

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

STATE OF DELAWARE)	
)	
v.)	ID #: 9608015635
)	
NIKERRAY MIDDLEBROOK,)	
)	
Defendant.)	

Submitted: September 3, 2004
Decided: December 16, 2004

ORDER

Upon Defendant's *Pro se* Motion for Postconviction Relief –***DENIED***

Defendant's conviction for Attempted Murder in the First Degree and related charges was affirmed by Delaware's Supreme Court on January 28, 2003.¹ On October 28, 2003, Defendant filed this motion for postconviction relief under Superior Court Criminal Rule 61.

The court preliminarily reviewed the motion and the record under Superior Court Criminal Rule 61(d). The court tentatively decided that all but one of Defendant's claims were subject to summary dismissal under Rule 61(d)(4). The

¹ *Middlebrook v. State*, Del. Supr., No. 424, 2000, Holland, J. (January 28, 2003).

court, however, ordered limited expansion of the record under Rule 61(g) by letter/order dated February 27, 2004. Thereafter, Defendant's trial counsel submitted a letter on March 23, 2004, as ordered. The State seemingly ignored the court's order, which precipitated another filing by Defendant on May 19, 2004.

As to the State's failure to respond to the court's February 27, 2004 order, the court will not exercise its discretion to deem the motion unopposed and grant postconviction relief. The court will not jeopardize the public to make a point. The court has deemed that the State has waived argument and the opportunity to raise issues beyond those presented by Defendant.

After reviewing the proper responses to the court's February 27, 2004 letter/order, the court called for further expansion of the record on July 26, 2004. The court merely required the State to produce Defendant's taped statement. Defendant claims the tape supports his argument that he was entitled to a suppression hearing. The State responded to the July 30, 2004 letter/order, without argument, and the expanded evidentiary record closed on September 3, 2004, with the exception of a cover letter from the State, enclosing the tapes, which was received by the court on September 7, 2004.

II.

Generally, Defendant offers three grounds for postconviction relief.

Defendant claims ineffective assistance of counsel. In summary, Defendant argues that his trial counsel was ineffective for failing to move to suppress Defendant's statement and for not properly impeaching three eyewitnesses by introducing their criminal histories. Defendant also alleges that his appellate counsel was ineffective, primarily due to appellate counsel's failure to communicate with Defendant. Defendant's next claim for postconviction is based on the fact that the court resentenced him without holding a formal hearing. Defendant also argues that he is entitled to postconviction relief because his right to a speedy trial was violated.

III.

Defendant's challenge to his resentencing is procedurally barred and substantively meritless. The claim is barred because Defendant was obligated to raise on direct appeal any procedural errors, including Defendant's objections to the way he was resentenced.² Thus, Defendant's claim is procedurally barred by Rule 61(i)(3). Defendant has not attempted to show cause for relief from his procedural default and prejudice from violation of his rights, as required by Rule 61(i)(3)(A) and (B). Moreover, Defendant's claim is substantively meritless because the only reason for Defendant's resentencing was to give him a fair opportunity to perfect his direct

² Super. Ct. Crim. R. 61(i)(3) (grounds for relief not asserted in proceedings leading to conviction thereafter barred unless movant shows cause for relief from procedural default and prejudice).

appeal. The circumstances leading to Defendant's resentencing are actually discussed with implicit approval in the Supreme Court's decision affirming Defendant's conviction.³

In summary, resentencing was necessary because Defendant's counsel failed to file Defendant's appeal in time. To make a long story short, Defendant retained new counsel after his conviction. His original counsel and his new counsel each thought the other would perfect Defendant's appeal. Meanwhile, the unbendable time limit for filing the appeal expired. Defendant, *pro se*, filed a motion under Rule 61 on June 20, 2000. That brought Defendant's neglected appeal to the court's attention. In order to give Defendant a fair chance at direct appeal, on August 21, 2000, the court issued a letter reimposing the original sentence. That restarted the Supreme Court's clock, which was the resentencing's only purpose.

To be clear, the court appreciates how important allowing defendants to appear at sentencings is. And Defendant appeared at his original sentencing. Defendant's resentencing, however, was entirely procedural. Under the circumstances, Defendant had no right to be heard in court where the court merely issued a written order reimposing the original sentence simply to allow him to file a

³ *Middlebrook*, at 5-6 (resentencing allowed because Defendant's counsel disregarded Defendant's request to appeal after original sentence).

direct appeal.

