

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE, )  
 )  
 Plaintiff, )  
 )  
 v. ) Cr. ID. No. 0408022175  
 )  
 )  
 PAUL WEBER, )  
 )  
 Defendant. )

Submitted: July 28, 2017  
Decided: August 22, 2017

**COMMISSIONER'S REPORT AND RECOMMENDATION  
THAT DEFENDANT'S MOTION FOR POSTCONVICTION  
RELIEF SHOULD BE DENIED**

Andrew J. Vella, Deputy Attorney General, Department of Justice, Wilmington,  
Delaware, Attorney for the State of Delaware.

Michael W. Modica, Wilmington, Delaware, Attorney for Paul Weber.

**MAYER**, Commissioner

This 22nd day of August, 2017, upon consideration of Defendant's Motion for Postconviction Relief and the record in this matter, the following is my Report and Recommendation.

### **BACKGROUND, FACTS AND PROCEDURAL HISTORY**

Mr. Weber's case has a long and complicated history with the courts. The docket reflects almost three hundred entries and a timeline dating back almost thirteen years. Rather than attempting to address the full history of this matter, some of the relevant procedural aspects of this long and protracted case will be set forth herein in order to provide context for the remainder of the opinion.

Paul E. Weber, Defendant, was originally indicted in this matter on September 20, 2004 on charges of Attempted Carjacking and Attempted Robbery First Degree. The charges arose from an incident that occurred on August 18, 2004 when Defendant approached Frederick Naspo at a gas station, and after the two exchanged words, there was a brief struggle and Defendant fled. Naspo testified that the man that approached him, said "I'm going to take your car," and while attempting to wrestle away Naspo's car keys, told him that he had a gun.<sup>1</sup> The State police later reviewed the gas station's video surveillance system and Defendant was identified as the man involved in the altercation. One of the police officers assigned to the investigation recognized Defendant from the video and testified at trial that the man

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<sup>1</sup> See *Weber v. State*, 971 A.2d 135, 140 (Del. 2009) (hereinafter "*Weber I*").

in the video had the same facial features as Weber and was wearing the same clothing as Weber when he was detained. In March 2005, following a jury trial, Defendant was convicted of both charges.

Defendant was sentenced and later appealed his conviction and sentences. The Delaware Supreme Court affirmed the conviction for Attempted Carjacking First Degree but reversed the conviction of Attempted Robbery First Degree and remanded the matter for a new trial to allow an instruction on the lesser included offense of Offensive Touching. In April 2010, a jury once again convicted Defendant of Attempted Robbery First Degree. Soon thereafter, the Court granted the State's motion to declare Defendant an habitual offender for sentencing purposes pursuant to 11 Del. C. §4212(a) (the "Habitual Offender Statute"). The habitual offender determination included consideration of the predicate conviction of Forgery Second Degree from 2001 that resulted in a sentence of 30 days. Defendant was eventually sentenced in this matter to 25 years at Level V for the Attempted Robbery First Degree conviction.<sup>2</sup> This decision was also appealed and affirmed by the Delaware Supreme Court on February 21, 2012.<sup>3</sup> Defendant later filed a Petition for

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<sup>2</sup> Defendant was also sentenced to 3 years at Level V for his conviction of Attempted Carjacking First Degree.

<sup>3</sup> *Weber v. Delaware*, 568 U.S. 865 (2012).

a Writ of Certiorari with the United States Supreme Court that was denied on October 1, 2012.

Defendant's *pro se* motion for postconviction relief was filed on August 6, 2013. Through an Opinion issued on July 29, 2014, the Court stayed the motion and granted a motion for appointment of counsel to represent the Defendant through the postconviction process. The record was enlarged and appointed counsel filed an amended motion for postconviction relief on March 24, 2017 (the "Amended Motion"),<sup>4</sup> the State submitted a response,<sup>5</sup> and counsel for Defendant replied.<sup>6</sup> Defendant's Amended Motion also seeks a fact finding hearing to address his claims.<sup>7</sup>

### **LEGAL ISSUES PRESENTED**

The Court must first determine whether there are any procedural bars to the motion before considering the merits of the claims.<sup>8</sup> As an initial matter, the State argued that Defendant's motion is barred by Superior Court Criminal Rule 61(i)(1)

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<sup>4</sup> D.I. # 281.

<sup>5</sup> D.I. # 285.

<sup>6</sup> D.I. # 287.

