IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 9510007098
	)	
KEVIN C. BRATHWAITE,	)	
	)	
Defendant.	)	

OPINION AND ORDER

On the Defendant's
Motion for a New Trial

Submitted: December 18, 2002
Decided: March 17, 2003

Donald R. Roberts, Esquire, Deputy Attorney General, Department of Justice, 820 North French Street, Wilmington, DE 19801.

Jerome M. Capone, Esquire, Towne Center, Suite 200, 4 East 8th Street, Wilmington, DE 19801, Attorney for the Defendant.

Mr. Thomas A. Foley, Esquire, 1326 King Street, Wilmington, DE 19801.

Mr. Kevin C. Brathwaite, Delaware Correctional Center, Box 500, RD #1, Smyrna, DE 19977, Defendant

TOLIVER, JUDGE

Presently before the Court is the motion filed by the Defendant, Kevin C. Brathwaite, seeking to set aside his conviction and be granted a new trial pursuant to Superior Court Criminal Rule 33. That which follows is the Court's resolution of the issues so presented.

FACTS AND PROCEDURAL POSTURE

Mr. Brathwaite was convicted of six counts of first degree, two counts of Unlawful Sexual Intercourse second degree, seven counts of Unlawful Sexual Intercourse third degree, one count of aggravated act of intimidation, one count of Unlawful Sexual Penetration third degree, and two counts of assault third degree on December 4, 1998. He was sentenced, *inter alia*, to several consecutive life sentences. On January 4, 1999, Mr. Brathwaite appealed his conviction to the Delaware Supreme Court. That appeal was

denied on October 22, 1999.[1] On December 16, 1999, Mr. Brathwaite filed a motion for new trial with this Court pursuant to Superior Court Criminal Rule 33 based on claims of newly discovered evidence and ineffective assistance of trial counsel.[2]

Insofar as the newly discovered evidence is concerned, Mr. Brathwaite alleges that Ms. Salan Chapman, who testified at his trial that Mr. Brathwaite raped her, intentionally withheld exculpatory evidence in order to secure his conviction. Mr. Brathwaite identifies at least one photo, purportedly of Ms. Chapman, in a highly revealing and compromising position, and an anonymous and very strongly worded letter which accompanied the photo. He claims that the photo and letter were sent to him by Ms. Chapman after

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[1] *See* State v. Brathwaite, 741 A.2d 1025 (Del. 1999).

[2] Mr. Brathwaite was represented by two attorneys - Mr. David J. Facciolo represented Mr. Brathwaite until December 3, 1997, at which time he withdrew. Mr. Thomas A. Foley assumed responsibility for Mr. Brathwaite's defense on December 15, 1997, and continued as defense counsel throughout trial, as well as through Mr. Brathwaite's subsequent appeal to the Delaware Supreme Court. Mr. Brathwaite's claim of ineffective assistance of counsel is lodged against Mr. Foley.

his conviction but prior to his direct appeal. He further claims that these pieces of evidence prove that he and Ms. Chapman had a pre-existing, consensual, intimate relationship, a conclusion that would lie in direct contradiction to Ms. Chapman's trial testimony.

Mr. Brathwaite's claim of ineffective assistance of counsel is twofold. First, he argues that Mr. Foley was ineffective for failing to adequately investigate the list of witnesses provided him by the Defendant as well as for his decision not to call any of those witnesses at trial. Mr. Brathwaite asserts that these witnesses are willing to testify to his innocence and to a vindictive scheme concocted by Ms. Chapman to secure his conviction after the termination of their relationship. He also believes presentation of these witnesses would certainly have persuaded the jury as to his innocence, and that Mr. Foley's performance therefore fell well below the acceptable level of professionalism and gravely prejudiced his defense.

Second, Mr. Brathwaite argues that Mr. Foley was ineffective because he told the Defendant that the photos of Ms. Chapman and accompanying letter could not be presented on direct appeal to the Delaware Supreme Court, since they were not part of the original trial record. Mr. Brathwaite believes that had the Delaware Supreme Court had the opportunity to view these items, it would have undoubtedly remanded the case to the Superior Court for a new trial. He argues that a new jury, privy to these new items of evidence, would surely have declined to convict him on the charges regarding Ms. Chapman, and that his defense was therefore severely compromised by Mr. Foley's unwillingness to submit the photo and letter to the Supreme Court on direct appeal.

