

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

January 6, 2005

N440
Andrew Warrington
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

**RE: State v. Andrew Warrington
Defendant ID No. 0008014979(R-1)**

Dear Mr. Warrington:

On March 8, 2004, you filed your Motion for Postconviction Relief. It consists of 21 pages raising 12 separate grounds for relief. It also includes a 155 page appendix. The Court expanded the record pursuant to Rule 61(g). I have received submissions under affidavit from your defense attorney, the State, and from you. On December 20, 2004, I received an additional submission from you containing information you wanted me to consider and I have done so.

On October 28, 2004, the Court began an evidentiary hearing as to the factual disputes between you and your attorney. Unfortunately, we quickly learned that your attorney had not provided you with copies of his submissions to the Court and therefore, the matter was rescheduled for December 2, 2004.

On that date, there were other problems. You desired to call your brother, Robert, as a witness, but he was not brought in from the prison. Additionally, the Court wanted more detailed testimony from defense counsel concerning one of your allegations. Therefore, we met again on December 9, 2004. I am satisfied that everyone has presented their respective positions concerning the allegations

raised in the Rule 61 Motion. As to the issues raised in which there is a factual dispute, it is necessary for the Court to make credibility determinations based upon not only the testimony of the respective witnesses, but on all the evidence presented both at trial and during the evidentiary hearings and Andrew Warrington's December 20, 2004 submission.

FACTUAL BACKGROUND

The Defendant was convicted of murder in the 1st degree and sentenced to life without parole. He was also convicted of possession of a deadly weapon during the commission of a felony and conspiracy. His brother and co-defendant, Robert Warrington, was convicted of the same offenses. The Defendant's conviction was affirmed on appeal. Warrington v. State, 840 A.2d 590 (Del. 2003). As noted in the decision of this Court concerning Robert Warrington's postconviction application, the Supreme Court reviewed the evidence in a light most favorable to the Defendants in detailing the factual background of the events leading to their conviction. The Supreme Court basically concluded that even if the victim had come to the Defendants' dwelling and was the initial aggressor, and even if the victim threatened the Defendant with a knife, there came a point in time that the victim was overpowered and was helpless. At that time, when the victim was no longer a threat to either of the Defendants, and when the Defendants had complete control over the situation, they intentionally killed him.

The evidence at trial established that the victim was able to break free of the Defendants and briefly secure himself in a room on the first floor of the dwelling. While there, he used a portable house phone to call 911, but before he could communicate anything, the Defendants broke through the door. The phone was knocked aside, but the 911 call had gone through and a connection had been made. The Defendants were obviously unaware of this. The 911 tape recording evidences pleas by the victim for help, his confusion as to why they were killing him, and his prayers when he knew he was dying.

The tape also evidences the continued beating the victim received while asking for help in his defenseless state. Whether or not this homicide was premeditated, or whether events took place as the Defendants testified concerning the victim being the initial aggressor, it is clear, as I stated at sentencing, that the Defendants made the decision to kill Mr. Peco and thereby made the decision to commit cold-blooded murder.

Andrew Warrington was represented by the Public Defenders' Office during his trial and appeal. His brother, Robert, was represented by private counsel up until his conviction. He then fired his attorney and a conflict attorney was appointed for both sentencing and appeal.

The appeal of both cases involved the same single issue. Both Defendants claimed that once the right of self-defense was triggered due to an aggressor being in their dwelling, then that right continued and the Defendants had a "license to kill" even after the intruder had been totally subdued. The Supreme Court did not accept that argument and held that if an intruder has been disabled so as to no longer pose a threat, then the continued use of deadly force was not justifiable. The Supreme Court upheld this Court's instruction stating same.

In his postconviction relief motion, the Defendant's allegations are frequently a stream of consciousness which mix potentially relevant legal concepts with issues that are totally irrelevant. Nevertheless, I am satisfied that with the benefit of the Rule 61(g) submissions and the evidentiary hearing, the Court can adequately address the grounds raised.

INEFFECTIVE ASSISTANCE OF COUNSEL

Many of the claims are based on allegations of ineffective assistance of counsel. Claims of ineffective assistance of counsel require that the movant establish deficient performance on the part of his attorney which actually prejudice the Defendant. The movant must establish a reasonable probability that but for his attorney's unprofessional errors, there is a reasonable probability that the

result of the trial would have been different. A reasonable probability is a probability sufficient to undermine the confidence of the outcome of the trial. Strickland v. Washington, 466 U. S. 668 (1984). The movant must establish both deficient performance and prejudice in order to present a successful claim of ineffective assistance of counsel. Simply put, if the movant fails to establish either the deficient performance prong or the prejudice prong, then the claim fails.

