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

STATE OF DELAWARE,	)	
	)	
v.	)	Def. I.D. No. 9811012658
	)	
CRAIG NELSON.	)	
	)	
Defendant,	)	
	)	

Date Submitted: May 12, 2004
Date Decided: July 22, 2004

Upon Consideration of Defendant's Motion for Postconviction Relief.
SUMMARILY DISMISSED.

ORDER

This 22nd day of July, 2004, upon consideration of the Motion for Postconviction Relief brought by Defendant, Craig Nelson, it appears to the Court that:

1. After a three-day trial, a jury convicted Mr. Nelson of First Degree Attempted Murder, two counts of Possession of a Firearm During the Commission of a Felony, First Degree Conspiracy, Second Degree Conspiracy, and First Degree Reckless Endangering. He was sentenced to a total of thirty (30) years Level V followed by probation. He directly appealed to the Delaware Supreme Court, which affirmed the Superior Court's conviction and sentence on April 30, 2001. Mr. Nelson

now brings his first motion for postconviction relief under Rule 61.[1]

2. Mr. Nelson raises one ground for relief in his motion. He argues that the trial judge improperly denied the jury's written request to receive transcripts of two witnesses' testimony during its deliberations.[2] Instead, the substitute judge told the jury:

> You have asked for the transcript of testimony of two witnesses, Gibbs and Chavarria . . . Unfortunately, a transcript is not available. We have a court reporter in the courtroom that takes down everything that's said, but it's not typed up immediately. It takes quite a bit of effort and time to prepare a transcript. So one is not available. I therefore must ask you to rely upon your recollection and memory of the testimony.

Mr. Nelson contends that this testimony was important to the jury in its deliberations, and that the judge should have had the court reporter read back the relevant portions. According to Mr. Nelson, because the substitute judge did not preside over the trial, he was not in a position to make this decision since he did not know the weight of the testimony.

3. The Court must apply the procedural bars of Rule 61(i) before reaching the merits of the claims.[3] Rule 61(i)(3) bars "any ground for relief that was not asserted

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[1] DEL. SUPER. CT. CRIM. R. 61 (2004).

[2] The judge presiding over the trial was unavailable when the jury delivered the note, and another judge responded to the note in his absence.

[3] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)(citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

in the proceedings leading to the judgment of conviction."[4] This can be overcome, however, if the movant can show both "[c]ause for relief from the procedural default" and "[p]rejudice from violation of the movant's rights."[5] Mr. Nelson's argument is subject to the Rule 61(i)(3) bar because he did not raise it in his direct appeal. In order for Mr. Nelson's claim to survive, he must meet the cause/prejudice exception. In order to demonstrate cause, the movant must show "some external impediment" that prevented him from raising the claim.[6] Prejudice requires a showing that there is a "substantial likelihood" that if the issue was raised on appeal, the outcome would have been different.[7]

4. In Delaware, "[t]he trial court has broad discretion in determining whether, and to what extent, a jury in deliberation should be permitted to rehear testimony."[8] Transcripts are not available during trial, and are normally not even prepared absent a formal request for a post-trial proceeding.[9] The requested testimony of these two

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[4]DEL. SUPER. CT. CRIM. R. 61(i)(3) (2004).

[5]*Id.*

[6]*Younger*, 580 A.2d at 556 (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)).

[7]*Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

[8]*Harrigan v. State*, 1997 WL 45084, at *2 (Del. Supr.)(citing *Ward v. State*, 1991 WL 181476, at *3 (Del. Supr.)).

[9]*Id.*

witnesses was lengthy: Gibbs testified for approximately 50 pages, and Chavarria's testimony exceeded 100 pages.[10] In reading back such a substantial amount of testimony, there are two significant risks the Court should consider. First, the request may slow the trial, and second, the jury may give undue weight to that portion of the testimony.[11] These concerns were certainly present in the case *sub judice* given the extent of the testimony. Furthermore, it does not appear that the jury had difficulty in reaching a verdict in the absence of the transcript.[12]

5. Finally, Mr. Nelson has failed to demonstrate any prejudice resulting from the trial court's ruling.[13] He does not show how the repetition of this testimony would have affected the outcome of his trial; he simply contends that the jury should have the opportunity to rehear it without pointing to areas of the testimony that would be helpful to his case.

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[10]Both Ms. Gibbs and Ms. Chavarria were witnesses for the prosecution.

[11]*Taylor v. State*, 685 A.2d 349, 350 (Del. 1996)(citing *United States v. Raab*, 453 F.2d 1012, 1013-14 (3d Cir. 1971)).

[12]After a three-day trial, the jury deliberated for about an hour and a half the first day before being recessed, and for approximately an hour and fifteen minutes the following day before submitting the written request to the judge. After the judge denied the request, the jury deliberated for approximately three hours before returning a verdict of guilty on all counts. *See Harrigan*, 1997 WL 45084, at *2 ("Given the timing of the jury's verdict in relation to the trial judge's response to their question, there is no indication that the jury encountered any difficulty in reaching a verdict absent the transcript."); *Taylor v. State*, 685 A.2d at 351 (same).

[13]*See State v. Lawrence*, 2001 WL 1021385, at *5 (Del. Super.).

6. Because Mr. Nelson did not raise this claim on direct appeal and has not demonstrated cause or prejudice, it is barred under Rule 61(i)(3) and **SUMMARILY DISMISSED.**

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary.