

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE	)	
	)	
	)	I.D. No. 1005009912
v.	)	
	)	
ANDRE C. WALKER	)	
	)	
Defendant.	)	

Submitted: March 24, 2015  
Decided: June 8, 2015

On Defendant's Amended Motion for Postconviction Relief.  
**DENIED.**

**ORDER**

Caterina Gatto, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, Attorney for the State

Kevin P. Tray, Esquire, Wilmington, Delaware, Attorney for Defendant  
COOCH, R.J.

This 8th day of June, 2015, upon consideration of Defendant's  
Amended Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Andre Walker was found guilty in November 2010 of one count of Robbery in the First Degree, one count of Possession of a Deadly Weapon During the Commission of a Felony, two counts of Aggravated Menacing, one count of Criminal Mischief, and one count of Resisting Arrest.<sup>1</sup>

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<sup>1</sup> For additional facts and procedural history not relevant to the instant motion, see *Walker v. State*, 2011 WL 3904991 (Del. Sept. 6, 2011).

Defendant was sentenced as a habitual offender in January 2011 to life plus ten years at Level V.<sup>2</sup> The Delaware Supreme Court affirmed Defendant's convictions and sentences on appeal on September 6, 2011.<sup>3</sup>

2. Defendant filed his first Motion for Postconviction Relief in January 2012. That motion was denied by this Court in April 2013 and the Delaware Supreme Court, upon appeal by Defendant, reversed the Superior Court's April 2013 judgment and remanded the case for the appointment of counsel.<sup>4</sup>
3. Counsel was appointed, and Defendant, through counsel, filed the instant Amended Motion for Postconviction Relief on November 17, 2014. The State filed a response but the Defendant never filed a reply, although given the option. Also filed were affidavits by Defendant's trial counsel John S. Edinger, Jr., and appellate counsel Bernard J. O'Donnell.
4. Defendant's Amended Motion for Postconviction Relief sets forth four claims for relief, which may be fairly summarized as follows:
  - (1) Trial counsel was ineffective for failing to request proper cautionary instructions regarding Andre Walker's wearing prison attire during the trial;
  - (2) Trial counsel was ineffective for failing to request that the jury be instructed properly on the charge of Robbery First Degree in conformity with Delaware Law and for failing to request a lesser included offense charge of Aggravated Menacing to the charge of Robbery First Degree;
  - (3) Appellate Counsel was ineffective for failure to pursue a[] non-frivolous appeal of the denial [of] trial counsel's Motion for Judgment of Acquittal;
  - (4) Mr. Walker is entitled to relief due to the prejudicial cumulative effects of Claims i-iii.<sup>5</sup>

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<sup>2</sup> See *State v. Walker*, 2013 WL 285737, at \*1 (Del. Super. Jan. 24, 2013). Defendant was also sentenced to a number of years of probation.

<sup>3</sup> See *Walker v. State*, 2011 WL 3904991 (Del. Sept. 6, 2011).

<sup>4</sup> See *Walker v. State*, 2013 WL 3355899 (Del. Jun. 28, 2013).

<sup>5</sup> Def.'s Mot. for Postconviction Relief at 5-14, D.I. 73 (Nov. 17, 2014).

5. Defendant's Motion for Postconviction Relief is controlled by Superior Court Criminal Rule 61.<sup>6</sup> Before addressing the merits of this Motion for Postconviction Relief, the Court must address any procedural requirements of Superior Court Criminal Rule 61(i).<sup>7</sup>
6. Under Superior Court Criminal Rule 61(i), a Motion for Postconviction Relief can be potentially procedurally barred for time limitations, successive motions, procedural defaults, and former adjudications.<sup>8</sup> If a procedural bar exists, then the Court will not consider the merits of the postconviction claim unless the Defendant can show that, pursuant to Rule 61(i)(5), the procedural bars are inapplicable.
7. Rule 61(i)(5), provides that consideration of otherwise procedurally barred claims is limited to claims 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."<sup>9</sup>
8. This Court finds that Defendant's original motion was timely pursuant to Rule 61(i)(1).<sup>10</sup> As for other procedural bars, it is well settled in Delaware that ineffective assistance of counsel claims fall within the exception found in Rule 61(i)(5), and as such, the Court will consider Defendant's arguments on their merits.<sup>11</sup> For clarity, all of Defendant's claims will be addressed in the order presented to this Court.

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<sup>6</sup> See Super. Ct. Crim. R. 61. Rule 61 has undergone a number of changes in recent months, but the version of the Rule in effect at the time Defendant filed his original Motion is controlling.

