

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
GEORGETOWN, DE 19947

December 29, 2004

Barry L. Hudson
Delaware Correction Center
1181 Paddock Road
Smyrna, De 19977

Adam D. Gelof, Esquire
Department of Justice
114 East Market Street
Georgetown, De 19947

Darryl K. Fountain, Esquire
715 King Street
Wilmington, De 19801

RE: State of Delaware v. Barry L. Hudson
Def. ID# 000303512
Memorandum Opinion - Motion for Postconviction Relief

Date Submitted: October 15, 2004

Dear Mr. Hudson and Counsel:

This is my decision on Barry L. Hudson's ("Hudson") Motion for Postconviction Relief. Hudson was indicted by the Grand Jury on March 13, 2000 on charges of Delivery of Cocaine, Maintaining a Vehicle for Keeping Controlled Substances, and Conspiracy in the Second Degree. The charges arose out of the purchase of cocaine by undercover police officer Darren Short ("Short") from Hudson on January 26, 2000. The purchase took place outside of Hudson's car. Hudson's girlfriend, Terry Wright ("Wright"), was in the car with Hudson at the time. The State of Delaware (the "State") gave Wright immunity from prosecution in exchange for her testimony against Hudson. The State nolle prossed the Conspiracy in the Second Degree charge before trial. Hudson was

represented by Darryl K. Fountain (“Fountain”). The State was represented by Deputy Attorney General Adam D. Gelof (“Gelof”). Hudson was found guilty by a jury on October 17, 2000 on the Delivery of Cocaine charge. The jury could not reach a verdict on the Maintaining a Vehicle for Keeping Controlled Substances charge. The State later nolle prossed this charge. The State, after Hudson’s conviction, filed a motion to have Hudson sentenced as an habitual offender pursuant to 11 Del. C. § 4214(b). I granted the State’s motion and sentenced Hudson to life in prison on December 9, 2000. Hudson filed an appeal with the Supreme Court. The Supreme Court affirmed Hudson’s conviction on August 9, 2001. Hudson filed his Motion for Postconviction Relief on July 23, 2004. This is his first Motion for Postconviction Relief and it was filed in a timely manner.

Hudson alleges (1) that he was denied the right to an impartial jury because Fountain did not move to strike a biased juror; (2) that Fountain should have filed a motion to suppress Wright’s testimony because she had been given immunity from prosecution by the State in exchange for her testimony; (3) that Fountain did not effectively cross-examine Short about an error in his police report concerning Wright’s race; (4) that the Court erred when it admitted a photograph of Hudson into evidence; (5) that the Court’s limiting instructions to the jury regarding Wright’s testimony about Hudson’s possession of cocaine did not ameliorate the unfairly prejudicial effect of her testimony; and (6) that Gelof committed prosecutorial misconduct by offering perjured testimony by Short.

A. Ineffective Assistance of Counsel

Hudson’s first three claims for relief are based on allegations that Fountain’s representation of him was ineffective. The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief. In order to prevail on a claim for

ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.¹ First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.² Second, the defendant must show that the deficient performance prejudiced the defense.³ Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."⁴ It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing that representation.'"⁵ There is no procedural bar to claims of ineffective assistance of counsel.⁶

I. Impartial Jury

Hudson alleges that he was denied the right to an impartial jury because Fountain did not move to strike a biased juror. During the trial a juror brought to my attention the fact that she recognized Hudson from an encounter in Family Court. The juror, who was interning in Family Court as an advocate for children, stated that the encounter occurred approximately one year prior to the trial. Hudson alleges that the encounter occurred only seven months prior to the trial and that

¹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

² *Id.* at 687.

³ *Id.* at 687.

⁴ *State v. Coleman*, 2003 WL 22092724 (Del. Super.Ct.).

⁵ *Coleman*, 2003 WL at *2, quoting *Strickland*, 466 U.S. at 689.

⁶ *Coleman*, 2003 WL at *1, citing *State v. Johnson*, Del. Super. Ct., Cr. A. No. 97-10-0164(R1), Graves, J. (August 12, 1999) at 2; *State v. Gattis*, Del. Super. Ct., Cr. A. Nos. IN90-05-1017 to 1019, Barron, J. (December 28, 1995) at 7, *aff'd*, 637 A.2d 1174 (Del. 1997).

he did have a matter pending in Family Court at that time. Based on this discrepancy, Hudson alleges that the juror was not only dishonest, but that she may have also biased the entire jury against him. I have concluded that there is no merit to this allegation. This matter was addressed and resolved to my satisfaction during the trial. The following is an excerpt of my examination of the juror:

The Court: Are you sure whether or not it was the defendant in Family Court? Are you even sure of that?

