

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

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	ID. No. 0110007432
	)	
DAVID W. RHOADES,	)	
	)	
Defendant.	)	

Submitted: August 25, 2004  
Decided: September 28, 2004

**OPINION**

*Defendant's Motion for Appointment of Counsel.  
Denied.*  
*Defendant's Motion for Postconviction Relief.  
Summarily Dismissed.*  
*Motion for Reduction of Sentence.  
Denied.*

*Appearances:*

David W. Rhoades, *pro se*.

Mark Chernev, Esquire, Wilmington, Delaware.  
Deputy Attorney General.

**JOHN E. BABIARZ, JR., JUDGE.**

In May 2002, a jury convicted Defendant David W. Rhoades of Robbery First Degree, Conspiracy Second Degree, Burglary First Degree and Criminal Mischief. He was sentenced to ten years of imprisonment and three years of probation. Defendant's convictions and sentence were affirmed on appeal.<sup>1</sup> Defendant has now filed a motion for appointment of counsel, a motion for postconviction relief seeking either an evidentiary hearing or a new trial, and a motion for reduction of sentence.

As to the request for counsel, there is no constitutional or statutory right to counsel on postconviction proceedings, and the Court is not persuaded to exercise its discretion to appoint counsel.<sup>2</sup> Defendant has not shown good cause for such appointment, and the motion is therefore denied.

As to ineffective assistance of counsel, Defendant raises three grounds for relief. Defendant alleges that counsel failed to (1) investigate his assertions that the victim had previously made false statements to the police; (2) investigate the story given by Co-Defendant Billy Garlic; and (3) file a motion for a new trial based on the victim's statement at sentencing wherein he allegedly recanted his trial testimony.

A defendant who claims ineffective assistance of counsel must allege and show

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<sup>1</sup>*Rhodes v. State*, 2003 WL 21189790 (Del. Supr.). The Court notes that all court-generated documents spell Defendant's name "Rhodes," whereas Defendant himself spells his name "Rhoades."

<sup>2</sup>Rule 61(e) provides in part that "[t]he court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown, but not otherwise."

that counsel's conduct did not meet reasonable professional standards and that such conduct was prejudicial to the defendant.<sup>3</sup> If a defendant cannot show actual prejudice, the claim must be dismissed on that basis alone.<sup>4</sup>

As to Defendant's claim that the victim had previously lied to police, even assuming this assertion to be true, the record shows that defense counsel was acquainted with the victim's history and made professionally reasonable efforts to use this information to his client's benefit. At trial, defense counsel argued that D.R.E. 609 permitted the use of the victim's juvenile convictions for burglary and theft as impeachment material. This Court ruled that although burglary and theft are crimes of dishonesty, they do not involve false statements, fraud or perjury, and are therefore inadmissible even for impeachment. If this evidence was not admissible, Defendant's unsupported allegations of the victim's miscellaneous lies would not be admissible under D.R.E. 609 or any other rule of this Court. This claim meets neither prong of the test for ineffective assistance of counsel.

Defendant also argues that counsel was ineffective for failing to investigate the events leading up to the robbery, that is, the ongoing tumultuous relationship between Defendant and the victim. These events were explored at trial to the extent that they

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<sup>3</sup>*Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>4</sup>*Id.*

were relevant, and this claim has no merit.

Defendant also argues that counsel was ineffective for not investigating (and presumably disproving) Garlic's version of crime. Where there are no eyewitnesses to a crime, there is little for defense counsel to "investigate," and Defendant has not offered any specifics as to what counsel might have done. Where each defendant points the finger of blame at the other, it is for the jury to decide which party is speaking the truth. In this case, the jury has spoken. The claim that defense counsel should have investigated the co-defendant's story has no merit.

Defendant also asserts that counsel was ineffective for not filing a motion for a new trial after the victim addressed the Court at the sentencing hearing. Mr. Dorman stated as follows:

I'm here today on behalf of Mr. Rhodes to ask that you show leniency in his sentence. And I stated many times to the Court that he was just there and did not do what the alleged charges as Billy Garlic did most of it. He sat and stood by the door. I forgive him for what he has done. He has been a good friend in the past and I have known him and it would be unfair if he got more time than Billy. God says to forgive people and I ask you to forgive him.<sup>5</sup>

Defendant interprets this statement as a recantation of the victim's previous testimony. A motion for a new trial based on recantation should be granted when (1) the Court is reasonably well satisfied that the testimony given by a material witness

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<sup>5</sup>*State v. Rhodes*, Sentencing Transcript (10/4/02) at 8.

is false; (2) without it the jury might have reached a different conclusion; and (3) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial.<sup>6</sup>

In this case, Defendant cannot meet any of these requirements. Dorman's statement at sentencing was ambiguous, at best, in that he simultaneously stated that Defendant was not the culprit and also asked the Court to forgive him for his actions. This statement does not persuade the Court that Dorman's trial testimony was false. Viewing the statement in light of Defendant's repeated assertions that Dorman readily lies not only to his acquaintances but also to authorities casts further doubt on an already dubious statement.

Furthermore, the record is clear that Dorman's trial testimony did not take the victim by surprise. From the outset, Dorman told his mother and the police that both Rhodes and Garlic robbed him. Even if it could be argued that the result of the trial might have been affected if Dorman had testified differently, the test for a new trial on grounds of recantation has three prongs, all of which must be met in order to warrant relief. Defendant cannot make either the first or third showing, and his recantation argument therefore has no merit.

Having reviewed Defendant's allegations of ineffective assistance of counsel,

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<sup>6</sup>*Blankenship v. State*, 447 A.2d 428, 433 (Del. 1982).

the Court concludes that Defendant is not entitled to relief, in the form of either an evidentiary hearing or a new trial. The motion for postconviction relief is ***Summarily Dismissed***.

Defendant also seeks a sentence reduction. However, he has not provided any information different from that upon which the original sentence was based. The Court has broad discretion in imposing sentence<sup>7</sup> and sees no reason to disturb the current sentence. The motion for reduction of sentence is ***Denied***.

***It Is So ORDERED.***

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Judge John E. Babiarz, Jr.

JEB,jr/rar/bjw  
Original to Prothonotary

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<sup>7</sup>*Mayes v. State*, 604 A.2d 839, 843-44 (Del. 1992).