

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : Def. ID# 0202007080
v. :
JARID L. CUBBAGE :

O R D E R

On this 13th day of April, 2005, upon consideration of Defendant Jarid L. Cubbage's ("defendant") Motion for Postconviction Relief, the Commissioner's Report and Recommendations, defendant's appeal therefrom, and the record in this case, it appears that:

1) A Superior Court jury found defendant guilty, on October 8, 2002, on the charges of Robbery in the First Degree in violation of 11 Del. C. § 832(a)(2); Possession of a Deadly Weapon During the Commission of a Felony in violation of 11 Del. C. § 1447(a); Conspiracy in the Second Degree in violation of 11 Del. C. § 512(1); and Wearing a Disguise During the Commission of a Felony in violation of 11 Del. C. § 1239(a).

2) Defendant filed an appeal, and the Delaware Supreme Court affirmed his conviction and sentence. Cubbage v. State, 827 A.2d 30 (Del. 2003). Defendant thereafter filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61").

3) The matter was referred to the Court Commissioner for findings of fact and recommendation pursuant to 10 Del. C. § 512(b) and Superior Court Criminal Rule 62. The Commissioner has filed a Report and Recommendations recommending that the Court deny defendant's motion for postconviction relief. The Report and Recommendations are attached hereto as Exhibit A and incorporated by reference. Defendant filed an appeal therefrom, wherein he objects to all of the Commissioner's findings, conclusions, and recommendations.

NOW, THEREFORE, after careful and de novo review of the record in this action, I find and conclude as follows:

1) I incorporate by reference the Commissioner's Report and Recommendations for the purpose of setting forth the factual history, procedural history, and Rule 61 claims, and I will not repeat such herein.

2) Only defendant's ineffective assistance of counsel claims are not procedurally barred; Rule 61(i)(3) bars all other claims.

3) With regard to Claim 1, defendant objects to each of the Commissioner's findings, conclusions and recommendations. This Court will not detail each of the objections. Basically, he argues against each finding, conclusion and recommendation of the Commissioner and refines his arguments advanced in his Rule 61 motion. Defendant also argues that the prejudice prong of an ineffective assistance of counsel claim can be met if a defendant

shows the results were "fundamentally unfair or unreliable." Defendant is legally incorrect. In order to establish the prejudice prong, defendant must show that but for the attorney's unprofessional errors, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). To the extent he argues otherwise, his arguments fail.

The Commissioner has thoroughly discussed the facts and the law. Her findings, conclusions, and recommendations are valid and well-reasoned, while defendant's arguments are neither valid nor well-reasoned. I accept the Commissioner's findings and recommendations with regard to Claim 1.

4) With regard to Claim 2, defendant continues to misunderstand the factual scenario on which he bases his arguments. Again, the limitation the Court imposed was to defendant's benefit, and defendant's argument is meritless. I accept the Commissioner's findings and recommendations with regard to Claim 2.

5) With regard to Claim 3, defendant advances the same arguments he advanced in the Rule 61 motion. I conclude his assertions and arguments are invalid, as did the Commissioner. I accept the Commissioner's findings and recommendations with regard to Claim 3.

6) With regard to Claim 4, defendant argues the Commissioner's assumption that Detective Hudson would have

clarified his testimony is speculative. Defendant argues that the cross-examination would have resulted in the jury acquitting him. Defendant's speculative conclusion requires the Court to assume that the jury would have ignored the powerful tape of Daron Lewis, the testimony of Daron Lewis and Billy Wilson, and the physical evidence which clearly existed and the jury would have acquitted defendant because Detective Hudson said, in response to a vague question, he had no physical evidence, at a point in time when he actually had such evidence. The Court will not reach such an illogical conclusion.

I accept the Commissioner's findings and recommendations with regard to Claim 4.

7) With regard to Claim 5, defendant continues to argue his rights were violated when he was questioned about his alibi. Defendant continues to ignore the facts and law. He waived his right to remain silent; consequently, trial counsel had no basis for pursuing this argument on appeal.

I accept the Commissioner's findings and recommendations with regard to Claim 5.

8) With regard to Claim 6, defendant reargues the standard for the prejudice prong is the results were unfair or unreliable. This is legally incorrect. I accept the Commissioner's findings and recommendations with regard to Claim 6.

9) With regard to Claim 7, defendant argues that he was

unable to confront an adverse witness. Defendant has failed to show that the Commissioner's findings and conclusions were invalid. I accept the Commissioner's findings and recommendations with regard to Claim 7.

10) With regard to Claim 8, defendant makes no valid argument. I accept the Commissioner's findings and recommendations with regard to Claim 8.

11) With regard to Claim 9, defendant argues that the State deliberately failed to disclose that Wilson had stated to the police officer that he had worn the red and white doo-rag, and the Supreme Court would have reversed on that ground. There is nothing in the record to establish any deliberate non-disclosure of any such statement. In fact, there is not even concrete evidence to establish that Wilson ever stated to the police officer that he wore the red and white doo-rag. The Court merely has been assuming that statement was made in order to consider defendant's arguments under a best case scenario. In any case, the evidence against defendant was overwhelming. The Supreme Court would not have reversed on this ground and defendant cannot show the outcome would have been something other than what it was. I accept the Commissioner's findings and recommendations with regard to Claim 9.

