

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0808021606
)	
CORY D. WASHINGTON,)	
)	
Defendant.)	
)	

Submitted: January 18, 2011
Decided: February 2, 2011

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE SUMMARILY DISMISSED.**

Cynthia L. Faraone, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Cory D. Washington, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 2nd day of February, 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Cory D. Washington was indicted on the charges of possession with intent to deliver heroin ("PWITD"), delivery of heroin, and loitering. After a two-day jury trial, on February 3, 2009, the jury found Defendant Cory D. Washington guilty of all charges. On May 8, 2009, Defendant Washington was sentenced to five years at Level V followed by six months at Level IV for PWITD; five years at Level V for delivery of heroin; and a fine of \$300 for loitering.

2. The facts giving rise to these charges, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal¹, are as follows: On August 28, 2008, two Wilmington Police Department officers in the Patrol Division were observing the corner of 3rd and Franklin Streets at about 1 p.m. Their patrol car was located on Broom Street, about two blocks away, but they observed the corner from their patrol car by video feed from Downtown Visions, a City of Wilmington street video monitoring system, of a video camera posted near 3rd and Franklin Streets.²

3. The police officers observed a group of individuals, which included Defendant Washington, standing at the corner of 3rd and Franklin Streets. A man, later identified as Richard Koffenberger, approached the group of men. Koffenberger made a thumb-down signal to the group. In response, Defendant Washington motioned back to Koffenberger. Washington then walked half a block down Conrad Street, while Koffenberger followed shortly behind. About halfway down the block on Conrad, Washington bent down in the

¹ *State v. Cory D. Washington*, 2009 WL 3823211 (Del.).

² *Washington*, 2009 WL 3823211 at 1.

area of a vacant lot. Koffenberger gave Washington either \$18 or \$20 for two bags of suspected heroin. Washington and Koffenberger then walked away from one another.³

4. Throughout this time, the police never lost sight of Koffenberger. When the police officers stopped Koffenberger a few minutes later, he did not have any drugs on his person. The police officers observed a powdery substance on his nose and he appeared high. He told the officers he had already snorted the substance he had purchased a few minutes earlier. Koffenberger later testified that he had been an addict for thirteen years and was out to buy heroin.⁴

5. After stopping Koffenberger, the police officers arrested Washington. At the time of his arrest, he had \$278 in cash on his person. Officers searched the area near the transaction and found multiple bundles of drugs under a remnant of carpet. They recovered fifteen blue glassine bags each containing a tan powder that the medical examiner later determined to be a total of .31 grams of heroin.⁵

6. At the conclusion of the State's case-in-chief, Washington moved to dismiss the charges of delivery of heroin and loitering. The Superior Court reserved decision on that motion.⁶ Two weeks after the jury convicted Washington of all three charges, Washington filed a written motion for judgment of acquittal on the charge of delivery of heroin. Washington never renewed his motion on the loitering charge. The Superior Court denied Washington's motion.

7. Defendant Washington filed a direct appeal to the Delaware Supreme Court. On appeal, Defendant Washington contended that the Superior Court erred by denying his

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ January 30, 2009 Trial Transcript, pgs. 71-77.

motion for judgment of acquittal on the conviction of delivery of heroin. On November 16, 2009, the Delaware Supreme Court concluded that Washington's appeal was without merit and affirmed the judgment of the Superior Court.⁷ The Delaware Supreme Court issued its mandate on December 14, 2009.⁸

8. Thereafter, Defendant Washington filed a motion for a new trial and a motion for judgment of acquittal on the conviction of delivery of heroin. Both motions were denied by the Superior Court.⁹

9. On January 10, 2011, Defendant filed this motion for postconviction relief. In his motion, Washington alleges: (1) that the court clerk erred when she failed to poll the jury individually; (2) that the trial judge was biased and should have recused himself from the case; and (3) that defendant was charged with loitering which was not in the police report or the affidavit of probable cause.

10. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.¹⁰ If a procedural bar exists, then the claim is barred and the Court should not consider the merits of the postconviction claim.¹¹ Moreover, if it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.¹²

⁷ *State v. Cory D. Washington*, 2009 WL 3823211 (Del.).

⁸ Superior Court Docket No. 26.

⁹ *State v. Cory D. Washington*, 2010 WL 4262022 (Del.Super.)(denying motion for a new trial); *State v. Cory D. Washington*, 2010 WL 4262021 (Del.Super.)(denying motion for judgment of acquittal).

¹⁰ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹¹ *Id.*

¹² Super.Ct.Crim.R. 61(d)(4).

11. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹³ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do 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.¹⁴ Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”¹⁵

12. In this case, Defendant’s motion is procedurally barred. Rule 61(i)(1) applies because Washington filed this motion more than one year after his final order of conviction. Rule 61(m) defines when the one year window for filing a motion for postconviction relief begins to run. In those cases, such as the present case, when the Defendant has filed a direct appeal, the one year window begins when the Supreme Court issued a mandate or order finally determining the case on direct review.¹⁶ The one year window for filing a motion for postconviction relief began no later than December 14, 2009, when the Supreme Court issued its mandate¹⁷ and ended one year later on or about

¹³ 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).

