

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE) In and for Kent County
)
 v.) RK12-11-0099-01 PFBPP PABPP (F)
) RK12-11-0100-01 PFDCF (F)
 LUIS M. CLARK,) RK12-11-0101-01 ASLT 2nd (F)
) RK12-11-0103-01 Reck End 1st (F)
 Defendant.)
 ID. No. 1207014755)

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Gregory R. Babowal, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Patrick J. Collins, Esq. and Matthew C. Buckworth, Esq., Collins and Associates, Wilmington, Delaware for Defendant.

FREUD, Commissioner
August 9, 2017

The defendant, Luis M. Clark ("Clark"), was found guilty following a jury trial on February 20, 2014 of one count of Possession of a Firearm or Firearm Ammunition by a Person Prohibited ("PFBPP"), 11 *Del. C.* § 1448; one count of Possession of a Firearm during the Commission of a Felony, 11 *Del. C.* § 1447; one

State v. Luis M. Clark
ID No. 1207014755
August 9, 2017

count of Assault Second Degree, 11 *Del. C.* § 612 and one count of Reckless Endangering First Degree, 11 *Del. C.* § 604. Clark was also facing one count of Aggravated Menacing and three additional counts of Reckless Endangering in the First Degree but was found not guilty on those charges. On April 17, 2014, at sentencing, Clark was declared a habitual offender pursuant to 11 *Del. C.* § 4214(a) and received a total sentence of forty-six years Level V incarceration followed by one year probation.

A timely Notice of Appeal to the Delaware Supreme Court was filed. Clark's counsel filed a brief and motion to withdraw pursuant to Supreme Court Rule 26(c). In the motion to withdraw, appellate counsel represented that he conducted a conscientious review of the record and concluded that no meritorious issues existed. By letter, counsel informed Clark of the provisions of Rule 26(c) and attached a copy of the motion to withdraw and accompanying brief. Clark was informed of his right to supplement his attorney's presentation. Clark, *pro se*, raised four issues for appeal for the Supreme Court to consider, which the Supreme Court classified as follows:

First, he contends that the prosecutor engaged in misconduct. Second, he asserts that his trial counsel was ineffective. Third, he contends that the complaining witness' testimony was not credible. Finally, he contends that the Superior Court erred by failing to ensure that Clark understood his counsel's stipulation allowing a DNA report into evidence without requiring the State to produce an expert witness to testify.¹

¹ *Clark v. State*, 2014 WL 5408410 at *1 (Del. Supr.).

The Supreme Court granted the State's motion to affirm as to all of Clark's claims.² Next, *pro se*, Clark filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("the original motion"). Subsequently Patrick J. Collins, Esquire and Matthew C. Buckworth, Esquire ("Appointed Counsel") were appointed to represent Clark in his motion. They filed an amended motion for postconviction relief alleging ineffective assistance of counsel on March 28, 2016.

FACTS

The following is a summary of the facts as noted by the Delaware Supreme Court in its opinion:

(5) The evidence presented by the State at trial reflects the following version of events: On July 17, 2012, the victim, Oscar Ventura, his girlfriend and three children were in a Mazda minivan. Ventura parked the minivan in a handicapped parking space in front of their apartment building so that his girlfriend could return to their apartment to retrieve their dirty laundry, which they were planning to take to the laundromat. Their neighbor, Luis Clark, made a derogatory comment about Ventura parking in the handicapped spot. Ventura told his girlfriend that he was going to 'whoop [Clark's] ass,' but his girlfriend told him not to engage Clark.

(6) After his girlfriend left the vehicle to return to their apartment, Ventura testified that he saw Clark approaching the driver's side door from the rear of his vehicle in a 'tactical,' 'crouching' position with a silver gun in his

² *Clark* at *1.

hand. Ventura grabbed a taser which was attached to a set of brass knuckles, from his center console. As he opened the driver's side door, he pushed Clark backwards. The two engaged in a physical fight. Ventura testified that Clark began hitting him in the face with the gun. During the struggle, the gun discharged and struck the driver's side door of the vehicle. The three children were still inside, although none of them was hurt. After the gun discharged, Clark walked away.

(7) During cross-examination, Ventura admitted that he was familiar with handguns because he and his two brothers, who were both in the army, liked to go to a local shooting range and practice. He testified that the cover photo on his Facebook page was a photo of guns. He denied owning any guns and stated that he only rented them when he went to the shooting range.