FOR THE FOREGOING REASONS, IT IS ORDERED AS FOLLOWS:

- 1) The defendant's objections are rejected;
- 2) The thoughtful and well-reasoned Commissioner's Report and Recommendations are adopted by the Court; and
- 3) Defendant's motion for postconviction relief is denied for the reasons set forth in the Commissioner's Report and Recommendations, which I have adopted.

Richard F. Stokes
JUDGE

cc: Prothonotary's Office
Hon. Alicia B. Howard
Jarid L. Cabbage
John Brady, Esquire
James Adkins, Esquire

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : Def. ID# 0202007080
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COMMISSIONER'S REPORT AND RECOMMENDATIONS

Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61

Pending before the Court is a motion for postconviction relief which defendant Jarid L. Cabbage ("defendant" or "Cabbage") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). Cabbage also requests the Court appoint counsel in connection with the presentation

of this motion. Because the motion may be decided on the record, defendant has thoroughly advanced his arguments, and the issues are simple, no need exists to appoint counsel to represent defendant, and accordingly, I recommend no counsel be appointed for this postconviction proceeding.

This constitutes my report and recommendations on the pending postconviction relief motion this **15th day of March, 2005.**

On October 8, 2002, a Superior Court jury convicted defendant of the charges of Robbery in the First Degree in violation of 11 Del. C. § 832(a)(2); Possession of a Deadly Weapon During the Commission of a Felony in violation of 11 Del. C. § 1447(a); Conspiracy in the Second Degree in violation of 11 Del. C. § 512(1); and Wearing a Disguise During the Commission of a Felony in violation of 11 Del. C. § 1239(a). Defendant appealed to the Supreme Court; that court denied the appeal. Cubbage v. State, 827 A.2d 30 (Del. 2003).

In its decision, the Supreme Court succinctly described the commission of the crime, and I quote therefrom.

2. *** From May 2000 to February 2002, Cubbage worked at a Burger King in Sussex County, and on February 8, 2002, Cubbage worked at a Burger King in Rehoboth Beach as an assistant manager. As one of the assistant managers, Cubbage had a key to the restaurant safe. The safe also contained a combination lock and only the owners and three store managers (Cubbage, Michael Johnson, and Pamela Sue Bland) had both the key and the combination.

3. On February 9, 2002, at approximately 1:00 a. m., assistant manager Johnson was counting the daily receipts and placing \$ 1,407.03 in the night deposit bag. Jason Baull, an employee, assisted Johnson with the closing responsibilities. Baull's responsibilities included cleaning the restaurant and removing the trash while Johnson totaled the receipts.

4. While totaling the receipts, Johnson heard Baull calling him from outside the restaurant. Johnson laid the deposit bag on a storage room table and went outside

to investigate. Johnson saw two people dressed in black and one of the individuals had his arms around Baull. The larger of the two individuals had what appeared to be a 9 millimeter handgun pointed at Baull's head while the other individual had a baseball bat. Johnson also noticed a third person dressed in black and wearing black gloves trying to hide behind the store's utility box. All three of the individuals wore masks, and Johnson heard the individual with the bat address the gunman as "Daron." The gunman commanded Johnson not to do anything stupid or he would shoot Baull. Johnson recognized the gunman's voice to be that of Daron Lewis, a former employee at the Rehoboth Burger King from July 2001 through December 2001. Johnson also recognized the voice of the person with the bat to be William James Wilson III, another former employee from June 2000 to December 2001.

5. Lewis and Wilson took Johnson to the trash dumpster behind the restaurant and locked Johnson and Baull in the trash dumpster area. A brick wall with access through two wooden doors standing approximately 12 feet high surrounded the restaurant dumpster area. When Lewis and Wilson eventually ran away, Baull climbed over the wall and opened the doors for Johnson. Johnson then noticed that someone opened the previously locked drive-thru window and took the deposit bag. Johnson also inspected the store safe and noticed that the safe was still locked. Johnson then telephoned Pamela Sue Bland, the store manager, to notify her of the robbery. Bland went to the restaurant to meet with the State Police and then noticed that the safe was closed. The next morning, however, Bland opened the safe and discovered approximately \$ 595.00 missing from the safe.

The Delaware State Police notified Daron Lewis ("Lewis") and William "Billy" James Wilson III ("Wilson") they wished to talk to them. Both came to Troop 4 on February 10, 2002, and met with Detective Douglas B. Hudson, who was investigating the case.

After being read his rights, Lewis waived those rights and agreed to talk to the Detective. The officer recorded the interview.¹ Although Lewis initially denied he was present at the time of the robbery, he eventually confessed that he was present and told a version of facts similar to that set forth above with the notable exception that he was holding the bat, not the gun. He explained

¹The recorded interview was played to the jury. Lewis' testimony at trial was consistent with this interview.

that he, Wilson and Cabbage perpetrated the crimes. He identified Cabbage as the person who was hiding near the utility box and as the one who went inside and took the money from the restaurant. He also explained that after the robbery, the three entered Cabbage's car and drove to the Salvation Army on Route 1 where Cabbage removed some items from the trunk. Wilson and Lewis left Cabbage there, then drove to West Rehoboth where they hid the BB gun and bat used in the robbery. They thereafter picked up Cabbage and traveled to Salisbury, Maryland, where Cabbage gave a bag to "Joselle".