Movant's allegations as to deficient performance on the part of his attorney must be concrete and specific. Conclusory allegations do not support a claim. Younger v. State, Del. Supr., 580 A.2d 552 (1990)

GROUND #1

The Defendant complains that no record exists that he was indicted by the Grand Jury. He further claims that he was not indicted by a vote of 12 grand jurors.

The Court's file contains the indictment which was handed down by the Sussex County Grand Jury on October 17, 2000. It is signed both by the foreman of the Grand Jury and the secretary. There is no factual basis for the Defendant's claim that he was not properly indicted by the Sussex County Grand Jury. The Defendant mistakenly believes there must be a Grand Jury vote of 12 or more persons in order for the Defendant to be indicted. Pursuant to statute, the Sussex County Grand Jury shall consist of 10 members and it is necessary to have an affirmative vote of 7 members in order for the Grand Jury to return a true bill of indictment. 10 Del. C. §4505. This claim is denied.

GROUND 2

The Defendant complains that he was denied the opportunity to present his self defense theory to the Grand Jury. The purpose of the Grand Jury is to review the State's evidence to determine if there is probable cause that a crime was committed and probable cause that the Defendant committed the crime.

While the Defendant may have wanted to inject self-defense into the Grand Jury process, he presents no legal authority as to his right or entitlement to present testimony before the Grand Jury. He properly presented this defense at his trial.

This claim is dismissed.

GROUND 3

The Defendant complains that he received ineffective assistance of counsel in the pretrial stages of the proceedings leading to his conviction. Specifically, he alleges that his attorney was ineffective for failing to attempt to dismiss the State's vindictive prosecution; failing to attack the indictment; failing to move to dismiss the charges; failing to move for a change in venue; and the failure to file a Motion to Sever. As contained in the Rule 61 Motion, these are conclusory claims and state nothing more in support of them than what the Court has stated above.

All claims of ineffective counsel require allegations of specific deficient performance by counsel which were unreasonable from an objective viewpoint. The movant must show how and why his attorney did not perform up to reasonable performance standards and he must show that the deficient performance was likely to have negatively influenced the outcome of the trial. Since these claims are conclusory, they must be dismissed.

I note that some of these claims are raised in later claims of this same motion. Thus, to the extent the Defendant seeks to incorporate other portions of his Motion into Ground 3, I likewise incorporate the Court's rulings into denying same in Ground 3.

Finally, I will rule upon those claims that were raised in the testimony.

The complaint concerning the failure to move for a change of venue was addressed through testimony during the evidentiary hearing. Defense counsel testified he thought that a change of venue motion would have been futile and that the defense resources were better spent on other aspects of the

Defendant's case. The Court notes that this was not a case that created such county-wide publicity that it was difficult for the Court to seat 12 impartial jurors. Any murder case generates a certain amount of publicity. This case was no different. Despite the Defendant's feelings, the publicity involved in this case did not prejudice the Defendant. Therefore, had a Motion for Change of Venue been made, it would not have been granted.

Also raised at the hearing was testimony concerning the complaint that defense counsel did not adequately follow through on a Motion to Sever. Presumably the Defendant means a Motion to Sever his trial from that of his brother's charges. But the evidence presented at the evidentiary hearing was that both attorneys thought it best to try the case together. Andrew's attorney thought that they should join forces and that two heads were better than one. There was a sharing of resources. As will be seen later in this decision, the lawyers cooperated in the pretrial investigative portions of the cases as well as during trial. I note there were no antagonistic defenses. Andrew's attorney also was concerned that if a severance was granted, and Andrew's case was scheduled for trial first, that this would put his client at a strategic disadvantage because there was no guarantee that Robert would have testified at his trial.

Defendant has not established that his attorney was deficient in not seeking the severance, nor has he shown that he has been prejudiced.

These claims are denied.

GROUND 4 - VINDICTIVE PROSECUTION

The Defendant alleges the State knew or should have known that the victim had a history of dealing drugs and was a violent individual. The assumption, not stated, is that he got what was coming to him. Therefore, the Defendant argues that it was vindictive for the State to have brought criminal charges against the Defendant and his brother.

It appears that this claim is based solely on the State's comment in the opening statement that Defendants were "cold-blooded killers". The term "cold-blooded killers" was used by the State but I find there was nothing wrong with the use of that term based upon the context in which it was used. "Cold-blooded" means a lack of feeling or emotion. The State's characterization of the killing of Mr. Peco in cold blood was not unreasonable when one considers the evidence in the case, especially the chilling events which are recorded on the 911 tape. Mr. Peco was executed intentionally and cruelly. Thus the use by the prosecutor of the reference to the Defendants being "cold-blooded killers" was not misconduct. This claim fails.

