IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID#: 9610003447
	)	
ERIC WITHERSPOON,	)	
	)	
Defendant.	)	

Submitted: October 24, 2002
Decided: January 31, 2003

ORDER

Upon Defendant's Motion for Postconviction Relief -- ***DENIED.***

Delaware's Supreme Court, on February 14, 2001, affirmed Eric Witherspoon's conviction for manslaughter, reckless endangering first degree and two related weapons offenses. The Supreme Court denied reargument on May 22, 2001. Witherspoon filed motions for a new trial and postconviction relief on July 25, 2002, and July 26, 2002, respectively.

The court immediately dismissed Witherspoon's motions. The motion for a new trial came too late under Superior Court Criminal Rule 33. The motion for postconviction relief was dismissed under Rule 61(c)(1) because it did not substantially comply with the form requirement under Rule 61(b). The dismissal was without prejudice, however, to Witherspoon's refiling the motion for postconviction relief, using the proper form. Anticipating that Witherspoon would comply, which he did on August 5, 2002, the court also ordered the State to respond under Rule 61(f).

As mentioned, Witherspoon filed a proper motion on August 5, 2002 and the State responded on October 24, 2002, after requesting an extension. Meanwhile, on August 23, 2002, Witherspoon filed an incorrectly captioned "Motion for Appointment of Appellate Counsel." After preliminary review of Witherspoon's motion for postconviction relief and his motion for appointment of counsel, the court refused to appoint counsel under Rule 61(e), by order dated September 23, 2002.

In summary, the court denied Witherspoon's motion for a new trial on July 25, 2002 and his motion for appointment of counsel on September 23, 2002. What now is left for the court to decide is Witherspoon's formal motion for postconviction relief and its related request for an evidentiary hearing.

I.

Witherspoon's motion for postconviction relief is sweeping. His many claims fall into three broad categories: claims of errors made by the trial court, claims of ineffective assistance of counsel at trial and claims of ineffective assistance of counsel on appeal. The court has considered the motion for postconviction relief, the State's response, which included appellate counsel's affidavit. The court has determined under Rule 61(h) that an evidentiary hearing is not desirable and the motion is ripe for summary disposition.

In considering Witherspoon's motion, two things must be kept in mind. First, Witherspoon's extensive statement of the case is one-sided and sometimes misleading. For example, Witherspoon's Memorandum of Law states, at page 20:

> Before the start of trial on February 24, 1999 the state informed the Court that the state would be introducing the tape recording of the 911 phone calls through Detective Scott Sowden (Tr. 2-24-99:5). Defense Counsel objected and told the court that he hadn't seen or

> heard the tape, not even the transcript of the tapes. However, defense Counsel failed to move for either A mistrial or continuance and opportunity to review and investigate the tapes. The court stated "well we're not going to keep the jury waiting while we do something that should have been taken care of ahead of time." (Tr. 2-24-99:6-8)

Witherspoon implies that the State was remiss in meeting its discovery obligations, trial counsel was derelict and the court was dismissive, at best. Reviewing the record carefully, however, reveals that the State raised the "911" tape first thing on the trial's second morning. Although the State was trying to be helpful, the court was anxious not to keep the jury waiting, which would begin a pattern of starting the trial late each morning. So, the court called for the jury and the trial went forward, as scheduled. The record further reveals, however, that as soon as the court sent the jury out at the next recess, on its own the court immediately re-raised the "911" tape. The State then asked that the matter be postponed further because the State had decided not to introduce the "911" tape "any time soon." As events transpired, the State never introduced the "911" tape. Furthermore, the State provided a transcript of the "911" tape, which Witherspoon's trial counsel eventually used on March 3, 1999, during Witherspoon's case. In summary on this point, Witherspoon's innuendo notwithstanding, the record actually reveals no shortcoming on the part of anyone concerning this example, much less any prejudice to Witherspoon.