On January 18, 2000, Mr. Foley responded to and denied each of Mr. Brathwaite's allegations. Simply put, at least from Mr. Foley's perspective, there was no newly discovered evidence or ineffective assistance of counsel. He indicates

that he met with the witnesses identified by Mr. Brathwaite as helpful to his case, but chose not to use them for various reasons. Most importantly, he determined that none of the perspective witnesses would be supportive of the allegations made by Mr. Brathwaite.

More specifically, Mr. Foley asserted that one prospective witness, a resident of the same institution where Mr. Brathwaite had been incarcerated, confessed that Mr. Brathwaite had asked him to testify falsely in return for a favor that Mr. Brathwaite had previously performed for him. A second witness not only seemed less than credible, but would have testified, among other things, about Mr. Brathwaite's illicit drug selling activity which Mr. Foley felt would not help Mr. Brathwaite's image before the jury. The third witness was deemed to be credible by Mr. Foley notwithstanding having been convicted for crimes of dishonesty, but would only have restated what other witnesses were going to say. The fourth witness, Ms. Sonya

Byers, simply refused to testify. Mr. Foley had no recollection of the other individuals identified by Mr. Brathwaite in his motion having been named as prospective witnesses.

Mr. Foley further asserts that he maintained open and cordial communications with Mr. Brathwaite at all times during the proceedings, and strongly advised him to accept the State's plea offer. Mr. Brathwaite decided to exercise his right to a trial, and Mr. Foley avers that he defended him to the best of his ability.

With regard to the "newly discovered evidence" Mr. Foley stated that he never saw the photo in question, but was suspicious of its sudden appearance post-trial, and declined to investigate the matter during the direct appeal process. He believed that the photo would have been be more appropriately presented to the trial court in a postconviction proceeding.

Given the nature of the allegations made by Mr.

Brathwaite and respective positions taken in response, Jerome M. Capone, Esquire, was appointed by the Court to represent Mr. Brathwaite. An evidentiary hearing was deemed necessary and began as scheduled on November 2, 2001. However, because of time constraints, the hearing could not be completed on that date. On May 21, 2002, it was resumed and completed.[3] Testifying on behalf of Mr. Brathwaite were Ms. Sonya Byers, Stuart Drowos, Esquire, Captain Joseph H. Belanger[4] and Mr. Brathwaite himself. Appearing on behalf of the State were Ms. Salan Chapman, Ms. Carmen Chapman and Corporal Michael Rash[5].

Ms. Chapman[6] testified consistently with her testimony at trial. In addition to copies of the photo and letter, Mr. Capone introduced the affidavit of Ms. Chapman's cousin,

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[3] There was a significant delay in resuming the evidentiary hearing because of the conflicts between the schedules of the attorneys and the Court. In addition, Ms. Chapman was expecting a child at the time of the first part of the hearing and its birth delayed the resumption along with the scheduling conflicts.

[4] Captain Belanger is a Department of Corrections Officer.

[5] Corporal Rash is a Department of Corrections Officer.

[6] References hereafter to "Ms. Chapman" are to Ms. Salan Chapman.

Sir Olden Hue Chapman, which it was argued contradicted the testimony of Ms. Chapman.

On December 18, 2002, the State filed its response.[7] Its argument, simply put, was that Mr. Brathwaite fails to meet the threshold requirements that would entitle him to the relief sought pursuant to Rule 33 and that his claims of ineffective assistance of counsel are unsupported by the record.

Mr. Capone filed his response on behalf of Mr. Brathwaite on November 17, 2002. In it Mr. Capone indicates that although Ms. Byers' fear of losing her job prevented her from testifying at Mr. Brathwaite's trial, she did offer evidence that conflicted, at least in part, with the testimony provided by Ms. Chapman at trial. Mr. Capone argues that testimony, along with the photo and letter received by Mr. Brathwaite post-trial, falls under the

[7] The Court notes that the State filed an initial response to Mr. Brathwaite's motion on February 2, 2000, advancing essentially the same arguments asserted in its December 18, 2002 motion. The Court will consider them as one.

definition of "newly discovered evidence" referenced in Rule 33, and the obligations demanded of a motion so presented have been satisfied as a result.