GROUND 5

The Defendant's next claim is also based upon the State's reference to the Defendants as "cold-blooded killers". He claims the use of these words was plain error and the Court should have *sua sponte* given a curative instruction or granted a mistrial. For the reasons stated in Ground 4, I find that it was not misconduct on the prosecutor's part to reference the killing as having been done by "cold-blooded killers". Additionally I note, that Mr. Peco had 8 blunt force injuries to his head. He had 25 knife wounds, 13 of which were determined by the medical examiner to be stab wounds. Robert Warrington had a small cut on his finger and Andrew Warrington had a small cut on his leg. Based upon the gruesome manner of Mr. Peco's death and the 911 tape evidencing his pleas for help, his questions as to why he was being killed, and his pleas for mercy while the beating was taking place evidence that the killing took place with a lack of feeling or emotion. Again, I do not find the use of "cold-blooded killers" to be improper in this context.

GROUND 6

CONVICTION OBTAINED BY INADMISSIBLE EVIDENCE

The Defendant makes a general and conclusory complaint that he was convicted based upon inadmissible evidence. The Defendant claims that the events captured in the 911 tape and the fingerprint testimony was prejudicial and misleading and therefore should have been excluded. This evidence had substantial probative value and a D.R.E. 403 analysis would not have excluded this evidence had an objection been made.

The fingerprint testimony excluded both Defendants as having been the person who left the single print, in blood, on the phone. Mr. Peco could not be determined to have made the print nor was he excluded, based upon the quality of the print records of Mr. Peco.

The 911 recording of the final minutes of Mr. Peco's life was factually prejudicial to the defense. It allowed the jury to understand what took place and to make reasonable conclusions as to the events. It was chilling to listen to, but such is the nature of such relevant evidence. Its D.R.E. 403 prejudice did not outweigh its relevance.

Therefore, the attorney was not ineffective for not objecting to this evidence and these claims fail.

GROUND 7

INEFFECTIVE ASSISTANCE OF COUNSEL FOR
FAILURE TO INVESTIGATE THE STATE'S FORENSIC EVIDENCE

Ground 7 is a general complaint against defense counsel for not investigating the State's evidence. This claim is conclusory and it is denied. To the extent that it was developed at the hearings, I find that Andrew Warrington's defense attorney, and Robert Warrington's defense attorney, and their respective investigators, conducted a great deal of investigation prior to trial and were prepared for trial.

The defense teams worked together effectively. Much work was done by both defense teams and their efforts were shared in an effort to present their common defense theory. That theory was that Mr. Peco attacked them and they had no choice but to kill him. Robert Warrington's attorney noted the only difference of opinion they had as to their approach to the case was that he thought Andrew Warrington's defense team's efforts in pursuing the investigation and attack on the DNA evidence were futile.

It is only Andrew Warrington's opinion that the adversarial process broke down due to a failure of his defense team to make investigations.

Also contained in this allegation is a complaint his defense attorney should have filed a pretrial motion to dismiss his charges because the evidence was mishandled. The Defendant alleges that the 911 tape was tampered with. He is correct in the sense that it was enhanced through technology, but it was not altered in any deceitful manner. The attorney representing Robert Warrington also sought technological assistance in enhancing the tape. It was the joint conclusion of both defense teams that the enhanced tape provided to them by the State was accurate. There is no factual basis to conclude the State "tampered with" the evidence.

Finally, to the extent the Defendant injects Superior Court Criminal Rule 48 into the case as being a grounds for dismissal, I note that this case was prosecuted in a timely fashion, based upon it being first degree murder and also the time requirements for DNA evidence to be analyzed. These claims are dismissed.

GROUND 7(A) - FAILURE TO INVESTIGATE MR. PECO

Mr. Warrington complained that there was insufficient investigation into Jesse Peco's alleged propensities for violence and fighting. Robert Warrington made a similar claim. At the hearing on

December 2, 2004, Andrew Warrington specifically mentioned three names of people who should have been called. These were Ed Freck, Elwood Johnson, and John Ternaham.

At the December 9, 2004 hearing, Robert Warrington's attorney and Andrew Warrington's attorney addressed these allegations. I reference both the attorneys because they were working together as a team, communicating with each other, and exchanging information concerning the witnesses and strategy.

As to Ed Freck, he would not cooperate and speak with counsel.

As to John Ternaham, it was noted that he was in jail in Maryland. An out-of-state witness subpoena, was prepared but it was ultimately determined that this witness would not be helpful because his testimony might be perceived that Mr. Peco was "all bark and no bite". He knew of Mr. Peco's drug involvement but that was not an issue because it was fully presented to the jury through other testimony.

As to Elwood Johnson, the testimony was that Mr. Johnson was incarcerated in prison in Delaware. Defense counsel for Robert Warrington interviewed him but was not satisfied that he was a credible witness. While he did offer testimony concerning Mr. Peco's propensities, counsel knew that he had not seen Mr. Peco since 1996. The conclusion was that he was not a strong enough witness to take a risk on him.

