IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
	:	
v.	:	Criminal I.D. No. 9711014027
	:	Criminal A. Nos. IN97120539R1 and
AMETRIUS WATSON,	:	IN97120540R1
	:	
Defendant	:	

Defendant's Motion for Postconviction Relief – GRANTED

Submitted: August 9, 2001
Decided: December 14, 2001

M E M O R A N D U M O P I N I O N

Ametrius Watson ("defendant") has moved for postconviction relief under Superior Court Criminal Rule 61. This Court is asked to consider whether defendant received ineffective assistance of counsel in conjunction with her 1999 trial.

Procedural Background

On March 11, 1999, the defendant was convicted of Attempted Murder in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. She was sentenced to a minimum mandatory sentence of fifteen years at Level V on the attempted murder charge. On the weapons charge, she was sentenced to five years at Level V, suspended after the three-year mandatory sentence for probation.

A direct appeal was taken. On December 8, 1999, the Supreme Court affirmed the conviction.[1]

[1] *State v. Watson,* Del. Supr., No. 231, 1999, (Dec. 8, 1999) (ORDER).

Defendant alleges that she was denied her right to effective assistance of counsel at her 1999 trial. The Superior Court held an evidentiary hearing in two parts on February 8, 2001, and May 11, 2001.

Facts

The Crime and Police Investigation

The State's evidence at trial showed that on November 24, 1997, at approximately 8:00 p.m., a woman, and an unidentified man drove to East 22nd Street and LaMotte Street to purchase drugs. The woman approached a group of 10-12 individuals standing on the corner. William Berry ("Berry"), an admitted drug dealer, was among those in the group. The woman attempted to purchase drugs, and was told that none were available. She persisted in demanding drugs until one of the members of the group pushed her. She fell into Berry who pushed her off of himself. The woman then reached for something which Berry thought was a knife, but turned out to be a gun. Upon seeing her reach, Berry and the others scattered. Berry ran down East 22nd Street, and the woman pursued him for a short distance as someone yelled, "she['s] got a gun."[2] The woman fired her gun; two shots pierced Berry's back and he collapsed on the sidewalk. The woman entered a car and drove away from the scene.

Defendant's Trial

At trial Berry testified as to the facts of the incident and made a positive identification of the defendant. He remembered that as she was departing the scene, she said to him, as he lay on the ground, "I should have killed your ass, bitch."[3]

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[2] Trial Transcript at 34 (March 9, 1999).
[3] *Id.* at 39.

Defense counsel attempted to illicit testimony that defendant had been shot on two prior occasions. The State objected and the Court sustained the objection ruling that such evidence was irrelevant. Berry said he learned of defendant's identity because someone told him she had bragged about the crime.[4]

The State called Carvin Demby ("Demby"). He stated that he was standing in the doorway of his residence at 2202 LaMotte Street, near the corner of East 22nd Street between 7:30 p.m. and 8:00 p.m., no more than a hundred feet away from the crime scene. He a saw a crowd of no more than seven people. He saw someone other than Berry shove defendant, that was followed by an uproar, then somebody said, "she has a gun."[5] Berry, his friend, ran down the street in his general direction; defendant followed him and shot him. The lighting was good; he heard multiple shots, and saw the defendant get into the driver's side of a car and leave the scene. He had a clear view of the defendant. Demby then drove around the neighborhood until he saw the defendant's car. He told his mother and she called the police. The police picked him up and took him to the car. The police went into defendant's home and brought her to the doorway. Demby identified her as the shooter.

The State called Brett Jones ("Jones"). The defendant was his cousin's roommate and a social friend of his. On the day of the incident, he went to defendant's house at 7:30 p.m. and she was not there. He left a short time later and returned at 9:00 p.m. Defendant was not home; she returned home at about 11:00 p.m. He testified that the defendant looked "rousted up."[6] She had "a look on her face I ain't never seen before."[7]

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[4] *Id.* at 56.
[5] *Id.* at 89.
[6] *Id.* at 129.
[7] *Id.* at 131.