The Juror: Yes, I am sure about that.

The Court: But you don't really remember?

The Juror: The specifics, no, I don't. I do not feel that it affects my –

The Court: Have you drawn any conclusions at all about this defendant?

The Juror: No. Only that I had –

The Court: – from the prior contact?

The Juror: No, I have not. Only that I had to mention it.

The Court: You haven't drawn any negative or positive conclusions about this defendant?

The Juror: No, sir.

The Court: Do you feel that you could still be fair and impartial?

The Juror: Yes, I do.

The Court: Can you base a decision in this case solely on the evidence you hear in this courtroom?

The Juror: Yes, sir.

The Court: All right, go back and step down, please. Thank you.

Mr. Fountain: Your Honor, that resolves the matter as far as I am concerned.

Fountain certainly did what was expected of an attorney in this regard. He made sure that the matter was addressed by the Court. I was satisfied, after my questioning of the juror, that she had not reached any negative conclusions about Hudson and that she could be a fair and impartial juror. Even if Fountain had objected to this juror remaining on the jury, I would not have removed her.

Hudson has made allegations of juror bias to this Court, but he has not substantiated them. In *Massey v. State of Delaware*, the Delaware Supreme Court stated, “that the policy in this state is that unless a defendant can prove a reasonable probability of juror taint due to egregious

circumstances that are inherently prejudicial, he will have to prove actual prejudice.”⁷ Hudson has not shown an egregious circumstance or actual prejudice on the part of this juror. I find that Mr. Fountain’s actions met the appropriate standard of reasonableness on this issue.

II. Illegally Obtained Evidence

Hudson alleges that Fountain should have filed a motion to suppress Wright’s testimony because she had been given immunity from prosecution by the State in exchange for her testimony. Wright was Hudson’s live-in girlfriend. As such, she was in a position to see Hudson possess and sell drugs. The State gave her immunity from prosecution in exchange for her testimony. Wright testified that Hudson, a week or so before the day he sold cocaine to Short, had cocaine in their home. Wright further testified that Hudson did not use cocaine personally and that the cocaine was for sale to others. Hudson argues, based on *United States v. Singleton*, 145 F.3d 1343 (10th Cir. 1999), that it was unlawful for Wright to testify because the State had given her immunity from prosecution in exchange for her testimony. Hudson has misinterpreted the law. The Court in *Singleton* stated that the United States has “drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency.”⁸ Additionally, the Court presumed that if “Congress had intended that section 201(c)(2) overturn this ingrained aspect of

⁷ *Massey v. State of Delaware*, 541 A.2d 1254, 1259 (Del. 1988).

⁸ *Singleton*, 165 F.3d at 1301; *See also U.S. ex rel. Tatman v. Anderson*, 391 F.Supp 68, 70 (D.Del. 1975)(“they [immunity statutes] are essential to the effective enforcement of various criminal statutes and, in their role of providing a rational accommodation between the imperatives of the Fifth Amendment privilege against compulsory self-incrimination and the legitimate demands of government to compel citizens to testify, immunity statutes have become part of our constitutional fabric.”); *See also Preston v. State*, 306 A.2d 712, 713 (Del. 1973)(“[t]he Delaware Immunity Statutes provides for immunity from prosecution as well as punishment.”).

American legal culture, it would have done so in clear, unmistakable, and unarguable language.”⁹ The Court noted that if a prosecutor steps beyond the limits and “offers something other than a concession normally granted by the government in exchange for testimony, the prosecutor is no longer the alter ego of the sovereign and is divested of the protective mantle of the government.”¹⁰ The prosecutor in Hudson’s case offered Wright immunity from prosecution in exchange for her truthful testimony. This concession was within the limits of concessions normally offered by the State, and is ingrained within Delaware’s legal culture. Thus, there was no legal basis for Fountain to file a motion to suppress Wright’s testimony. Therefore, I find that Fountain’s actions clearly met the appropriate standard of reasonableness on this issue.

III. Cross-examination of Detective Short

Hudson alleges that Fountain did not effectively cross-examine Short about an error in his police report concerning Wright’s race. Short’s purchase of cocaine from Hudson took place outside of Hudson’s car at approximately 5:22 p.m. on January 26, 2000. Wright, who is white, was in Hudson’s car at the time. Short’s police report states that the passenger in Hudson’s car at the time of the purchase was a black female. Hudson alleges that Fountain should have questioned Short about the error in his police report.

