

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

STATE OF DELAWARE	)	In and For Kent County
	)	ID No. 1305019721
v.	)	
	)	RK13-06-0128-01
WARREN A. BROOKS,	)	PFBPP PABPP (F)
	)	RK13-06-0130-01
Defendant.	)	PDWBPP (F)
	)	RK13-06-0131-01
	)	CCDW (F)
	)	RK13-06-0133-01
	)	Resist Arrest (M)

**COMMISSIONER'S REPORT AND RECOMMENDATION**

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

Stephen R. Welch, Jr., Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Patrick J. Collins, Esquire and Colleen E. Durkin, Esquire, Collins and Associates, Wilmington, Delaware for Defendant.

FREUD, Commissioner  
September 29, 2017

The defendant, Warren A. Brooks ("Brooks") was found guilty, following a jury trial on February 6, 2014, of one count of Possession of a Firearm or Firearm Ammunition by a Person Prohibited, 11 *Del. C.* § 1448; one count of Possession of

a Deadly Weapon by a Person Prohibited, 11 *Del. C.* § 1448; one count of Carrying a Concealed Deadly Weapon, 11 *Del. C.* § 1442; and one count of Resisting Arrest, 11 *Del. C.* § 1257. A presentence investigation was ordered by the Court. On April 16, 2014, Brooks was sentenced to ten years and nine months incarceration, pursuant to 11 *Del. C.* § 4214 habitual offender status, followed by probation.

Brooks, through counsel, appealed his conviction to the Delaware Supreme Court. The issues on appeal were noted by the Court as follows:

Brooks raises four claims of error in this direct appeal. First, Brooks argues that the trial court denied his federal Constitutional rights to due process and to be free from double jeopardy when it denied his motion for a judgment of acquittal and sent the indictment to the jury without clarifying which alleged acts were being charged in each of the individual counts. Second, Brooks contends that the prosecutor's continued questioning and testimonial references to the police viewing an allegedly much clearer video at the police station than the DVD presented as evidence to the jury amounted to improper vouching. Third, Brooks submits that the prosecutor's improper statements at trial and during the State's closing were repetitive errors central to the State's case and cast doubt on the integrity of the judicial process. Finally, Brooks argues that, even if this Court were to conclude that each individual error, was harmless, the cumulative impact of the errors requires reversal.<sup>1</sup>

The Supreme Court, on February 24, 2015, affirmed Brooks' conviction and

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<sup>1</sup> *Brooks v. State*, 2015 WL 802995 at \*1 (Del. 2015).

sentence stating “We have concluded that all of Brooks’ claims are without merit. Therefore, the judgment of the Superior Court must be affirmed.”<sup>2</sup>

On June 1, 2015, Brooks filed a *pro se* motion for postconviction relief in which he raised multiple grounds for relief including ineffective assistance of counsel. After briefing on the motion was complete, the Court appointed counsel to represent Brooks in his motion. Next Appointed Counsel filed an Amended Motion for Postconviction Relief and waived all the grounds raised earlier in Brooks’ *pro se* motion. The pending amended motion alleges ineffective assistance of Trial Counsel.

### FACTS

Following are the facts as set forth by the Delaware Supreme Court:

(3) On the early morning of May 24, 2013, Dover Police Department Patrolman First Class (PFC) John Michael Willson was on patrol on South New Street, ‘a high-crime, high-drug area’ in the city of Dover. FN1 Around 2 a.m., PFC Willson observed a large, very animated group of 10 to 15 people in the vicinity of the Colonial Apartments at 132 South New Street. Two or three individuals were throwing their hands up in the air, and Willson saw one person being restrained by someone. Sensing there might be a potential problem, Willson reported the situation by radio to Sergeant David Spicer, his supervisor. Since Willson was alone, Spicer told Willson to return to the Dover Police station, pick up other officers, and formulate a plan.

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<sup>2</sup> *Id.* at \*1.

