

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID. No. 1212017553
)
)
 CHRISTOPHER BROWN,)
)
 Defendant.)
)

Submitted: May 28, 2016
Decided: August 25, 2016

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S RULE 61 MOTION AND/OR THE STATE’S RULE 35 MOTION
SHOULD BE GRANTED AS TO SENTENCING
AND
DEFENDANT’S RULE 61 MOTION SHOULD BE DENIED ON ALL OTHER
CLAIMS**

Daniel Logan, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

R. Joseph Hrubiec, Esquire, 715 N. Tatnall Street, Wilmington, Delaware, Attorney for
Defendant Christopher Brown

PARKER, Commissioner

INTRODUCTION

Following a three day jury trial, Defendant Christopher Brown was convicted of a number of charges, including a burglary second conviction, stemming from two break-ins which were consolidated for trial. Defendant was sentenced as a habitual offender pursuant to 11 *Del. C.* § 4214(a) on the burglary second conviction.

Defendant's criminal history is extensive with a number of prior burglary, theft and/or robbery related convictions. In the State's motion to declare Defendant a habitual offender it provided certified records of three of these convictions.¹ One of the convictions relied upon by the State to support its habitual offender petition was reversed and vacated on appeal as to the burglary conviction. In *People v. Christopher Brown*, 101 A.D. 3d 895, 956 NYS2d 109 (Dec. 2012), the New York Supreme Court, Appellate Division, reversed and dismissed Defendant's burglary in the second degree conviction.

Because one of the convictions relied upon to form the basis for Defendant's habitual offender status was overturned, Defendant's sentence should be vacated and Defendant resentenced without reliance on that New York conviction.

All other issues raised in Defendant's Rule 61 motion are without merit and should be denied.

BACKGROUND AND PROCEDURAL HISTORY

On October 3, 2013, after a three day trial, a Superior Court jury found Defendant guilty of Burglary in the Second Degree, Criminal Trespass in the First Degree as a lesser included offense of Burglary in the Second Degree, Criminal Impersonation, two counts of Criminal Mischief, Theft and Resisting Arrest. These convictions stemmed from two break-ins which were consolidated for trial.

¹ Superior Court Docket No. 38- State's Motion to Declare Defendant a Habitual Offender

On February 27, 2014, the Superior Court granted the State's motion to declare Defendant a habitual offender on the Burglary in the Second Degree conviction and thereafter sentenced him as follows:

- a) for Burglary in the Second Degree, ten years at Level V incarceration;
- b) for Criminal Trespass in the First Degree, one year at Level V incarceration;
- c) for Criminal Impersonation, one year at Level V incarceration suspended for one year of Level III probation;
- d) for one count of Criminal Mischief, thirty days of Level V incarceration;
- e) for the other count of Criminal Mischief, thirty days of Level V incarceration suspended for one year of Level III probation;
- f) for Theft, one year of Level V incarceration suspended for one year of Level III probation; and
- g) for Resisting Arrest, one year of Level V incarceration suspended for one year of Level III probation.

Defendant filed a direct appeal to the Delaware Supreme Court. On his direct appeal, Defendant contended, *inter alia*, that the State failed to establish that he had the necessary intent to commit Burglary in the Second Degree. On December 1, 2014, the Delaware Supreme Court affirmed the judgment of the Superior Court.² The Delaware Supreme Court found Defendant's appeal, including the issue of the lack of necessary intent, to be without merit.³

On January 5, 2015, Defendant filed the subject motion for postconviction relief.

² *Brown v. State*, 2014 WL 7010810 (Del. 2014).

³ *Id.*

FACTS

As mainly set forth by the Delaware Supreme Court in its opinion on Defendant's direct appeal, the facts giving rise to the subject action are as follows:⁴

There were two separate incidents which were consolidated for trial.

The Woodlawn Avenue Incident

As to the first, on December 28, 2012, shortly before 1 p.m., Mary Campese was alone in her home in the 800 block of Woodlawn Avenue when she heard someone repeatedly ring the doorbell. She looked outside a window and did not recognize the man at the door. She was not expecting anyone and did not answer the door. She set her alarm system.⁵

After setting the alarm, Campese looked outside again and did not see the man at the door. She looked outside other windows and saw the man in the backyard looking at the door to the basement. She then called 911 and described the man to the 911 operator.⁶

While Campese was on the phone with the 911 operator, she heard a banging and crash from the basement. The security alarm went off. Campese left the house when the police arrived. The police discovered that the basement door to the house had been kicked off its hinges.⁷

One of the police officers responding to the 911 call observed a man fitting the description Campese gave the 911 operator approximately a block away from Campese's