On February 12, 2002, Lewis took the Detective to the location of the bat and BB gun actually used in the robbery.

Wilson's story, as the recorded interview showed, was that he, Cabbage and Lewis went to Rehoboth after Cabbage and Lewis picked him up from church. He was adamant that they did not rob anyone.² However, Wilson later talked to the Detective at his preliminary hearing in February, 2002. At that time, he told the Detective "just about the exact same story as Mr. Lewis." Transcript of Preliminary Hearing in State v. Cabbage, dated February 28, 2002, at 7. The Detective did not record the interview. It never was clarified whether the Detective took notes of that interview. If he did, he did not produce them.

Wilson's trial testimony was similar to the version set forth above. What is significant to this pending motion is his testimony that he was wearing a red and white doo-rag as a mask at the time of the crimes. This red and white doo-rag was found in defendant's car after defendant's arrest.

The Detective also interviewed Cabbage on February 10, 2002. Cabbage agreed to talk

²This tape recorded interview also was played for the jury.

to the Detective after being read his rights. His reported knowledge about the robbery was limited; he knew that Johnson and Baull were robbed and put in the dumpster. The Detective told Cabbage he knew Cabbage had participated in the robbery. Cabbage's response was that the Detective might as well take him to jail; if the detective said he did it, then he did it. He claimed he did not know "Joselle". He said he did not know where the money was. After the Detective told him all he wanted was to get the money back, Cabbage stated that he could give him \$2,000.00, if that is all the Detective wanted.

The Detective arrested Cabbage. The police searched Cabbage's car and found four bandanas, a pair of black gloves, and a single black glove.

Cabbage's preliminary hearing took place on February 28, 2002. Defendant invokes testimony given at this hearing in support of the pending motion. The first pertinent exchange is:

Q. Okay. And did you also, you also discussed in your testimony whether any or all three were wearing a disguise on the occasion of this offense and what kind of disguise?

A. Yes. Mr. Lewis stated they had on all black clothing and had a shirt over his face. Said that Mr. Wilson and Mr. Cabbage had on black, possibly neoprene type ski masks.

Transcript of Preliminary Hearing in State v. Cabbage, dated February 28, 2002, at 8.

The second pertinent exchange is:

Q. So, was the gun and the bat tested for any sort of fingerprint evidence?

A. It's in the process of that now, sir. I don't know if it's been done yet.

Q. Okay. And so the only evidence that you really have against Mr. Cabbage is the statements by the two codefendants; is that correct?

A. Yes. Plus that matches up with the only people at the crime scene who would have known certain elements of what happened if they were there.

Q. You are circumstantially correct, but as far as any physical evidence or identification the only thing you have are the codefendants' statements; correct?

A. Yes, sir.

Id. at 16.

A third matter of importance is the Detective's testimony at preliminary hearings that he had spoken to Wilson at the time of his preliminary hearing and Wilson had told him "just about the exact same story as Mr. Lewis." Id. at 7.

Some of the discovery materials also are pertinent to the pending motion. At the time discovery first was produced, defendant's attorney was Thomas D.H. Barnett, Esquire. By letter dated April 25, 2002, the State of Delaware ("the State") provided discovery responses pursuant to Superior Court Criminal Rule 16. The State enclosed, with that letter, copies of the police reports and the criminal histories of Lewis, Wilson and Cabbage. The letter also provided in pertinent part as follows:

Rule 16(a)(1)(A): Relevant written, recorded or oral statements made by defendant or any juvenile or adult co-defendant in response to interrogation by a person then known by the defendant to be a state agent:

Defendants, Lewis, Wilson, and Cabbage made statements that were audio recorded, which are available for your inspection at a mutually convenient time. If you prefer, please forward three (3) blank tapes and copies will be made and forwarded to you.

Inspection of documents and tangible objects will be permitted upon reasonable notice and during normal business hours. Please contact my office to arrange for a mutually convenient time for inspection. This evidence includes, but is not limited to crime scene video, photos and items seized from 1998 Toyota. See enclosed copy of application, affidavit and return re: search of 1998 Toyota.

In early September, 2002, John Brady, Esquire was substituted as counsel for defendant

because Mr. Barnett's contract as conflict counsel expired. Trial was continued approximately a month to allow Mr. Brady the opportunity to "get up to speed".

By letter dated September 27, 2002, the State provided the following information:

It is my understanding that when you were substituted as counsel for the defendant in the place of Thomas Barnett, Esquire, you were provided the entire file from Mr. Barnett, which would have included the State's complete discovery package, dated April 25, 2002. Despite the fact that said formal discovery invited defense counsel to arrange a time to listen to audio tapes of the defendant or provide blank tapes, so that we could forward copies to defense counsel, I have heard nothing from defense counsel on this subject and; therefore, I am choosing to go ahead and provide copies of these audio tapes to you today. Please find enclosed copies of the following audio tapes:

1. Interview of Co-Defendant, Daron Lewis (2 tapes).
2. Interview of Co-Defendant, William Wilson.
3. Interview of Defendant, Jarid Cubbage.