(4) Pursuant to Spicer's order. Willson radioed five other Dover Police Officers on his shift (Master Corporal Brian Sherwood, PFC Joseph Bauer, and Patrolmen Krough, Wood, and Schmidt), and requested that they meet at the Dover Police station. Once assembled at the station dispatch center, Sergeant Spicer and the six Dover Police officers were able to observe the group of civilians assembled on South New Street by means of a remote surveillance camera located behind Kunkel's Auto Supply.

(5) The City of Dover has multiple cameras that allow the police to monitor activity on downtown streets. The Dover downtown surveillance cameras may be moved by a police dispatcher and there is a zoom feature for closer viewing of a particular location. At the Dover Police Station, the images detected by the remote surveillance cameras may be viewed live on two 72" High Definition screens in the station dispatch area. In addition, the cameras have a recording system.

(6) At the Dover Police Station, one of the remote surveillance cameras was pointed directly at 132 South New Street at 2:22 a.m. on May 24, 2013. At that time it was raining. In the area of the Colonial Apartments, there was an alley between that South New Street location and South Queen Street. There was also a wrought iron gate and fence in the alley.

(7) The assembled Dover Police officers watched the activities at the 132 South New Street location on the Stations's 72" screens. Accordingly to Sergeant Spicer, it

appeared that the group on South New Street was about to fight. While watching the South New Street activity on the remote surveillance camera, the Dover Police officers observed Jenkins walk to a silver Malibu automobile parked on South New Street, retrieve an object from the driver's compartment, place the object in his right rear pocket, return, and jump over a fence in the alley.

(8) While still observing the remote surveillance camera broadcast at the station, the police officers then saw Brooks walk to the same silver car, open the car trunk, remove a long object covered with clothing (jeans) or cloth, and walk to the alleyway fence that Jenkins had previously jumped. At the alleyway, Brooks set the concealed object to the side of the fence where it was retrieved by Snipes.

(9) Viewing this activity remotely at the station, the assembled police officers suspected that Jenkins and Brooks had both retrieved firearms from the silver car. Spicer thought the long object covered with clothing that Brooks removed from the car trunk was a long gun (a rifle or shotgun). Officer Sherwood also thought the concealed object Brooks obtained might be a "chopper," or sawed-off shotgun.

(10) Sergeant Spicer believed that "something was about to happen," and he feared that "there was going to be a shooting." Spicer ordered Willson and Sherwood to go to New Street and the other four officers (Krogh, Schmidt, Bauer, and Wood) to go to South Queen Street.

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(11) When Willson and Sherwood got to South New Street, they noticed that the unoccupied silver Malibu was running. Willson thought that because the Malibu was running it could be a get-away vehicle. Sherwood blocked in the Malibu with his police vehicle, and removed the keys from the Malibu ignition. The Malibu was later towed to the Dover Police station, and searched.

(12) Officer Krogh and Wood went to South Queen Street where individuals on the front porch of 133 South Queen Street pointed down the alleyway where the large group was still gathered. Krogh shined his flashlight down the alleyway at the group, and three of the individuals (Brooks, Jenkins, and Snipes) started running. Krogh yelled, "Stop, police," but they continued fleeing. Wood saw Snipes throw down the jeans containing the hard object that Brooks had taken from the car trunk.

(13) Officer Wood took Snipes into custody while Officer Bauer retrieved the jeans Snipes had just discarded. Inside the wet jeans, Bauer discovered a sawed-off shotgun loaded with two 12-gauge rounds. The shotgun Snipes discarded was admitted into evidence at the joint jury trial of all three defendants (Brooks, Jenkins and Snipes) as State's Exhibit # 4, and the two shotgun shells removed from the firearm were admitted as State's Exhibit # 5.

(14) Brooks was also apprehended at the scene when he jumped the alleyway fence and began running north on South New Street directly at Officers Sherwood and Willson. Both policemen drew their weapons and yelled "Police." Brooks was taken into custody when he slipped

on the wet roadway and fell. At trial Sherwood confirmed that Brooks was the same person who removed the concealed shotgun from the car trunk and who slipped and fell on South New Street when he ran toward Sherwood and Willson.