¹⁴ Super.Ct.Crim.R. 61(i)(5).

¹⁵ Super.Ct.Crim.R. 61(i)(4).

¹⁶ Super.Ct.Crim.R. 61(m)(2).

¹⁷ Superior Court Docket No. 26.

December 15, 2010. Defendant failed to file his motion for postconviction relief during this applicable one-year limit. Defendant's motion, filed in January 2011, was filed outside the applicable one-year limit, and is time-barred.

13. The issues raised in this motion for postconviction relief could all have been raised in a timely filed motion. Indeed, the issues raised in this motion were all related to alleged errors made at trial. Defendant does not raise anything new or recently discovered or which was not known during the one year window for the timely filing of a postconviction motion. Defendant was aware of, had time to, and the opportunity to raise all of the issues in his post conviction motion in a timely filed motion. Defendant has not offered any explanation of cause which prevented him from raising these claims in a timely manner.¹⁸ Because Defendant's Rule 61 motion was filed more than one year after his conviction became final, Defendant's motion is procedurally barred.

14. In addition to being time-barred, Defendant's motion is also procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), for his failure to raise the subject claims in any prior postconviction proceeding. If Defendant genuinely believed his contentions had any merit, he was required to raise those contentions on direct appeal. Having failed to raise these claims in his direct appeal, they are now procedurally barred pursuant to Rule 61(i)(2) and Rule 61(i)(3).

15. Even if Defendant's claims are not procedurally barred, they are without merit.

16. Turning to Defendant's first claim, Washington contends that the court erred as a matter of law when the court clerk failed to poll the jury individually. Defendant is incorrect in this regard. Pursuant to Superior Court Criminal Rule 31(d), a jury poll is

¹⁸ *Outten v. State*, 720 A.2d 547, 556 (Del. 1998)(a showing of cause is satisfied when a movant shows some external impediment which prevented him from raising the claim in a timely manner).

only required at the request of a party or upon the court's own motion. In the subject case, neither party nor the court make a request for the jury to be polled. Consequently, the court clerk was not required to poll the jury.¹⁹ Defendant's first claim is without merit.

17. Turning to Defendant's second claim, Washington contends that the trial judge was biased and should have recused himself. Washington's claim of trial judge bias stems from the trial judge's deferral of his ruling on Defendant's motion for judgment of acquittal and thereafter on the trial judge's adverse rulings against Defendant. Defendant contends that the "judge should have recused himself because he lost focus on ruling subjectively in the case but ruled objectively although the State has not prove their case beyond a reasonable doubt."²⁰

18. Defendant's discontent with the trial judge's rulings is not a valid basis for disqualification.²¹ It should be self evident that adverse rulings in themselves do not create judicial partiality.²² Judicial rulings alone are an insufficient bases for recusal.²³ A trial judge's rulings alone almost never constitute a valid *per se* basis for disqualification on the ground of bias. Indeed, bias developed during the course of trial is not a sufficient ground for recusal.²⁴ The bias must be a personal one, not judicial. Any bias developed during the trial is judicial bias, and is not personal bias.²⁵ To be sufficient for a judge to

¹⁹ See, *Stovall v. State*, 1998 WL 138931, *4 (Del. 1998)(there is no duty to poll the jury after the verdict when there has not been a request to do so by either party or the court).

²⁰ See, Defendant's Memorandum of Law in support of Rule 61 Motion, at pg. 6.

²¹ *Gattis v. State*, 955 A.2d 1276, 1286 (Del. 2008); *State v. Desmond*, 2011 WL 91984, *12 (Del.Super. 2011).

²² *State v. Desmond*, 2011 WL 91984, *12 (Del.Super. 2011); *In the Matter of Margaret A. West*, 1987 WL 18824, *1 (Del.Ch. 1987).

²³ *Gattis v. State*, 955 A.2d 1276, 1286 (Del. 2008); *State v. Desmond*, 2011 WL 91984, *12 (Del.Super. 2011).

²⁴ *State v. Desmond*, 2011 WL 91984, *12 (Del.Super. 2011).

²⁵ *Id.*

be disqualified from a case, that bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.²⁶

19. In the subject case, Defendant does not even allege, let alone support an allegation, that the trial judge harbored any bias or prejudice from an extrajudicial source. Nor for that matter does Defendant allege, let alone support an allegation, that the trial judge's rulings were made on the basis of anything other than what the judge learned from his participation in the case. Consequently, the Defendant has not set forth even a *prima facie* allegation of judicial bias that would warrant a sufficient basis for recusal.²⁷

20. It is important to note that the Defendant had the right to take a direct appeal to the Delaware Supreme Court on any adverse ruling from the trial court that he so desired. Indeed, Defendant did, in fact, take a direct appeal from the trial judge's ruling on his motion for judgment of acquittal on the conviction of delivery of heroin. Although Defendant contends in this motion that the trial judge failed to rule objectively because he denied Defendant's motion for judgment of acquittal even though the State had not proven its case, the Delaware Supreme Court affirmed the trial judge's ruling and upheld the conviction. Despite Defendant's contention that the State had not proven its case, the Delaware Supreme Court agreed with the Superior Court in its conclusion that it had. The record is devoid of any support for Defendant's contention of judicial bias. This claim is without merit.

