

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 PABLO DAMIANI-MELENDEZ,)
)
 Defendant.)

Cr. ID No. 1012004307A

Submitted: March 10, 2020

Decided: June 23, 2020

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

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Wilmington, Delaware, Attorney for the State.

Pablo Damiani-Melendez, Maryland Diagnostic & Classification Center,
Baltimore, Maryland, *pro se*.

PARKER, Commissioner

This 23rd day of June 2020, upon consideration of Defendant's Second Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. Over a three month period, from September-December 2010, Defendant Pablo Damiani-Melendez (hereinafter "Melendez") and two alleged co-conspirators either robbed, or attempted to rob, a number of retail stores in New Castle County.
2. Following Melendez's September 2011 Superior Court jury trial, Melendez was convicted of eighteen counts of Robbery in the First Degree, thirty-three counts of Possession of a Firearm During the Commission of a Felony, eleven counts of Wearing a Disguise, six counts of Conspiracy in the Second Degree, six counts of Aggravated Menacing, eight counts of Attempted Robbery in the First Degree, and one count of Reckless Endangering in the First Degree. Melendez was acquitted of 24 additional counts in the indictment.¹
3. Melendez filed a direct appeal to the Delaware Supreme Court. On October 26, 2012, the Delaware Supreme Court affirmed the judgment of the Superior Court.²
4. On October 1, 2013, Melendez filed his first Motion for postconviction relief. Counsel was appointed to represent Melendez in his first Rule 61 motion for postconviction relief. After conducting a careful, full and thorough review of the

¹ *State v. Damiani-Melendez*, 2015 WL 9015051, *2, 6 (Del.Super.), *aff'd*, 2016 WL 2928891 (Del.).

² *Damiani-Melendez v. State*, 55 A.3d 357 (Del. 2012).

record and Melendez's claims raised therein, the Superior Court denied Melendez's motion for postconviction relief.³ The denial of Melendez's Rule 61 motion was affirmed by the Delaware Supreme Court on appeal.⁴

MELLENDEZ'S SECOND RULE 61 MOTION

5. On September 19, 2019, Melendez filed a second Rule 61 motion. In the subject motion, Melendez claims that the May 2018 arrest of and October 2018 guilty plea to falsifying business records by Carl Rone, the State's Firearms expert, constitutes newly discovered exculpatory evidence that somehow creates a strong inference of Melendez's actual innocence and should result in the granting of a new trial.

6. On March 10, 2020, the State filed a response to Melendez's motion.

7. Since Melendez filed the subject Rule 61 motion in 2019, it is the Rule 61 in effect in 2019, at the time of the filing of this motion, that is applicable to this motion.⁵

8. The applicable Rule 61 mandates that in second or subsequent postconviction motions, the motion shall be summarily dismissed unless the defendant establishes:

1) that *new* evidence exists that creates a strong inference that the defendant is actually innocent of the charges for which he was convicted, or 2) the existence of a

³*State v. Damiani-Melendez*, 2015 WL 9015051 (Del.Super.).

⁴*Damiani-Melendez v. State*, 2016 WL 2928891 (Del.).

⁵ See, *Bunting v. State*, 2015 WL 2147188, ftnt. 7 (Del.).

new rule of constitutional law made retroactive to cases on collateral review rendered his convictions invalid.⁶ If it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.⁷

9. Carl Rone, a firearms and tool mark examiner for the Delaware State Police was indicted in 2018 for criminal acts that occurred over a period of time in 2016-2017. He pled guilty to Theft by False Pretense and Falsifying Business Records in 2018. The allegations involved Mr. Rone falsifying payroll records in 2016 and 2017 and being paid for time when he was not working. There were no allegations that Mr. Rone was engaged in similar misconduct at the time of Melendez's trial in 2011, or at any time prior to trial. Moreover, the allegations did not involve mishandling evidence, falsifying documents related to his examination of evidence, or the reports he produced and to which he later testified.⁸

10. The controversy and misconduct of Carl Rone alone does not demand a new trial. The defendant needs to establish that this newly discovered evidence would have probably changed the result of defendant's trial if presented to the jury.⁹

⁶ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i) (effective June 4, 2014).

⁷ Super.Ct.Crim.R. 61(d)(5).

⁸ See, *Davenport v. State*, 2019 WL 2513771, *3 (Del.); *State v. Pierce*, 2018 WL 4771787, *4 (Del.Super.).