IV.

Defendant's next ground for postconviction relief, pretrial delay, also is procedurally barred and substantively meritless. The claim is procedurally barred because, like his claim concerning his resentencing, his pretrial delay claim had to have been raised during his direct appeal. Again, Defendant has not shown cause for relief nor prejudice, as required by Rule 61(i)(3)(A) and (B).

Moreover, Defendant was indicted on September 30, 1996. He had a case review on November 25, 1996 and the matter was set for trial on January 27, 1997. Had it gone forward as originally scheduled, Defendant's trial would have taken place less than four months after his indictment. The trial was continued, however, at Defendant's request because his trial attorney was unavailable.

Thereafter, the case was continued again on March 24, 1997 because the prosecutor was unavailable. It was rescheduled a third time on May 5, 1997 for unknown reasons. The record, however, does not show that Defendant's counsel objected to the May continuance. In any event, the trial began on July 19, 1997 and Defendant was convicted. Even with its rescheduling, the time from offense, to indictment, to conviction was ten months.

Defendant could have stood trial within four months of indictment.

More importantly, the court recalls that Defendant was not only indicted for the serious felonies in this case. He also had been separately indicted for a serious armed robbery involving another shooting. Because the likelihood that Defendant would be convicted on both indictments was great and he was facing several lifetimes in prison, much of the court's and counsel's efforts were directed toward resolving Defendant's cases through plea negotiations.

The fact that the parties are trying to resolve a case by a plea agreement does not justify postponing trial indefinitely. Indeed, despite the fact that it concerned serious, violent felonies, Defendant's conviction in the other case was dismissed on speedy trial grounds.⁴ Nevertheless, the fact that the parties were trying to resolve this case through a plea helps explain how it was delayed. And most importantly, it undermines Defendant's claim that the pretrial delay was prejudicial. In any event, the ten month delay in this case, as opposed to the dismissed case, was neither unreasonable nor prejudicial to Defendant.

V.

A. Trial Counsel's Failure to File Motion to Suppress

The first way that Defendant claims that his trial counsel was ineffective was because trial counsel did not move to suppress oral statements made by

⁴ *Middlebrook v. State*, 802 A.2d 268 (Del. 2002).

Defendant to the police when they interviewed him after his arrest on September 11, 1996. At first, he claimed to be someone else. In response to questions, Defendant told the police that a backpack found near the shooting scene belonged to him. Defendant also told the police there was a dispute between one of the victims, Jerry Williams and Defendant.

The court carefully reviewed the videotapes of Defendant's interrogation. His claim that he did not receive *Miranda* warnings is incorrect. Furthermore, trial counsel observed in his March 23, 2004 letter, Defendant's postconviction claims are contradictory. He contends that the police did not give him *Miranda* warnings and he also contends that the police coerced him into waiving his *Miranda* rights.

When he was first interviewed, after receiving *Miranda* warnings, Defendant identified himself as Victor Bullock. He was processed under that name. Later, Defendant was interrogated again. The second interrogation began with the police officer quickly reminding Defendant that he had been given his warnings.

Moreover, Defendant's claim that his statements were involuntary, coming on the heels of a night of "drinking and using drugs," is belied by the way he appeared and what he said during questioning. First, Defendant looked and acted composed during both interviews. He fenced with the interrogator. For example, he

admitted that the backpack was his, but he insisted that he had given the backpack to someone else before the shooting. Moreover, as Defendant’s trial counsel pointed out during cross-examination of Detective Connor, Defendant never made “any admission of culpability. . . .”

Under *Strickland v. Washington*,⁵ defendant must establish two things in order to overcome the presumption that his trial counsel was effective. Defendant must establish that trial counsel’s efforts fell below a reasonable standard of professionalism. And Defendant must show that trial counsel’s sub-standard performance made a difference. Here, Defendant has not met either of the *Strickland* tests. Giving Defendant the benefit of considerable doubt, some defense attorneys might have filed a motion to suppress. But that is a far cry from finding that trial counsel’s decision not to challenge the interrogation fell below reasonable professional standards. Moreover, after watching the videotapes there is almost no likelihood that the court would have suppressed the statements.

