

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
THE CIRCLE
P.O. BOX 746
GEORGETOWN, DE 19947
(302) 856-5257

October 31, 2003

N440
Jackie E. Jackson
SBI No. 00464240
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Jackson
Defendant ID No. 0107021899(R-1)

DATE SUBMITTED: September 22, 2003

Dear Mr. Jackson:

This is the Court's decision as to your Motion for Postconviction Relief filed on May 22, 2003, as well as your Motion to Amend the Petition for Postconviction Relief which was filed on June 5, 2003.

PROCEDURAL HISTORY

Pursuant to Superior Court Criminal Rule 61(g), I requested that counsel for Mr. Jackson respond by way of affidavit to his allegations as to ineffective assistance of counsel. Mr. Jackson was given an opportunity to reply pursuant to the same rule. Mr. Jackson requested an extension, which was granted, and subsequently, Mr. Jackson filed a response received on September 22, 2003. With the matter being ripe for decision, this is the Court's ruling denying Mr. Jackson's application.

Mr. Jackson was convicted of burglary in the second degree, conspiracy in the second degree, theft, receiving stolen property, unlawful use of credit card, and criminal impersonation. At sentencing, he received a period of thirteen (13) years incarceration, followed by probation. Mr. Jackson's prior convictions played a significant role in this Court's decision to incarcerate him for thirteen years. The State of Delaware ("the State") filed an application to have Mr. Jackson declared a habitual offender, but the Court denied that application because it was filed on the morning of sentencing. Mr. Jackson was pro se, and I determined Mr. Jackson did not have proper notice of the application for due process purposes.

Mr. Jackson's conviction was affirmed on appeal. Jackson v. State, 815 A.2d 348 (Del. 2003). The Supreme Court's decision contains a good summary of the evidence against Mr. Jackson and his co-defendant, Mark Guess. In a nutshell, Mr. Jackson and his co-defendant were gentlemen burglars. Brazenly, they would break into hotel or motel rooms while tourists were at the beach or wherever. Money, checks, and other valuables were taken. They targeted motels in the Rehoboth and Dewey Beach areas.

The events leading to their arrest are interesting. A hotel manager in Dewey Beach received a call from one of the guests reporting that someone was trying to get into his room. When the manager left his office, he saw a man leave the second floor of the motel and run to a white Nissan Maxima. The automobile had a Pennsylvania license plate. That car sped off, but the hotel manager got a partial license number and reported what had happened to the police by a 911 call. Mr. Jackson and his co-defendant left the beach area by illegally speeding up the right-hand shoulder of Route 1, past slow-moving traffic. State police observed that driving, and also received information of the Nissan being wanted for an investigation in Dewey. The police gave chase. When Mr. Jackson and his co-defendant realized this, a high-speed chase began and did not end until the Nissan's engine failed in Kent County. Speeds approached 100 mph with other cars being passed on the left, right and shoulder lanes. Police then found stolen property in the vehicle, including travelers' checks of one of the victims as well as "Do Not Disturb" doorknob signs. Subsequently, a liquor store clerk identified Mr. Jackson and Mr. Guess from a photo line-up as the two men who had used one of the victim's credit cards very shortly after it was stolen to purchase a large quantity of champagne and liquor.

On the eve of trial, Mr. Jackson chose to represent himself. His attorney was prepared to go to trial, but due to Mr. Jackson's desire to represent himself, she was appointed standby counsel. Mr. Jackson was tried with his co-defendant, Mr. Guess, who had his own attorney. Even though Mr. Jackson was pro se, he consulted with his standby attorney and his co-defendant's counsel throughout the trial. After being convicted, Mr. Jackson's standby trial counsel handled the appeal to the Delaware Supreme Court. Three issues were raised at the Delaware Supreme Court. One was a claim of insufficiency of the evidence. Mr. Jackson contended that the State had failed to prove the burglary and relied too heavily on the presumption that a person in possession of goods taken from a recent crime is presumed to have committed that crime. Mr. Jackson also complained that the State had failed to establish a proper 11 Del. C. §3507 foundation before the police officer testified as to a liquor store clerk's identification from the photo line-up. Finally, the Defendant complained about the admission of testimony concerning hearsay testimony from the guest in the Dewey Beach hotel, that guest's report being one of the triggers that started the high-speed chase. The Supreme Court affirmed the conviction.