⁴ *Brown v. State*, 2014 WL 7010810, at *1-3 (Del. 2014).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

house. The officer detained the man, who identified himself as David Daniels, but turned out to be Defendant Christopher Brown. Brown was disheveled and sweating profusely.⁸

The officer took Brown to Campese's house and Campese identified Brown as the man she saw at her door and in her backyard, but stated that his clothes had changed.⁹

The police found clothing in a trash can around the corner from Campese's house. The clothing consisted of a cabbie hat, tan pants, a black sweater, and black socks. A DNA analysis was performed on the clothes. Although the black socks had no DNA profile and testing on the pants was inconclusive, the DNA on the sweater was consistent with Brown's DNA profile and the DNA profile of at least three other individuals and the DNA on the hat was consistent with Brown's DNA profile and at least two other individuals.¹⁰

At trial, Brown testified on his own behalf. According to him, he went to the Woodlawn Avenue house with a woman named Patty who wanted to confront someone living in the house. Patty rang the doorbell and banged on the basement door. Brown kicked the basement door open, which set off the alarm. Brown was arrested, but Patty escaped.¹¹

Brown testified that the clothes found in the trash can belonged to him. He also testified that he did not give his real name to the police because he did not have identification, he thought the police might let him go, and he did not want the police to know his real name.¹²

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

The Broom Street Incident

As to the second incident, it occurred on February 5, 2013 on Broom Street. Aaron Poole returned to his residence around 1:15 p.m. and saw that the back door was kicked in. Poole called 911. While on the phone with a 911 operator, Poole observed a man leave the house with a green bag. At trial, Poole identified Brown as the man he saw leaving his house. Poole followed Brown down Broom Street and pointed him out to the police when they arrived on Broom Street.¹³

When the police cruiser pulled next to Brown, he dropped the green bag and began to run away. The police stopped Brown and tried to handcuff him. After a struggle, Brown was handcuffed. The green bag contained toiletries and jewelry belonging to Poole's mother.¹⁴

At trial, Brown, testifying on his own behalf, claimed that he was high on heroin and needed to clean up after soiling himself. Brown kicked open the door and used a bathroom to clean up. Before leaving the house, Brown took some toiletries from the bathroom as well as several small boxes in an adjoining bedroom and put them in a bag. Brown then left the house with the bag of items he had taken and was arrested.¹⁵

As to the first incident, the Woodlawn Avenue incident, Brown was found guilty of Criminal Trespass in the First Degree as a lesser included offense of Burglary in the Second Degree, Criminal Mischief and Criminal Impersonation.

As to the second incident, the Broom Street incident, Brown was found guilty of Burglary in the Second Degree, Criminal Mischief, Misdemeanor Theft, and Resisting Arrest.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

DEFENDANT'S RULE 61 MOTION

On January 5, 2015, Defendant filed the subject motion for postconviction relief. In the subject motion, Defendant raised three claims: 1) Sentencing Error for basing his habitual status on an out-of-state conviction that had been overturned on appeal; 2) Insufficiency of Intent to Commit Theft to support the Burglary Second Degree conviction; and 3) Ineffective Assistance of Counsel for allowing Defendant to testify at trial and for failing to request a limiting instruction as to his prior felony convictions.

Before making a recommendation, the Commissioner enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter, the State filed a response to the motion.

In addition to filing a response to the subject motion, the State also filed a Superior Court Criminal Rule 35(a) Motion for Resentencing in light of the fact that the out-of-state conviction relied upon by the State to form the basis of its habitual status petition had been overturned on appeal.

After the briefing by Defendant's trial counsel and the State was completed, Defendant requested the appointment of counsel. In light of the meritorious legal issue presented on the sentencing issue, the court granted Defendant's motion for the appointment of counsel on Defendant's Rule 61 motion, as well as on the State's Rule 35 motion for resentencing.¹⁶

On or about February 19, 2016, counsel was appointed. On April 29, 2016, assigned counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e).

¹⁶ See, Superior Court Docket No. 61.

Superior Court Criminal Rule 61(e)(6) provides that:

If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

In the motion to withdraw, Defendant's Rule 61 counsel represented that, after undertaking a thorough analysis of the Defendant's claims, counsel has determined that the claims are lacking in merit and that counsel cannot ethically advocate any of them.¹⁷ Counsel further represented that, following a thorough review of the record, counsel was not aware of any other meritorious grounds available to Defendant Brown that can be asserted in his Rule 61 motion.¹⁸

Defendant's Rule 61 counsel advised Defendant of his motion to withdraw and advised Defendant that he had the right to file a response thereto within 30 days, if Defendant desired to do so.¹⁹ Defendant has not filed a response to counsel's motion to withdraw.