In addition, please be advised that Det. Doug Hudson did an untaped oral interview of Co-Defendant, William Wilson, in the presence of his attorney, Mr. William Chasanov, on his preliminary hearing date, February 21, 2002, in which William Wilson admitted his involvement in the subject robbery and substantially corroborated the version given by Co-Defendant, Daron Lewis. The main inconsistency between Lewis and Wilson is that they each claim the other one had the gun.

I also enclosed herein, in advance of trial, the following "Jencks material":

1. Copy of audio taped interview of victim/witness - Michael Johnson;
2. Copy of audio taped interview of victim/witness - Jason Baull.

Finally, please find enclosed copies of motor vehicle and criminal records for witnesses: Jason Baull, Pamela Bland, and Michael Johnson. The records for Co-Defendants Lewis and Wilson should be in the previously mentioned April 25th discovery package.

Before the trial commenced, the defense was aware of every piece of evidence the State had except apparently for the testimony of Wilson that a red and white doo-rag which was found

in defendant's car during the police search was what Wilson used to mask his face during the robbery.

Trial commenced on October 2, 2002. Cabbage testified and presented an alibi defense; he maintained he was with his mistress, not the co-defendants, at the time of the robbery. The testimony of his mistress corresponded to defendant's.

After the conviction, defendant filed a motion for judgment of acquittal, which the trial court denied. Transcript of Proceedings on December 6, 2002, at 2-4. In rendering its decision, the Court stated:

The standard of review for the denial of a motion of judgment of acquittal is whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.

As the trial judge, of course, I heard all of the evidence in this case. Of course, the matter was submitted for a jury trial. The jury came back with a finding of guilt on the charges.

In this case, we had testimony from Daron Lewis and William Wilson, who were co-defendants, who previously entered pleas. They appeared as witnesses, and they set out in detail the involvement of the defendant in this episode. This was an episode where the three of them, the evidence shows, and certainly a rational fact finder could find this determination, planned to rob the Burger King. The two of them, Daron Lewis and William Wilson, did the outside work. Whereas Jarid Cabbage, who was also on the outside with them, went inside and took the money from the cash register.

There is overwhelming evidence of the defendant's culpability in this matter. And there was physical evidence introduced that supported the guilty verdict as well, black gloves, several bandanas found and seized by the police from the defendant's vehicle. Daron Lewis' taped statement. He said everybody, himself and the co-conspirators, had gloves on. And the taped statement of Lewis and Johnson refer to the defendant wearing a ski mask.

The defendant was found to be having keys to the safe in his possession. He had been an assistant manager at Burger King. The evidence would show a rational fact finder would rationally conclude, could conclude, that he knew the

combination, and that the method of the employees of the Burger King, and that he was the leader of the trio and was the man that went inside and got the money. So motion denied.

Id.

After being sentenced, defendant appealed his case to the Supreme Court, where he argued the trial judge should have granted his Motion for Judgment of Acquittal because the evidence was insufficient to support any of the four guilty verdicts and he could not be convicted of the count charging Possession of a Deadly Weapon During the Commission of a Felony because he never possessed either the BB gun or the bat during the robbery. Cubbage v. State, 827 A.2d. Defendant maintains in his pending motion that he also requested trial counsel to advance the following two arguments, but trial counsel failed to do so: error from a discovery violation of Superior Court Criminal Rule 16 and the Court erroneously admitted inadmissible evidence.

The Supreme Court held in pertinent part as follows:

9. We conclude that the State presented sufficient evidence to support the trial judge's decision to deny Cubbage's Motion for Judgment of Acquittal. While Cubbage denied participation in the robbery, the jury, as the determiner of witness credibility, was free to reject Cubbage's assertions and accept the contrary testimony of Lewis and Wilson.

10. With respect to the count of Robbery in the First Degree, the trial testimony of the various prosecution witnesses provided sufficient evidence for a rational juror to find Cubbage guilty beyond a reasonable doubt. In order to convict Cubbage of Robbery in the First Degree, the State must prove that Cubbage committed the offense of Robbery in the Second Degree and while in the course of the commission of that crime, Cubbage or another participant in the crime displayed what appeared to be a deadly weapon. n6 In order to prove Robbery in the Second Degree, the State must prove beyond a reasonable doubt that Cubbage, while in the course of committing theft, used or threatened the immediate use of force upon another person with the intent to prevent or overcome resistance to the taking of the property or to the retention of the property immediately after the

taking. n7 The trial judge instructed the jury on all of the statutory elements, including accomplice liability. n8 Cabbage does not claim any error in the jury instructions.

----- Footnotes -----

n6 11 Del. C. § 832(a)(2).

n7 11 Del. C. § 832(a)(1).

n8 11 Del. C. § 271.

