

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

STATE OF DELAWARE,	)	CR. A. NOS.: IN08-05-0432-R1
	)	IN08-05-0433-R1
	)	IN08-05-0434-R1
	)	IN08-05-0435-R1
v.	)	IN08-05-0444-R1
	)	IN08-05-0447-R1
	)	IN08-05-0448-R1
CURTIS MERCER,	)	IN08-05-0450-R1
	)	IN08-05-0452-R1
Defendant.	)	IN08-05-0453-R1
	)	IN08-05-2791-R1
)	
)	
	)	DEF. I.D.: 0804033000
)	

Date Submitted: November 8, 2010

Date Decided: December 15, 2010

*Upon Consideration of
Defendant’s Pro Se Motion for Postconviction Relief*
DENIED.

ORDER

This 15th day of December, 2010, upon consideration of the Motion for Post-conviction Relief brought by Defendant, Curtis Mercer (“Defendant”), it appears to the Court that:

1. On January 16, 2009, Defendant was convicted of four counts of rape first degree, one count of kidnaping, two counts of possession of a deadly weapon during the commission of a felony, one count of burglary first degree, one count of tampering with physical evidence, one count of theft and one count of terroristic threatening.¹ On March 6, 2009, Defendant was sentenced to four consecutive life sentences plus nine additional years at Level V.

2. On September 9, 2009, Defendant appealed his convictions of burglary first degree and kidnaping first degree. By order dated November 25, 2009, the Supreme Court of Delaware affirmed the convictions and sentences.²

3. Defendant filed this *pro se* motion for postconviction relief on July 6, 2010. As best as the Court can discern, Defendant raises four grounds for relief: 1) ineffective assistance of counsel; 2) that the indictment was fatally defective; 3) that the State failed to present evidence that would allow a rational fact finder to conclude beyond a reasonable doubt that the Defendant engaged in kidnaping; and 4) that the jury's verdict was a "compromise verdict."

4. Before addressing the merits of any postconviction relief motion, the Court must first determine whether the claims pass through the procedural filters of

¹Super. Ct. Crim. Docket at 1.

²*State v. Mercer*, 985 A.2d 390, 2009 WL 4164765 (Del. Nov. 25, 2009) (TABLE).

Superior Court Criminal Rule 61 (“Rule 61”). To protect the integrity of the procedural rules, the Court will not address the substantive aspects of the claims if Defendant’s claims are procedurally barred.³ Rule 61 imposes four procedural imperatives upon a defendant when bringing a Rule 61 motion: (1) the motion must be filed within one year of a final order of conviction; (2) any basis for relief must have been asserted previously in any prior postconviction proceedings unless warranted in the interest of justice; (3) any basis for relief not asserted in the proceedings below as required by the court rules is subsequently barred unless defendant can show cause and prejudice; and (4) any ground for relief must not have been formerly adjudicated in any proceeding unless warranted in the interest of justice.⁴ Under Rule 61(i)(5), a defendant may avoid the first three procedural imperatives if the claim is jurisdictional or presents “a colorable claim that there was a miscarriage of justice because of a constitutional violation.”⁵

5. A judgment of conviction is final for the purposes of postconviction review under the following circumstances:

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)(“It is well-settled that the Superior Court and this Court must address the procedural requirements of Rule 61 before considering the merits of this motion.”).

⁴ SUPER. CT. CRIM. R. 61(i).

⁵ SUPER. CT. CRIM. R. 61(i)(5).

(1) if the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) if the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) if the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the U.S. Supreme Court issues a mandate or order finally disposing of the case on direct review.⁶

Pursuant to Rule 61(i)(1), Defendant's motion is timely given that his appeal to the Supreme Court was affirmed on November 25, 2009, and the instant motion was filed within one year of that date.⁷

6. Although timely presented, Defendant's claim that the State failed to present evidence that would allow a rational fact finder to conclude beyond a reasonable doubt that the Defendant engaged in kidnaping is procedurally barred under Rule 61(i)(4) because it was formally adjudicated by the Supreme Court.⁸

A. Defendant's Ineffective Assistance of Counsel Claims

7. Defendant asserts that counsel failed: 1) to raise a claim of multiplicity of charges; 2) to competently and candidly disclose to Defendant a plea offer; 3) to conduct an adequate and thorough investigation of the facts surrounding the burglary in the first degree charge; and 4) to challenge the validity of the indictment.