In order to evaluate Defendant's Rule 61 motion, and to determine whether Defendant's Rule 61 counsel's motion to withdraw should be granted, the court should be satisfied that Rule 61 counsel made a conscientious examination of the record and the law for claims that could arguably support Defendant's Rule 61 motion. In addition, the court

¹⁷ See, Superior Court Docket No. 66- Defendant's Rule 61 counsel's Motion to Withdraw with Brief in Support of Motion to Withdraw.

¹⁸ *Id.*

¹⁹ See, Superior Court Docket No. 67.

should conduct its own review of the record in order to determine whether Defendant's Rule 61 motion is devoid of any, at least, arguable postconviction claims.²⁰

Each of Defendant's claims will be addressed below. Since the out-of-state conviction relied upon to form the basis of the habitual eligible petition was overturned on appeal, Defendant will need to be resentenced without reliance on the successfully appealed New York conviction. None of Defendant's other claims presented in his Rule 61 motion have any merit.

Therefore, Defendant's counsel's motion to withdraw on Defendant's Rule 61 motion is granted. Defendant's counsel shall remain appointed on the State's Rule 35 motion for resentencing and Defendant's counsel should continue to represent Defendant at his resentencing.

DEFENDANT'S FIRST CLAIM: SENTENCING ERROR

One of the prior convictions relied upon by the State to support its motion to sentence Defendant as a habitual offender pursuant to 11 *Del. C.* § 4214(a) was overturned on appeal.²¹

As a result, the State filed a Superior Court Criminal Rule 35 Motion for Resentencing. The State correctly points out that a Rule 61 motion is the appropriate vehicle for a defendant to seek to set aside the judgment of conviction or a sentence of death, and that a Superior Court Criminal Rule 35 is proper vehicle to correct an improper sentence.²² As such, the appropriate vehicle to seek the resentencing of Defendant is by way of a Rule 35, not a Rule 61 motion. Rule 35 permits the court to

²⁰ See, for example, *Roth v. State of Delaware*, 2013 WL 5918509, at *1 (Del. 2013)(discussing standard to be employed when deciding counsel's motion to withdraw on a defendant's direct appeal).

²¹ See, *People v. Christopher Brown*, 101 A.D. 3d 895, 956 NYS2d 109 (Dec. 2012).

²² Superior Court Criminal Rule 35(a).

correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner.

Although the sentencing error is more properly raised under Rule 35(a), because it seeks to correct an improper sentence, the sentencing error can also be heard in the context of a Rule 61 motion in the interests of judicial economy.²³

Since the granting of the petition to declare Defendant habitual eligible was prefaced on a prior underlying conviction that was overturned on appeal, Defendant's sentence must be vacated and Defendant resentenced. Since a Rule 35 motion, rather than a Rule 61 motion, is the proper vehicle for seeking the resentencing, the State's Rule 35 motion for resentencing is granted, and Defendant should be resentenced without reliance on the successfully appealed New York conviction.

DEFENDANT'S SECOND CLAIM: INSUFFICIENCY OF INTENT

Defendant contends that he lacked the intent to commit a theft at the time he kicked down the back door of the Broom Street residence to use the bathroom. As such, Defendant contends that there not sufficient evidence to support a conviction for Burglary in the Second Degree.

This issue was raised by Defendant on direct appeal, was found to be without merit, and is now procedurally barred.

On direct appeal, the Delaware Supreme Court noted that the intent to commit a crime in a dwelling may be formed prior to the unlawful entry, be concurrent with the unlawful entry or may be formed after the entry while the person remains unlawfully.²⁴ Here, the record reflected that Defendant kicked open the back door of the house on

²³ *Wilson v. State*, 2006 WL 1291369, *2 (Del.).

²⁴ *Brown v. State*, 2014 WL 7010810, at *3 (Del.).

Broom Street, entered the house, and took toiletries and jewelry from the house. The Delaware Supreme Court held that based upon the trial record a reasonable jury could conclude that Brown was guilty of Burglary in the Second Degree beyond a reasonable doubt.²⁵

This issue is now procedurally barred by Rule 61(i)(4), since it was already adjudicated on direct appeal. Any claim already formerly adjudicated on appeal is thereafter barred.²⁶

This claim is procedurally barred and without merit.

DEFENDANT’S THIRD CLAIM- INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant, in his Rule 61 motion, contends his counsel was ineffective for failing to properly advise him of the risks of testifying at trial and for failing to request a limiting instruction regarding his prior felonies.

In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.²⁷ The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.²⁸

²⁵ *Id.*

²⁶ See, *Superior Court Criminal Rule* 61(i)(4).

²⁷ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

²⁸ *Id.*

Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.²⁹ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.³⁰ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.³¹

The United States Supreme Court reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v. Richter*,³² the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.³³ The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.³⁴

The United States Supreme Court explained that a defendant is not guaranteed perfect representation, only a reasonably competent attorney. There is no expectation that competent counsel will be a flawless strategist or tactician. A defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare

²⁹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

³⁰ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

³¹ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

³² *Harrington v. Richter*, 131 S.Ct. 770 (2011).

