July 30, 2001

Michael Mundy
Delaware Correctional Center
Smyrna, DE 19977

RE: State v. Michael Mundy
ID No. 9702002522

Submitted: April 20, 2001
Decided: July 30, 2001

On Defendant Michael Mundy's Motion for Postconviction Relief. Denied.

Mr. Mundy:

Having reviewed your Motion For Postconviction Relief,[1] as well as the supplemental submissions and the record of your trial, I conclude that your Motion must be denied.

[1] ***See*** **Super. Ct. Crim. R. 61, referred to throughout this letter as "Rule 61."**

On February 4, 1997, you were arrested after Wilmington police officers responded to two 911 calls and found you in an alley lying on top of Annie Melvin and engaged in sexual intercourse with her while holding your forearm against her throat. On November 18, 1998, a Superior Court jury found you guilty of Unlawful Sexual Intercourse first degree, Kidnapping first degree and Possession of a Deadly Weapon During the Commission of a Felony. You were acquitted of charges stemming from an incident that occurred minutes earlier on the same evening with the same victim. You were sentenced accordingly on January 30, 1998. The Delaware Supreme Court affirmed.[2]

You subsequently filed a Motion For Postconviction Relief, as well as numerous amended pleadings and motions. You raise claims of judicial error, prosecutorial misconduct and ineffective assistance of counsel. At the Court's request, defense counsel filed an affidavit in response to your allegations of ineffective representation.[3] As required, you were given the opportunity to admit or deny the correctness of counsel's averments,[4] but the Court has received nothing from you in spite of waiting nearly four months to give you a full opportunity to respond recognizing your incarceration.

As a threshold matter, I note that you state your desire "to attain an adequate review of the proceedings" that led to your convictions. However, an "adequate review" in a postconviction setting is limited indeed and is not a substitute for a direct appeal. Rather, the motion allows for a collateral attack

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[2] ***Mundy v. State*, Del. Supr., No. 86, 1998, Hartnett, J. (Dec. 30, 1998) (ORDER).**

[3] ***See* Rule 61(g)(2).**

[4] ***See* Rule 61(g)(3).**

on a conviction or sentence[5] and for this reason, there are procedural safeguards that prevent substantive review of meritless claims.[6]

[5] ***Flamer v. State*, Del. Supr., 585 A.2d 736, 745 (1990).**

[6] ***Id.***

Claims of ineffective assistance of counsel are not subject to the procedural bars but must instead meet the two-prong test of *Strickland v. Washington.*[7] To prevail on a claim of ineffective assistance of counsel, a movant must show that counsel's representation fell below an objective standard of reasonableness and, that, but for counsel's errors, the outcome of the proceedings would have been different.[8] Review of counsel's representation is subject to a strong presumption that it was professionally reasonable.[9] Thus, a movant must make and substantiate allegations of actual prejudice in order to avoid summary dismissal.[10]

1. Witnesses. You allege first that trial counsel failed to call as witnesses John Raison, Sarah Hill and your grandmother, Shirley A. Mundy. These individuals were with you and Melvin at your grandmother's house just prior to the incidents that led to your arrest. You acknowledge that Raison and Hill could have testified as to collateral matters only, and you offer few specifics as to the possible content of their testimony. You state that they could have testified that Melvin's eye was injured prior to February 4, 1997. However, this fact was established at trial. Both you and Melvin testified that you injured Melvin when you punched her in the face approximately a week before the events leading to your arrest. You have not shown that defense counsel's decision not to call Raison or Hill was professionally unreasonable or that you suffered any prejudice stemming from their absence at trial.

You submitted to the Court an affidavit from your grandmother, Shirley Mundy, dated April 10, 2000. Her affidavit indicates that "Ann Anderson" (presumably another name for Annie Melvin, your victim) lived with you at her house. Melvin herself testified to this fact at trial. Your grandmother also stated in her affidavit that Melvin is a heavy drinker who likes to argue. These facts, even if true, are not relevant to the question of your guilt on the charges against you. She also asserted that when she saw Melvin before trial, Melvin indicated

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[7] **466 U.S. 668 (1984) (adopted by *Albury v. State*, Del. Supr., 551 A.2d 53, 60 (1985)).**

[8] ***Id.* at 688, 694.**

[9] ***Flamer v. State*, 585 A.2d at 753.**

[10] ***Younger v. State*, Del. Supr., 580 A.2d 552, 556 (1990).**

that she loved you and would not press charges against you. However, once indicted, the decision whether to pursue the charges rests with the office of the Attorney General not a witness, and thus her personal desire or wishes would not be relevant. In light of the overwhelming evidence of your guilt in regard to the second incident, the Court concludes that counsel's decision not to call your grandmother as a witness was not professionally unreasonable and that, even if he had called her, her testimony would not have changed the outcome of your trial.