DISCUSSION

In order to succeed in a motion for new trial pursuant to Superior Court Criminal Rule 33, the movant must meet the requirements articulated by the Superior Court in State v. Hamilton.[8] In Hamilton, the Court set forth the rule by which these motions must be measured:

> In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial and could not have been discovered before by the exercise of due diligence; (3) that it is not merely cumulative or

[8] 406 A.2d 879 (Del. Super. 1974).

impeaching.[9]

The State points out that Mr. Brathwaite has failed to meet any of these requirements. First, he admits that he knew of the evidence in question prior to trial. Second, the State claims the evidence is merely cumulative and impeaching regarding his alleged relationship with Ms. Chapman and his belief that she was falsely accusing him. Third, the State argues that this "new evidence" is insufficient to change the outcome of the initial trial in any case. The Court agrees.

The record reveals that at least the photo proffered by Mr. Brathwaite was in his possession prior to his arrest, which necessarily means that it was available at the time of trial and discoverable by the exercise of due diligence. Mr. Brathwaite never mentioned these pieces of evidence he feels to be so crucial to his innocence before or during trial. In fact, these items were never brought to the

[9] Hamilton at 880, *citing* State v. Lynch, 128 A. 565 (Del. Term. R. 1925).

Court's attention prior to Mr. Brathwaite's instant motion. Moreover, because they were produced following his incarceration, the Court must view them with great caution.[10] Mr. Brathwaite's motion is similarly compromised by the fact that his newly discovered evidence, advanced to support the notion that he and Ms. Chapman had a pre-existing intimate relationship, is merely cumulative. He testified at trial that they had shared a relationship that was sexual in nature as early as October of 1995.[11] Therefore, the photograph that shows a woman in a sexually revealing position, even if it is Ms. Chapman, is cumulative of testimony given before the jury at trial. Further, Mr. Brathwaite does not appear to appreciate that a prior sexual relationship, real or imagined, does not automatically indicate that Ms. Chapman consented to intercourse or other sexual activity on the occasion in question.[12]

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[10] *See* Blankenship v. State, 447 A.2d 428 (Del. 1982).

[11] August 26, 1998 Tr. Transcript at p. 141-142.

[12] State v. Yowell, 1982 Del. Super. LEXIS 918 at 5.

As for the anonymous letter, Mr. Brathwaite claims that it proves that Ms. Chapman concocted a scheme to have him convicted on false charges due to her hurt feelings over their recent breakup. However, Mr. Brathwaite also had the opportunity at trial to present his the theory that Ms. Chapman made up her story and lied under oath.[13] Presentation of the letter now in support of that same theory does not constitute newly discovered evidence, nor does it justify granting a new trial.

Because Mr. Brathwaite has failed to satisfy two of the factors of the Hamilton test, it is unnecessary for the Court to engage in discussion as to whether his "newly discovered evidence" would change the outcome of events if a new trial were granted. However, the Court does note that Mr. Brathwaite's conflicting and unreliable testimony at the two postconviction evidentiary hearings bolsters the Court's impression that the items in question would hardly sway a

[13] August 27, 1998 Tr. Transcript at p. 81-82.

jury to acquit him of the crimes with which he was charged. As such, they form an insufficient basis upon which a new trial may be granted.

As for Mr. Brathwaite's claim of ineffective assistance of counsel, Rule 33 provides that a motion for new trial must be made within seven days after verdict or finding of guilty if it is premised on grounds other than newly discovered evidence. Therefore, a claim of ineffective assistance of counsel should have technically been raised in a motion filed within that proscribed time period. However, it appears to the Court that it would have been nearly impossible for Mr. Brathwaite to have produced such a motion, *pro se,* within seven days of his verdict in satisfaction of Rule 33. Consequently, the Court will treat this claim as a motion for postconviction relief pursuant to Superior Court Criminal Rule 61, and will evaluate it accordingly.

Before the Court can consider the merits of a

motion for post-conviction relief, the movant must first overcome the substantial procedural bars contained in Superior Court Criminal Rule 61(i).[14] Under Rule 61(i), post-conviction claims for relief must be brought within three years of the movant's conviction becoming final.[15] Further, any ground for relief not asserted in a prior post-conviction motion is thereafter barred, unless consideration of the claim is necessary in the interest of justice.[16] Similarly, grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for the procedural default, and (2) prejudice from any violation of the movant's rights.[17] Finally, any ground for relief that was formerly adjudicated in the proceedings leading to judgment of conviction or in a prior post-conviction

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[14] Flamer v. State, 585 A.2d 736, 745 (Del. 1990); Younger v. State, 580 A.2d 552, 554 (Del. 1990); Saunders v. State, 1995 Del. LEXIS 17 at *5.