The second and larger overall concern about Witherspoon's motion is that he persistently fails to recognize why he was prosecuted and convicted. The facts surrounding Lakayla Booker's death in the early morning of October 5, 1996 were discussed in this court's July 30, 1999 Opinion and Order, and in the Supreme Court's previously mentioned February 14, 2001 Order.

Briefly, Witherspoon became involved in a barroom dispute that spilled out to the street. Brandishing a large handgun, wearing military camouflage-style clothing, and shouting taunts, Witherspoon recklessly participated in what every witness, including his own, agreed was a gun battle on a crowded city street. While at least one witness thought someone else fired the first shot, most witnesses agreed that Witherspoon fired two shots in the air, which precipitated a further exchange of gun fire. Everyone also agrees that someone other than Witherspoon fired the bullet that actually killed Booker. At Witherspoon's trial, every witness, in effect, agreed that Witherspoon knowingly participated in the gun battle under circumstances that made it easily foreseeable that someone was likely to be killed.

Nevertheless, Witherspoon continues to insist:

> The principle issue in the case was who fired the first shot in the alleged gun battle and whether defendant possessed A weapon/gun prior to and during the alleged incident.

Not only is who fired the first shot not the "principle issue in the case," it is beside the point. Everyone, from the Supreme Court on down, except Witherspoon, understands that Witherspoon was guilty because he recklessly participated in a gun battle and it was foreseeable under the circumstances that someone would be shot. Just as it makes no difference whether Witherspoon fired the fatal bullet, it does not matter whether he fired the first bullet. As it is, the weight of the evidence strongly points to Witherspoon as having started the shooting. Nonetheless, even if he "only" was returning fire, his conduct before and during the shooting was reckless and the jury concluded correctly that but for what he did, Lakayla Booker would not have been killed.

Witherspoon's misleading presentation of the record and his misunderstanding about his criminal liability colors all his claims for postconviction relief. Because of the way he sees the case, Witherspoon emphasizes things that mattered very little. For example, Witherspoon emphasizes repeatedly how important it was to ferret out the identity of Booker's actual shooter. Witherspoon, however, never explains how having that information probably would have resulted in his acquittal. As discussed below, in Section III, knowing the fatal shooter's identity probably would not have helped Witherspoon's defense.

Along the same line, even if, as Witherspoon now claims, the shooting was an "ambush" or "an attempted execution of the defendant," that does not legally justify his conduct. And again, the evidence overwhelmingly points to the shooting's having been provoked by Witherspoon's fighting words, accompanied by his otherwise recklessly belligerent behavior as he confronted everyone before and after the shooting started. Finally, Witherspoon's passing suggestion that during the gun battle Booker was shot intentionally, for reasons unknown, is fanciful.

II.

Turning to Witherspoon's specific contentions about errors made by the court before and during Witherspoon's trial, those claims are procedurally defaulted under Rule 61(i)(3). They involve the court's countenancing alleged discovery violations by the State, especially concerning the State's failure to provide what Witherspoon characterizes as exculpatory, "*Brady*"[1] material.

[1] *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

Witherspoon also challenges the jury instructions. Other than alleging his counsel's ineffectiveness, which is a separate argument discussed in Section III, Witherspoon has neither alleged nor demonstrated cause for his failing to raise on direct appeal the alleged errors. In deciding that Witherspoon's first claims are procedurally defaulted and barred, the court has not ignored them entirely. If the court were to address them substantively, it would find them meritless.

III.

Witherspoon's second general ground for postconviction relief concerns alleged ineffective assistance of counsel at trial. Basically, Witherspoon contends that his trial counsel failed to investigate the case, failed to demand a continuance, failed to move to compel production of the statement of a State's trial witness and failed to file a motion to obtain immunity for "defense witness (i.e. David Chat)...."

Witherspoon has not met either prong of *Strickland v. Washington*.[2] He has not demonstrated that his trial attorney's efforts fell below those of a reasonable practitioner. Nor has he established that any shortcoming on his trial counsel's part probably made a difference to the trial's outcome. Witherspoon primarily complains that his trial counsel did not receive the pre-trial statements of the State's witnesses until shortly before or immediately after they testified for the State. For one eyewitness, Danny Wharton, Witherspoon complains that he still has not seen the entire statement. In some instances, Witherspoon characterizes the witnesses' statements as *Brady* material. In other instances, he relies on

[2]466 U.S. 668 (1984).