<sup>7</sup> Amended Motion at p. 30.

<sup>8</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

for having been filed more than one year after the judgment of conviction became final. On February 21, 2012, the Delaware Supreme Court issued an Order affirming the Superior Court judgment of conviction. However, if additional relief is sought, then the judgment of conviction becomes final when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review.<sup>9</sup> Therefore, Defendant's conviction became final for purposes of Superior Court Criminal Rule 61 on October 1, 2012 when the Petition for a Writ of Certiorari was denied. Defendant's motion, having been filed on August 6, 2013, was timely.

However, Defendant's claims face additional procedural hurdles. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is barred, unless the movant can show cause for relief from the procedural default and prejudice from a violation of the movant's rights.<sup>10</sup> And, any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.<sup>11</sup>

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<sup>9</sup> See Super. Ct. Crim. R. 61(m)(2).

<sup>10</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>11</sup> Super. Ct. Crim. R. 61(i)(4).

The procedural bar in Rule 61(i)(3) set forth above, will 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.<sup>12</sup> However, this exception does not allow consideration of claims that are barred as formerly adjudicated under Superior Court Criminal Rule 61(i)(4). Ineffective assistance of counsel claims cannot be raised at any earlier stage in the proceedings and are properly presented by way of a motion for postconviction relief.<sup>13</sup> The fact that counsel did not raise an argument or objection during the trial proceedings does not bar a defendant from alleging that counsel's failure amounted to ineffective assistance.<sup>14</sup>

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and the deficiencies in counsel's representation caused the defendant

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<sup>12</sup> Super. Ct. Crim. R. 61(i)(5). Defendant's original motion having been filed in 2013, the Court will refer to provisions of Rule 61 in place at that time.

<sup>13</sup> *Whittle v. State*, 2016 WL 2585904, at \*3 (Del. Apr. 28, 2016); *State v. Evan-Mayes*, 2016 WL 4502303, at \*2 (Del. Super. Aug. 25, 2016).

<sup>14</sup> *See Malloy v. State*, 2011 WL 1135107, at \*2 (Del. Mar. 28, 2011); *Brodie v. State*, 2011 WL 927673, at \*1 (Del. Super. Mar. 17, 2011); *State v. Ross*, 2004 WL 2735515, at \*2 (Del. Super. Nov. 22, 2004).

actual prejudice.<sup>15</sup> When reviewing such a claim, the Court must analyze counsel's conduct based upon all of the facts of the case and avoid peering through the lens of hindsight.<sup>16</sup> Defendant must show that any alleged errors were so serious that his counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.<sup>17</sup> "A defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities."<sup>18</sup> Great weight and deference are given to tactical decisions by the trial attorney and counsel cannot be deemed ineffective for failing to pursue motions that lack merit.<sup>19</sup> Further, in order to prevail on an ineffective assistance of counsel claim, a defendant must show that but for the errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>20</sup>

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<sup>15</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Hitchens v. State*, 757 A.2d 1278 (Del. 2000).

<sup>16</sup> *State v. Wright*, 653 A.2d 288, 295 (Del. Super., 1994).

<sup>17</sup> *State v. Finn*, 2012 WL 1980566, at \*4 (Del. Super., May 23, 2012).

<sup>18</sup> *State v. Finn*, 2012 WL 1980566, at \*4 (Del. Super., May 23, 2012) (holding defense counsel provided active and capable advocacy when evidence against Defendant was overwhelming) (citing *Harrington v. Richter*, 131 S.Ct. 770, 787-792 (2011)).

<sup>19</sup> *State v. Miller*, 2013 WL 871320, at \*4 (Del. Super., Feb. 26, 2013).

<sup>20</sup> *Strickland*, 466 U.S. at 687-88, 694; *Hitchens v. State*, 757 A.2d 1278 (Del. 2000).

Defendant must overcome a strong presumption that counsel's conduct was reasonably professional under the circumstances.<sup>21</sup>

### **DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF**

Defendant's motion asserts six bases for relief:

Ground One: Application of the Habitual Offender Statute violated Defendant's constitutional due process rights because it was based on a conviction that was unappealable;

Ground Two: The Habitual Offender Statute violates the Equal Protection Clause because similarly situated offenders could challenge their convictions;

Ground Three: Trial counsel was ineffective for not objecting to the prosecutor's use of the term "victim" at trial;

Ground Four: Trial Counsel was ineffective by using the term "victim" throughout the trial;

Ground Five: Trial counsel was ineffective for not pursuing a renunciation defense and instruction;

Ground Six: Trial and appellate counsel were ineffective for not raising the arguments set forth as Grounds One through Five.