⁶ SUPER. CT. CRIM. R. 61(m).

⁷*Mercer*, 2009 WL 4164765 *4 (Del. Nov. 25, 2009).

⁸*Id.* Affirming this Court.

8. When a defendant raises a colorable claim of ineffective assistance of counsel, the procedural bars of Rule 61(i) are inapplicable because there may be “a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceeding.”⁹ In order to succeed on an ineffective assistance of counsel claim, the United States Supreme Court held in *Strickland v. Washington*, that a defendant must show both: (1) “that counsel’s representation fell below an objective standard of reasonableness,” and (2) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁰ There is a strong presumption that the legal representation was professionally reasonable.¹¹ And the failure to prove either the cause or the prejudice prong will render the claim unsuccessful.¹² In such instances, the court need not address the other prong.¹³ Initially, the accused bears the burden of showing that counsel’s inadequacy affected the outcome of the trial.¹⁴ If the defendant carries this

⁹See Rule 61(i)(5). See also *State v. St. Louis*, 2004 WL 2153645, at *3 (Del. Super. Sept. 22, 2004)(“Since the Supreme Court generally will not hear a claim for ineffective assistance of counsel on direct appeal, the procedural default rules do not bar those assertions of errors premised on ineffective assistance of counsel.”).

¹⁰*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¹¹*Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990)(citations omitted).

¹²*Strickland*, 466 U.S. at 697.

¹³*Id.*

¹⁴*Stevenson v. State*, 469 A.2d 797, 799 (Del. 1983)(citations omitted).

burden, then the burden shifts to the State to demonstrate that the outcome was not tainted.¹⁵ If the accused fails to meet his initial burden, the claim fails.

9. Defendant's argument that counsel was ineffective for failing to raise a claim of multiplicity of charges is misguided. At the conclusion of the State's case in chief, Defendant's Counsel made a Motion for Judgment of Acquittal, or in the alternative, a merger of the multiple rape first degree counts.¹⁶ Counsel argued that the acts alleged by the State constituted one continuous act and, therefore, the charges should be reduced to one, or in the alternative, two rape first degree charges.¹⁷ That Motion was denied by this Court.¹⁸ Counsel's actions in this regard do not fall below the objective standard of reasonableness required by *Strickland* because he effectively raised the argument that Defendant alleges he should have raised.¹⁹

10. Defendant's argument that Counsel failed completely and candidly to disclose a plea offer presented by the State on December 22, 2008, is not supported by the evidence before the Court. In an affidavit to the Court, Counsel affirms that he

¹⁵*Id.*

¹⁶Aff. in Resp. to Def.'s Mot. to Dismiss at 3.

¹⁷*Id.* See also Trial Tr. 131, January 15, 2009.

¹⁸Counsel was ultimately successful in this effort, however, in that the State entered a *nolle prosequi* on four counts of Rape in the First Degree (Defendant was originally charged with eight counts of Rape in the First Degree) based upon Counsel's arguments. *Id.*

¹⁹*Strickland*, 466 U.S. at 668.

and Defendant fully discussed the Defendant's case and the plea option: "Defendant was adamant that he would not accept a plea because he did nothing wrong"²⁰ The Defendant, and the Defendant alone, must ultimately make the decision whether or not to accept a plea.²¹ If Defendant was "adamant" that he would not accept a plea bargain because he was innocent, Counsel was bound to honor that decision.

11. Defendant's contention that Counsel failed to conduct an adequate and thorough investigation of the facts surrounding the charges against Defendant, causing him not to file a pretrial motion to dismiss the burglary first degree charge, is also not supported by the evidence before the Court. As his affidavit reveals, Counsel conducted an investigation of the facts of Defendant's case through client interviews, defense witness interviews, and review of discovery materials and reports.²² The Court is satisfied that Counsel's investigation of Defendant's case did not fall below an objective standard of reasonableness; thus, Defendant's claim does

²⁰Aff. in Resp. to Def.'s Mot. to Dismiss at 4.

²¹*Florida v. Nixon*, 543 U.S. 175, 187-88 (2004).