He could tell from her expression that "something happened."[8] Defendant paced the floor; he was not sure if she had a gun. On cross-examination Berry admitted that he was drinking on the evening of the shooting.

The State interrupted the testimony of Jones to present a prior statement pursuant to 11 *Del. C.* § 3507. Detective A. Kyle Rogers ("Detective Rogers") of the Wilmington Police Department testified that the day after the shooting at about 9:30 p.m. he interviewed Jones. Jones told him that he had seen the defendant at her residence the night before. He had described her as extremely upset, pacing, and carrying a black and brown handgun.

During the cross-examination of Detective Rogers, defense counsel conducted the following interrogation:

> Q. And were any other police officers conducting the interview?
> A. No.
> Q. So, it was just you?
> A. It was just me.
> Q. Okay.
> A. Yeah.
> Q. And it was taped; is that correct?
> * * * *
> Q. Now, do you know whether, in fact, he was telling the truth back in November of '97 when he said that, in response to your question, he saw a handgun and whether he was telling the truth today where he said he didn't really see anything, he just wanted to get out of there?
> A. Are you asking me to say he was telling the truth then, or is he telling it now?
> Q. Right.
> A. I believe he was telling the truth then.
> Q. Okay.
> A. I believed him then.
> Q. Why is that?

[8] *Id.* at 135.

A. Well, I believe that he knows the defendant.
Q. Okay.
A. And I'm sure he doesn't want to see the defendant get in trouble.
Q. Okay. So, that's why he would say to you that he saw her with a handgun?
A. No. That's the reason why he would say that he doesn't remember today what she was holding then.[9]

Defense counsel objected to the §3507 testimony. The Court asked defense counsel if he had a legal argument to support his position. Defense counsel said it would be unfairly prejudicial; the objection was overruled.

The second day of trial began with a second juror excused for cause.[10] The jury was reduced to eleven. The defendant was given the option of proceeding with eleven jurors or having a mistrial declared. Defense counsel briefly conferred with defendant and chose to proceed with eleven jurors. The defendant was questioned by the Court and she agreed to proceed with eleven jurors.

Detective Rogers resumed his testimony. He went with Demby to see where defendant's car and home were located. Defendant's roommate invited Detective Rogers inside their home and she consented to a search of her car, where nothing was found. A later search of the apartment also discovered nothing. He acknowledged that Demby's testimony that he was not in the crowd conflicts with Berry's testimony that Demby was in the crowd. He also acknowledged that Berry's testimony at trial had differed in a number of ways from his earlier statement. Berry had not previously told him that someone had shoved the defendant into him or that defendant said something like, "I

[9] *Id.* at 148-149.
[10] The first juror had been excused upon seeing that the victim was in a wheelchair because her son was wheelchair bound and she did not feel she could be impartial.

should have killed you"[11] as she departed. Berry had told him that everybody ran when somebody said she's got a gun. Detective Rogers also said another person he questioned could not identify defendant as the shooter and that the police were looking for the passenger in defendant's car as another suspect in the case.

Detective Rogers had spoken to Berry while he was in the hospital. Berry did not appear to be impaired. He did not check Berry's medical chart or ask a doctor if Berry was on any impairing medication. Berry identified defendant as the shooter from a photographic lineup consisting of six pictures.

The State rested and defense counsel made a motion for an acquittal. The Court denied the motion. No defense was presented.

A prayer conference was then held in chambers. The defendant did not request any lesser-included offenses. The State requested and the Court agreed to charge Assault in the First Degree as a lesser-included offense of Attempted Murder First Degree.

After the Court instructed the jury, the State made its closing statement. Defense counsel then closed. He contended that the State's case rested on the testimony of a drug dealer, a convict, and a substance abuser. He said there were inconsistencies in the time of the crime, whether Demby was in the group or not, and the color of the car leaving the scene. He asserted the defendant had no motive to commit the crime. Finally, he said one person could not identify defendant and that Jones was drunk and high when he visited defendant the night of the crime.

[11] Trial Transcript at 24 (March 10, 1999).

The defendant raises multiple issues in connection with her application for postconviction relief. Counsel was appointed to represent her, and her counsel retained Joseph Gabay, Esquire to testify as an expert.