2. Instructions. You allege that counsel was constitutionally ineffective for failing to object to the jury instructions. Your assertions about the instructions are factually incorrect. All of the definitions you allege to be absent in the instructions are in fact present, including the meaning of the required *mens rea* for USI 1st degree and the weapons charge.[11] The Court also gave the *Weber*[12] instruction on the kidnapping charge, contrary to your assertion.[13] This ground for relief has no factual basis and is wholly without merit.

3. Suppression of 911 tapes. Your allegation about the 911 tapes is similarly flawed. You allege that defense should have moved to suppress evidence of both 911 calls. Counsel did so move, and he argued conscientiously on your behalf at the hearing.[14] This argument has no merit.

4. Prosecutorial misconduct. Next, you challenge counsel's failure to object to the prosecutor's opening and closing statements. You object first to the prosecutor's description of the second incident, which occurred in an alley off West 3rd Street. The prosecutor indicated that, after Melvin escaped from your clutches and ran away, you eventually caught up with her and dragged her down an alley. This is an apt description of the case against you, and defense counsel had no reason to object.

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[11]**Transcript of the Trial (11/17/97) at 159, 161-62. The transcripts are subsequently referred to as "Tr." along with the appropriate date and page number.**

[12]***See Weber v. State*, Del. Supr., 547 A.2d 948, 959 (1988).**

[13]**Tr. (11/17/97) at 164.**

[14]***See* Tr. (11/12/97) at 13-14, 15-17, 33-36.**

You also object to the prosecutor's remark in his closing statement that "over 20 people admitted that they had heard the screams the night before and did nothing."[15] Although you fail to clarify your objection to this statement, the Court infers that you believe it is not an accurate description of the evidence at your trial. That's true. The prosecutor said that he was describing an incident that is commonly presented in textbooks to illustrate people's reluctance to get involved in a crime. The remark did not pertain to you.

Next, you object to the prosecutor's statement that you did not look like a man unjustly accused. Based on your paraphrase of the comments, the Court believes that you challenge the following statement:

> **You did not see an innocent man wrongfully accused, you saw a guilty man rightfully accused who had nothing to say, no answers to provide to the hard questions that were asked of him. For one good reason his story makes no sense, it's a lie, and he's guilty.[16]**

This statement was offered in rebuttal to defense counsel's comments about your demeanor in court and your overall credibility.[17] In his earlier statement, the prosecutor thoroughly reviewed for the jury all the evidence against you. In light of the overwhelming evidence against you, he was entitled to argue the reasonable inference that you were not credible in your assertion that Melvin had consented to have sex with you in the alley.[18] Thus, because the prosecutor's statement about your lack of candor was supported by the evidence, his remarks were not improper, and defense counsel had no reason to object.

5. Failure to investigate. You argue that counsel failed to investigate your case prior to trial. Specifically, you contend that counsel should have filed for a bill of particulars and should have requested DNA evidence. You offer no

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[15] **Tr. (11/17/97) at 148.**

[16] ***Id.*** **at 144.**

[17] ***Id.*** **at 121-22.**

[18] ***Clayton v. State*****, Del. Supr., 765 A.2d 940, 943 (2001);** ***see also Brokenbrough v. State,*** **Del. Supr., 522 A.2d 851 (1987).**

facts to show how a bill of particulars would have changed the outcome of your trial. In affirming your convictions, the Supreme Court stated that the indictments brought against you were "plain, concise and definite written statements of the essential facts constituting the offenses charged."[19] Thus, your assertion that counsel was constitutionally ineffective for not obtaining a bill of particulars is without merit.

As to DNA, identity was not an issue at your trial. Corporal Alex Velasquez of the Wilmington Police Department apprehended you in the midst of the conduct which led to your arrest and conviction. There was no reason to obtain DNA evidence, and defense counsel was not ineffective for not seeking it.