³³ *Id.*, at * 791.

³⁴ *Id.*

for what appear to be remote possibilities.³⁵ Counsel's representation must be judged by the most deferential of standards.³⁶

Turning now to the subject case, Defendant claims that he was not properly advised of the risks of testifying at trial. However, the trial record reflects to the contrary.

The trial record reflects that, prior to Defendant testifying, counsel placed on the record that he advised Defendant about the risks of testifying.³⁷ In addition, the court also advised Defendant about the risks of testifying and addressed Defendant extensively about his rights to testify.³⁸

Defendant, after being so advised, repeatedly expressed his desire to testify.³⁹ The record reflects that Defendant was not "goaded" to take the stand, that he was properly advised as to the risks of testifying by his counsel, as well as by the court. The record further reflects that Defendant was advised that the State may use his prior felony convictions to impeach his credibility.

Defendant is bound by his representations at the colloquy regarding his decision to testify absent clear and convincing evidence to the contrary.⁴⁰ Defendant, after being fully advised as to the risks of testifying at trial, made the decision to testify. Despite his contention to the contrary, Defendant's decision to testify was knowingly and voluntarily made. Defendant has not presented any clear, contrary evidence to call into question his

³⁵ *Id.*, at *787-792

³⁶ *Id.* at 787-88.

³⁷ October 2, 2013 Trial Transcript, at pg. 198.

³⁸ October 2, 2013 Trial Transcript, at pgs. 194-198.

³⁹ October 2, 2013 Trial Transcript, at pgs. 196, 198, 199.

⁴⁰ See, *State v. Harden*, 1998 WL 735879, *5 (Del.Super.); *State v. Stuart*, 2008 WL 4868658, *3 (Del.Super. 2008).

prior representations to the court. Defendant's counsel was not deficient and Defendant's ineffective assistance of counsel claim on this ground must fail.

Defendant also claims that his counsel provided ineffective assistance for failing to request a limiting instruction as to Defendant's prior convictions.

The testimony elicited by the State from Defendant on cross-examination was that Defendant was convicted of felonies in 1999, 2004, and 2008, as apparent impeachment evidence.⁴¹ No specifics as to the nature of the convictions or the specifics regarding the convictions were addressed. No limiting instruction was requested or given to the jury as to the limited purpose for which the jury should consider this prior crimes evidence under D.R.E. 609.

Defendant was advised by both his counsel and by the court that the State may use his prior felony convictions to impeach his credibility, if he elected to testify. He was aware of this possibility and he still elected to testify.

Prior to Defendant testifying, Defendant's counsel sought and received a concession from the State that cross-examination as to Defendant's prior felony convictions would be limited only to the dates that the felony convictions occurred making no mention that the prior convictions were burglaries.⁴² It was only in the event that Defendant was to deny the existence of the convictions that the specifics of the crime could be explored. Defendant did not deny the convictions and the specifics were not explored.

⁴¹ October 2, 2013 Trial Transcript, at pg. 217.

⁴² October 2, 2013 Trial Transcript, at pgs. 196-197.

There is no evidence of unfair prejudice to Defendant. Defendant cannot establish that he suffered any prejudice from a lack of jury instruction that would only highlight his “unnamed” convictions.

The absence of a limiting instruction concerning a defendant’s prior convictions is not unduly prejudicial if it did not measurably affect the outcome of the trial.⁴³ In this case, the evidence against Defendant was overwhelming and it is not reasonably probable that the outcome of the trial would have been different had counsel requested a limiting instruction regarding Defendant’s prior felonies. Indeed, as to both incidents, Defendant was caught at or near the scene of the incident on the day of the incident, the victims identified Defendant as having committed the crime, and Defendant admitted that he committed the break-ins. Because of the overwhelming evidence against Defendant, any failure to request a limiting instruction would not have likely rendered the result of Defendant’s trial fundamentally unfair or unreliable.

Moreover, any potential for jury misunderstanding or misuse of the evidence was minimal at best. The jury did not find Defendant guilty of one count of Burglary in the Second Degree, the count related to the Woodlawn Avenue incident, and instead convicted him of the lesser included offense of Criminal Trespass First Degree. This further supports the determination that the jury listened to the evidence of each particular incident and made a careful determination based on the evidence before it without reliance on any impermissible character inference.

Defendant has failed to make any concrete allegations of actual prejudice and substantiate them. Defendant’s motion for postconviction relief must fail.

⁴³ See, *Bowen v. State*, 2006 WL 2073058, at *2 (Del.)