⁹ *State v. Taylor*, 2019 WL 6353355, *3 (Del.Super.); *State v. Page*, 2014 WL 4348286, *2 (Del.Super.), citing, *State v. Wright*, 653 A.2d 288, 298 (Del.Super.1994).

11. At this juncture, the Delaware Supreme Court has considered various challenges by defendants demanding new trials based on the controversy and misconduct of Carl Rone and has provided guidance for the determination of these claims. The Delaware Supreme Court has determined that when Carl Rone presented the key evidence the State used to establish the defendant's guilt, the conviction may need to be set aside and a new trial held.¹⁰ On the other hand, in cases where there is independent, overwhelming evidence that the defendant committed the acts underlying the charges, and the ballistics testimony was not critical to the finding of defendant's guilt, there is no basis to set aside the jury verdict.¹¹

12. In *Fowler*, the State relied on the strength of the ballistics evidence introduced at trial to excuse its serious discovery violations. Rone's testimony was critical to the State's case and his credibility was an important issue at trial. The reliability of *all* of the key evidence the State used to establish Fowler's guilt had been called into question given the serious discovery violations and the credibility of the ballistics evidence. Because Rone's testimony concerning the ballistics was central

¹⁰ See, *Fowler v. State*, 194 A.3d 16, 19-20 (Del. 2018).

¹¹ See, *George v. State*, 2019 WL 1590631, *2 (Del.); *Phillips v. State*, 2020 WL 1487787, *5 (Del.).

to finding Fowler guilty, the Delaware Supreme Court set aside Fowler's conviction and ordered a new trial.¹²

13. On the other hand, when there is an abundance of evidence of guilt from other sources such as eyewitnesses, photographic evidence, and/or confessions, there is no basis to set aside the jury verdict.¹³ In *George*, the Delaware Supreme Court concluded that the testimony provided by Rone was not central, or even necessary, to identifying George as the shooter, given the circumstances of that case including the eyewitness testimony and photographic evidence, and the other evidence establishing George's guilt at trial.¹⁴

14. Likewise, in *Phillips*, the Delaware Supreme Court determined that Phillips' conviction did not turn on Rone's testimony because there were multiple testifying eyewitnesses who identified the defendant as one of the shooters.¹⁵ The Delaware Supreme Court held that the *Phillips* conviction was not a close case and the evidence against Phillips was overwhelming. Because Phillips had not sufficiently discredited the remaining evidence, he failed to meet his burden to justify relief.¹⁶

¹² *Fowler v. State*, 194 A.3d 16, 19-20 (Del. 2018).

¹³ *George v. State*, 2019 WL 1590631, *2 (Del.); *Phillips v. State*, 2020 WL 1487787, *5 (Del.); *State v. Taylor*, 2019 WL 6353355, *3 (Del.Super.).

¹⁴ *George v. State*, 2019 WL 1590631, *2 (Del.).

¹⁵ *Phillips v. State*, 2020 WL 1487787, *5 (Del.).

¹⁶ *Phillips v. State*, 2020 WL 1487787, *5 (Del.).

15. Turning to the subject case, Melendez was charged with various felonies arising from a three-month string of twelve robberies and two attempted robberies.¹⁷ The trial lasted nine days during which numerous victims to the robberies and attempted robberies testified, police officers testified, numerous exhibits of physical evidence linking Melendez to the crimes were introduced, surveillance video footage was introduced, numerous photographs were introduced, and Melendez gave a voluntary post-*Miranda* confession as to his participation in some of the robberies.¹⁸

16. Moreover, Melendez was captured following one of the robberies he committed. The police were at the scene of the robbery, followed Melendez after he exited the store, engaged in a high-speed chase, captured him and surrounded him. At the time of his arrest, Melendez had a loaded gun in his car. Also found in his car were masks, gloves, a black-knit ski cap, along with a cell phone, wallet and laptop computer all traced to victims of the robberies, 13 cartons of Newport cigarettes stolen from the robberies, a large amount of cash, and other physical evidence linking Melendez to the string of robberies at issue.

17. It is important to emphasize that of the twelve robberies and two attempted robberies at issue in this matter, Carl Rone's report pertained to only one of the robberies. The robbery that occurred at Auto Zone on October 27, 2010. The parties

¹⁷ *Damiani-Melendez v. State*, 55 A.3d 357, 358-360 (Del. 2012).