21. Turning to Defendant's third claim, Washington contends that "he was charged with loitering that was not in the police report or the Affidavit of Probable Cause as

²⁶ *Id.*

²⁷ See, *Manchester v. State*, 1998 WL 188559 (Del. 1998)(a defendant that offers no support for his claim of bias other than the fact that the trial judge made adverse rulings has not stated a valid claim).

testified to.” Defendant was convicted of loitering for which he received a \$300 fine. It is this conviction that is the subject of his third claim. At the conclusion of the State’s case-in-chief, Washington moved to dismiss the charge of loitering as well as the delivery of heroin charge. Defendant made the same arguments in his motion to dismiss the charge of loitering at the conclusion of the State’s case-in-chief that he now makes in his motion for postconviction relief.²⁸ The Superior Court reserved decision on both the loitering and deliver of heroin charges.²⁹ After Washington was convicted of these charges, he chose only to renew his motion on the delivery of heroin charge. Washington never renewed his motion on the loitering charge. Following the Superior Court’s denial of Washington’s motion on the delivery of heroin charge, he filed a direct appeal and again chose only to renew his motion seeking the dismissal of the delivery of heroin charge.

22. As previously discussed, Defendant’s third claim is procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), since this claim was not renewed at trial, was not raised on direct appeal, nor was it raised in any other postconviction proceeding. Defendant has not offered any explanation of cause which prevented him from raising this claim in a timely manner.³⁰

23. It is important to note that even if the charge of loitering was not adequately set forth in the police report or Affidavit of Probable Cause, or even if the police report or Affidavit of Probable Cause contained factual mistakes, when Washington was indicted by the New Castle County Grand Jury in September 2008, a separate probable cause

²⁸ January 30, 2009 Trial Transcript, pgs. 71-77.

²⁹ January 30, 2009 Trial Transcript, pgs. 71-77.

³⁰ *Outten v. State*, 720 A.2d 547, 556 (Del. 1998)(a showing of cause is satisfied when a movant shows some external impediment which prevented him from raising the claim in a timely manner.)

determination was made and thereafter the Grand Jury indictment was the basis for Washington's ultimate prosecution. A grand jury indictment, by definition, establishes probable cause.³¹ Moreover, the indictment, as required, provided a plain, concise and definite written statement of the essential facts constituting the offense charged.³² Defendant was on notice of what he was being called upon to defend. Any challenge to the indictment, or to the loitering conviction, should have been made to the Delaware Supreme Court on direct appeal.

24. It is also important to note that the Superior Court fully and properly instructed the jury as to all the elements that must be proven by the State in order for the defendant to be found guilty on the charge of loitering.³³ The jury reached a unanimous verdict based on the weight and credibility of the evidence produced at trial. When determining a motion for judgment of acquittal, the court must consider whether any rational trier of fact viewing the evidence in the light most favorable to the prosecution, could find the defendant guilty beyond a reasonable doubt of all elements of the crime.³⁴ The State provided sufficient direct and circumstantial evidence to permit a rational trier of fact, viewing the evidence in light most favorable to the prosecution, to find Washington guilty beyond a reasonable doubt of loitering. There was sufficient evidence to convict Defendant on the loitering charge. Defendant's third claim is procedurally barred and without merit.

³¹ *Gibbs v. Hartsky*, 2004 WL 1328278, *3 (D.Del. 2004); *Joy v. Superior Court*, 298 A.2d 315, 316 (Del. 1972)(an indictment itself is in effect a finding of probable cause); *State v. Curtis*, 2006 WL 1579786 (Del.Super.)(when the Grand Jury heard the case and determined that the defendant should stand trial and face the charges there is no basis to have the charges dismissed before trial based on lack of evidence).

³² Super.Ct.Crim.R. 7(c).

³³ January 30, 2009 Trial Transcript, pgs. 94-97.

³⁴ *Washington v. State*, 2009 WL 3823211 at 2.

25. In this case, Defendant has failed to overcome any of the procedural bars by showing a “colorable claim that there was a miscarriage of justice” or that “reconsideration of the claim is warranted in the interest of justice.” The “miscarriage of justice” exception is a “narrow one and has been applied only in limited circumstances.”³⁵ The defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”³⁶ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the “interests of justice” require it to consider the otherwise procedurally barred claim for relief.³⁷

For all of the foregoing reasons, Defendant’s Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary

³⁵ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

³⁶ *Id.*

³⁷ *Id.*