<sup>7</sup> See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>8</sup> See Super. Ct. Crim. R. 61(i)(1)-(4).

<sup>9</sup> Super. Ct. Crim. R. 61(i)(5).

<sup>10</sup> See Super. Ct. Crim. R. 61(i)(1)(barring as untimely any postconviction motion filed more than one year after judgment of conviction is final); See also *Felton v. State*, 945 A.2d 594 (Del. 2008) (internal citation omitted) (measuring start of filing period from date direct Supreme Court mandate was issued and direct appeal process concluded).

<sup>11</sup> See, e.g., *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

9. To successfully articulate an ineffective assistance of counsel claim, a claimant must demonstrate: 1) that counsel's performance was deficient, and 2) that the deficiencies prejudiced the Defendant by depriving him or her of a fair trial with reliable results.<sup>12</sup> To prove counsel's deficiency, a Defendant must show that counsel's representation fell below an objective standard of reasonableness.<sup>13</sup> Moreover, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.<sup>14</sup> The Court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>15</sup> Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>16</sup> A successful Sixth Amendment claim of ineffective assistance of counsel requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>17</sup>
10. Defendant's first argument is that counsel was ineffective for failing to request the proper cautionary instructions regarding the fact that Defendant wore a prison uniform during the trial. Notably, the Defendant has not argued that he was compelled to wear his prison uniform at trial, but assuming *arguendo* he had, the claim would fail. The record reflects that neither Defendant requested civilian clothing nor made other arrangements for civilian clothing.<sup>18</sup> Trial counsel affirms that had Defendant made a request or other arrangements for clothing, "[c]ounsel's practice would have been to request a continuance to obtain such clothing."<sup>19</sup> Nothing in the record suggests that Defendant was forced to wear prison garb during trial, and "[i]n the absence of

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<sup>12</sup> See *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>13</sup> *Id.*

<sup>14</sup> *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

<sup>15</sup> *Strickland*, 466 U.S. at 689.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 694.

<sup>18</sup> Aff. of John S. Edinger, Jr. at ¶ 2, D.I. 75 (Jan. 16, 2015) ("Client made no such arrangements for civilian clothing nor made a request to counsel or the Court for civilian clothing.").

<sup>19</sup> *Id.*

the element of compulsion, there [is] no constitutional violation.”<sup>20</sup>

11. Applying the *Strickland* standard to Defendant’s first claim, This Court finds that counsel’s decision not to ask for a cautionary instruction regarding Defendant’s attire was part of a reasonable trial strategy. Trial counsel states that “[i]n light of the fact that throughout the trial Defendant was guarded by two correctional officers, Counsel did not want to draw further attention to Defendant’s custody status by requesting a cautionary instruction regarding prison attire.”<sup>21</sup> Instructions that could potentially be requested are often not requested to avoid emphasis, and under the circumstances, the Court finds that avoiding emphasis of Defendant’s prison garb is conduct that amounted to reasonable professional assistance.<sup>22</sup> Defendant has failed to show that trial counsel’s actions fell below an objective standard of reasonableness and therefore, cannot meet the first prong of *Strickland*. Even assuming *arguendo* that Defendant could set forth sufficient evidence to show that trial counsel had acted unreasonably, Defendant further fails to set forth sufficient evidence to show that but for the decision not to request the cautionary instruction, the result of the proceeding would have been different. Defendant’s first claim fails both prongs of *Strickland*.
  
12. Defendant’s second claim is that trial counsel was ineffective for failing to request that the jury be properly instructed on the charge of Robbery First Degree and that trial counsel was also ineffective for failing to request a lesser included offense of Aggravated Menacing. Defendant argues that an instruction on the lesser included offense of Aggravated Menacing should have been requested by trial counsel because, under *State v. Bridgers* and *State v. Owens*, the jury might not have found him guilty of Robbery First Degree.<sup>23</sup>

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<sup>20</sup> *Smith v. State*, 2009 WL 1659873, at \*2 (citing *Estelle v. Williams*, 425 U.S. 501, 512 (1976)).

<sup>21</sup> Aff. of John S. Edinger, Jr. at ¶ 2.

<sup>22</sup> See, e.g. *Major v. State*, 1995 WL 236658, at \*2 (Del. Apr. 20, 1995).

<sup>23</sup> See Def.’s Mot. for Postconviction Relief at 11-13.