DEFENDANT'S RULE 61 COMPLAINTS

The Defendant raised eight (8) grounds in his 31-page Rule 61 Petition. Subsequently, he added Grounds 9, 10, and 11 in his amended petition filed in June. He has raised many issues but unfortunately, the complex explanations for his positions are sometimes too complex and therefore difficult to understand.

I received a Rule 61(g) affidavit from his standby counsel who was also his appellate counsel. Mr. Jackson did not file a Rule 61(g) affidavit. The Rule 61(g) counsel's affidavit leads me to conclude that his attorney was extremely organized, well-prepared, and kept Mr. Jackson updated on his case as it developed. During the appeal stage, counsel likewise communicated with Mr. Jackson and sought input from Mr. Jackson as to appellate issues; but she made him aware that she was going to seek a reversal based upon what she thought would be his best issues, and not non-issues.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM

I take Ground 7, out of order, because it alleges ineffective assistance of counsel on direct appeal. A decision on that complaint necessarily affects most of the Defendant's other claims and whether or not they are procedurally barred. In Ground 7, the Defendant boldly argues that appellate counsel was ineffective in ignoring his request to address certain issues and therefore, she intentionally sabotaged his direct appeal. It is his position that she chose the three most frivolous grounds for the appeal due to a conflict with him. He argues that her work was not in his best interests.

He complains that she did not raise, on appeal, an issue concerning juror problems. In a nutshell, the Court addressed those problems by a voir dire of each juror. Of four jurors who were ultimately at issue, two were retained and two were excused. There was no appeal of this decision. The Defendant also complains that the appeal did not raise the issue of the Court's denial of the pro se Defendant's Motion for Continuance on the eve of trial. Finally, the Defendant complains that appellate counsel did not raise an issue of "intentional delay of discovery material provided by the prosecutor".

Defendant's burden in claiming ineffective assistance of counsel is to show that his attorney's representation fell below an objective standard of reasonableness. Additionally, he must show that but for his attorney's unprofessional errors, there was a reasonable probability that the proceedings would have been different. Strickland v. Washington, 466 U. S. 668 (1984) ("Strickland").

In reviewing whether or not there was deficient performance which actually prejudiced the Defendant, the Strickland decision warns that any review must be highly deferential and must examine counsel's performance from counsel's position at the time decisions were being made. In other words, it is easy to "Monday morning quarterback" and a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged, conduct, and to evaluate the conduct from counsel's perspective at the time". Strickland, 466 U. S. at 689.

Also, our Supreme Court has determined that appellate counsel is permitted to make strategic choices as to what issues have merit and what issues should not be raised. The goal on appeal is to obtain a reversal of the conviction, and that usually is best done by focusing on the stronger arguments and casting aside weaker arguments. Zebroski v. State, 822 A.2d 1038 (Del.

2003).

In appellate counsel's Rule 61(g) affidavit, she has attached copies of correspondence which are helpful in the Court's analysis. Mr. Jackson corresponded with appellate counsel at least two times raising many, many issues. By way of example, the Defendant wished for the appeal to address a suppression issue. Following the high-speed chase, the police gathered items which were thrown out of the vehicle and placed them inside the vehicle. Then the police had the automobile towed. The Defendant complains that they then obtained a search warrant to seize the evidence from the vehicle when they did not need a search warrant because they had probable cause to conduct a search following the high-speed chase. I agree with Defendant and I expect counsel did, too. But that does not mean that the cautiousness of the police in obtaining a warrant when they already had probable cause would then result in the suppression of evidence. Such a claim is meritless and frivolous. What is important is in the Rule 61(g) affidavit, appellate counsel shows she went through the issues raised by the Defendant and made comments. She did not ignore them. She analyzed the merits and subsequently made a decision as to what was appealable. The Defendant did not direct appellate counsel to raise specific issues, but directed her to "use your professional tools to review the record and develop appealable issues. Please consider whether the following are appealable issues, and/or are in need of your professional, legal skills to develop them." Subsequently, appellate counsel filed a brief which was provided to the Defendant. He apparently was not dissatisfied with her work product at that time. After he received the brief, he corresponded with her, thanking her and apologizing for his conduct. "I truly thank you, from my heart, for being there for me and dealing with me. . . ." ". . . I pray to God, that he may continue to bless you. . . . Well, young lady, do continue to take care of yourself and stay strong and again thanks." These are not the communications of a disgruntled client. I am satisfied that appellate counsel did not ignore Defendant's request that certain issues be considered and that she considered the merits of those issues and chose what, in her professional opinion, was the Defendant's best shot on appeal.