(8) An eyewitness, who had been at a business across the street, testified at trial that she saw two men (whom she described as a black man and a white man) fighting. She saw the black man holding a gun to the white man's neck. She did not see the white man strike the black man. After the gun discharged, she saw the black man hand the gun to a different black man in a red shirt.

(9) Police officers were dispatched to the scene in response to several phone calls reporting gunfire. Approximately 20 officers responded. One officer testified that he reached the scene and found Ventura bloody and dazed. After he was briefly interviewed, Ventura was taken to the hospital by ambulance. Other officers went to Clark's girlfriend's apartment, which was the apartment next door to Ventura's. They recovered bloody napkins from the

apartment but found no sign of Clark. Clark, in fact, was not found and arrested until several months after the incident.

(10) Another officer testified at trial that he responded to the vicinity of the reported gunfire in order to establish a perimeter around the scene. In the process, the officer encountered a man who turned his back upon seeing the officer. The officer handcuffed the man, who turned out to be Clark's brother, Donald. The officer searched Donald Clark and found two guns. One gun was silver and had blood on it.

(11) The gun was sent to a laboratory for DNA testing. The State admitted the DNA report at trial without objection. No expert witness testified about the results. The report reflected that swabs taken of the trigger and grip of the gun did not show any traces of blood. There was a mixture of other DNA evidence in those swabs from three individuals. One of those individuals was positively identified as Ventura. The other two contributors were unidentified, and no conclusion could be drawn about whether Clark was one of those contributors. Two other swabs found evidence of blood elsewhere on the handgun and also on the magazine. The DNA in that blood evidence was consistent with Ventura's DNA profile. Clark was excluded as a contributor of that DNA evidence.

(12) Clark presented the testimony of an eyewitness, Jerome Lands. Lands testified that he knew Clark and is a friend of Clark's mother. He testified that he saw Ventura park his van in the handicap spot and heard Clark make an insulting comment. He stated that Ventura exited the van with a taser in his hand and began to attack Clark. Lands

stated that as Clark began to get the upper-hand in the fight, Ventura returned to the van and produced a silver handgun. As Clark and Ventura struggled, the gun discharged. Clark grabbed the gun and used it to strike Ventura in the head.

(13) Clark testified in his own defense at trial. He admitted striking Ventura with a gun but claimed that he acted in self-defense. Clark testified that he and Ventura got into a verbal altercation while Ventura was inside his van. Clark stated that, as he started to approach the van, Ventura got out and starting swinging at him. Clark felt an electric jolt with each punch that Ventura landed. Clark testified that as he started to punch back, Ventura retreated to his van and retrieved a gun, which Clark tried to wrestle away from him. He stated that when the gun discharged, it startled both of them. Clark then was able to take the gun away from Ventura. He testified that he hit Ventura in the head several times just until Ventura was incapacitated; then he walked away. As Clark was approaching his apartment, he saw his brother walking toward him. He panicked and gave the gun to his brother, although he did not instruct his brother to dispose of the gun. Clark then went to his apartment, cleaned himself off and left the area.³

CLARK'S CONTENTIONS

In the Amended Motion for Postconviction Relief, Appointed Counsel raised the following grounds for relief:

Ground one: Trial Counsel's failure to request a jury instruction regarding a "Choice

³ *Clark*, at *1-3.

of Evils” defense undermines the reliability of the verdict: as such, Mr. Clark is entitled to a new trial.

Ground two: Trial Counsel was ineffective for stipulating that Mr. Clark was a person prohibited at the time that the offense occurred and as a result Mr. Clark suffered Constitutional Prejudice.
The State has evidence that links the defendant to the evidence that is being charged. (Guns and ammunition)]. But not in the evidence list. Which was requested on numerous occasions.

DISCUSSION

Under Delaware law, this Court must first determine whether Clark has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.⁴ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.⁵ Clark’s initial *pro se* motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply.

Neither of Clark’s grounds for relief were asserted in the proceedings leading to judgment of conviction are thereafter barred unless he can demonstrate: (1) cause

⁴ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

⁵ Super. Ct. Crim. R. 61(i)(1).