A careful review of the extensive record in this case, as well as the briefs presented by the parties, leads to the conclusion that each of the claims presented by Defendant should be denied.

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<sup>21</sup> *State v. Wright*, 653 A.2d 288, 293-94 (citations omitted).



## Grounds One and Two

Defendant's first two arguments are barred by Super. Ct. Crim. R. 61(i)(4). Defendant recognizes that the Delaware Supreme Court has already ruled that regardless of whether he had a right of appeal, his Forgery conviction qualified as a predicate offense under the Delaware Habitual Offender Statute.<sup>22</sup> Defendant now argues, as Ground One, that the Habitual Offender Statute violates the United States Constitution due process clause to the extent that it can be based upon convictions that are unappealable. It is difficult to see how this argument differs from that presented on appeal. In essence, Defendant's argument is that "[t]he Delaware habitual offender statute is unconstitutional to the extent that it permits imposition of an enhanced penalty for recidivism without a meaningful opportunity to challenge the constitutionality of the prior conviction used to enhance the current conviction." Despite this attempt to re-couch the argument, the Delaware Supreme Court considered this issue when rendering its decision. In fact, Defendant cites and attacks the Delaware Supreme Court's decision.

The Delaware Supreme Court cited *Daniels v. United States*, 532 U.S. 374, 375 (2001) wherein the United States Supreme Court was faced with a federal enhanced sentencing statute and determined that if a prior conviction has not been set aside on direct or collateral review by the time of sentencing, then it is

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<sup>22</sup> See *Weber I* at 160.

presumptively valid and may be used to enhance the federal sentence. The United States Supreme Court also opined that other than a claim of a violation of the right to counsel, “[n]o other constitutional challenge to a prior conviction may be raised in the sentencing forum.”<sup>23</sup> Although Defendant may now be without recourse to attack the Forgery conviction, *Daniels* indicates it may be relied upon to determine enhanced sentencing and the Delaware Supreme Court gave this argument full consideration.

As to Ground Two, Defendant argues that the Delaware Habitual Offender Statute denied him equal protection of the law because similarly situated offenders are treated differently. Defendant believes he is similarly situated to other offenders that qualify for enhanced sentencing under the Delaware Habitual Offender Statute, but treated differently because he was denied a right of appeal from his Forgery conviction. As a result, Defendant submits “[t]he different appeal rights afforded to offenders based upon the nature of their convictions result in the unequal treatment among offenders for purposes of the habitual offender statute.”<sup>24</sup> In addition to the basis to deny the relief for the reasons set forth above with respect to Ground One,

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<sup>23</sup> *Daniels v. United States*, 532 U.S. 374, 382 (2001).

<sup>24</sup> Amended Motion at p. 18.

this argument is also barred as an untimely collateral attack on his Forgery conviction.

Defendant challenges the constitutionality of the deprivation of the right of appeal from his Forgery conviction that resulted in a sentence of not more than 30 days. Defendant was not convicted in *this case* of any charge fitting that description. Rather, the Forgery conviction was part of his 2001 proceedings and as such, cannot be attacked by way of a postconviction relief motion herein. In *Custis v. United States*, 511 U.S. 485, 490-497, the United States Supreme Court held that a defendant cannot collaterally attack prior convictions at a federal sentencing proceeding where the prior conviction is relied upon for purposes of determining enhanced sentencing. That holding is equally applicable here and precludes Defendant from attempting to attack the 2001 Forgery conviction by way of a post-conviction relief motion addressing his 2010 conviction and sentencing. The Delaware Supreme Court also gave this premise consideration when it recognized that the United States Constitution does not guarantee a right to appeal a state law conviction.<sup>25</sup> Defendant's inability to appeal his Forgery conviction did not change the Court's analysis in *Weber I*.

