

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID No. 9707012195
)	
KOREY E. TWYMAN,)	
)	
Defendant.)	

Submitted: October 4, 2010
Decided: October 19, 2010

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
AND FOR APPOINTMENT OF COUNSEL AND EXPANSION
OF THE RECORD SHOULD BE SUMMARILY DISMISSED.**

Mark Bunitsky, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Korey E. Twyman, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 19th day of October 2010, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Following a jury trial, on March 9, 1999, Defendant Korey E. Twyman was found guilty of one count of First Degree Murder, one count of Second Degree Murder, one count of Attempted Murder First Degree, three counts of Possession of a Firearm During the Commission of a Felony, one count of Possession of a Deadly Weapon by a Person Prohibited, and one count of Conspiracy First Degree.

2. The facts giving rise to these convictions reveal that on the evening of July 13, 1997 or the early morning hours of July 14, 1997, Defendant together with co-defendant Freddy Flonnory decided to exact revenge for a prior altercation and together they went over to the 6th and Jefferson Street area in Wilmington, Delaware, armed and determined to kill. They hunted their victims down around midnight and ambushed them as the victims were sitting in chairs talking. All three of the victims were shot, two of the victims (Danya Adams and Angela Farmer) were killed, and one victim (Dwayne Warren) although injured did not die.¹

3. Defendant, born on July 25, 1981, turned sixteen ten days after the murders. Because Defendant was fifteen at the time of the murders, the State did not seek the death penalty. On July 9, 1999, the Defendant was sentenced. On the Murder First Degree conviction, Defendant was sentenced to life in prison without the benefit of probation or parole pursuant to 11 *Del. C.* §4209(d)(2). On the Murder Second Degree conviction, Defendant was sentenced to 20 years at Level V. On the Attempted Murder First Degree conviction, Defendant was sentenced to life imprisonment. Defendant was

¹ See, July 9, 1999 Sentencing Transcript, pg. 5-6; February 16, 1999 Trial Transcript, pgs. 58-74; March 3, 1999 Trial Transcript, pgs. 13-73; March 8, 1999 Trial Transcript, pgs. 55-83;

sentenced to 20 years at Level V for each of the three weapons convictions, for a total of 60 years on these charges. Defendant was sentenced to 5 years at Level V suspended after 4 years on the Conspiracy First conviction. Defendant was sentenced to 3 years at Level V suspended after 2 years on the Possession of a Deadly Weapon by a Person Prohibited conviction.

4. On direct appeal, on May 4, 2001, Defendant's convictions and sentences were affirmed.²

5. On September 28, 2010, Defendant filed the subject motion for postconviction relief. In the subject motion, Defendant challenges only his life sentence on the Attempted First Degree Murder conviction.³

6. Defendant's motion should be summarily dismissed because his issue regarding his life sentence on the Attempted First Degree Murder conviction is not ripe for consideration. Defendant must first serve his life sentence for First Degree Murder, without probation or parole or any other reduction⁴, before he will begin to serve his life sentence on the Attempted First Degree Murder conviction. Defendant does not challenge his life sentence, without probation or parole, on his First Degree Murder conviction. In addition, Defendant must serve an additional 86 years on the Second Degree Murder, conspiracy and weapons convictions. Because Defendant must first serve his life sentence without probation, parole or any other reduction for his First Degree Murder conviction, it is unlikely he will ever serve any of the other remaining sentences. Thus, Defendant does not appear to present an "actual controversy" at the present time.

² *Twyman v. State*, 2001 WL 474932 (Del.Supr.).

³ It appears that Defendant's motion should be under Rule 35 rather than Rule 61 since he is seeking a correction of a sentence.

⁴ See, 11 *Del. C.* §4209(d)(2).

Delaware courts are not required to expend judicial resources to answer questions that have no significant current impact.⁵

7. Moreover, there is no question that Defendant's motion for postconviction relief is procedurally barred pursuant to Superior Court Criminal Rule 61(i), unless there is a newly recognized, retroactively applicable right, that would permit a consideration of Defendant's challenge to his life sentence for his Attempted First Degree Murder conviction at this late date. If there is no newly recognized right, Defendant's motion is procedurally barred because it is untimely (filed over 9 years after the Supreme Court's mandate on Defendant's direct appeal)⁶; it was not previously asserted in any prior postconviction proceeding;⁷ and it was not asserted at trial or on direct appeal as required by the court rules.⁸

8. Defendant contends that the United States Supreme Court in *Graham v. Florida*, 130 S.Ct. 2011 (2010), created a newly recognized retroactive right which would permit Defendant's challenge to his life sentence on the Attempted First Degree Murder conviction in this case at this late date. Defendant's reliance on *Graham* in this case is inappropriate, misplaced and inapplicable. The *Graham* case has no applicability here.

9. In *Graham*, the United States Supreme Court held that the imposition of a life sentence without parole on a juvenile offender *who did not commit homicide* is unconstitutional.⁹

⁵ *Govan v. State*, 2003 WL 22227548, at *1 (Del.Supr.).

⁶ Since this final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005) (amending Super.Ct.Crim.R. 61(i)(1)(May 1, 1996)).

⁷ Super.Ct.Crim.R. 61(i)(2).

⁸ Super.Ct.Crim.R. 61(i)(3).

⁹ *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010).

10. The subject action is a homicide case. Consequently, the subject case is not governed by *Graham*. *Graham* is only applicable in those cases which do not involve a homicide and in which the juvenile defendant was sentenced to life without parole. Indeed, Defendant is serving a life sentence without probation or parole on his First Degree Murder conviction, which he does not challenge here.

11. In *Graham*, the Supreme Court made it clear that it was deciding whether a juvenile offender could be sentenced to life in prison without parole for a nonhomicide crime. Since an attempt to commit first degree murder is an offense of the same grade and degree as first degree murder, an attempted first degree murder like an executed first degree murder, both constitute homicide crimes.¹⁰ It is the intent to kill that elevates homicides above other crimes and makes the Defendant more deserving of the most serious forms of punishment.¹¹ Defendants who do not kill, *intend to kill*, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.¹²

12. An attempted murder first degree conviction necessarily means that the Defendant harbored the intent to kill and attempted to do so. An attempted first degree murder and an executed first degree murder are of the same grade and degree, and both appear to fall within the ambit of homicide cases, in which the intent to kill is present, as distinguished from nonhomicide cases, in which the intent to kill is not present. It appears therefore that a juvenile defendant who intended to kill, and is convicted of an attempted homicide,

¹⁰ See, 11 *Del.C.* § 531 (attempt to commit a crime is an offense of the same grade and degree as the most serious offense which the accused is found guilty of attempting).

¹¹ *Id.* at 2027-2031.

¹² *Id.* at 2027.

may be sentenced to life without probation or parole for attempted murder first degree under *Graham*.

13. Defendant's request for appointment of counsel and for an expansion of the record is denied. The Court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown.¹³ Prisoners have no constitutional right to counsel beyond their direct appeal, and the appointment of an attorney at taxpayer expense occurs only in exceptional circumstances.¹⁴ It does not appear that exceptional circumstances exist for the appointment of counsel nor does it appear that any expansion of the record will aid in the resolution of the issue presented herein.

14. Defendant's motion for postconviction relief is procedurally barred, without merit, and should be denied.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief and for the appointment of counsel and to expand the record should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary

¹³ Super.Ct.Crim.R. 61(e).

¹⁴ *State v. Johnson*, 2004 WL 3029940 (Del.Super.); *State v. Andrus*, 2006 WL 3492293 (Del.Super.).