[15] Super. Ct. Crim. R. 61(i)(1).

[16] Super. Ct. Crim. R. 61(i)(2).

[17] Super. Ct. Crim. R. 61(i)(3).

proceeding is thereafter barred from consideration.[18]

Mr. Brathwaite's conviction became final on October 22, 1999. The instant motion was filed on December 16, 1999, well within the three year time limit, and in satisfaction of Rule 61(i)(1). He has filed no prior postconviction motions, and is thus not barred by 61(i)(2). Mr. Brathwaite could not raise the issue of ineffective assistance of counsel in his direct appeal because his complaint addresses the way in which counsel handled both the trial and the appeal. He is therefore not barred by 61(i)(3). Finally, none of the claims raised by Mr. Brathwaite were previously adjudicated, and are therefore eligible for review under 61(i)(4). The Court therefore reaches the merits of Mr. Brathwaite's claim of ineffective assistance of counsel.[19]

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[18] Super. Ct. Crim. R. 61(i)(4).

[19] Even if Mr. Brathwaite's motion had been procedurally barred by any portion of Rule 61(i)(1)-(4), those bars may be lifted if the defendant establishes a colorable claim that there has been a "miscarriage of justice" under Rule 61(i)(5). Though this exception is very narrow, and only applicable in very limited circumstances, a claim of ineffective counsel in violation of the Sixth Amendment to the United States Constitution, by its very nature, qualifies as just such an exception. *See* Mason v. State, 725 A.2d 442 (Del. 1999); State v. McRae, 2002 Del. Super. LEXIS 495 at *15.

In order to prevail, Mr. Brathwaite must satisfy the two factors set forth in Strickland v. Washington[20]. First, he must demonstrate that counsel's representation fell below an objective standard of reasonableness. Second, he must show that counsel's actions were prejudicial to the defense, creating a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.[21] The Strickland standard is highly demanding and under the first prong of the test, there is a "strong presumption that the representation was professionally reasonable."[22]

Mr. Foley's response and the State's response show that Mr. Foley did in fact investigate the list of individuals provided him by Mr. Brathwaite, and that he made extensive notes at that time as to the fitness of each prospective witness. That Mr. Foley in his professional judgment

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[20] 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

[21] Strickland at 694.

[22] Stone v. State, 690 A.2d 924, 925 (Del. 1996); Flamer at 753.

determined whether each could or could not make a credible contribution to Mr. Brathwaite's case does not constitute ineffective assistance of counsel. Despite Mr. Brathwaite's belief that presentation of these witnesses would undoubtedly have convinced the jury of his innocence, the decisions that Mr. Foley made appear to not only satisfy an objective standard of reasonableness, they appear to be sound trial strategy as well.

Mr. Brathwaite is also mistaken in his belief that evidence not made part of the record at the trial level may be presented on direct appeal before the Supreme Court. Supreme Court Rule 9(a) states, "Record - Contents. An appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal". The photo and letter Mr. Brathwaite wished to present (for the first time) during the proceedings therefore would not have been eligible for the Supreme Court's review on direct appeal, as they were not made part of the record during his trial

before this Court. Mr. Foley, again demonstrating competent lawyering, was quite right to decline to present the items in that context and to reserve them for a postconviction proceeding.[23]

In sum, Mr. Brathwaite has failed to demonstrate that counsel's assistance was unreasonable and has thus failed the first prong of the Strickland test. As a result, it is unnecessary for the Court to reach the second prong of that test.

[23] Mr. Brathwaite's related claim that the jury would certainly have found him not guilty if they had had an opportunity to view the items in question is speculative at best. Since the Supreme Court would not have viewed those items on direct appeal, pursuant to Rule 9(a), that Court would have had insufficient evidence on which to predicate a remand, and there would have been no remanded trial at which a jury could view the photo or letter.

CONCLUSION

For the foregoing reasons, Mr. Brathwaite's motion for a new trial and/or postconviction relief must be, and hereby is, **denied.**

IT IS SO ORDERED.

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TOLIVER, JUDGE