----- End Footnotes-----

11. Johnson, the assistant manager, testified that he placed \$ 1,407.03 in the deposit bag the night of the robbery and that there was money in the store safe that evening. Johnson also testified that he saw three individuals and recognized two of the individuals (Lewis and Wilson) as former employees. Johnson also testified that the previously locked drive-thru window was open after the robbery, but the store safe was still locked. Later on Saturday morning, February 9, manager Pamela Sue Bland discovered approximately \$ 595.00 missing from the safe. Bland also testified that only possession of a key and knowledge of the safe combination could unlock the safe. According to Bland, only the restaurant owners, Johnson, Cabbage and she possessed keys to the safe. Thus, Cabbage's ability to access the safe constituted circumstantial evidence that Cabbage stole the money from the safe. Cabbage's ability to access the safe, Lewis and Wilson's testimony implicating Cabbage as the third robber, and the bandana and gloves found in Cabbage's car provided sufficient evidence for a rational juror to conclude that Cabbage took part in the Burger King robbery. Several witnesses testified that the robbers used what appeared to be deadly weapons (a gun and a baseball bat) during the commission of the robbery. Accordingly, the trial judge properly denied Cabbage's Motion for Judgment of Acquittal with respect to the charge of Robbery in the First Degree.

12. With respect to the conspiracy charge, both Lewis and Wilson testified that along with Cabbage, the three men traveled to Rehoboth Beach, purchased disguises at a dollar store, and discussed the plan to rob the Burger King. Based on this testimony, a rational juror could conclude that Cabbage conspired with Lewis and Wilson to commit the robbery. In addition, this testimony along with Johnson's testimony that the three robbers wore disguises could easily result in a rational juror concluding that Cabbage wore a disguise in the robbery.

13. While intent must be proved in order to convict on the four offenses charged,

that statutory element is normally proved by circumstantial evidence. 11 Del. C. § 306(c) states: "A person is presumed to intend the natural and probable consequences of the person's act." A rational juror could therefore reasonably infer that Cabbage's actions in planning the Burger King robbery with Lewis and Wilson, wearing a disguise during the robbery, and entering the restaurant to steal money were all actions done with the intent to commit the robbery offense. A juror could also rationally conclude that Cabbage had the required intent for conviction of the deadly weapon offense even though he did not possess the gun or the bat because the trial testimony revealed that Cabbage directed Lewis and Wilson to exchange the weapons before the robbery and told the defendants to discard the weapons in West Rehoboth after the robbery. n9

----- Footnotes -----

n9 See Appendix to State's Answering Brief at 22, 25, 28 (trial testimony of Daron Lewis).

----- End Footnotes-----

14. Finally, it was not necessary for Cabbage to have personal possession of either the gun or the bat for a jury to convict him of the Possession of a Deadly Weapon During the Commission of a Felony. "The defendant, by participating in the robbery, is responsible under Section 271 for the felony-weapons offense which was an integral part of the robbery." n10 Cabbage had vicarious accomplice liability despite not personally possessing the weapons because the gun and the bat were used as an integral part of the robbery and Cabbage participated in planning and committing the robbery.

----- Footnotes -----

n10 Brooks v. State, 367 A.2d 638, 639-40 (Del. 1976).

----- End Footnotes-----

Id.

Defendant filed his pending motion on April 27, 2004. He has raised numerous grounds for relief, which I will address below on an individual basis. However, before reviewing those

grounds, I first must determine if the grounds are procedurally barred pursuant to Superior Court Criminal Rule 61(i).³

The motion is not time-barred pursuant to Rule 61(i)(1), since it was filed within three (3) years of the date the Supreme Court issued its mandate on the appeal. Because this is defendant's first motion for postconviction relief, Rule 61(i)(2), which precludes the consideration of any claim not raised in a previously-filed postconviction motion, does not apply. Defendant does not raise any previously adjudicated claims; thus, Rule 61(i)(4) does not apply. However, the bar

³In Superior Court Criminal Rule 61(i), it is provided as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

- (A) Cause for relief from the procedural default and
- (B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that 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 of conviction.

which is applicable to several grounds is contained in Rule 61(i)(3).⁴

Defendant seeks to avoid the bar by arguing the cause for relief from not asserting these grounds previously is that his trial counsel was ineffective. However, “to use ineffective assistance of counsel to justify ‘cause’ for not asserting the claim earlier, the movants must establish that counsel was truly ineffective.” Holden v. State, Del. Super., Def. ID#s 9605000739, et al., Graves, J. (August 14, 1997) at 3, aff’d, 710 A.2d 218 (Del. 1998). To establish a claim of ineffective assistance of counsel, defendant must show that trial counsel’s representation fell below an objective standard of reasonableness and but for the attorney’s unprofessional errors, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). With regard to the actual prejudice aspect, “[d]efendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland v. Washington, 466 U.S. at 694.

In addition to using ineffective assistance of counsel as cause for relief from the procedural bar of Rule 61(i)(3), defendant also employs ineffective assistance of counsel to independently support several claims. Those claims are not procedurally barred since this is the first opportunity defendant has had to raise them.

I consider defendant’s contentions below.

⁴Besides making a showing as provided in Rule 61(i)(3)(A) and (B), defendant can avoid the procedural bars, pursuant to Rule 61(i)(5), by showing that the court lacked jurisdiction or that there is a colorable claim 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 of conviction. Defendant has not made any such showing; thus, I do not consider Rule 61(i)(5).

