

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID#: 9510018718
)	
WALLACE HARDEN,)	
)	
Defendant.)	

Submitted: December 7, 2000
Decided: January 19, 2001

ORDER

Upon Defendant's Motion for Postconviction Relief—*DENIED*

On October 17, 1996 a jury convicted Harden. The conviction was affirmed on May 29, 1998.¹ Harden, *pro se*, filed this motion for postconviction relief under Superior Court Criminal Rule 61, on June 13, 2000. Harden claims that the case belonged in Family Court, not Superior Court, and his court-appointed counsel was ineffective.

¹ *Harden v. State*, Del. Supr., 712 A.2d 475 (TABLE), No. 107,1997, Holland, J. (May 29, 1998) (ORDER).

The Court called for a response,² which the State provided on August 30, 2000. The same day, Harden’s trial counsel submitted a letter and affidavit denying Harden’s ineffective assistance of counsel claim.³ Harden replied on September 11, 2000 and the case then was ready for decision. Nevertheless, on December 7, 2000, Harden filed an *ad hoc* “Motion to Dismiss.” Essentially, the latter just rehashes the postconviction relief motion’s jurisdictional claim.

Having considered Harden’s motion for postconviction relief, the State’s response, trial counsel’s affidavit, Harden’s reply, his home cooked “Motion to Dismiss,” and the record, the Court finds that no evidentiary hearing is desirable.⁴ The motion for postconviction relief is subject to summary dismissal.⁵ And on its face, the “Motion to Dismiss” is meritless.

I.

² Super. Ct. Crim. R. 61(f).

³ Super. Ct. Crim. R. 61(g)(2).

⁴ Super. Ct. Crim. R. 61(h)(1).

⁵ Super. Ct. Crim. R. 61(h)(3).

Harden's crimes are recounted in *Harden v. State*.⁶ For now, it is enough to say that Harden stands convicted of sexual crimes against his two daughters, who were under 16 years old. Concerning one victim, the State's case was strong, including the girl's accusations, Harden's incriminating statements and circumstantial corroboration. Harden was convicted as charged for his crimes against that child. While he was acquitted of a similar Class A felony involving his other daughter, Harden was convicted of a lesser-included misdemeanor. As part of the indictment, Harden also was charged with yet another sexual offense against an unrelated girl. But after Harden's trial counsel filed a pre-trial motion on his behalf, the charge involving the unrelated child was severed.

II.

In his Rule 61 motion, Harden challenges his convictions several ways. His claims, however, all recapitulate two, basic themes. As mentioned, Harden characterizes one group of claims as "jurisdictional" and the other group alleges ineffective assistance of counsel. Both are unavailing.

First, Harden claims that because his victims are his children, as a matter of law, he could not be prosecuted for felony sex offenses involving them. Instead, according to Harden, the Attorney General's only choice was

⁶ *Harden*, at 2.

to prosecute for incest, a misdemeanor, and let it go at that. From his basic premise, Harden spins off several overlapping arguments: The Family Court has exclusive jurisdiction over incest; therefore, according to Harden, the Superior Court lacked subject-matter jurisdiction; his preliminary hearing should have been in the Justice of the Peace Court, not in the Court of Common Pleas; the failure to provide Harden with a proper preliminary hearing somehow divested the Superior Court of jurisdiction; procedural irregularities flowing from the improper choice of forum violated Harden's constitutional rights, and so on. Those arguments, however, spring from the fountainhead claim that Harden was guilty of incest, at worst. As discussed below, that basic legal premise is wrong.

Second, Harden claims he received ineffective assistance of counsel because his attorney allegedly did not "protect movant[']s rights to a preliminary hearing when he advised [movant] to sign a waiver on the preliminary hearing and to the grand jury indictments." Harden also alleges his trial attorney failed to research and pursue Harden's legal claim concerning incest and "counsel failed to discuss the case or theory and a[n] overall strategy with movant." Finally, Harden contends that counsel failed to investigate the facts "other than reliance and review of police report" Harden's ineffective assistance claim also plainly is without merit.

III.

Harden characterizes his initial argument, incest and unlawful sexual intercourse are mutually exclusive, as a Rule 61(i)(5) claim that the Superior Court lacked jurisdiction over his prosecution.⁷ For Rule 61 purposes, Harden benefits by resting his claim on jurisdictional grounds. That sort of claim is a legitimate way around Rule 61's procedural bars.⁸ The Court, however, will not parse Rule 61 to decide whether Harden's self-styled jurisdictional claim is procedurally barred. Harden's claim fails simply because its premise clearly is wrong.

⁷ Super. Ct. Crim. R. 61(i)(5).

⁸ Super. Ct. Crim. R. 61(i)(1)-(3).

As mentioned, Harden's first ground for postconviction relief flows from his fundamental argument that, as a matter of law, he only could be prosecuted for incest⁹, not unlawful sexual intercourse.¹⁰ Harden's syllogism is: Jurisdiction for incest lies exclusively in Family Court;¹¹ Harden committed incest; therefore, Harden could not be prosecuted in Superior Court for rape.

