Comer was resentenced.

3. It is important, for present purposes, that the felony murder was

¹*Comer v. State*, 977 A.2d 334 (Del. 2009).

²*Id.* at 344.

not overturned because of insufficient evidence. The State was allowed to re-prosecute the felony murder but chose not to. No court has held that Comer could not have been convicted of felony murder. To the contrary, the courts are satisfied that the State had evidence to convict, but Comer's trial was defective.

4. On February 3, 2010, Comer filed a timely motion for postconviction relief. The motion was properly referred, and after preliminary review, the court called for trial counsel's affidavit and the State's response. On May 13, 2010, Comer filed a reply to counsel's and the State's submissions.

5. Comer makes six claims. At bottom, three claims rest on an alleged error by the trial court. To avoid Superior Court Criminal Rule 61's procedural bars,³ however, Comer frames each of those claims as a failure on his trial counsel's part. In that way, the claims do not appear barred. In large measure, Comer is trying to repackage and relitigate his original claims.

6. Specifically, Comer alleges here that his trial counsel were ineffective because, in Comer's view, they failed to:

- challeng[e] fact that defendant was charged and prosecuted on wrong degree on homicide[;]
- [move] for judgment of acquittal on

³See Super. Ct. Crim. R. 61(i)(3).

attempted murder/assault first degree where all the prosecution evidence established defendant acted recklessly, not intentionally[;]

- object[] to defective supplemental jury instructions . . . [which] allowed the jury to convict defendant on attempted murder/assault in the first degree based upon reckless conduct[;]
- challenge the State’s improper charge for the death of Bakeem Mitchell, a crime defendant did not commit[;]
- conduct any direct examination o[f] Chaquan McCoy[.]

7. In his sixth claim, Comer also criticizes his post-trial and appellate counsel “for not challenging the trial court’s abuse of discretion in denying defendant’s motion for judgment of acquittal (or sua sponta [sic] entering acquittal) on the felony murder count[.] . . .”

8. Each claim begs the question, as Comer mostly assumes the error he alleges. Actually, Comer’s claims fail to meet either of *Strickland v. Washington*’s⁴ tests for ineffective assistance of counsel.

9. The facts leading to Comer’s convictions are provided, in detail, in the post-trial denial of Comer’s motion to dismiss and renewed motion for

⁴466 U.S. 668 (1984).

judgment of acquittal,⁵ and the direct appeal.⁶ In summary, the State's theory behind the felony murder was that in the process of attempting to murder or assault Frank Johnson, Comer recklessly caused the death of Bakeem Mitchell, an innocent bystander. Basically, Comer was shooting at Johnson, but a ricochet killed Mitchell. Thus, the felony murder indictment alleged that Comer committed an intentional felony against Johnson, and, in the process, Comer's recklessness caused Mitchell's death. Accordingly, Comer was properly charged with felony murder. While it is true, as Comer insists, that the State could simply have charged him with manslaughter at the outset, that does not mean he was not potentially liable for felony murder, as alleged. Otherwise, it is fanciful to suggest, as Comer does, that if the State had originally charged him with manslaughter for Mitchell's death, the State would then have offered a plea bargain involving criminally negligent homicide, which Comer would have accepted.

10. As to his first claim, Comer specifically argues:

[T]he true basis of defendant's claim is that he should have never been charged with felony murder because there is no separate underlying felony.

⁵*State v. Comer*, 2007 WL 313574 (Del. Super. Feb. 2, 2007) (Silverman, J.).

⁶*Comer v. State*, 977 A.2d 334 (Del. 2009).

He further maintains:

[I]t is unconstitutional under the felony murder rule to split the causations of the attempted first degree murder charge which include the reckless killing of Bakeem Mitchell to support a charge of felony murder under 11 Del. C. § 636(a)(2).

Comer explains:

[S]ince the attempt[ed] murder of Johnson . . . and the reckless killing of Mitchell occurred in a single transaction, thus if defendant is acquitted of the attempted murder then there will be no existing corpus delicti liability for the reckless killing of Mitchell[.]

11. Comer misconstrues what happened at trial and on direct appeal.

As presented above, he was not acquitted. He was convicted. Comer's conviction for trying to shoot Johnson was affirmed. Only the conviction for felony murder was reversed, but the Supreme Court determined that the evidence supported a manslaughter conviction as a lesser-included offense. Thus, the State was allowed to accept that outcome, instead of a retrial. The indictment was proper.