Claim 1

State misled the defense into proceeding to trial unprepared because of nondisclosure [sic]

The State entered Wilson's statements into evidence without first disclosing them to the defense.

This claim focuses on Wilson's statement at trial that the red and white doo-rag which was found in defendant's car was what Wilson used as a mask.⁵ Defendant maintains as follows. This was a surprise. No information the defense had before trial connected this red and white doo-rag to defendant. Also, this was the only physical evidence which tied defendant to the crime.

Trial counsel did not object to this testimony. Thus, the claim is procedurally barred unless defendant shows cause for relief from the procedural default. The cause defendant advances for relief is trial counsel was ineffective for not obtaining this information before trial by way of discovery and for not seeking its exclusion based upon a discovery violation.

The first step is to address whether the information was discoverable. It never was clarified whether the Detective had notes of the conversation with Wilson which took place at the preliminary hearing. If there were no notes, defendant was not entitled to the oral statements of Wilson pursuant to discovery. Superior Court Criminal Rule 16(a) (allows only for discovery of written or recorded statements of a codefendant, not oral statements); Dickerson v. State, Del.

⁵Defendant incorrectly argues that the oral interview with Wilson was not disclosed until just before trial. Defendant and his attorney were aware of the interview at the time of defendant's preliminary hearing in February, 2002. Transcript of Preliminary Hearing in State v. Cabbage, dated February 28, 2002, at 7, 17.

Supr., No. 353, 1992, Veasey, J. (December 21, 1993). Thus, under this scenario, trial counsel was not ineffective for not seeking disclosure of the notes during discovery or for not seeking exclusion of the statement on the ground discovery was violated.

I will assume, however, that the Detective took notes and failed to produce them. I also will assume that the notes would have reflected a statement by Wilson identifying the color of the doo-rag he wore.⁶

First, trial counsel was not ineffective for failing to file a discovery request to obtain this information; the State had undertaken to comply with Superior Court Criminal Rule 16 and was obligated to disclose this information. If any fault on trial counsel's part existed, it was for failing to object to the information's admissibility as a sanction for a discovery violation. I will assume that had trial counsel so moved, then the trial court would have stricken Wilson's testimony about the red and white doo-rag.

Defendant argues as follows:

Wilson's statements were central to the State's case against Cubbage because his statements was [sic] **the only** [emphasis added] evidence that offered physical evidence to link the defendant to the robbery and the nondisclosure of his statements prevented the defendant from preparing the best available defense and raising reasonable doubt in the minds of one or more of the jurors.

One of the "best available" defenses to which defendant alludes is the entry of a plea, implying he might have entered into a plea of guilty if he had known he was facing this evidence. However, he does not offer any concrete information regarding a plea having been offered and which he would have entered which would have produced a better outcome than what took place.

⁶Frankly, there is not much of a basis for making this assumption, but I make it in order to resolve this pending Rule 61 motion.

Vague, conclusory allegations fail. Younger v. State, 580 A.2d 552, 555 (Del. 1990).

Defendant also speculates that if he had been aware of this evidence, then the defense might have had DNA testing done on it to obtain information which might have impeached Wilson. This argument is too speculative to establish a reasonable probability that the outcome would have been different. See Younger v. State, 580 A.2d at 555, 556. It fails.

Defendant's claim also fails to the extent he argues that his trial counsel's failure to object to the admissibility of this testimony concerning the doo-rag was prejudicial because without it, he would not have been convicted. There was substantial, overwhelming evidence of defendant's guilt. The testimony and statements of Wilson and Lewis established that defendant participated in the robbery. The facts defendant had a key to the safe and the money in the safe was taken constitute additional evidence of defendant's participation in the crimes. The gloves found in defendant's car were tied to the robbery. If the doo-rag statement had not been a part of the State's case, then the outcome would have been different only if the jury had not believed the statements and testimony of Wilson and Lewis, had believed the testimony of defendant and his mistress, and had ignored the facts regarding defendant's access to the safe from which money was taken. The testimony about the red and white doo-rag was but one drop in a bucket of evidence. Defendant cannot show that the outcome of the trial would have been different if the statement regarding the red and white doo-rag had been excluded. This claim fails.

Claim 2

Denial of the right to confront witness

Trial Judge abused it's [sic] discretion when he limited the defense's cross-examination of codefendant Wilson.

Defendant maintains that the trial court limited defense counsel's cross-examination of Wilson. Defendant completely misunderstands what occurred. A review of the transcript of pages B-80 through B-87 shows the following. The State sought to introduce the tape recorded interview of Wilson pursuant to 11 Del. C. § 3507. In that interview, Wilson denies that he, Cubbage or Lewis participated in a robbery that night. However, the Detective later interviewed Wilson at his preliminary hearing and at that time, defendant told him that all three of them did participate in the robbery. Defense counsel sought to limit the questioning of the Detective during the 11 Del. C. § 3507 proceedings to Wilson's involvement in the robbery and to prohibit testimony and questioning about Wilson's oral statement that defendant was involved in the robbery. The Court granted that limitation. Thus, the limitation was to defendant's benefit. This is a meritless argument and the additional arguments defendant makes based on this faulty argument also are meritless. This claim fails.