The fault in Harden's logic is obvious. To be sure, Harden had sexual relations or sexual contact with his daughters and he could have been convicted for incest in Family Court, not Superior Court. Nevertheless, incest and rape are not the same, even if the victim is the rapist's daughter. In that case the crimes overlap, but they are not co-extensive. While Harden's criminal acts amounted to incest, they also included extra criminal elements.

Not only were Harden's victims his daughters, they were underage and entrusted to his custody or care. If Harden's children had been adults and if they had consented, Harden only would have been guilty of incest, just as he claims. Harden's victims, however, not only were his daughters, they were too

⁹ 11 *Del. C.* § 766.

¹⁰ 11 *Del. C.* § 775 repealed by 71 *Del. Laws c.* 285 § 13.

¹¹ 11 *Del. C.* § 766(b).

young and they did not consent in any way to their father’s sexual advances. The victims’ youth is an added factor legally justifying felony prosecutions.

When the General Assembly criminalized incest, it intended to deter sexual relations between close relatives. By prohibiting that misconduct, however, the General Assembly in no way meant to minimize non-consensual sex acts, especially between adult offenders and children. It makes no difference that Harden’s victims also are his kin. That does not trump the fact that Harden’s misconduct involved non-consensual sex acts with children.

In his reply, Harden sums up his claim, declaring: “This was a family matter.” His stance is sad and paradoxical. In effect, he contends that because the children he victimized were his daughters, he only can be held accountable for misdemeanors. According to Harden, his daughters’ youth, their inability to consent, their lack of consent and their being in his custody and care mean nothing. Harden believes that because they are his children, Harden’s daughters are entitled to less legal protection than anyone else’s child. But he is wrong. As discussed above, Harden’s kinship with his underage victims is not a mitigating factor protecting him from felony prosecution. Harden is not entitled to special consideration because he victimized his own children.

The applicable syllogism is: All non-consensual sex is rape; any sex act between close relatives is incest; therefore, a defendant who has non-

consensual sex with a close relative is guilty of rape and incest. It follows that a defendant who commits rape and incest may be prosecuted in the appropriate court for either crime. In other words, as a matter of law, when a father has sexual intercourse or sexual contact with his underage daughters, he is guilty of and can be indicted in Superior Court for Unlawful Sexual Intercourse First Degree or Unlawful Sexual Contact Second Degree, just as if his victims were someone else's children. Harden's indictment and his conviction were legally sound, and just.

Having concluded that Harden's basic "jurisdictional" claim is meritless, it follows that his derivative claims for postconviction relief, based on pre-indictment procedural errors, are procedurally barred.¹² And besides, those alleged mistakes have no bearing on the prosecution. They certainly do not fundamentally undermine the convictions. The Court, however, does not agree that pre-indictment mistakes were made.

In upholding Harden's convictions, the Court has considered and rejected Harden's incorrect, *ipsa dixit*, subordinate claim that somehow he was subjected to an impermissible, irrebuttable presumption that the children were not his voluntary social companions when he had sexual intercourse or contact with them. That is not a jurisdictional claim and it is procedurally barred. Also, by law, the children were too young to have had a say over their relations with

¹² Super. Ct. Crim. R. 61(i)(3).

any adult, including Harden. At their ages, the children could not have been voluntary companions for sexual purposes to any adult custodian.¹³

¹³ **11 Del. C. § 761(h): “A victim who is less than 16 years of age . . . is not the voluntary social companion of a defendant in whose custody or care the victim is placed.” Omitted in 11 Del. C. § 761 (2000).**

The Court also has considered and rejected Harden’s ancillary claim that he could not be convicted because he did not use force on the children. That claim is procedurally barred and furthermore, even when victims are adults, force is not a prerequisite to rape. The State merely needed to prove lack of consent¹⁴ and, as discussed above, children who are not yet 16 years old are too young to consent to an adult custodian.

IV.

It is settled firmly that Harden must meet a two-part test to establish his alternative claim of ineffective assistance of counsel. First, Harden must establish that his trial counsel’s effort fell below the level expected of typical trial attorneys practicing before this Court. Second, Harden must demonstrate that his trial counsel’s failure to meet the basic standards probably caused Harden’s conviction, which would not have occurred if Harden’s trial counsel’s efforts had been up to snuff.¹⁵ Harden plainly fails to make his claim

¹⁴ See 11 Del. C. § 775(a)(2) repealed by 71 Del. Laws c. 285, § 13: “A person is guilty of unlawful sexual intercourse in the first degree when the person intentionally engages in sexual intercourse with another person and any of the following circumstances exist The intercourse occurs without the victim’s consent and the defendant was not the victim’s voluntary social companion on the occasion of the crime. . . .”