²²Aff. in Resp. to Def.'s Mot. to Dismiss at 4-5. The Court notes that Defendant cites *Harris v. State*, 965 A.2d 691 (Del. 2009) as the basis for his claim that Counsel failed to investigate evidence that the victim, Ms. Sutton, did not suffer "physical injury." Defendant's argument that Ms. Sutton did not suffer physical injury was addressed by the Supreme Court on Defendant's appeal: "In this case, the number of abrasions and bruises caused either during the sexual assault or the victim's subsequent escape attempt, combined with the victim's swollen ankle were sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the victim suffered an impaired physical condition." *Mercer*, 2009 WL 4164765 *3 (Del. Nov. 25, 2009). Moreover, *Harris* was not decided until January 23, 2009, seven days after Defendant's trial concluded. Thus, Counsel could not have raised the *Harris* case at Defendant's trial.

not satisfy the first prong of the *Strickland* “cause and prejudice” standard.²³

12. Defendant’s argument that Counsel was ineffective for failing to challenge the validity of the indictment is wholly without merit. Superior Court Criminal Rule 7(c) requires an indictment to contain a plain, concise, and definite written statement of the essential facts constituting the offense charged. Further, as Defendant notes in his Motion, the elements of the statute must be accompanied by a statement of the facts and circumstances as will inform the accused of the specific offense with which he is charged.²⁴ As explained below, the Court is satisfied that the indictment meets those requirements.²⁵ Defendant, therefore, fails to show that Counsel’s representation in failing to challenge a facially adequate indictment fell below the reasonableness standard imposed under *Strickland*.²⁶

B. Defendant’s Defective Indictment Claim

13. Defendant argues that the indictment is fatally defective for failing to state with specificity all of the essential elements of the offenses. In particular, Defendant contends that Counts I-IV of the indictment fail to specify all the material elements of rape first degree and that the term “sexual intercourse” is ambiguous.

²³*Strickland*, 466 U.S. at 668.

²⁴*Russell v. U.S.*, 369 U.S. 749 (2006).

²⁵*See infra* B.

²⁶*Strickland*, 466 U.S. at 668.

Further, Defendant contends that the indictment fails to specify the deadly weapon the Defendant is alleged to have displayed.

14. Defendant's arguments fail both procedurally and on the merits. First, under Superior Court Criminal Rules 12(b)(2) and 12(f), a defense or objection based on a defect in an indictment is waived unless it is raised before the trial.²⁷ Second, even if Defendant's claim is not waived, the Court is satisfied that the indictment contains no fatal defects. To the contrary, the indictment is a plain, concise, and definite written statement of the essential facts constituting the offenses charged. The elements of the statute were accompanied by a statement of the facts and circumstances so as to have informed the Defendant of the specific offense with which he was charged. Defendant fails to provide any support for his argument that the term "sexual intercourse," a statutorily defined term,²⁸ is ambiguous and seems to ignore the clear language of the indictment specifying the deadly weapon displayed.²⁹

²⁷*Stewart v. State*, 829 A.2d 936, 2003 WL 22015766 *1 (Del. July 29, 2003)(TABLE).

²⁸*See* 11 Del. C. § 761(f).

²⁹The indictment specifies that the Defendant "...represented by words or conduct that he was in possession or control of a deadly or dangerous instrument" and, further, that Defendant displayed a knife.

C. Defendant's Compromise Verdict Claim

15. Defendant next argues that the State facilitated a “compromise verdict” because the Jury had moral disdain for the Defendant and the verdict went against the great weight of the evidence.

16. In examining a “compromise verdict” claim, the Court must conduct a two part analysis. The first consideration is whether the jury verdict was consistent as a matter of law.³⁰ If the verdict is legally inconsistent, the Court must then determine whether the outcome could have been the result of jury lenity, in which case the verdict remains undisturbed.³¹ If a verdict is legally inconsistent and the outcome was not the result of jury lenity, then the verdict is invalid.³²

17. The Jury in Defendant's trial returned 11 guilty verdicts each of which was consistent with the others. Thus, as a matter of law, the Court need not decide the issue of whether the verdicts were the result of jury lenity. Moreover, the Court is satisfied that the verdicts were amply supported by the evidence presented at trial.

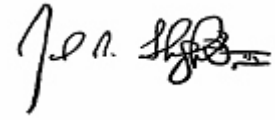
18. Based upon the foregoing, Defendant's motion for postconviction relief is **DENIED**.

³⁰*Whitfield v. State*, 867 A.2d 168, 174 (Del. 2004).

³¹*Id.*

³²*Id.* at 173-174.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "J.R. Slights, III". The signature is written in a cursive style with a horizontal line at the end.

Judge Joseph R. Slights, III

Original to Prothonotary