(15) Once Wilson gained control of Brooks, Sherwood joined Officer Krogh in pursuing Jenkins who ran toward Loockerman Street. Jenkins ran for a few blocks in downtown Dover, although he lost at least one of his shoes near Bradford Street during his attempted escape. Jenkins, the last fleeing suspect, was apprehended in the State Street alley after being Tazered by Sherwood.

(16) Officers Krogh and Schmidt handcuffed Jenkins, and Krogh discovered a Taurus .38 Special revolver loaded with five rounds in Jenkins' right rear pocket. Jenkins' revolver was admitted as State's Exhibit #6, and the 5 bullets in the cylinder were State's Exhibit #7. Jenkins later gave a recorded statement to Dover Detective Christopher Bumgarner wherein Jenkins admitted the revolver was his gun. Neither Brooks nor Snipes spoke with Bumgarner, the chief investigating officer.

(17) All three defendants were prohibited from possessing a firearm and a stipulation to that effect was entered at trial. None of the three defendants either testified at the joint trial or summoned any other defense witnesses.<sup>3</sup>

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<sup>3</sup> *Brooks*, 2015 WL 802995 at \*1 - 3.

### **BROOKS' CONTENTIONS**

In the amended motion, Appointed Counsel raises four grounds for relief:

- Ground one: Trial Counsel was ineffective for stipulating that Mr. Brooks was a person prohibited; as a result, Mr. Brooks suffered constitutional prejudice.
- Ground two: Trial Counsel's failure to request a bill of particulars to explain the identical charges prejudiced Mr. Brooks at trial and on appeal.
- Ground three: Trial Counsel was ineffective for failing to move for a new trial after the jury returned its verdict; Mr. Brooks suffered prejudice as a result of trial counsel's deficient performance.
- Ground Four: Trial counsel's cumulative conduct at trial caused a due process violation by preventing the jury from being fair and impartial, resulting in prejudice to Mr. Brooks.

### **DISCUSSION**

Under Delaware law, the Court must first determine whether Brooks has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may



consider the merits of the postconviction relief claims.<sup>4</sup> Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.<sup>5</sup> Brooks' motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Brooks' initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.<sup>6</sup> The bars to relief are inapplicable to a jurisdictional challenge 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>7</sup>

Each of Brooks' grounds for relief are premised on allegations of ineffective assistance of counsel. Therefore Brooks has alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. Brooks' ineffective assistance of counsel claims are not subject to the procedural default rule, in part

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

<sup>5</sup> Super. Ct. Crim. R. 61(i)(1).

<sup>6</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>7</sup> Super. Ct. Crim. R. 61(i)(5).

because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Brooks, 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.”<sup>8</sup> 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 the 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 adequate legal assistance;’ [i]neffective assistance of counsel then is cause for a procedural default.<sup>9</sup>

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*<sup>10</sup> and adopted by the Delaware Supreme Court in *Albury v. State*.<sup>11</sup>

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<sup>8</sup> *State v. Gattis*, 1995 WL 790961 (Del. Super.).

<sup>9</sup> *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

<sup>10</sup> 466 U.S. 668 (1984).

<sup>11</sup> 551 A.2d 53, 58 (Del. 1988).

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.<sup>12</sup> Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.<sup>13</sup> 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.<sup>14</sup>

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.<sup>15</sup> 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."<sup>16</sup> 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

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<sup>12</sup> *Strickland*, 466 U.S. at 687; see *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

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

<sup>14</sup> See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at \*1 (Del. Supr.)).

<sup>15</sup> *Strickland*, 466 U.S. at 687.

<sup>16</sup> *Id.* at 697.

alone.<sup>17</sup> Furthermore, Brooks 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."<sup>18</sup>

Turning to Brooks' first ground for relief, he claims that his counsel was ineffective for stipulating that Brooks was a person prohibited. Counsel makes clear in his affidavit he chose to stipulate that Brooks was a person prohibited so as to avoid the jury discovering that he had previously been convicted of Robbery in the Second Degree. This minimized the damage of his criminal past. I conclude that in light of the facts of this case and the charges that this was an entirely reasonable trial strategy and this claim is meritless. Furthermore, I can discern no prejudice to Brooks. This ground for relief is meritless.