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Albury v. State*, Del. Supr., 551 A.2d 53, 58 (1988) (Defendant must show that “counsel’s representation fell below an objective standard of reasonableness” and that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”) (citing *Strickland*); *Somerville v. State*, Del. Supr., 703 A.2d 629, 631 (1997) (To prevail on an ineffective counsel claim, defendant

in both respects.¹⁶

As mentioned, Harden starts by contending that his first, court-appointed counsel failed to “protect movant[']s rights to a preliminary hearing when he advised [movant] to sign a waiver on the preliminary hearing and to the grand jury indictments.” The claim also is based on his trial attorney’s supposed failure to research and pursue Harden’s legal theory concerning incest. Harden further alleges that “counsel failed to discuss the case or theory and a[n] overall strategy with movant.” Finally, Harden also alleges that counsel failed to investigate the facts “other than reliance and review of police reports. . . .”

must meet *Strickland*’s test.). Moreover, *Albury* states that, “[w]hen an appellate court examines the representation of counsel pursuant to the first prong of the *Strickland* test, that review is subject to a strong presumption that counsel’s conduct was professionally reasonable.” (citing *Strickland* at 689). See also *Dawson v. State*, Del. Supr., 673 A.2d 1186, 1190 (1996) (Counsel’s efforts . . . enjoy a strong presumption of reasonableness.” (citing *Flamer*, 585 A.2d at 753-54.)).

¹⁶ *Strickland, supra*; *Flamer v. State*, Del. Supr., 585 A.2d 736 (1990).

Concerning the preliminary hearing, Harden does not allege, much less establish, that anything his counsel did fell below an objective, professional standard. Moreover, Harden does not explain, much less demonstrate, how his waiving the preliminary hearing impacted on his trial's outcome. Even in theory it is difficult to see how it made a difference whether Harden had a preliminary hearing. Procedurally, it had no effect whatsoever. Harden stood trial after indictment.¹⁷ At best, a preliminary hearing incidentally might have provided some additional discovery for the defense. The State has ignored Harden's preliminary hearing claim. But it appears from the record that in order to get past the preliminary hearing, the prosecution would not have had to reveal much more than it had to produce under the general discovery rule.¹⁸

Harden's claim that his trial counsel failed to research his specious legal theory about incest also is unavailing. As discussed above, Harden's legal position concerning incest is incorrect and his trial counsel properly chose not to waste everyone's time with it. It is worth mention that Harden's trial counsel did undertake vigorous, appropriate, pretrial motion practice, including

¹⁷ *Holder v. State*, Del. Supr., 692 A.2d 882 (1997) (“[B]ecause the focus of both a preliminary hearing and an indictment is a determination of probable cause, the indictment eliminates the need for a preliminary hearing.” (citing *Smith v. State*, Del. Supr., 344 A.2d 251, 253 (1975)); *Joy v. Superior Court*, Del. Supr., 298 A.2d 315, 316 (1972) (an indictment eliminates the need for a preliminary hearing (citing *United States ex rel. Kassin v. Mulligan*, 295 U.S. 396 (1935))).

¹⁸ **Super. Ct. Crim. R. 16.**

substantial motions to suppress, to sever and to limit the State's using Harden's prior sexual misconduct. In contrast to Harden's baseless "jurisdictional" theory, his trial counsel's motions were serious and potentially helpful to his defense. In part, those motions are discussed in the decision affirming Harden's conviction.

Finally, even if it were true, which obviously it is not, Harden's claim that his trial counsel failed "to discuss the case or theory and overall trial strategy with movant" hardly establishes counsel's ineffectiveness. As with the rest of his claim, Harden fails to establish either prong of the test for ineffective assistance. To the contrary, it is clear from the pretrial motion practice that Harden and his trial counsel spent considerable time together before trial and it was clear that Harden's trial counsel knew what Harden was up against at trial and, eventually, sentencing. The court rejects Harden's specific claims.

Generally, the challenges facing Harden's trial counsel were daunting. His victims accused Harden of improprieties and he was discovered in a compromising position. He made incriminating statements to the authorities. To make matters worse, Harden was a habitual offender and his criminal history included sex offenses. Even so, Harden's trial attorney managed to procure limited severance of the indictment. At trial, Harden was acquitted of one Class A felony, which the jury reduced to a misdemeanor. For his most serious crime, Harden was sentenced to the statutory minimum, fifteen

years. He also received several more years in prison for his other crimes, but again he received less than the maximum. That “lenience” for a repeat offender so exasperated the State, it publicly castigated the Court.

Under the circumstances, trial counsel’s limited success was more remarkable than disappointing. The possibility that Harden might leave prison, albeit after he is old and his victims are grown, is a testament to his trial counsel’s effectiveness. But for his trial counsel’s tenacity, Harden could easily be serving multiple, consecutive life sentences. The Court sees why Harden challenges his loyal counsel’s effectiveness -- any port in the storm -- but Harden’s desperation lends no buoyancy to his claims. In reality, Harden’s trial counsel was diligent and effective.

V.

For the foregoing reasons, Defendant’s September 9, 2000 Motion for Postconviction Relief and his December 12, 2000 “Motion to Dismiss” are DENIED.

IT IS SO ORDERED.

Date

Judge

oc: Prothonotary (Criminal)
Raymond Radulski, Esquire (Nancy J. Perillo, Esq)
Susan Purcell, Deputy Attorney General
Wallace Harden, *Pro Se* Defendant