12. The fact that the felony murder conviction was reversed on appeal due to a problem with the jury instructions does not mean, under the circumstances, that the felony murder indictment was defective or subject to dismissal

before trial, as Comer contends. To the contrary, in reversing the felony murder conviction, the Supreme Court specifically found that there was sufficient evidence for retrial of the felony murder charge. Only because the State accepted the lesser-included manslaughter conviction did the retrial not happen. Otherwise, there is no rule, as Comer claims there is, against a single act's supporting multiple convictions.

13. By the same token, there is no rule, as Comer further asserts in his third claim, that “[t]wo theories cannot be charged for the same incident – Defendant had to act intentionally or recklessly.” Here, a jury could have found that when he voluntarily shot at Johnson, Comer had the criminal mind sets (intent as to Johnson, and recklessness as to innocent bystanders) and his voluntary act (firing a handgun at Johnson) put Johnson at risk of murder or assault, and killed or helped kill Mitchell. Simply put, although there was one voluntary act, there were two victims, two criminal mind sets and, therefore, two crimes.

14. Comer's second and third claims rest on the false notion that the evidence merely tended to show recklessness on Comer's part. As explained above, recklessness was not an element of the crime against Johnson. In a supplemental instruction, the jury was specifically told that. And, the jury could have found that Comer was shooting at Johnson with the intent to kill or wound. At the same time, the shooting was reckless as to bystanders.

15. Comer's fourth claim alleges that there was insufficient evidence to tie him to Mitchell's death. That claim is procedurally barred,⁷ except that Comer now alleges it as an ineffective assistance of counsel claim. In part, Comer's argument rests on his incorrectly viewing the evidence in the light most favorable to him. As to that, the court re-acknowledges that the State's evidence was not entirely consistent and the defense presented evidence supporting the claim that the fatal shot came from Johnson's car, Comer's "drive-by shooting" argument. It is true, nonetheless, that the State's evidence clearly showed that as the incident began, Comer was firing at Johnson. Although Comer discredits it, there was other evidence that Comer was firing at Johnson when Mitchell was struck. Not only that, there was also evidence that Johnson was not firing back. Again, while Comer highlights his evidence, the jury had reason to be satisfied that the fatal bullet did not come from Johnson's car. That leaves Comer responsible by the process of elimination. In closing on this claim, the court re-acknowledges Comer's "no reload" argument, which is that if a critical State witness's testimony that Comer fired thirty shots were believed, then Comer had to have reloaded several times, which is unbelievable. "No reload," in effect, was argued by trial and appellate counsel.

16. Comer's fifth claim, which is that "Counsel failed to conduct any

⁷Super. Ct. Crim. R. 61(i)(4).

direct examination on Chaquan McCoy who would support that Bakeem Mitchell was killed in a Drive-by shooting by Frank Johnson,” is simply not true. McCoy was called by co-defendant Williams. She was examined by counsel for all defendants on direct and re-direct. Furthermore, the defense called a private investigator and McCoy’s prior out-of-court statements were introduced.⁸ The three defense attorneys elicited potentially helpful testimony, including McCoy’s recollection that Mitchell yelled, “Drive-by, drive-by.” And, in one statement, McCoy said she saw the passenger in Johnson’s car firing a rifle. The problem with McCoy was that she was very inconsistent and, as the court recalls, far-fetched. For example, she told the police that Johnson was driving a Lincoln or Mercury. She testified, however, that it was a green Chrysler. She gave the police a partial description of the passenger with the rifle. She testified, however, that there was no passenger,⁹ and so on. The only way the defense could employ McCoy was to cherry pick from her testimony and statements to the police and the defense’s investigator, which they tried to do. In short, Comer has not shown that trial counsel’s examination of McCoy was substandard, nor that it was prejudicial.

17. Finally, in his sixth claim, Comer again presents his insufficiency

⁸11 *Del. C.* § 3507.

⁹Trial Tr. 18:11-13 (May 17, 2006) (“Q: How about the passenger in the vehicle, did you see a passenger? A: No.”).

of evidence claim, again couched as ineffective assistance of counsel. But, as the State argues and Comer tacitly concedes, trial counsel moved for judgment of acquittal, and appellate counsel pursued it on appeal with significant success. Accordingly, the claim is procedurally barred and without merit.

For the foregoing reasons, Defendant's February 3, 2010, motion for postconviction relief is **DENIED**. The prothonotary **SHALL** notify Defendant.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

PC: Prothonotary (Criminal Division)
Martin O'Connor, Deputy Attorney General
James Kriner, Deputy Attorney General
Jennifer-Kate Aaronson, Esquire
Andrew J. Witherell, Esquire
Lamar Comer, Defendant