¹⁸ *Damiani-Melendez v. State*, 55 A.3d 357, 358-360 (Del. 2012).

stipulated to the admission of Mr. Rone's report and he was not called to testify at all during the trial. The entire substance of the report was that the two shotgun wads collected from the Auto Zone robbery scene were consistent with 12-gauge shotgun wads.¹⁹

18. Of the nine-day jury trial, which included approximately forty witnesses that included law enforcement as well as victims, lay and expert witnesses, Mr. Rone was not called to testify at all during the trial.

19. Mr. Rone's report did not offer any details as to the brand of the shotgun wadding collected from the Auto Zone robbery scene. It did not offer any opinion as to whether the shotgun seized in this case was the shotgun used at the Auto Zone robbery scene. It also did not provide any opinion as to whether the ammunition fired from the shotgun at the Auto Zone was from the same shotgun that was recovered from Melendez's co-conspirator in this case.

20. Mr. Rone's report was uncontroversial, far from central to the determination of Melendez's guilt, and largely is not completely inconsequential.

21. The Delaware Supreme Court has already concluded that the evidence presented of Melendez's guilt was overwhelming at trial.²⁰ The Delaware Supreme

¹⁹ September 30, 2011 Trial Transcript, at pg. 82-84.

²⁰ See, *Damiani-Melendez v. State*, 55 A.3d 357, 360 (Del. 2012); *State v. Damiani-Melendez*, 2015 WL 9015051, *6 (Del.Super.)(the evidence of defendant's guilt was overwhelming at trial), *aff'd*, 2016 WL 2928891 (Del.).

Court on Melendez's direct appeal recognized that the testimony of the numerous victims, plus the physical evidence in Melendez's possession that linked him to the crimes were sufficient for the jury to determine Melendez's guilt.²¹ The Delaware Supreme Court did not refer to Rone's report in any way whatsoever in reaching its conclusion that the evidence in this case was overwhelming.

22. The evidence presented during the nine-day trial was that there was a series of related armed robberies occurring in New Castle County. The robbers targeted commercial businesses, mainly free-standing liquor stores.²² Two or three male subjects would enter the establishments in complete disguise, including dark masks, hats and gloves. One subject would brandish a long-barred shotgun. The serial robberies spanned the time-frame from September 24, 2010 until Melendez's arrest on December 6, 2010.

23. On December 6, 2010, several law enforcement agencies met in a coordinated effort to catch the perpetrators. On December 6, 2010, the first robbery was reported at 7:33 p.m. at American Liquors on Old Baltimore Pike.²³ The second robbery of the evening occurred off Route 896 at the Tobacco Plus located in the Four Seasons

²¹ *Damiani-Melendez v. State*, 55 A.3d 357, 360 (Del. 2012); *State v. Damiani-Melendez*, 2015 WL 9015051, *5 (Del.Super.), *aff'd*, 2016 WL 2928891 (Del.).

²² *Damiani-Melendez v. State*, 55 A.3d 357, 360 (Del. 2012); *State v. Damiani-Melendez*, 2015 WL 9015051, *5 (Del.Super.), *aff'd*, 2016 WL 2928891 (Del.).

²³ September 27, 2011 Trial Transcript, at pg. 42.

Shopping Center at 8:13 p.m.²⁴ The third robbery occurred at 8:32 p.m. at Airport News and Tobacco in Wilmington Manor.²⁵ The fourth robbery occurred at Silview Liquors on Route 4, between the towns of Stanton and Newport. This robbery was reported at 8:52 p.m.²⁶

24. Detective Morrissey from Wilmington Police and Detective Bouldin from New Castle County Police were stationed at Silview Liquors. The police were on the lookout for a black car with a white fender.²⁷ The police had determined that the getaway car was a black car with a white fender based on surveillance video footage from the Stanton Liquor robbery that occurred on November 29, 2010.²⁸ The police followed Melendez as he left Silview Liquors and drove away in his dark Honda Civic with a white fender. Melendez led the police on a high-speed chase as he attempted to lose them. The police eventually caught up to Melendez and surrounded him. Melendez was arrested.²⁹

25. In the car, the police found a loaded gun.³⁰ The police also found masks, a black-knit ski cap, black-knit glove, a bag containing seven cartons of Newport cigarettes, another bag containing six cartons of Newport cigarettes, cash in the

²⁴ September 27, 2011 Trial Transcript, at pg. 42-43.

²⁵ September 27, 2011 Trial Transcript, at pg. 43-44.

²⁶ September 27, 2011 Trial Transcript, at pg. 44.