Superior Court Criminal Rule 26.2, which codifies *Jencks v. U.S.*[3] and *Hooks v. State.*[4]

As mentioned below, the State violated neither *Brady*, nor Rule 26.2. But if it did, that does not establish a violation of *Strickland's* test for ineffective assistance of counsel. Trial counsel requested discovery and he objected several times when he saw potential *Brady* or Rule 26.2 violations. Even if another attorney might have objected more frequently, it cannot be said that trial counsel's efforts fell below accepted standards. Trial counsel asked for discovery before and during trial, and he objected with mixed results when he felt he was being blind-sided. Furthermore, it is unlikely that court would have continued the trial based on Witherspoon's allegations. And it also is unlikely that a postponed trial would have ended better for Witherspoon.

More importantly, Witherspoon has not demonstrated that more objections by trial counsel would have generated more production by the State. Nor has Witherspoon demonstrated that with more information, trial counsel's cross-examination would have undermined the State's theory of prosecution. Again, while there was some dispute as to whether Witherspoon fired the first shot, everyone who testified agreed that Witherspoon took it to the street, started taunting the crowd, brandished a handgun, and actively participated in the gun battle. And, as presented above, it is far more likely than not that he actually started the fatal gun battle by firing two shots in the air.

In closing on Witherspoon's ineffective assistance of trial counsel

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[3]353 U.S. 657 (1957).

[4]416 A.2d 189 (Del. 1980).

argument, the Court recognizes the importance Witherspoon places on the fact that the person who fired the fatal shot was never identified. And the court understands Witherspoon's belief that some of the State's witnesses know who fired the fatal shot. The court doubts that identifying the shooter would help Witherspoon at all. To the contrary, if the shooter had been identified and if the shooter's testimony could have been procured at Witherspoon's trial, the shooter most likely would have denied his role in the killing. Or, he would have testified that Witherspoon started it. Thus, knowing the shooter's identity probably would have had little impact on Witherspoon's trial, at least no favorable impact. And of course, all of this assumes that the shooter's identity could have been ferreted out. Toward that end, the State declinded to offer immunity and if Witherspoon had pressed the issued, the court would not have immunized anyone, either.

IV.

Witherspoon's claims of ineffective assistance of counsel on appeal are undermined by the Supreme Court's Order affirming Witherspoon's conviction and by his appellate counsel's affidavit. As was the case concerning Witherspoon's claims of ineffective assistance at trial, his claims about his appellate counsel do not pass either of *Strickland's* tests. There is no reason to believe that other appellate counsel would have made the arguments Witherspoon wanted presented. Additionally, there is no reason to believe that he would have prevailed on any of those arguments.

V.

In summary, different trial and appellate defense attorneys might have approached this case differently. It is difficult to comprehend, however, how

another attorney or a different approach probably would have resulted in a more favorable verdict to Witherspoon. His involvement in this senseless tragedy was starkly clear. At that, Witherspoon's trial counsel managed to obtain Witherspoon's acquittal on the lead charge in the indictment, murder in the second degree. But for trial counsel's efforts, the jury easily could have concluded that Witherspoon acted with a cruel, wicked and depraved indifference to human life and it could have found him guilty as charged. Thus, the presumption that Witherspoon's trial counsel was effective[5] is corroborated to some degree by the verdict. Otherwise, the court sees no basis for concluding that Witherspoon's trial counsel's efforts fell below a reasonable standard of professionalism, much less that any failure on trial counsel's part resulted in prejudice to Witherspoon. The same is true for Witherspoon's appellate counsel's efforts.

VI.

For the foregoing reasons, Defendant's August 5, 2002 motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

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Judge

Original to Prothonotary

cc:

[5] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).