I do not find appellate counsel's strategy decisions to be deficient performance on her part.

Now to the specifics as to what the Defendant now claims should have been included in his direct appeal so that the prejudice prong may be addressed.

The Defendant complains that the Court abused its discretion in refusing to dismiss tainted jurors. A juror reported two other jurors made inappropriate remarks about the Defendant's clothes. The record reflects the Court took the time to voir dire all the jurors individually to determine who heard what and whether or not they could be a fair and impartial juror. The Defendant has not established how or why he could prevail

on appeal had this been raised. He has not shown prejudice. Therefore I conclude that his attorney was not ineffective in failing to raise this issue on appeal.

The Defendant has not established how the denial of his Motion for Continuance prejudiced him. While the Defendant chose to represent himself on the eve of trial, that was his decision knowing that the case was set for trial. By correspondence dated November 29, 2001, his then trial attorney corresponded with him and made him aware of the trial date in January and enclosed the latest plea offer, the discovery request responses, the indictment, the investigative report, and the affidavits concerning the arrest warrants. The Rule 61(g) attachments evidence additional correspondence supplying supplemental discovery and responding to the Defendant's letters. The correspondence from his then trial counsel to the Defendant establishes she was diligent in her efforts in defending Mr. Jackson and kept him fully advised of developments in the case and the information she had in her file. He was not ignorant of the State's case.

At the time Mr. Jackson's request for continuance was denied, the Court knew that he had standby counsel, that a request for continuance would have necessitated the request to continue a co-defendant's trial who was also incarcerated, that the co-defendant was represented, and that the co-defendants were cooperating with each other. I do not find the Supreme Court would have found there was an abuse of discretion in not continuing the case on the eve of trial under these circumstances. I do not find the Defendant has established any prejudice. Therefore, I conclude that his attorney was not ineffective, knowing what she knew, in failing to raise this issue on appeal.

Finally, the Defendant complains that his appellate attorney should have raised the issue of "intentional delay of discovery material by the prosecutor". In his correspondence to appellate counsel, Defendant raises this issue. Appellate counsel notes in her comments on his correspondence "Specifically what discovery?" That is also the problem with the Defendant's Rule 61 allegation in that he does not say what he received late and how it prejudiced him. What is known is that there were communications between his then trial attorney and the prosecutor updating discovery. The general and conclusory complaint that discovery material was provided late, thereby affecting the preparation for the trial, is an insufficient claim to pursue on appeal. Appellate counsel committed no error by not raising this. Nor has the Defendant shown any prejudice whatsoever as to the allegations he received discovery late. Therefore, I conclude that his attorney was not ineffective in failing to raise this issue on appeal.

In summary, I do not find the Defendant has met his burden under Strickland v. Washington, in that he has neither shown deficient performance on the part of his appellate counsel for not raising the three issues contained in Ground 7, nor has he shown any specific prejudice in the failure to raise any of those three issues.

I have considered Ground 7 out of order because it is important to resolve the issues of ineffective assistance of counsel on appeal first. The Defendant was pro se at trial, by his own choice. Therefore, the Defendant's problems and the consequences of issues not being raised at trial fall into his own lap. If an issue was not raised at trial and/or not raised on appeal, the Defendant is procedurally barred from attempting to litigate those issues in a Rule 61 application unless he can show cause for the procedural fault, i.e., why it was not raised either at the trial level or appeal level, and prejudice from a violation of his rights. Superior Court Criminal Rule 61(i)(3). He has only complained about the aforementioned three issues being not raised on appeal. Therefore, he cannot avoid the Rule 61(i)(3) procedural bar as to the remaining claims by trying to put the blame on appellate counsel. The remaining portion of the Defendant's claims are procedurally barred under Rule 61(i)(3) with the exception of those that were raised before and decided by the

Supreme Court which are barred under Rule 61(i)(4) as being formerly adjudicated. The claim of ineffective counsel, based upon not filing a suppression motion, is not procedurally barred.