The identity, or race, of the passenger in Hudson’s car was not an issue. The identity of the seller of the cocaine was the real issue. I assume that Hudson’s argument is that if Short was wrong about the race of the passenger, then he also could have been wrong about the identity of the person who sold the cocaine to him. Fountain aggressively examined Short about his identification of

⁹ *Singleton*, 165 F.3d at 1302.

¹⁰ *Id.* at 1302.

Hudson. Regarding the passenger's identity, Short testified that he was focused on Hudson, not the passenger, and that the passenger-side of the car was facing away from him. Given this, and the fact that it was early evening, I am not surprised that Short was wrong about the passenger's race. In any event, it does not matter. Short was, despite Fountain's efforts, unwavering in his identification of Hudson as the person who sold cocaine to him. Therefore, I conclude that Fountain's actions clearly met the appropriate standard of reasonableness on this issue.

B. Other Alleged Errors

Hudson's next three claims for relief could have been, but were not, raised in his appeal to the Delaware Supreme Court. As such, they are procedurally barred.¹¹ However, the bar to relief will not apply to a colorable constitutional claim if "there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment or conviction."¹² I have concluded, for the reasons that follow, that Hudson has not satisfied this requirement.

I. Due Process.

Hudson alleges that the Court committed error when it admitted a photograph of him into evidence. Short testified that he used a photograph of Hudson to identify him. The photograph was actually a mug shot that contained front and side views of Hudson, as well as personal information about him. The State, during its direct examination of Short, did not seek to admit the photograph. After Fountain's cross-examination of Short, the State sought to admit the photograph into evidence. I permitted the front-view of Hudson's face to be admitted into evidence because it

¹¹ Super. Ct. Cr. R. 61(i)(3).

¹² Super. Ct. Cr. R. 61(i)(5).

was relevant to Short's identification of Hudson. However, I would not permit the use of the side-view and the personal information because they were prejudicial. Hudson argues that the redacted photograph looks like a mug shot and is prejudicial to him because it suggests to the jury that he has committed other criminal acts. There is no merit to Hudson's argument. Hudson's mug shot, when redacted, was simply a front-view of Hudson and was, as such, suggestion of nothing, let alone other criminal acts.

II. Due Process.

Hudson also alleges that the Court committed error because its limiting instructions to the jury regarding Wright's testimony of Hudson's possession of cocaine a week before the alleged sale of cocaine to Short did not ameliorate the unfairly prejudicial effect of her testimony. As I stated previously, Wright testified that Hudson, a week or so before the day he sold cocaine to Short, had cocaine in their home. Wright testified further that Hudson did not use cocaine personally and that the cocaine was for sale to others. This testimony was relevant because it showed that Hudson had cocaine available for sale. Before allowing this testimony, I conducted a *Getz*¹³ analysis and concluded that it could be admitted. After it was admitted, I gave a limiting instruction to the jury. At the conclusion of all of the evidence, I gave a more detailed limiting instruction to the jury. Having concluded at the time that the testimony could be admitted and that the limiting instructions were appropriate, I see no reason to rule otherwise now.

III. Prosecutorial Misconduct

Hudson alleges that Gelof committed prosecutorial misconduct by offering perjured testimony by Short. This argument relates to the error in Short's police report concerning the race

¹³ *Getz v. State*, 538 A.2d 726 (Del. 1988).

of the passenger in Hudson's car. As I stated previously, Short's police report stated that the passenger in Hudson's car was a black female. Wright, who is white, was the passenger. Short only testified as follows on this matter:

Question: Which car?

Answer: 1991 Honda Civic , the blue car. He placed it on there. I could see what appeared to be another person in the vehicle. It appeared to be a female, but my attention was focused on Mr. Hudson, who was seated in the vehicle at the time. He placed it on there. I asked if it was good stuff. He said, "Yeah, it was good stuff."

Question: There was someone else in that vehicle, wasn't there?

Answer: In the other vehicle?

Question: Yes.

Answer: I could see a head. Appeared to be a female head on the passenger side.

Short only testified that the passenger appeared to be a female, which is consistent with his police report. Thus, while there is a conflict between Short's and Wright's testimony, there is no conflict or falsehood in Short's testimony itself. Therefore, Hudson's argument is without merit.

CONCLUSION

Hudson's Motion for Postconviction Relief is denied for the foregoing reasons.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

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oc: Prothonotary's Office