

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

August 26, 2010

Justin A. Foreman
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

**RE: Defendant ID No. 0802018812 (R-1)
Motion for Postconviction Relief**

Dear Mr. Foreman:

On June 16, 2010, the Court received your timely Motion for Postconviction Relief. Pursuant to Superior Court Criminal Rule 61(g), the record was enlarged by way of an affidavit from your attorney and your affidavit received on August 16, 2010. This is the Court's decision as to your Motion.

BACKGROUND

Following a jury trial, you were convicted of rape in the second degree, rape in the fourth degree, and unlawful sexual contact. In total, you received a ten-year sentence at Level 5 (and a directive to complete the Family Problems program), followed by probation. The conviction was affirmed on September 9, 2009. *Foreman v. State*, 2009 WL2878065 (Del.), 939 A.2d 1110 (Del. 2009) (TABLE).

The State's case in a nutshell was that you visited your girlfriend in the late evening of December 25, 2006. That evening one of her best girlfriends ("Jane") was "sleeping over". When you arrived, Jane moved from the bed to the floor and you got in bed with your girlfriend.

Jane testified you later got on top of her and had forced sex. The next morning, Jane was emotionally upset and when asked why by her friend (your girlfriend) she reported what happened. Your girlfriend confronted you and you denied anything had happened. Your girlfriend then accused Jane of lying and making it all up because she was jealous. Jane left and started walking home. Your girlfriend's mother saw Jane leave and picked her up in a vehicle and took Jane home. Jane reported the rape to your girlfriend's mother who then told Jane's mother. Jane was taken to the hospital and, as part of the examination, DNA swabs were taken.

You steadfastly denied any sexual contact with Jane to everyone, including the police.

The profile of the DNA of vaginal swab was compared to your DNA . Eventually the DNA analysis established a high statistical probability that your semen was on the vaginal swab.

For your DNA profile, the statistical analysis for someone in the population with the same sperm cell DNA was:

- (a) Caucasian population - 1 in 125,000 quintillion;
- (b) African American population - 1 in 2,999 quintillion;
- (c) Southeastern Hispanic population - 1 in 75,640 quintillion;
- (d) Southwestern Hispanic population - 1 in 132,800 quintillion.

You were not arrested until after the DNA analysis was completed. Upon your arrest and being advised of the DNA results, you continued to deny having sexual intercourse with Jane.

At trial, you testified you did have sexual intercourse with Jane, but it was consensual. You also testified that you were lying about your previous statements denying any sexual contact with Jane. You were 17 years old at the time of the rape. When arrested, you were 18 years old.

Rule 61 Allegations

The allegations are not organized in a logical manner, but I believe the below list captures all of your allegations.

- (1) Ineffective assistance of counsel - Trial counsel failed to go to the scene to investigate the location of other bedrooms;
- (2) Ineffective assistance of counsel - Trial counsel failed to file an 11 *Del. C. §3508* motion (“Rape Shield Motion”);
- (3) Jurisdictional defect and ineffective assistance of counsel - Superior Court lacked jurisdiction because you were only 17 years old at the time of the incident and there was no request for an amenability hearing to send your case to Family Court;
- (4) Ineffective assistance of counsel - Your attorney argued you were not guilty of anything but being a liar when you falsely denied having intercourse to everyone. You also allege your counsel’s use of consensual and non-consensual in his opening statement was a mistake.

INEFFECTIVE ASSISTANCE OF COUNSEL

_____ It is your burden to establish that your attorney (i) made mistakes or errors of omission; and (ii) that your attorney's mistakes, errors, and/or omissions actually prejudiced you by impacting the verdict. *Strickland v. Washington*, 466 U. S. 668 (1984). You must make concrete allegations as to the errors and/or omissions and prejudice. Conclusory allegations are subject to dismissal. *Younger v. State*, 580 A.2d 552 (Del. 1990).

As to the failure to investigate the scene, your counsel reports that the entire case revolved around the issue of consent and that the location of the incident (on the floor next to the bed your girlfriend was sleeping in) and the location of the other bedrooms was fully explored. You dispute this.

I am satisfied defense counsel was not ineffective by not visiting the crime scene, nor have you established any prejudice. This case was all about consensual versus non-consensual sex. The location of the bed with your girlfriend in same was well-established. This case boiled down to why didn't Jane cry out to wake up her girlfriend because the bed was so close she could touch it. This case was about force, intimidation, fear and shock. A visit to the scene would not have helped. Jane did not cry out or scream, so the proximity of other bedrooms was irrelevant. You have not proven this claim of ineffective assistance of counsel.

The claim alleging that counsel should have filed a Rape Shield Motion is denied as it is conclusory.

While you and counsel disagree as to the Rape Shield Motion, you acknowledge you did not give your attorney full names, but said there was a relative whom he should contact.

In the present Motion, you provide no names or substantial concrete allegations of what information these unknown persons would provide in order to overcome the protections afforded an alleged rape victim provided by the Rape Shield statute. This allegation is conclusory and is denied.

In his opening statement, your attorney acknowledged he used both consensual and non-consensual sex in the same sentence, but it is clear this was a mis-statement. In light of the remainder of the opening statement, your testimony, Jane's testimony, and closing arguments by counsel that focused on the issue of consent, the mis-statement did not cause any confusion to the jury or prejudice to you. This claim is denied.

Finally, you allege your lawyer was ineffective for arguing the only thing you were guilty of was lying about whether you had sex with the victim.

This was the defense strategy, i.e., stupid but not a rapist.

You admitted on the stand that you had lied. "I'm sorry I lied". (Trial Transcript, p.78). You lied about any sex with Jane because of your relationship with your girlfriend, etc., etc.

It was not an error for defense counsel to make this argument, and you can show no prejudice in light of the defense strategy and your own statement.

This ground is denied.

JURISDICTION

A person who is 17 years of age at the time of allegedly committing a crime, but 18 years of age at the time of arrest and/or indictment, is properly in the jurisdiction of the Superior Court. *State v. Connors*, 505 A.2d 1301 (Del. Super. 1986).

As to your position that you should have had an amenability hearing to get an order transferring the case to Family Court, you again only state the conclusion and have no allegations of fact supporting your claim. In other words, even if I believed defense counsel should have filed an amenability motion, you have not established in any way the merits of such a motion.

In similar cases, when forcible rape is charged and the defendant is 18 years of age at the time of the charge, it is a difficult burden to establish that Family Court is the more appropriate venue. That is because of the limited sentencing options in Family Court for an 18-year-old convicted of forcible rape.

As aforesaid, you have not attempted to meet the burden of establishing the merits of this claim and therefore, you have shown no prejudice. This claim is denied.

In summary, you have not established any grounds which would provide postconviction relief and the motion is denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

THG:baj

cc: Prothonotary
Stacey Cohee, Esquire
Paula Ryan, Esquire
Office of the Public Defender