THE REMAINING CLAIMS

In Ground 1, the Defendant claims the trial court erred in admitting the 911 audio tape. He claims his rights to confrontation and cross-examination were violated. The Defendant offers no reason for cause for relief from not raising this matter at trial and/or on appeal. He does not claim his attorney was ineffective for not raising this on appeal and therefore it is procedurally barred under Rule 61(i)(3). Nor has he satisfied the Court of any legal prejudice to him by the admission of the 911 tape.

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and this ground is denied.

In Ground 2, the Defendant complains that the trial court abused its discretion when it denied the Defendant's oral request for continuance. As this issue has been resolved in Ground 7, aforementioned, wherein I found appellate counsel was not ineffective for not raising this issue on appeal, I have likewise found that there is no prejudice to the defendant and therefore this ground is procedurally barred under Rule 61(i)(3).

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and this ground is dismissed.

In Ground 3, the Defendant complains that he was denied the right to counsel at a critical stage of Defendant's case when the police exhibited a photographic array to the liquor store clerk following the Defendant's arrest. This is procedurally barred under Rule 61(i)(3) as there has been no showing for cause for relief for not raising this at the trial and/or Supreme Court. Defendant can establish no prejudice because this is not a critical stage of Defendant's case. It is not a line-up wherein the Defendant is physically present with a potential witness and the need for Defendant's counsel being present has been recognized. Defendant is wrong as to his argument that his attorney needed to be present when the police showed his photo, in a photo line-up, to the liquor store clerk. Allen v. State, 453 A.2d 1166 (Del. 1982); Reed v. State, 281 A.2d 142 (Del. 1971).

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and the claim is denied.

In Ground 4, the Defendant complains that the Court's Beyond a Reasonable Doubt Instruction is faulty. The Defendant has not provided the Court with cause as to why he has not raised this earlier before the trial court and/or the Supreme Court, nor has he shown any prejudice. The Reasonable Doubt instruction used in this case is the standard Superior Court Criminal Instruction which has found approval with the Delaware Supreme Court. Mills v. State, 732 A.2d 845 (Del. 1999). He has not shown cause or prejudice under Rule 61(i)(3) as to why this should not be barred.

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and the claim is denied.

In Ground 5, the Defendant complains that the State withheld Brady information, citing Brady v. Maryland, 373 U. S. 83 (1963). This claim is barred under Rule 61(i)(3) in that Defendant has not established cause for not raising this issue at the trial and/or the Supreme Court. I repeat, in Ground 7, Defendant made complaints concerning his appellant attorney's ineffective assistance of counsel in not raising certain issues in the Supreme Court. This is not one of those issues. Defendant has not shown cause for relief from this procedural default.

Nor can the Defendant show any prejudice in that he has not established that the prosecution withheld evidence favorable to him. While he complains that there was late discovery provided to him, he has not shown this to be exculpatory.

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and the claim is denied.

In Ground 6, the Defendant claims that there was prosecutorial misconduct by improperly directing the jury to an instruction that the trial court had already read to the jury. Apparently, the Defendant is claiming that the prosecutor's use of the instructions provided by the Court over-emphasizes those instructions and "was equal to a supplemental charge given to the jury from the Judge". This claim is barred under Rule 61(i)(3) in that the Defendant has provided no cause for not raising this before the trial court and/or the Supreme Court nor has he shown any prejudice from a violation of his rights. Establishing prejudice would be difficult because it is not misconduct for an attorney to reference the Court's instructions in making arguments on particular points being argued by the State.

The Defendant also raises in Ground 6 that the prosecutor commented that he was caught in the act when in fact he was not. This complaint is likewise procedurally barred under Rule 61(i)(3) in that Defendant has established no cause for failing to raise it before the trial court and/or the Supreme Court nor has he shown any prejudice. Prejudice would be difficult to establish because inferentially the Defendant was caught in the act in a larger sense.

If the Defendant's focus is on the Dewey Beach incident where the guest reported that there was somebody trying to get into his room, the Supreme Court has ruled there was no prejudice. The conviction arising from the Dewey incident was vacated following his conviction for reasons that are not relevant to this postconviction application.

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and this ground is denied.

Ground 7 has been resolved at the beginning of this decision in order that the Court may address the procedural bars.

Ground 8 is particularly difficult to understand, but it appears the Defendant argues he was denied due process when the presumption under 11 Del. C. §306(c)(2) was included in the instructions. In general he complains that this instruction shifted the burden of proof to the Defendant. In the appeal, Mr. Jackson contended that the State could not rely on this statutory presumption. The Supreme Court determined that his argument failed. Therefore, by presenting his argument to the Supreme Court and getting a determination from the Delaware Supreme Court on this issue, he cannot now raise it. It is procedurally barred under Rule 61(i)(4).