Claim 3

The State used false evidence to gain a conviction

Prosecutor Adkins submitted pictures of doorrags and gloves plus the actual items as evidence used in the Burger King robbery when he knew that the State didn't possess any physical evidence against the defendant.

This argument of defendant's is confusing. I will, however, summarize it as best I can.

First, he argues that the following colloquy from preliminary hearings **establishes** the State had no physical evidence against him:

Q. So, was the gun and the bat tested for any sort of fingerprint evidence?

A. It's in the process of that now, sir. I don't know if it's been done yet.

Q. Okay. And so the only evidence that you really have against Mr. Cabbage is the statements by the two codefendants; is that correct?

A. Yes. Plus that matches up with the only people at the crime scene who would have known certain elements of what happened if they were there.

Q. You are circumstantially correct, but as far as any physical evidence or identification the only thing you have are the codefendants' statements; correct?

A. Yes, sir.

Transcript of Preliminary Hearing in State v. Cabbage, dated February 28, 2002, at 16.⁷

Defendant maintains that because the State had no evidence, it could not produce the photographs of the doo-rags and three black gloves unless the State introduced them through the defendant, a codefendant or a witness, who must have identified that evidence. Otherwise, the evidence was false and inadmissible. He wraps up his argument as follows:

The admitted evidence prejudiced the defendant because the State couldn't connect the items entered into evidence with the crime committed and the jury speculated that the defendant was guilty because the defendant possessed the means to commit the crime.

To survive the procedural bar, defendant must establish ineffective assistance of counsel with regard to this claim. Trial counsel was not ineffective for failing to object to the admission of the evidence; there was no ground for objecting. Defendant's premise fails. The Detective's statement at the preliminary hearing did not render any other evidence "false". The State identified the photographs in its discovery responses dated April 25, 2002. The State properly

⁷The context of the questioning allows for the inference that the Detective was stating he did not have identifying evidence against defendant, such as DNA or fingerprints. However, I will assume the Detective was stating he did not have any physical evidence in the case at that time. This assumption is illogical in light of the fact that the masks, gloves, BB gun and bat had been located by the time of this statement. However, I make this assumption for purposes of resolving the pending Rule 61 motion.

obtained the admission of the photographs. Since trial counsel was not ineffective, this claim fails.

Claim 4

Prosecutor solicited false testimony from Det. Hudson

Det. Hudson testified falsely at trial when he said the bags of items was evidence but eight months prior to trial, he testified that the only evidence he had against the movant was the statements of the codefendants.

Defendant again argues that the above-quoted passage from defendant's preliminary hearing establishes that, besides the statements of the co-defendants, all "evidence" and testimony entered in his case was false and the product of perjury.

This claim is procedurally barred unless the ineffective assistance of counsel claim constitutes cause for relief from that bar.

Even if I assume the Detective's statement actually was that no physical evidence existed,⁸ trial counsel was not ineffective for failing to object to all other evidence entered in the trial on this ground. The premise is preposterous and the argument fails.

To the extent defendant argues that trial counsel was ineffective for failing to impeach the Detective's testimony at trial with the preliminary hearing testimony, the argument fails. If trial counsel had sought to impeach the Detective, the Detective merely would have clarified his statement because he clearly had physical evidence against defendant as a result of the car search and location of the weapons. Defendant cannot establish that the outcome of the trial would have been different had trial counsel impeached the Detective with his preliminary hearing statement.

⁸See footnote 5, supra.

This claim fails.

Claim 5

Prosecutor Adkins commented on the movant's post-arrest silence

Prosecutor Adkins sought to impeach the movant's trial testimony by questioning him about why he didn't tell Det. Hudson about his alibi during police interrogations.

Defendant argues that the trial judge erred by allowing the State to question him about his "post-arrest silence" over a defense objection. The question asked was why did defendant not mention his alibi to the Detective when the Detective was questioning him.

Defendant argues trial counsel was ineffective in failing to pursue the issue on appeal. Trial counsel was not ineffective; there was no valid basis for such an argument. Defendant did not invoke his right to remain silent; he specifically waived it. Consequently, trial counsel had no basis for pursuing an argument that a comment on defendant's post-arrest silence was a constitutional violation. This claim fails.

Claim 6

Ineffective assistance of counsel

Mr. Brady failed to investigate and prepare for trial. Mr. Brady failed to obtain codefendant Wilson's statements after being asked by movant and the defense was unable to prepare for Wilson's damaging trial testimony.

Defendant specifies several instances of ineffectiveness. I do not readdress those claims defendant sets forth under this argument which I previously addressed when dealing with earlier claims. I address only the new arguments.

Defendant alleges trial counsel failed to keep him informed of what he was investigating and what were the results of his investigation. To the extent he fails to state in concrete terms how this failure affected the outcome of the trial, the claim fails. State v. Younger, supra. The argument that if trial counsel had investigated, he would have been aware that the State had no physical evidence against him is illogical because the State did have physical evidence against him. This claim fails.