13. Reliance on both cases is, as the State argues, misplaced.<sup>24</sup> Here, Isabelle Charles, the cashier that Defendant attacked, does not fit within the *Bridgers* definition of a “bystander.” The Court in *Bridgers* distinguished between bystanders, bank customers present during an armed robbery, and the victim bank employees, who were forced at gunpoint to relinquish the bank’s money. The Court held that a threatened bystander to a robbery cannot be considered the victim of a robbery, but rather is a victim of aggravated menacing.<sup>25</sup> Further, the Court held that “anyone from whom property is taken by threat or force and anyone actively involved during a theft-in-progress . . . may be a robbery victim.”<sup>26</sup> In *Owens*, this Court granted a judgment of acquittal because nothing was actually taken from the customer service representative. Because there, nothing was taken from the victim, the robbery conviction could not stand.<sup>27</sup> This case is distinguishable from *Owens* as here, the money in the cash register was taken from Ms. Charles with the use of force.
14. Trial counsel affirms that there was no basis in fact upon which he felt he could request the lesser included offense of Aggravated Menacing.<sup>28</sup> Trial counsel further states that “for the same reason, Counsel disagrees that the jury was improperly instructed as to the charge of Robbery First Degree.”<sup>29</sup> The Court agrees with the State and trial counsel, and finds that not only is the above-discussed case law distinguishable, but trial counsel’s decision not to seek an instruction on the lesser included offense based on the available facts was sound trial strategy. Counsel’s choice not to request that the jury be instructed properly on Robbery First Degree and decision not to request an instruction on the lesser included offense of aggravated menacing did not fall below an objective standard of reasonableness. Accordingly, Defendant’s second claim fails the first prong of *Strickland*.

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<sup>24</sup> State’s Resp. at 8-10, D.I. 76 (Mar. 2, 2015).

<sup>25</sup> *Id.* at 944.

<sup>26</sup> *State v. Bridgers*, 988 A.2d 939, 944 (Del. Super. 2007), *aff’d*, *State v. Bridgers*, 2009 WL 824536 (Del. Mar. 30, 2009).

<sup>27</sup> *See State v. Owens*, 2010 WL 2892701, at \*10 (Del. Super. Jul. 16, 2010).

<sup>28</sup> *Aff. of John S. Edinger, Jr.* at ¶ 3.

<sup>29</sup> *Id.*

15. Defendant's third claim is that appellate counsel was ineffective for failing to pursue a non-frivolous appeal of trial counsel's Motion for Judgment of Acquittal which was denied at trial.<sup>30</sup> Appellate counsel explains in his affidavit that he submitted a motion to withdraw and a non-merit brief pursuant to Supreme Court Rule 26(c), wherein appellate counsel stated that he believed there were no appealable issues. The Delaware Supreme Court, in affirming Defendant's conviction, found that "the evidence reflected that [Defendant] struck the cashier in the head with a hatchet, giving her a concussion, to prevent her from interfering with [Defendant's] theft from the register."<sup>31</sup> This evidence, the Court found, was "more than sufficient to sustain [Defendant's] conviction for first degree robbery."<sup>32</sup> Accordingly, the Court concluded that appellate counsel had conducted a conscientious review of the record and that Defendant's appeal was "wholly without merit and devoid of any arguably appealable issues."<sup>33</sup>
16. The highest Court in Delaware found, and this Court agrees, that appellate counsel "made a conscientious effort to examine the record and the law and . . . properly determined that Defendant could not raise a meritorious claim [on] appeal."<sup>34</sup> There is no evidence to suggest to this Court that appellate counsel acted unreasonably by not raising the previously denied motion for judgment of acquittal as an issue on appeal. Defendant has failed to show that appellate counsel's actions fell below an objective standard of reasonableness. Accordingly, Defendant's third claim fails the first prong of *Strickland*.
17. Defendant's fourth and final claim is that of cumulative error. Defendant argues that taken together, all of his claims show that he was deprived of a fair trial. The state argues that because none of Defendant's claims have merit, the Court should not entertain Defendant's claim of cumulative error. As discussed, none of Defendant's individual claims of ineffective assistance have merit, either because of a failure to survive the performance

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<sup>30</sup> Def.'s Mot. for Postconviction Relief at 13.

<sup>31</sup> *Walker v. State*, 2011 WL 3904991, at \*3 (Del. Sept. 6, 2011).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Walker v. State*, 2011 WL 3904991, at \*3 (Del. Sept. 6, 2011).

prong of *Strickland*, the prejudice prong of *Strickland*, or both. Because all of Defendant's claims are without merit, Defendant's claim of cumulative error is also without merit. Therefore, Defendant's Motion for Postconviction Relief is **DENIED**.

**IT IS SO ORDERED.**

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Richard R. Cooch, R.J.

oc: Prothonotary  
cc: Investigative Services  
Caterina Gatto, Esquire  
Kevin P. Tray, Esquire