²⁷ September 27, 2011 Trial Transcript, at pgs. 79-80.

²⁸ September 27, 2011 Trial Transcript, at pgs. 79-80.

²⁹ *Damiani v. Duffy et al.*, 754 Fed.Appx. 142, 143-144 (3rd Cir. 2018).

³⁰ September 27, 2011 Trial Transcript, at pgs. 48-49, 84-85, 88-92, 107, 119.

amount of \$3,453, a wallet belonging to a victim from the American Liquor robbery committed that night, a cellphone and laptop belonging to the victims of an American Liquors robbery committed on November 22, 2010, and other items.³¹

26. A backpack was used in the Tobacco Plus robbery committed on December 6, 2010, the night of Melendez's arrest. The suspect was captured on camera holding a backpack on the front of his body (as opposed to the back) with a circular seal on the front of the backpack.³² A backpack was found on Melendez's passenger seat that had a circular seal, a Delaware River and Bay seal, on the front of the backpack. Also, Tobacco Plus drew a green line down the cartons of cigarettes that were stacked in the store for sale. The cartons of cigarettes found in Melendez's car had that green stripe on them.³³

27. On December 8, 2010, Melendez gave a post-*Miranda* statement to police implicating himself in the robberies that occurred on December 6, 2010.

28. Although Melendez had been apprehended and was in custody, the two other co-conspirators remained at large, and the long-barreled shotgun had not yet been recovered. Melendez's prison calls were obtained and reviewed.³⁴ Melendez had made phone calls to his girlfriend, Angela Wallace, and identified the two other

³¹ September 27, 2011 Trial Transcript, at pgs. 48-49, 84-85, 88-92, 107, 119.

³² September 27, 2011 Trial Transcript, at pgs. 80-81.

³³ September 27, 2011 Trial Transcript, at pg. 90.

³⁴ September 27, 2011 Trial Transcript, at pg. 107.

suspects by the names “Rock” and “Flip”. During those phone calls to Angela Wallace, Melendez provided the location of the shotgun as being in a couch at “Flip’s” residence.³⁵ A long-barreled shotgun was depicted in numerous surveillance video clips played for the jury during trial.

29. Ultimately, a search warrant was executed at the residence of Thaddeus “Flip” Saddler and a long-barreled shotgun was recovered from the inside of the couch cushions.³⁶ Melendez led the police directly to this critical piece of evidence, thus linking himself to the robbery spree that occurred in New Castle County in 2010.

30. A search of Melendez’s residence uncovered a box of Winchester shotgun rounds for a 12-gauge shotgun.³⁷ Also found was a hat with a NY logo offset on the front with red embroidery over the left ear that matched the hat worn by the armed suspect in one of the robberies.³⁸ At one point, the State entered into evidence an entire matching outfit Melendez wore during one of the robberies that the police recovered from his residence.³⁹

31. In the subject Rule 61 motion, Melendez claims that Rone’s testimony was “vital” to the State’s case and “central to the determination of guilt or innocence”,

³⁵ September 27, 2011 Trial Transcript, at pgs. 107-108.

³⁶ September 27, 2011 Trial Transcript, at pg. 109.

³⁷ September 27, 2011 Trial Transcript, at pg. 95.

³⁸ September 27, 2011 Trial Transcript, at pgs. 98-104.

³⁹ *State v. Damiani-Melendez*, 2015 WL 9015051, *6, fnt. 55 (Del.Super.), *aff’d*, 2016 WL 2928891 (Del.).

yet in reality this claim is inaccurate and directly at odds with the evidence established at trial. In reality, Rone did not testify at all during the trial and his report addressed only a minor point in only one of the fourteen robberies and attempted robberies at issue.

32. Rone's report addressed the Auto Zone robbery that occurred on October 27, 2010. The Chief Investigating Officer Daniel Grassi⁴⁰ and the two victims of that robbery, Tanya Reid⁴¹ and Charles Higgins⁴², all testified at trial. There was also surveillance video from that robbery.⁴³ The two victims testified that three masked suspects, one armed, two unarmed entered the Auto Zone on Pulaski Highway at the corner of Route 40 and Salem Church Road in Bear, Delaware at around 8:45 p.m. The armed suspect was carrying a long-barreled shotgun. The robbers instructed them to lock the doors and shut off the lights. Charles Higgins went to lock the doors. Tanya Reid went to the back of the store to shut the lights off. The armed suspect asked her where she was going and pointed the shotgun at her. She believed she was about to be shot so she grabbed the barrel of the shotgun. There was a struggle for control of the weapon. The shotgun was fired as it was held between her arm and face. She received wounds to her face and arm from the gas and matter

⁴⁰ September 27, 2011 Trial Transcript, at pgs. 71-72.