To the extent the Defendant believes this issue was not fully presented to the Supreme Court, then it is barred under Rule 61(i)(3) in that he has not shown cause for not presenting it to the trial court and/or the Supreme Court nor has he shown any prejudice. Prejudice would be difficult to establish as the claims he makes were specifically addressed in the instructions to the jury.

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and this claim is denied.

In turning to the amended petition, in Ground 9, the Defendant alleges the trial court erred when it refused Defendant's motion to suppress evidence. Defendant contends that after discovering that his then trial attorney refused to file a Motion to Suppress, he attempted to make an oral motion at trial which was denied as being untimely. Presumably trial counsel did not file a Motion to Suppress for the same reasons she felt it was not an issue on appeal, that is the Defendant complained that a search warrant should not have been obtained because the police had probable cause to search following the high-speed chase. Defendant believes that the obtaining of the search warrant somehow tainted the evidence. It is clear that had the Court entertained the Defendant's Motion to Suppress on the eve of trial or during trial, that the ruling would have been against the Defendant. The Defendant and his co-defendant led the police on a high speed chase down Route 1 at speeds up to 100 mph. Based upon the high-speed chase alone, the police had probable cause to seize the vehicle and therefore search it. Nevertheless, the police were cautious and they obtained a search warrant. It is incredulous and frivolous for Defendant to complain that the evidence which could have been seized by the police immediately was somehow tainted by the obtaining of a search warrant. This ground is procedurally barred in that the Defendant has not established cause for not presenting it to the trial court and/or the Supreme Court nor has he shown prejudice.

The Defendant's complaints concerning the "mishandling of the evidence" are evidentiary matters separate and apart from the constitutional issues he complains about in the suppression argument. Those evidentiary matters as to who saw what and where evidence was placed were presented to the jury through examination and cross-examination. Defendant has not shown any legal basis as to why that testimony should have been suppressed.

Defendant has not established cause as to why this was not raised before the trial court and/or the Supreme Court nor has he established prejudice and therefore these allegations and claims are denied. Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and this ground is denied.

In Ground 10, the Defendant revisits his complaint raised in Ground 7 that appellate counsel was ineffective for raising his claim that the court abused its discretion in keeping two jurors

on the panel who were tainted. Comments were made by two jurors referring to the Defendant's "dress and garb". Another juror reported this to the Court. Jurors 4 and 6 were removed and the Court voir dired the remaining jurors, including the two that had overheard the comments. The Court was satisfied that the remaining jurors were not impacted by the comments and could be fair and impartial jurors. In Ground 7 I found that appellate counsel was not ineffective in not presenting this issue to the Supreme Court. I found that her conduct was not deficient nor did the Defendant establish prejudice. That same ruling is applicable to Ground 10 which independently raises this complaint and it is dismissed. Under Rule 61(i)(3), there can be no cause in not raising this to the Delaware Supreme Court under the finding previously made, nor has the Defendant established any prejudice.

Defendant has not established that the Court lacked jurisdiction, nor has he established a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. Therefore, the bar must be applied and this ground is denied.

In Ground 11, the Defendant attacks his attorney as being ineffective during the pretrial stages of his case. Again it is worth repeating, the Defendant was represented by counsel up until the eve of trial. Then the Defendant elected to proceed pro se at trial and his attorney was removed from the case, but requested to be standby counsel. After his conviction, the Defendant chose to have that attorney represent him on appeal.

In this claim, the Defendant alleges his trial attorney was ineffective for failure to file a Motion to Suppress or "should have at least obtained a preliminary hearing on the suppression issues". For the reasons aforesaid, I find that the Defendant's pretrial counsel was neither deficient in her performance nor did the failure to file a suppression motion cause the Defendant any prejudice. The Defendant alleges that his pretrial defense counsel was not prepared for trial, but there is no basis in his allegations for the Court to address this. It is conclusory. As conclusory, it is denied.

Defendant's Motion for Postconviction Relief, as amended, containing 11 separate grounds for relief, is hereby denied.

IT IS SO ORDERED.

Yours very truly,

T. Henley Graves

THG:baj

oc: Prothonotary

cc: Department of Justice
Carole J. Dunn, Esquire