Postconviction Hearing

Darryl Fountain testified that he told the defendant that she needed to hire a private investigator. He thought an investigator might be helpful in locating witnesses who were not reflected in the police report; people who were reluctant to come forward with information about the shooting. As it turned out, no investigator was hired because the defendant did not pay the requisite money. He denied that any of the money that had been paid to him was for the purpose of retaining an investigator. The only information available to the defense counsel about the evidence when the trial started was the information provided in discovery,[12] a conversation with Jones over the telephone, and possibly a conversation with Demby.[13]

Conviction of the two charges pending against the defendant carried a minimum mandatory sentence of 15 years on the attempted murder charge and 3 years on the weapons charge, for a total of 18 years. Plea negotiation occurred throughout the pre-trial period. Initially the State offered Assault First Degree and a weapons charge. A better offer, to the weapons charge only, was extended a few weeks before trial. The mandatory time associated with that plea was 3 years, with probation to follow.

Defense counsel testified that he believed that the defendant was at the scene of the crime, that she had a gun, that the gun discharged, and that the discharge was

[12] Postconviction Hearing Transcript at 18 (February 8, 2001).
[13] *Id.* at 34.

intentional. He did not inquire about the number of shots fired from the gun.[14] He also believed that there were witnesses to the incident who may or may not be able to identify the defendant, and he believed that there were no available alibi witnesses. He also knew that the defendant had a military background and the stance assumed by the shooter was described by Demby as a military looking or professional stance. For that, and other reasons, it was his conclusion that the defendant was unlikely to testify at trial in her own defense. Notwithstanding this analysis, defense counsel did not feel it prudent to insist, or "strongly recommend"[15] that the defendant take the plea because he felt that the witnesses who would testify against the defendant were impeachable, as all were felons or drug dealers. His strategy was to discredit the State's witnesses. He thought the jury would be disinclined to convict the defendant because they would be, "really put off and revolted by this culture, this drug culture, people changing their stories, admitted felons and people who were identified and introduced to the jury as drug dealers."[16] He erroneously expected to put in evidence the fact that the victim had twice previously been shot.

In spite of the strategy he had developed, and the admitted risk[17] of not putting on a defense, defense counsel, during his opening statement, asked the jury to "remember that old axiom that there's always two sides to a story."[18]

Fountain testified that after the State's case was nearly complete, when the 12th juror had to be dismissed due to a death in the family, with no alternates available, he did not recommend that the defendant take the opportunity for a mistrial. He testified that he

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[14] *Id.* at 78.
[15] *Id.* at 74.
[16] *Id.* at 52.
[17] *Id.* at 20.

"felt comfortable with . . . the strides that I had felt I made on discrediting the State's witnesses."[19] The defendant had expressed to him the desire to get it over with.[20] His assessment of the case was that he "didn't see anything that we were hurt really badly on."[21]

The defendant called Joseph Gabay, Esquire as an expert witness. Mr. Gabay expressed the opinion that Mr. Fountain's representation fell below the *Strickland v. Washington*[22] standard of reasonableness. Gabay testified regarding several areas of deficiency.

1. Counsel failed to strongly recommend that the defendant accept a plea bargain, to Assault if possible, or to the weapon charge with an associated three-year minimum mandatory sentence. Associated with that is the inadequacy of counsel's factual investigation. Since defense counsel's only investigation was telephone calls to one or more of the witnesses identified by the State, he was unable to introduce §3507 statements when the witnesses' testimony varied from what he had been told. Additionally, the failure to conduct a thorough investigation impaired his ability to properly evaluate the plea offer in contrast to the likelihood of success at trial.

2. General lack of competency reflected by the suggestion to the jury on opening statement that they would hear from the defense the "other side" of the evidence when he did not intend to present such evidence; the decision to proceed with the trial, in spite of the clear right to a mistrial when the number of jurors fell below 12; his apparent failure to review the taped statement of Jones which impaired his ability to effectively anticipate

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[18] Trial Transcript at 12 (March 9, 1999).
[19] Postconviction Hearing Transcript at 29 (February 8, 2001).
[20] *Id.* at 30.
[21] *Id.*

his testimony and cross-examine him; his failure to object to the hearsay statement admitted through Berry that the defendant had bragged about shooting him; and eliciting from Detective Rogers his otherwise inadmissible opinion about the veracity of the testimony of Jones thereby bolstering the State's evidence.