State v. Luis M. Clark
ID No. 1207014755
August 9, 2017

for the procedural fault and (2) prejudice from a violation of the movant's rights.⁶ All the bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim of miscarriage of justice stemming from a constitutional violation that "undermine[s] the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."⁷

Both of Clark's claims are based to some extent on an allegation of ineffective assistance of counsel. These types of claims are not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Clark, allege ineffective assistance of counsel in order to overcome the procedural default.

However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards.⁸ The United States Supreme Court has held that:

[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without

⁶ Super. Ct. Crim. R. 61(i)(3).

⁷ Super. Ct. Crim. R. 61(i)(5).

⁸ See *State v. Gattis*, 1995 WL 790961, at *3 (Del. Super. Dec. 28, 1995), *aff'd*, 697 A.2d 1174 (Del. 1997).

adequate legal assistance.” Ineffective assistance of counsel, then, is cause for a procedural default.⁹

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two-part analysis enunciated in *Strickland v. Washington*¹⁰ and adopted by the Delaware Supreme Court in *Albury v. State*.¹¹

The *Strickland* test requires the movant to show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.¹² Second, under *Strickland*, the movant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” that is, actual prejudice.¹³ In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.¹⁴

Generally, a claim for ineffective assistance of counsel fails unless both

⁹ *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (second alteration in original) (citation omitted).

¹⁰ 466 U.S. 668 (1984).

¹¹ 551 A.2d 53, 58 (Del. 1988).

¹² *Strickland*, 466 U.S. at 687-88; see also *Dawson v. State*, 673 A.2d 1186, 1190 (Del.1996).

¹³ *Strickland*, 466 U.S. at 694; see also *Dawson*, 673 A.2d at 1190.

¹⁴ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

prongs of the test have been established.¹⁵ However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."¹⁶ "In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone."¹⁷ "Furthermore, the defendant must rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the distorting effects of hindsight when viewing that representation.'"¹⁸

In the case at bar, Clark raises two claims of ineffective assistance of counsel. First, he claims that his counsel was ineffective for not requesting a "Choice of Evils" defense instruction. In his second ground, he claims that Trial Counsel was ineffective for stipulating that Clark was a person prohibited.

Clark's first claim is that his attorney was ineffective for failing to request an instruction regarding a "Choice of Evils." Clark's Trial Counsel, in his Affidavit denies he was ineffective and states that given his trial strategy and the fact that the

¹⁵ *Strickland*, 466 U.S. at 687.

¹⁶ *Id.* at 697.

¹⁷ *Gattis*, 1995 WL 790961, at *4.

¹⁸ *Id.* (quoting *Strickland*, 466 U.S. at 689).

State v. Luis M. Clark
ID No. 1207014755
August 9, 2017

Court gave a self-defense instruction on all the charges except the Possession of a Deadly Weapon by a Person Prohibited charge and agreed to favorably entertain a motion for judgment of acquittal on the Possession of a Deadly Weapon by a Person Prohibited should the jury find Clark not guilty on the other charges counsel made a strategic decision not to request a “Choice of Evils” instruction. The defense in the case was that Clark acted in self-defense. In fact, Clark so testified at the trial. I have reviewed the file, the pleadings and the trial transcripts and find that Trial Counsel’s actions did not amount to ineffective assistance. I likewise do not find any prejudice as a result of Trial Counsel’s actions. Given the evidence in the case I find this ground for relief is meritless.

Clark’s second claim is that Trial Counsel was ineffective because he entered into a stipulation that Clark was a person prohibited. In his Affidavit Trial Counsel explained that this was a strategic decision made in order to limit the presentation of Clark’s criminal history and to “sanitize” the record. Given Clark’s criminal record and his decision to testify at trial, I feel Trial Counsel made a reasonable strategic decision and there was no ineffective assistance of counsel. Furthermore, I find no prejudice to Clark as a result of the stipulation. The case against Clark was strong and the jury clearly believed the testimony of the victim and the independent eyewitness. This claim is without merit.

State v. Luis M. Clark
ID No. 1207014755
August 9, 2017

CONCLUSION

In reviewing the record in this case, it is clear that Clark has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). Consequently, I recommend that Clark's amended postconviction motion be denied as procedurally barred by Rule 61(i) for failure to prove cause and prejudice, and as meritless.

/s/ Andrea M. Freud
Commissioner

AMF/dsc