Finally, although there has been a modification of the Habitual Offender Statute by legislative amendment, no court has declared this statute to be

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<sup>25</sup> *Weber I* at 160.

unconstitutional. Defendant's displeasure with the Habitual Offender Statute was litigated many times. Defendant first raised the issue in April of 2005 at sentencing with several motions and briefing. The issue was again litigated in July of 2007 through an amended habitual offender petition due to the re-sentencing on the robbery charge. Although in April 2009, the Delaware Supreme Court reversed Defendant's conviction in part, it did not declare the statute unconstitutional. After Defendant's second conviction in 2010, the State once again moved for a habitual offender determination. The Court ruled in favor of the State and on appeal, the Delaware Supreme Court affirmed the decision. Although Defendant argues that his present challenges to the Habitual Offender Statute are "different" from the arguments previously raised, I disagree. Not only has the Superior Court considered and adjudicated this issue multiple times, but the Supreme Court has issued a final non-appealable order resolving the issue. Defendant's attempt to re-phrase and re-argue the merits again is not permissible. Grounds One and Two are thus procedurally barred by Super. Ct. Crim. R. 61(i)(4) and reconsideration of the claims is not warranted.

Further, any claim that trial counsel was ineffective for not raising these claims on direct appeal in this matter, fails for the reasons set forth above.

### **Grounds Three and Four**

The State argues, persuasively, that no prosecutorial misconduct occurred, nor was defense counsel ineffective, when the term “victim” was used at times during the trial. There is no blanket prohibition against the use of the term “victim” in the trial process and where there is no dispute that a crime has in fact occurred, there is no harm in the use of the term.<sup>26</sup> Similarly, where commission of the crime is not in dispute, and consent is not at issue, then the use of the term “victim” is permissible and trial counsel cannot be found ineffective for failing to object.<sup>27</sup>

Despite Defendant’s belief to the contrary, the evidence presented at trial supports the conviction. In fact, Defendant’s own motion recognizes that “[t]he Delaware Supreme Court found that there was sufficient evidence to support Weber’s conviction. Namely, the State presented video surveillance footage of the incident together with testimony from Hawk identifying Weber as the assailant depicted in the footage. Weber also generally fit the physical description given by Naspo and the police found Weber in close proximity to the crime scene.”<sup>28</sup> The video evidence showed a struggle and the testimony at trial corroborated the

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<sup>26</sup> *Jackson v. State*, 600 A.2d 21, 24-25 (Del. 1991).

<sup>27</sup> *Washington v. State*, 2008 WL 697591, at \*1 (Del. Mar. 17, 2008).

<sup>28</sup> Amended Motion at p. 4 n. 4.

illegality of the acts depicted on the video thus establishing a victim, and a perpetrator. Defendant at times mischaracterizes the Delaware Supreme Court's ruling. The Delaware Supreme Court did not emphasize that Defendant should have been acquitted of the Robbery charge thus signaling *no* crime had occurred. Rather, the Delaware Supreme Court found that the video surveillance showed a struggle, and that there was sufficient evidence for a jury to have convicted Defendant of the lesser included offense of Offensive Touching. Therefore, the Delaware Supreme Court's opinion acknowledges that there was evidentiary support that a "crime" occurred and that there was a "victim." As such, trial counsel was not objectively unreasonable by not objecting to the use of the term or by using it himself. Furthermore, other than a general statement of prejudice,<sup>29</sup> Defendant has not set forth a sufficient showing that but for the use of the term, the outcome of the proceedings would have been different.

Additionally, to the extent the claim is re-couched as "prosecutorial misconduct," this claim is prohibited under Superior Court Criminal Rule 61(i)(3) as it was not raised in the proceedings leading to the judgment of conviction or on

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<sup>29</sup> Defendant's Amended Motion fails to specifically identify uses of the term "victim" during the trial. Although the papers reference appendix citations, no appendix was filed with the Amended Motion. It can only be presumed that Defendant intended to refer to the Appendix filed on appeal with the Delaware Supreme Court. Regardless, a review of the very few references in comparison to the weight of the trial record suggests that the use was isolated and not reasonably likely to have altered the decision.

direct appeal and Defendant's blanket assertions of prejudice do not rise to the level necessary to bypass the procedural bar.

### **Ground Five**

Defendant's claim of ineffective assistance of counsel requires a showing that trial counsel's conduct fell below an objective standard of reasonableness when he failed to present a renunciation defense, as well as a persuasive argument that the evidence would have shown that Defendant completely and voluntarily abandoned his effort to commit the crime or otherwise prevented its commission.<sup>30</sup> The renunciation is not "voluntary and complete" if circumstances exist that render the accomplishment of the criminal purpose more difficult.<sup>31</sup>

Defendant presented an "identity defense" and through counsel, argued that he was not the perpetrator of the crime. Although defendants may raise inconsistent defenses, in light of the fact that when presented at a show-up identification, the victim could not identify Defendant as the man that assaulted him, it was certainly a reasonable strategy for trial counsel to present a defense to the jury that the wrong man was on trial. In order for trial counsel to present a renunciation defense, he would have had to directly contradict that strategy by admitting his client was there, but had chosen to walk away after failing to successfully rob the victim.