In his second ground for relief Brooks argues that Trial Counsel should have requested a Bill of Particulars. Counsel stated he did not do so because the facts of the case were clear and straight forward. Furthermore, as the State points out in its response this claim appears to be a restatement of Brooks argument on direct appeal and would then be barred by Rule 61(i)(4).

Further, as argued in paragraphs two and three of the State's original memorandum (September 25, 2015), Brooks was charged with just five offenses in

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<sup>17</sup> *State v. Gattis*, 1995 WL 790961 (Del. Super.).

<sup>18</sup> *Strickland*, 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

this case. There is no reason at all to believe that the jury would have been “confused” by the five count indictment.<sup>19</sup> Additionally, as the State argued in response to Brooks’ motion for judgment of acquittal during the trial, the evidence was that Brooks possessed a sawed-off shotgun which was loaded with two shotgun shells.<sup>20</sup> There is no reason to believe that the jury would not have been intelligent enough to understand that Brooks was charged with the possession of the shotgun and also the ammunition in the shotgun. There was no evidence presented that Brooks was in possession of any other firearm or ammunition. Further, in making his motion for judgment of acquittal, trial counsel for Brooks, identified this precise issue and argued that counts one and four in the indictment should be merged, or that one of them should be dismissed.<sup>21</sup> The motion for judgment of acquittal was correctly denied by the Court, since there was an evidentiary basis to present each charge to the jury. To take this one step further, the jury’s decision to convict Brooks of both counts one and four in the indictment is supported by evidence in the record sufficient to support a finding that he possessed both the shotgun and the ammunition.<sup>22</sup> This should end the inquiry. There is no reason whatever to believe that Brooks was

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<sup>19</sup> Paranthetically, one would think that trial counsel for Brooks would have *wanted* the jury to be confused. There was a great deal of evidence against him, and, as the saying goes, confusion is the mother of reasonable doubt.

<sup>20</sup> Trial Transcript, Feb. 4, 2014. 72-73.

<sup>21</sup> Trial Transcript, Feb. 4, 2014, pp. 68-69.

<sup>22</sup> *Cf. Taylor v. State*, 76 A.3d 791, 799 (Del. 2013).

“likely convicted of PFBPP PABPP and PDWBPP for the same offense,” as argued on page 24 of the amended motion.

Brooks argues, on page 22 of the amended motion, that his sentencing “further demonstrates the confusion created by the charges as indicted.” It is true that the Court initially sentenced Brooks to a five year minimum mandatory jail term on both counts one and four. This error, however, may have been based on the Court’s failure to understand that the five year mandatory sentence for Possession of a Firearm did not apply to Possession of Ammunition.<sup>23</sup> This error was corrected, however, when trial counsel filed a motion to modify sentence pursuant to Superior Court Criminal Rule 35. The State did not oppose the modification of the sentence. It is difficult to see how an error at sentencing, which was subsequently corrected, somehow establishes that the jury was confused in returning its verdicts.<sup>24</sup>

Finally it bears noting that counts one and four of the indictment were actually worded in such a way as to allow the jury to distinguish between the count alleging Possession of a Firearm (count 4) and the count alleging Possession of Ammunition (count 1). Specifically, count one charge Brooks with “Possession of a Firearm or Firearm Ammunition by a Person Prohibited.” There is a reference to ammunition both in the caption to the charge and in the body of the charge. Count four charged *only* Possession of a Firearm in both the caption and body of the charge. A jury

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<sup>23</sup> 11 *Del. C.* § 1448.