⁴¹ September 30, 2011 Trial Transcript, at pgs. 63-77.

⁴² September 30, 2011 Trial Transcript, at pgs. 53-62.

⁴³ September 30, 2011 Trial Transcript, at pgs. 36-44.

that comes out of the shotgun when the shot is fired. At that point, she let go of the shotgun. The armed suspect took cash from the register and all three suspects fled.⁴⁴

Tanya Reid saw the armed suspect pick up the spent shotgun shell and put it in his pocket.⁴⁵ No spent shotgun shell was found at the scene.

33. The round went into the ceiling and hit a smoke detector that was mounted on the ceiling. There was damage to the smoke detector and damage to the ceiling tile as a result of the shot.⁴⁶

34. The surveillance video showed Charles Higgins locking the front door, the armed suspect struggling with Tanya Reid for control of the shotgun, the shots fired, the armed suspect taking the cash from the register, and the armed suspect bending down and picking up the ejected round.⁴⁷

35. Rone's report, which was stipulated to by the parties, stated only that the two shotgun wads collected from the Auto Zone robbery scene were consistent with 12-gauge shotgun wads.⁴⁸ Rone's report did not offer any other details as to the brand of the shotgun wadding or whether the shotgun seized from the couch of the co-conspirator was the shotgun used. His report did not add anything additional to what

⁴⁴ September 27, 2011 Trial Transcript, pgs. 71-72.

⁴⁵ September 30, 2011 Trial Transcript, pg. 44.

⁴⁶ September 27, 2011 Trial Transcript, pgs. 71-72.

⁴⁷ September 30 2011 Trial Transcript, at pgs. 36-44, 69.

⁴⁸ September 30, 2011 Trial Transcript, at pg. 82-84.

the surveillance video showed and the eyewitnesses testified to that a shotgun had been fired at the Auto Zone.

36. Mr. Rone's report added little, if anything, to this case and was nearly, if not entirely, superfluous. Melendez's conviction did not turn on Rone's report. This was not a close case and the evidence against Melendez was overwhelming. Here, the record is devoid of any evidence to suggest that Rone's report in this matter was incorrect in any regard or that there is any basis to assert a claim of legal innocence.

37. Melendez's subject Rule 61 motion should be denied. Contrary to Melendez's representation, he has not met his burden to establish that any new evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted. Melendez has failed to meet the pleading requirements allowing him to proceed with this Rule 61 motion.⁴⁹

REQUEST FOR DISCOVERY IS DENIED

38. Melendez filed a motion for discovery and inspection of statements, documents, transcripts, and other documents and materials for this Rule 61 motion and so that he can file a federal habeas corpus petition.⁵⁰ There is no absolute right,

⁴⁹ Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i).

⁵⁰ See, Superior Court Docket No. 172.

absent a showing of good cause, to free transcripts or court documents on collateral review.⁵¹

39. Melendez's conviction became final in 2012, and his first Rule 61 postconviction relief motion was denied in 2015, and the denial was affirmed by the Delaware Supreme Court in 2016.

40. Melendez has failed to meet the pleading requirements allowing him to proceed with this second Rule 61 motion so there is no need for the materials requested. These materials will not aid in the presentation or consideration of Melendez's second Rule 61 motion.

41. At this late date, any postconviction motion in federal or state court is time-barred.⁵² Melendez's motion for discovery is hereby denied.

⁵¹ *In the Matter of the Petition of Shamar Stanford for a Writ of Mandamus*, 2019 WL 494456, *1 (Del.).

⁵² See, Rule 61(i)(1)(to be timely, a Rule 61 motion must be filed within one year of the final order of conviction- 2012 in this case- absent exceptional circumstances which are not present in this case).

Any federal writ of habeas corpus must be filed within one-year after a timely state postconviction motion has been decided. See, 28 U.S.C. §2244 (b) & (d)(2). In this case, the timely postconviction motion was decided in 2016. Any federal writ of habeas corpus was required to be filed by 2017, and is now time-barred absent exceptional circumstances which are not present in this case.

For all of the foregoing reasons, Melendez's Motion for Postconviction Relief and Motion for Discovery should be DENIED.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

cc: Prothonotary