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<sup>30</sup> 11 Del. C. §541(b) and (c).

<sup>31</sup> 11 Del. C. §541(c)(1).

Defendant was convicted of Attempted First Degree Robbery and Attempted First Degree Carjacking, which required a showing that he intentionally engaged in a substantial step planned to culminate in the commission of the crime.<sup>32</sup> The video surveillance and witness testimony showed that Defendant walked up to the victim, grabbed him with both hands in an attempt to get the car keys, and told the victim he had a gun. It was only after the victim resisted that Defendant walked away. The crime was therefore completed before Defendant walked away and he did not voluntarily renounce his acts without intervention. A reviewing court should not second-guess the trial strategy of trial counsel.<sup>33</sup> In light of the evidence presented, and the great weight and deference given to tactical decisions by the trial attorney, it was objectively reasonable for trial counsel to pursue the selected strategy. The evidence supported the convictions and it was not unreasonable for trial counsel to pursue a strategy of mistaken identity and omit a renunciation defense.

After trial, Defendant moved for acquittal and the Superior Court found that there was “no question” that an attempted robbery occurred. In addition, on appeal, trial counsel argued that (i) the State failed to prove attempt; and (ii) Defendant was entitled to an instruction for the defense of renunciation. These issues were briefed

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<sup>32</sup> 11 Del. C. §531.

<sup>33</sup> *Strickland*, 466 U.S. at 691.



by the parties and the Delaware Supreme Court rejected Defendant's arguments.<sup>34</sup> Defendant's fifth claim, despite the attempt to re-state it here, is also barred by Superior Court Criminal Rule 61(i)(4) as already adjudicated.

### **Ground Six**

In light of the fact that Defendant's claims labeled Grounds One through Five fail to offer a basis for relief, and some of these claims were in fact presented by counsel at trial and on appeal, Defendant's final argument – *i.e.* Ground Six, that trial and appellate counsel were ineffective for not raising these claims, likewise should be denied. The Court is not required to re-examine claims that were already adjudicated on the merits simply because the claim is now being presented as a claim for ineffective assistance of counsel unless it is in the interest of justice to do so.<sup>35</sup> Even though Defendant recognizes that the exception set forth in Superior Court Criminal Rule 61(i)(5) is a “narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after a direct appeal,” he cites no such newly recognized right. Defendant also cannot establish prejudice from a violation of his rights. Defendant was afforded numerous opportunities for consideration of his legal issues by the Delaware

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<sup>34</sup> *Weber v. State*, 38 A.3d 271, 278 (Del. 2012) (“*Weber II*”).

<sup>35</sup> *Johnson v. State*, 1992 WL 183069, at \*1 (Del. 1992); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

Superior Court, the Delaware Supreme Court and the United States Supreme Court. Defendant's constitutional and due process arguments were carefully and fairly examined by the courts. It is hard to fathom a record more thorough and considered. The interests of justice have been served and Defendant's claims should not be reconsidered anew.

### **DEFENDANT'S REQUEST FOR A HEARING**

It is within the Court's discretion to hold an evidentiary hearing on a motion for postconviction relief.<sup>36</sup> Other than requesting a hearing in his closing, Defendant proffers no argument in support of the request. The Court here was aided by an extensive record with a deep history. The evidentiary record, the parties' submissions, and the legal issues presented were carefully considered and it does not appear that an evidentiary hearing will aid in the resolution of this motion.

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<sup>36</sup> Super. Ct. Crim. R. 61(h)(1); *Getz v. State*, 2013 WL 5656208, at \*1 (Del. Oct. 15, 2013); *Johnson v. State*, 2015 WL 8528889, at \*4 (Del. Dec. 10, 2015).

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief, as well as Defendant's request for an evidentiary hearing, should be DENIED.

**IT IS SO RECOMMENDED.**



Commissioner Katharine L. Mayer

oc: Prothonotary  
cc: Michael W. Modica, Esquire  
Andrew Vella, Esquire