<sup>24</sup> *See pp.* A1033 - A1053 of Brooks’ appendix to his amended motion.

which read these charges would have known that Brooks could be conviction of count one based on the possession of ammunition but could only have been convicted of count four if he actually possessed a firearm.<sup>25</sup> I conclude it was perfectly reasonable not to request a Bill of Particular in this case and that to the extent this claim is a restatement of an appellate argument it is also procedurally barred. Additionally there was no prejudice to Brooks. I conclude this ground for relief is meritless.

Brooks' third claim is that Trial Counsel was ineffective because he did not move for a new trial after Brooks was convicted. This claim makes little sense. It is predicated upon the fact that the jury returned verdicts of guilty against Brooks but was unable to reach verdicts with regard to Jenkins and Snipes. Counsel for Brooks describe the jury's decisions as "bizarre" - without, of course, having any idea how the jury reached its decisions. This is purely speculative. It is entirely possible that the jury was probably able to reach a decision in Brooks' case because his conduct with the firearm was filmed by the city cameras, while the behavior of Jenkins and Snipes - or at least their actual possession of the weapons - was not captured on the surveillance footage. With regard to Jenkins and Snipes, the jury was making different determinations based on an evaluation of different evidence. The jurors' failure to reach verdicts on the charges involving Jenkins and Snipes in no way

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<sup>25</sup> The indictment is attached as an exhibit to the State's September 25, 2015 memorandum and also reprinted at pp. A1060-1064 of Brooks' appendix to his amended motion.

invalidates their unanimous verdicts in Brooks' case.

In any event, the jury's determinations are entitled to respect, and should not automatically be dismissed as "bizarre" or irrational. As argued in the State's original submission in this case, the issue of what happened with the co-defendants' charges in a red herring because, legally, the jury's determination with regard to a co-defendant does not undermine their verdicts in Brooks' case as long as these verdicts were supported by competent evidence.<sup>26</sup> In Brooks' case, the guilty verdicts returned by the jury were clearly supported by competent evidence. The jury's alleged "inconsistent" determinations in this case did not provide the basis for a motion for a new trial.

Brooks' final argument is that he was denied a fair trial because trial counsel's "cumulative conduct" at trial prevented the jury from being "fair and impartial." This argument is completely without merit. First of all there is absolutely no evidence that the jury in this case was not "fair and impartial." This conclusory allegation is not proven by the fact that the jury failed to reach verdicts in Jenkins' and Snipes' cases.

The argument seems odd given that the more normal complaint on appeal or at the Rule 61 stage is that defense counsel failed to object often enough, or failed to preserve issues for appeal by raising objections. An attorney is supposed to object when he/she believes that an improper question has been asked, and is supposed to ask for a mistrial if he/she believes a mistrial to be warranted. The Delaware

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<sup>26</sup> See *Walls v. State*, 560 A.2d 1038, 1045-47 (Del. 1989).



Supreme Court has made it clear that attorneys have an obligation to protect the record in this way.<sup>27</sup> In Brooks' case, the examples of objections by trial counsel set forth on pp. 29-30 of Brooks' amended motion do not seem particularly egregious or unusual. Likewise, the fact that trial counsel objected 34 times during a seven day trial does not seem excessive. What seems more unusual is that the other two defense attorneys only made three objections during the trial.<sup>28</sup> It is telling that Brooks offers no legal authority for the claim that a defense attorney can violate a defendant's due process rights by vigorously raising objections at trial. There is no reason to believe that trial counsel's objections in any way prejudiced Brooks or violated his rights.

### CONCLUSION

After reviewing the record in this case, it is clear that Brooks has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). A review of his counsel's affidavit clearly shows that counsel represented Brooks in a competent fashion and was not ineffective. Additionally, Brooks has failed to demonstrate any concrete prejudice. Consequently, I recommend that Brooks' motion be denied as procedurally barred by Rule 61(i)(3) and (4) for failure to prove cause and prejudice and as previously adjudicated.

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/s/ Andrea M. Freud

Commissioner

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<sup>27</sup> See, e.g., *State v. Bennefield*, 567 A.2d 863, 867-78 (Del. 1989).

<sup>28</sup> See p. 30 of Brooks' amended motion.