[19] ***Mundy v. State*, Order at 2.**

6. Cross-examination. You assert that defense counsel should have attempted to limit the State's direct examination of Annie Thompson (whom you refer to as "Gina Thompson") who made two 911 calls about your crimes. You argue that Ms. Thompson's statements about her granddaughter being upset at overhearing Ms. Melvin's screams were unduly prejudicial to your case. This contention borders on the frivolous. Annie Thompson described in detail seeing you assaulting Melvin, holding her down, beating her with a stick, and later, with your pants down, forcing her to have sexual intercourse with you.[20] In light of these descriptions, which are both highly specific and highly relevant, it is beyond the pale of common sense to argue that the fact that Thompson's granddaughter was upset was unduly prejudicial. Furthermore, although you object to portions of Thompson's testimony as being "highly prejudicial," the legal standard under the weighing test of D.R.E. 403 is "unfairly prejudicial." Counsel's performance was not constitutionally deficient for not lodging an objection to this testimony.

[20] **Tr. (11/17/97) at 66-67.**

7. Detective Paul Reutter's notes. On cross examination of Det. Reutter, defense counsel asked about various facets of the detective's investigation, including his handwritten notes. On redirect, the State continued to delve into the notes, and Det. Reutter testified that Melvin made inconsistent statements about what you had said to her as you dragged her into the alley prior to the second incident. In the first interview at the hospital on February 4, Melvin stated that you said to her, "Bitch, I'm going to fuck you. I'm going to do everything that I possibly can."[21] Reutter also testified that in a taped interview the next day, Melvin said she could not remember what you had said to her.[22] You assert that your alleged comments on February 4 were inflammatory and prejudicial, and that defense counsel was ineffective for pursuing the subject of Det. Reutter's notes, thereby opening the door to questions about the content of those notes. At trial, defense counsel did object when the State asked about your alleged comments, but later withdrew his objection for strategic reasons.[23] As counsel states in his affidavit, he wanted the jury to hear that Melvin made inconsistent statements about your remarks to her.[24] As a strategic move, this decision was not professionally unreasonable, and counsel was not ineffective for withdrawing his objection.

8. Appellate issues. You also make a general argument that your attorney failed to make appropriate objections in order to preserve appellate issues and failed to raise issues on appeal. You have not raised any issues that would have changed the outcome of your appeal, and this argument is therefore without merit.

In addition to the claims of ineffective assistance of counsel, you raise issues of abuse of discretion and prosecutorial misconduct. However, each of these claims duplicates one of the arguments raised under ineffective assistance of counsel. Furthermore, each claim is procedurally barred, as explained below.

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[21] **Tr. (11/14/97) at 68.**

[22] ***Id.* at 59-61.**

[23] ***Id.* at 64.**

[24] **Affidavit at ¶ 3.10**

1. Judicial error. You argue that the Court failed to instruct the jury on the required *mens rea* for USI 1st degree and the weapons charges, and failed to give a *Weber* instruction on the kidnapping charge. These allegations have no basis in fact.[25] Even if there was factual basis for these allegations, they are subject to procedural default because you failed to raise them at any of the prior proceedings.[26]

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[25] ***See*** **Tr. (11/17/97) at 159, 161-62, 164.**

[26] **Rule 61(i)(3) provides as follows:**

> **Procedural default. Any ground for relief that was not asserted in the proceedings leading to judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows**
> **(A) Cause for relief from the procedural default and**
> **(B) Prejudice from violation of the movant's rights.**

2. Prosecutorial misconduct. You argue that the prosecutor misstated the evidence in his opening statement and made improper statements of personal opinion in his closing remarks. Because you did not previously raise these issues, they are subject to procedural default.[27] You attempted to evade default by raising these issues as allegations of ineffective assistance of counsel, but you were not able to meet either prong of the *Strickland* standard, as explained above.

3. Abuse of discretion. You argue that the Court abused its discretion by denying your pretrial motion to suppress the 911 tapes. In fact, one of the calls was admitted, but the other was not. You seem to object to admission of the caller's statement, "he's raping her," which was the basis for the Court's decision to exclude this call.[28] Be that as it may, this issue was fully litigated before trial and is therefore barred as having been previously adjudicated.[29]

In sum, Mr. Mundy, you have not raised any claims which warrant relief from your convictions. There must be a "definitive end to the litigable aspect of the criminal process."[30] You have reached such an end.

For all these reasons, the Court concludes that your Motion For Postconviction Relief must be and hereby is *DENIED.*

Sincerely yours,

Judge William C. Carpenter, Jr.

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[27] ***See id.***

[28] **Tr. (11/12/97) at 36-38.**

[29] **Rule 61 (i)(4) provides as follows:**

> **Former adjudication. 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.**

[30] ***Flamer v. State*, 585 A.2d at 745.**

WCCjr:twp
cc: Prothonotary
Presentence