Defendant argues trial counsel was ineffective because he did not seek to interview Wilson. This claim fails because defendant cannot show that Wilson and Wilson's attorney would have agreed to such an interview. Second, he cannot show how the outcome of the trial would have been otherwise because he has not established what information the interview would have produced. This claim fails.

Defendant argues trial counsel was ineffective because he did not seek to interview the Detective. Trial counsel had no right to interview the Detective, and defendant cannot show that the Detective would have agreed to an interview or how the outcome of the trial would have been otherwise because he has not established what information the interview would have produced. This claim fails.

Defendant argues that trial counsel did not aptly handle the surprise statement by Wilson that he wore the red and white doo-rag.⁹ He argues trial counsel should have sought a continuance based on a discovery violation.

The Court would not have granted a continuance. At the most, trial counsel may have

⁹Again, I must assume, without knowing for sure, that Wilson even mentioned a mask during the interview and that he described it.

obtained a striking of the testimony regarding the red and white doo-rag. However, as discussed earlier, defendant cannot establish the outcome of the trial would have been different in light of the significant amount of evidence against him other than the red and white doo-rag. This claim fails.

Defendant also argues that trial counsel did not effectively cross-examine Wilson about the red and white doo-rag. The defense was alibi. In support of that defense, it was necessary for trial counsel to establish Wilson and Lewis were not credible. Trial counsel's clear strategy was to show the inconsistencies in the co-defendants' stories and thereby, throw doubt on their credibility. Trial counsel cross-examined the Detective about the nature of the disguises the participants wore and established that Wilson's wearing of the red and white doo-rag was inconsistent with previous information regarding what he was wearing. Transcript of Trial Proceedings Occurring on October 7, 2002, at 79-82. He allowed Wilson and Lewis' stories to be told again and again and he pointed out the inconsistencies with each telling to attack their credibility. Transcript of Trial Proceedings Occurring on October 8, 2002, at D-132, D-137-38, D-142.

This was an effective trial strategy. Even if the Court concluded it was not, defendant cannot establish the outcome of the trial would have been any different as the jury clearly was aware of the inconsistencies regarding the color of the doo-rag and it still convicted defendant. This claim fails.

Claim 7

Ineffective assistance of counsel

Mr. Brady failed to investigate and prepare for trial. Mr. Brady failed to obtain Wilson's criminal record which has a conviction for shoplifting and he could have impeached Wilson's trial testimony.

On August 6, 2001, Wilson pled delinquent in Family Court to a charge of misdemeanor shoplifting. Trial counsel had this information. Defendant maintains trial counsel should have used this information to impeach Wilson.

Rule 609(d) of the Delaware Rules of Evidence ("D.R.E.")¹⁰ applies to this argument. As explained in Harris v. State, 695 A.2d 34, 43 (Del. 1997):

D.R.E. 609(d) generally prohibits evidence of juvenile adjudications for impeachment purposes unless the Superior Court is "satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. [Citation and footnote omitted.]

Accord Rhodes v. State, 825 A.2d 239 (Del. 2003); Rash v. State, Del. Supr., No. 85, 1992, Holland, J. (July 30, 1992).

In this case, to establish prejudice, defendant would have to show that evidence of Wilson's juvenile adjudication was necessary to a fair determination of defendant's guilt or innocence. Defendant has not made such a showing.¹¹ In any case, the jury was made aware of Wilson's convictions for robbery in the second degree and wearing a disguise during the

¹⁰In D.R.E. 609(d), it is provided:

Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The Court may, however, in a criminal case, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

¹¹To clarify, Wilson stated that he had not "been in trouble like this before", not that he never had been in any trouble before. Transcript of Trial Proceedings Occurring on October 3, 2002, at B-81.

commission of a felony. Trial counsel also attacked Wilson's credibility during cross-examination and in his closing argument. Thus, trial counsel undermined Wilson's credibility. Defendant cannot show prejudice from the failure of trial counsel to obtain the admissibility of Wilson's criminal adjudication for shoplifting. This claim fails.

Claim 8

Ineffective assistance of counsel

Mr. Brady failed to impeach Det. Hudson's trial testimony that the bags of items were evidence with his prior inconsistent preliminary hearing testimony that the only evidence he had against the defendant was the statements of the codefendants.

I addressed this claim in addressing Claim 4. It fails for the aforesaid reasons.

Claim 9

Ineffective assistance of counsel

Mr. Brady failed to raise on direct appeal the issue of Prosecutor Adkins [sic] failure to disclose.

Defendant cannot show that the Supreme Court would have reversed, even if trial counsel had raised the issue on appeal, since the discovery issue did not prejudice defendant's case because the evidence regarding the doo-rag was not crucial to the defendant's conviction. This claim fails.

CONCLUSION

After reviewing the record in this case and the defendant's submissions on the Rule 61 motion, it is clear defendant has failed to overcome the procedural bars of Rule 61(i) and failed to establish ineffective assistance of counsel. Therefore, I recommend that the Court deny his motion for postconviction relief for the reasons set forth herein.

Commissioner

cc: Prothonotary's Office
The Honorable Richard F. Stokes
Jarid L. Cabbage
John Brady, Esquire
James Adkins, Esquire