B. Failure to Impeach State’s Eyewitnesses

Defendant’s second claim of ineffective assistance of counsel concerns the fact that trial counsel did not cross-examine one of the victims, Jerry Williams, and Williams’ sister, an eyewitness, Misha Perkins “for possible bias.” Defendant

⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

relies on the fact that Perkins was facing felony charges, including Burglary second degree, when she testified against him. And another complaining witness, Jerome Perkins, was on probation.

Defendant's trial counsel "cannot suggest why Mr. Perkins was not cross-examined as to [his conviction for criminal impersonation.]" Trial counsel points out, however, "a person's applicable criminal record for impeachment is only one avenue to highlight for a jury[] a given witness bias or prejudice in a case."

Viewed out of context, trial counsel's failure to cross-examine the witnesses on their criminal histories appears noteworthy. As the trial unfolded, the criminal histories have less significance. Trial counsel's tack was to establish that Jerome Perkins did not know who shot him. That was a potentially more effective line of impeachment than an attack on his character would have been. Undeniably, Perkins was shot. As a matter of common sense, it is more likely that he would have been mistaken about who shot him than that he would have attempted to frame someone and let the shooter go free. While the latter was a theoretical possibility, the former tack was more likely to be convincing.

Meanwhile, the best approach toward Jerome Perkins was probably the one that trial counsel attempted to take. Jerome Perkins honestly believed that Defendant was the shooter, but in the excitement Perkins was mistaken. Perkins

might have been prone to embellish his testimony, but the larger point was that the shooting and the events surrounding it were chaotic.

The same reasoning applies to Misha Perkins. Moreover, trial counsel pointed to an inconsistency between Misha Perkins' and Jerome Perkins' testimony about whether Jerome Perkins owned an automobile. The testimony of Misha Perkins highlighted the fact that she was most concerned about her brother, there were several people in the area during the shooting and the situation was confused.

In this instance, it is a closer question whether more defense attorneys would have cross-examined on the criminal histories of the witnesses. It is not demonstrated, however, that the cross-examination here fell below a reasonable standard. In addition, it is unlikely that the impeachment would have changed the jury's view of the testimony.

Finally, the evidence left Defendant's trial counsel with a dilemma. Defendant was charged with two counts of attempted murder. The State's case was stronger as to the shooter's identity and less strong as to his intent. Defendant's backpack was found at the scene and he was carrying ammunition when arrested.

In his closing argument, Defendant's counsel argued both defenses. He emphasized, for example, how little scientific corroboration the State produced. But Defendant's trial counsel placed more emphasis in his closing argument on the

shooter's lack of intent to kill. And that argument was successful on one of the two attempted murder counts.

C. Appellate Counsel's Alleged Ineffectiveness

Defendant's challenge to his court-appointed appellate counsel primarily concerns alleged failures to communicate with Defendant. Defendant claims that his appellate counsel did not tell Defendant about the decision affirming Defendant's conviction. Thus, Defendant lost his chance to ask for reargument, *en banc*. Sadly, Defendant also alleges his appellate counsel's "abandonment" of him.

The court sees no reason to believe that other counsel would have filed for reargument. Defendant should have been notified promptly about the Supreme Court's decision. But assuming he was not notified, the court cannot conclude that the Supreme Court would have granted reargument, much less have reached a different decision based on Defendant's *pro se* application.

The Supreme Court obviously considered Defendant's direct appeal in this case based on counsel's presentation. And the notion that Defendant's appellate counsel abandoned him is sad, considering that the same lawyer obtained a stunningly favorable result for Defendant in the prosecution that was dismissed. In any event, Defendant again has failed to overcome the presumption that his counsel was effective.

The court is not satisfied that Defendant has met either of the *Strickland v. Washington* standards in order to overcome the presumption that trial counsel was effective. This is not to say other counsel would not have done differently, or even that other counsel might have done better. The point is that trial counsel pursued a reasonable line of defense with skill and modest success.

VI.

For the foregoing reasons, after preliminary and subsequent consideration, it appears from the motion for postconviction relief, the record of prior proceedings and the twice expanded record that Defendant is not entitled to relief and Defendant's motion is summarily ***DENIED***.⁶ The Prothonotary shall notify Defendant of this decision.⁷

IT IS SO ORDERED.

Judge

oc: Prothonotary
pc: James Bayard, Esquire
Jerome Capone, Esquire
Robert Surlles, Deputy Attorney General
Nikerray Middlebrook (DCC)

⁶ Super. Ct. Crim. R. 61(d)(4).

⁷ *Id.*