IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	Def. I.D. No. 0208012184
	)	
THOMAS GRAHAM.	)	
	)	
Defendant,	)	
	)	

Date Submitted: May 3, 2004
Date Decided: July 29, 2004

Upon Consideration of Defendant's Motion for Postconviction Relief.
DENIED in part and **SUMMARILY DISMISSED** in part**.**

ORDER

This 29th day of July, 2004, upon consideration of the Motion for Postconviction Relief brought by Defendant, Thomas Graham, it appears to the Court that:

1. Mr. Graham was charged and convicted by a jury of Aggravated Menacing, Possession of a Deadly Weapon During the Commission of a Felony ("PDWDCF") and Sexual Harassment. He was sentenced to three (3) years and six (6) months Level V, followed by various levels of probation. On March 19, 2004 the Supreme Court of Delaware affirmed the conviction and sentence. Mr. Graham now brings his first motion for postconviction relief pursuant to Delaware Superior Court Criminal

Rule 61 ("Rule 61").[1]

2. Mr. Graham raises three grounds for relief, all three of which are ineffective assistance of counsel claims. In his first claim he asserts that his counsel should have moved to suppress the weapon in the alleged offenses because it was not in his possession at the time of the arrest, nor were any fingerprints found on it. In his second claim, Mr. Graham contends that his counsel improperly failed to object at trial when the state presented the weapon to the witnesses and asked the witnesses if they had seen the weapon without first authenticating it. According to Mr. Graham, this resulted in a verdict of guilty on the second weapons-related charge. His third claim states that his counsel wrongfully agreed with the prosecution that two victims saw Mr. Graham with a weapon when this fact was not established in any of the pre-trial proceedings or at trial. Finally, Mr. Graham states that these grounds were not raised on appeal because his counsel failed to attach a ten-page document of "points" that Mr. Graham had prepared, which would have caused a different outcome.

3. The Court must apply the procedural bars of Rule 61 before reaching the merits of the claims.[2] When a defendant raises a colorable claim of ineffective assistance of counsel, however, the procedural bars are inapplicable because there

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

[2] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)(citation omitted).

may be "a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceeding."[3] In order to succeed on an ineffective assistance of counsel claim, a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[4] There is a strong presumption that the legal representation was professionally reasonable.[5]

4. Rule 61(d)(4) provides that a claim may be summarily dismissed if "it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief . . ."[6] Mr. Graham's argument that his counsel did not attach the ten-page document of "points" to his appeal is without merit; the record plainly shows that this is not true. The document Mr. Graham refers to is attached to his appellate brief. Furthermore, Mr. Graham's counsel describes the document in the brief itself: "[a]ttached to this brief are ten pages of information the defendant wishes the Court to consider. Although there was

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[3]DEL. SUPER. CT. CRIM. R. 61(i)(5)(2004).

[4]*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

[5]*Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990)(citations omitted).

[6]DEL. SUPER. CT. CRIM. R. 61(d)(4)(2004).

some repetition of thoughts, it was deemed prudent that all of the documents be presented."[7] Consequently, Mr. Graham's ineffective assistance of counsel claim to this extent is **SUMMARILY DISMISSED**.

5. Mr. Graham's remaining grounds were all raised in the aforementioned ten-page document of "points." The Court will address these claims on the merits.[8] Mr. Graham's first two claims deal with the knife that was entered into evidence and that formed the basis of the PDWDCF charge. First, he alleges that his counsel failed to file a motion to suppress the weapon used to commit the offenses. Second, Mr. Graham contends that his counsel improperly asked the witnesses to identify the knife before it was authenticated and admitted into evidence. When an item of evidence is alleged to be the actual evidence used to commit a crime, such as the knife in the case *sub judice*, it must be authenticated as a condition precedent to admissibility.[9] Under Rule 901(a) of the Delaware Rules of Evidence, the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[10] The State must also account for the

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[7] *See* Motion for Postconviction Relief.

[8] A defendant cannot raise ineffective assistance claims on direct appeal to the state Supreme Court. DEL. SUPR. CT. R. 8 (2004).

