

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

1 THE CIRCLE, SUITE 2
COURTHOUSE
GEORGETOWN, DE 19947

February 25, 2005

N440
Mark Guess
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Mark Guess
Defendant ID No. 0107018161

Dear Mr. Guess:

The transcripts in your case have been made available by the Supreme Court. You may recall that I corresponded with you and advised that the Court could not take up your Motion for Rule 61 relief until the transcripts had been returned from the Supreme Court concerning your co-defendant's appeal. Now that I have had the opportunity to study your application as well as the transcripts, I inform you it must be denied.

Following a jury trial, you were convicted of multiple counts of burglary and conspiracy. Your convictions were affirmed by the Delaware Supreme Court. Guess v. State, 2003 WL60491 (Del. 2003).

In your Postconviction application, you allege that hearsay testimony of James Gainor was introduced into evidence improperly through the testimony of Mick Tekman. You allege that there should have been an analysis by the Court under D.R.E. 404(b); and furthermore, that the Gainor testimony was inadmissible hearsay. Finally, you alleged that your attorney was ineffective for not objecting to Mr. Tekman's testimony concerning Mr. Gainor.

At your trial, Mr. Tekman testified that he was employed by a motel located in Dewey Beach, DE. He testified that he received a telephone call from one of the motel's residents complaining that somebody was trying to get into his room. It is the testimony of Mr. Tekman as to what the resident, Mr. Gainor, reported that is the basis of your Rule 61 Postconviction application.

Initially, I note that you are mistaken in that you complain that your attorney did not object.

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The record clearly shows that both your attorney and your co-defendant, Mr. Jackson, who was *pro se*, objected when Mr. Tekman started to testify as to the Gainor communications.

This Court heard argument from both the defense and the State and made a ruling it was admissible under D.R.E. 803(2) as an excited utterance. He was reporting to the motel manager that he believed someone was attempting to break into his room. Having made that ruling, there was an adjudication by the Court on this issue.

Since you are mistaken as to whether or not your attorney objected and due to the previous adjudication, your present application is procedurally barred under Rule 61(i)(4).

It is also procedurally barred under Rule 61(i)(3) because there was a ruling and there was an opportunity to raise this ground on appeal to the Delaware Supreme Court. That was not done and therefore, under Rule 61(i)(3) it is barred because you have not shown cause for relief presenting this issue to the Delaware Supreme Court, nor prejudice.

I note that the prejudice prong would be difficult to meet because your co-defendant did raise this issue on direct appeal in his case and the Supreme Court determined that it was moot because the convictions of attempted burglary and conspiracy based upon the Gainor report were vacated prior to sentencing by the Superior Court. That ruling would be likewise applicable to you. Jackson v. State, 2003 WL161250 (Del. 2001). I also note that the Supreme Court again dealt with this same issue in Mr. Jackson's appeal of this Court's denial of his Rule 61 Motion. Jackie Jackson v. State, 2005 Del. LEXIS 77.

Therefore, in conclusion, your Motion for Postconviction Relief is denied because it is procedurally barred in that there was a prior adjudication on the merits; you have shown no cause for not raising the issue to the Delaware Supreme Court; and you can show no prejudice.

Yours very truly,

T. Henley Graves

THG:baj
cc: Prothonotary
Department of Justice