It was also revealed that numerous other witnesses were investigated in a search to paint Mr. Peco as being a violent individual. Those witnesses either would not cooperate, did not have information which was helpful, or placed Mr. Peco in the "hot-shot", "loud mouth", or "all bark and no bite" category.

I note that both the attorneys for Robert Warrington and Andrew Warrington were aware of this Court's ruling on the use of allegations of a victim's prior aggression or prior violent conduct and how it may be used as self defense.

Finally, I note that there has been no proffer offered by either Defendant as to the testimony of any person who was not called at trial who would support this claim. The claim is dismissed as the Defendant has not proven deficient performance nor prejudice.

GROUND 8

INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

_____ In this claim, Andrew Warrington alleges that his defense attorney did not communicate with him sufficiently so that the Defendant could make informed choices as to whether or not to attack the evidence presented by the State at trial.

I am satisfied that the defense team of Mr. Andrew Warrington met with him on numerous times and communicated with him regularly.

While the Defendant may allege that he would have liked to have had more information, this does not establish a claim that his defense attorney was deficient nor has he established that had he received additional information, how that would have helped his case. There has been no showing that the claimed lack of communications in any way allowed inadmissible evidence to be introduced at trial. The conclusory claim that trial counsel was ineffective for his failure to communicate with the Defendant fails, and it is dismissed.

GROUND 9

INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

The Defendant argues that his attorney failed to communicate with him as to the issues which should have been raised on appeal. He also argues that his defense attorney's argument "was not put well enough into perspective". Basically, he argues that his defense attorney should have reargued the facts of the case to justify self defense.

The Defendant continues to be unwilling to accept the jury's verdict. He is unwilling to accept the legal proposition that he does not have a "license to kill" any intruder after that intruder has been rendered harmless. The Defendant fails to present any authority or argument as to what should have been argued to the Supreme Court in order to support the Defendant's present theories. The Defendant has not shown deficient performance nor has he shown any prejudice as to the work product of his appellate counsel, and therefore this claim is denied.

To the extent the Defendant interweaves the failure to challenge a change of venue issue on appeal, this claim is denied as it has been previously dealt with in this decision.

Finally, to the extent the Defendant argues that the trial judge should have recused himself due to the sentencing remarks, I note that he does not cite which remarks he feels were prejudicial, but I'll assume it is the Court's comment that the killing was done in cold blood. I am satisfied that the sentencing remarks were appropriate under the factual circumstances of this case. This claim is denied.

Finally, the Defendant makes another unrelated allegation. He argues that since a person can't plead guilty while under the influence of alcohol or drugs, the 911 tape should have been excluded because Mr. Peco had previously used drugs and/or was under the influence of drugs. This is a frivolous argument and it is denied.

GROUND 10

INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION

In this ground, the Defendant argues that there was insufficient evidence to support his conviction. The Defendant is mistaken. There was ample circumstantial evidence to support a one-sided fight. That combined with the direct evidence contained in the 911 tape evidence an intention to kill.

This claim is denied.

GROUND 11 - BRADY VIOLATIONS

The Defendant alleges that there were Brady and discovery violations. He alleges that there were witnesses' notes that were never produced to the defense. This is a conclusory allegation and therefore a conclusory response is appropriate. Even though there are no specific allegations, trial counsel was asked at the evidentiary hearing if he knew any basis for making such a claim. Trial counsel informed the Court he knew of no basis but recognized his recollection was based on a case that was tried several years ago. With these same limitations, this Judge does not recall any problems relating to the failure of the State to meet its obligations under the discovery rules or Brady v. Maryland, 373 U. S. 83 (1963). It is the Defendant's burden to make specific allegations. He has not done so. This conclusory allegation is denied.

GROUND 12

OUT-OF-COURT STATEMENTS

In this claim, the Defendant alleges that the DNA expert that testified for the State commented that certain portions of the testing process were conducted by others while under her supervision. The Defendant complains that this testimony should not have been permitted as it was hearsay and further that his attorney was ineffective for not objecting to the DNA expert's testimony based on these grounds. This ground is denied because under DRE 703, the expert is entitled to rely upon information which would normally be used in the field of expertise of that particular expert. The fact that a lab assistant assisted the expert in preparing the samples and in conducting the test does not mean that the DNA expert's opinion should be excluded.

I do not find that trial counsel was ineffective for not objecting to the testimony concerning the expert's use of the work product of her assistants.

For the aforementioned reasons, the Defendant's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

T. Henley Graves

THG:baj

cc: Karl Haller, Esquire
James W. Adkins, Esquire
Adam D. Gelof, Esquire
David M. Hume, Esquire