[9] DEL. R. EVID. 901(a) (2004). *See also Demby v. State*, 695 A.2d 1127, 1131 (Del. 1997).

[10] *Id.*

"careful custody of evidence from the moment the State is in receipt of the evidence until trial."[11]

6. The State clearly met its burden of authenticating the knife that Mr. Graham allegedly used to threaten the victims.[12] Before the knife was entered into evidence, it was identified by two victims of the purported crime, who personally saw Mr. Graham with the knife, and Officer Andrew Poulos, Jr., who retrieved the knife from the bush next to where Mr. Graham was standing at the time of his arrest.[13] This evidence is more than sufficient to show that the knife was "what its proponent claim[ed]," namely, the weapon on which the PWDCF charge was based. And, contrary to Mr. Graham's argument that the knife was improperly presented to the witnesses before it was authenticated, having witnesses identify the evidence is precisely *how* evidence is authenticated. The Court will not entertain claims of ineffective assistance that are conclusory and unsubstantiated.[14] Therefore, Mr. Graham's second ground for relief is **DENIED**.

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[11] *Bey v. State*, 402 A.2d 362, 364 (Del. 1979)(quoting *Tatman v. State*, 314 A.2d 417 (Del. 1973)).

[12] DEL. R. EVID. 901(a) (2004). *See also Demby*, 695 A.2d at 1131.

[13] D.I. 22 (February 20, 2003 trial transcript) at 60, 74, 106.

[14] *See State v. Brittingham*, 1994 WL 750341, at *2 (Del. Super.)("It is settled Delaware law that allegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel.")(citations omitted).

7. The "chain of custody" requirement of authentication also has been met. "Delaware's chain of custody law requires that the State authenticate the evidence proffered and eliminate the possibilities of misidentification and adulteration, not to an absolute certainty, but simply as a matter of reasonable probability."[15] One of the victims observed Mr. Graham throw the knife into a bush before the police arrived at the scene.[16] Officer Poulos testified that he located the knife in a bush about ten feet away from where Mr. Graham was handcuffed.[17] According to Officer Poulos, he logged the knife into the police evidence room immediately after the incident and recovered it from the evidence room on the day of the trial.[18] The "chain of custody" is established through the testimony of the seizing officer and the packaging officer which, in this case, are one and the same.[19] And the record also reflects that Mr. Graham's counsel conferred with him to "explain the process" before the knife was admitted into evidence at trial.[20] There is no indication that this process was improper

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[15]*Demby*, 695 A.2d at 1131 (citing *Tatman*, 314 A.2d at 418).

[16]*Id.* at 75-76

[17]D.I. 22 at 106. This was the same bush into which the victim saw Mr. Graham throw the knife. *Id.* at 75-76.

[18]*Id.* at 107.

[19]DEL. CODE ANN. tit. 10, § 4331 (2003). (The "chain of custody" statute). *See Demby*, 695 A.2d at 1131.

[20]D.I. 22 at 108.

and, in fact, the testimony of record supports the admission of the knife into evidence. There was no basis upon which to file a motion to suppress. Therefore, Mr. Graham's allegation of attorney error is unsubstantiated and, consequently it must be **DENIED**.

8. Finally, Mr. Graham argues that his counsel wrongfully agreed with the prosecution that two victims saw him with a weapon when it was not established at any of the pretrial proceedings or at trial. The undisputed evidence of record shows that two victims did see Mr. Graham with a knife. This issue turned on the jury's determination of these witnesses' credibility, which is well within its discretion.[21] It plainly appears from the motion and the record that Mr. Graham is not entitled to relief on his third ground, therefore, it is **SUMMARILY DISMISSED**.[22]

9. Based on the foregoing, Mr. Graham's motion for postconviction relief is **DENIED** in part and **SUMMARILY DISMISSED** in part.

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

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[21] *See Smith v. State*, 669 A.2d 1, 6 (Del. 1995)("The jury is the sole trier of fact and is wholly responsible for determining the credibility of witnesses.")(citing *Robertson v. State*, 630 A.2d 1084, 1095 (Del. 1993).

[22] DEL. SUPER. CT. CRIM R. 61(d)(4) (2004).