3. Objecting to the inclusion of the charge of Assault in the First Degree, and when the instruction was given over objection, failing to discuss during closing argument that crime as an alternative to a conviction of Attempted Murder.

Legal Principles

The Sixth Amendment of the United States Constitution states that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[23] "[T]he right to counsel is the right to the effective assistance of counsel."[24] "In order to prevail under the Sixth Amendment on the grounds of ineffective assistance of counsel, 'the defendant must show that 'counsel's representation fell below an objective standard of reasonableness,' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[25] Given these standards, there is a strong presumption that counsel's representation was professionally reasonable.[26] A movant's claims for ineffective assistance of counsel must assert substantive, concrete allegations of both attorney deficiency and actual prejudice.[27] In assessing attorney performance, every effort must be made "to eliminate the distorting

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[22] *Strickland v. Washington,* 466 U.S. 668 (1984).
[23] U.S. CONST. amend. VI.
[24] *Strickland,* 466 U.S. at 694 (quoting *McMann v. Richardson,* 397 U.S. 759, 771, n.14 (1970)).
[25] *Albury v. State,* Del. Supr., 551 A.2d 53, 58 (1988) (quoting *Strickland,* 466 U.S at 688, 694).
[26] *Stone v. State,* Del. Supr., 690 A.2d 924, 925 (1996); *Flamer v. State,* Del. Supr., 585 A.2d 736, 747 (1990).
[27] *Robinson v. State,* Del. Supr., 562 A.2d 1184, 1185 (1989).

effects of hindsight."[28] Counsel's conduct can be judged in the aggregate to determine if it constituted ineffective assistance of counsel.[29]

Defendant's Grounds for Ineffective Assistance of Counsel

Defense Counsel's Failure to Investigate a Plea Offer

"In the area of plea negotiations, the advice of counsel is vital and that duty can be effectively discharged only after defense counsel has investigated the basis for any plea offer."[30] Defense counsel must function as a counselor to his client.[31] Section 14-3.2(b) of the ABA Standards for Criminal Justice provides that:

> To aid the defendant in reaching a decision, defense counsel, *after appropriate investigation,* should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. *Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed*.[32]

In the case at bar, defense counsel admitted that he was offered a plea bargain that would result in a "two to three-year" sentence.[33] Moreover, he admitted that he was aware that if defendant were convicted, she would receive a fifteen to eighteen-year sentence.[34] However, he did not recommend that defendant accept the plea despite the fact that there was a substantial amount of incriminating evidence against the defendant. Defense counsel's explanation for not making a recommendation to accept the plea is that he had one prior case where he recommended a plea, his client refused, and his client was

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[28] *Strickland,* 466 U.S. at 688.
[29] *State v. Webb,* Del. Super., 1993 WL 331074, at *7, Babiarz, J. (March 19, 1993).
[30] *MacDonald v. State,* Del. Supr., No. 220, 2000, at 17-18, Walsh, J. (July 27, 2001).
[31] *Id.* at 17.
[32] *Id*. at 17 (quoting ABA, STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, Standard 14-3.2 (3d ed. 1999).
[33] Postconviction Hearing Transcript at 14 (February 8, 2001).

later acquitted.[35] Thus, he does not insist that his clients accept plea offers.[36] He also testified that he did not need to urge the defendant to accept the plea because her friend and roommate Bridget Benson was urging her to do so.[37]

The success of counsel's prior case does not obviate defense counsel's responsibility to aid defendant's decision making process by undertaking an appropriate investigation and addressing alternatives available to defendant. Defendants who choose to be represented by private counsel are not entitled to funding from public sources for investigators or other services.[38] Private counsel has a duty to decline representation if adequate representation cannot be provided due to financial limitations.[39] It appears that defense counsel's inadequate investigation of the crime impaired his ability to adequately explain to his client the unlikelihood of success at trial. Defense counsel's act of merely presenting the plea offer to his client, without an investigation and perhaps without the appropriate level of "reality," falls below an objective standard of reasonable representation.

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[34] *Id.*
[35] *Id.* at 14-16.
[36] *Id.* at 15-16.
[37] *Id.* at 9. Bridget Benson testified as follows:

> Q. Did you ever meet with her [defendant] and Darryl Fountain and beg her to accept a guilty plea or a plea bargain that was offered by the prosecution in this case?
> A. No, I didn't.
> Q. Did you ever discuss with Mr. Fountain any plea offer that may have been extended by the State to Miss Watson in this case?
> A. No, I didn't.
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> Postconviction Hearing Transcript at 83 (February 8, 2001).

[38] *Bailey v. State,* Del. Supr., 438 A.2d 877, 878 (1981) ("[A]n indigent defendant who relieves the public of the burden of representing him cannot secure investigative assistance which he can get . . . if he places the entire burden on the public."); ABA, STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION STANDARDS, Standard 4-1.2 (3d ed. 1993) states, "[o]nce a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment."
[39] *Id.*

Defense Counsel's Trial Strategy

The reasonableness of counsel's conduct should be viewed as of the time of counsel's conduct.[40] Defendant must identify acts or omissions of counsel that are not the result of reasonable professional judgment.[41] "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."[42]

At the time of trial, defense counsel knew that defendant would be identified as the shooter, and had decided, at least preliminarily, that he would not put her on the stand. His whole defense strategy rested with attacking the credibility of witnesses, including the eyewitness identification of the paraplegic victim. Such an assessment of the impact of the evidence is simply unreasonable.

It was unreasonable to suggest in opening statements that he would put on a defense, then not do it. It was unreasonable under the circumstances of this case, and given the unrebutted positive, indeed emphatic, identification of the defendant as the perpetrator, not to seize upon the opportunity for a mistrial when the number of jurors fell below 12. It appears that defense counsel did not review the taped statement of Jones, as he apparently did not anticipate the §3507 significance of the statement, nor was that statement effectively used to undermine his reliability as a witness.

The defense counsel's failure to object to the hearsay statement of Berry that he had heard from another that the defendant was bragging about committing the crime was extremely prejudicial to the defendant as it provided the jury with the only glimpse into the thinking of the defendant which was available at trial. There was a lesser-included

[40] *Strickland,* 466 U.S. at 690.
[41] *Id.*

instruction on Assault First Degree, the significant difference in the elements between that and Attempted Murder being the intent to cause death. The alleged, and inadmissible bragging about the crime, and the inflammatory statement, "I should have killed your ass, bitch,"[43] combined with the evidence that the victim was chased and the evidence of repeated firing from a military looking posture provided justification for conviction of the more serious crime. The failure to object under such circumstances was not reasonable.

Finally, questioning the Detective about his opinion regarding the veracity of the testimony of Jones was misguided and detrimental. He effectively gave the Detective the opportunity to explain why the witness would have softened his position on a critical fact, the defendant's possession of a gun on the night of the incident. Counsel's cross-examination bolstered the State's case.

Lesser-Included Offense

There is no credible explanation for the decision to oppose the giving of a lesser-included offense. Nor is there any explanation for the decision not to argue in closing and in the alternative, for the Assault.

Conclusion

These omissions, decisions and errors, when viewed in the aggregate show that defense counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[44] Accordingly, defendant's motion for postconviction relief on grounds of ineffective assistance of counsel is GRANTED. The conviction is vacated and defendant is granted a new trial.

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[42] *Id.*
[43] Trial Transcript at 39 (March 9, 1999).

IT IS SO ORDERED.

Judge Susan C. Del Pesco

Original to Prothonotary
xc: Sean P. Lugg, Deputy Attorney General
Jerome M. Capone, Esq.
Darryl K. Fountain, Esq.

[44] *Albury,* 551 A.2d at 58.