IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
	:	
v.	:	I.D. No.: 9807001798
	:	IN 98-07-0990 R1;
BRUCE GRONENTHAL,	:	IN 98-07-0992 R1;
	:	IN 98-07-1792 R1
Defendant.	:	

Upon consideration of Defendant's Pro Se Motion for Post-Conviction Relief - **DENIED**

Submitted: March 7, 2005
Decided: June 3, 2005

O R D E R

Whereas this 3rd day of June, 2005, defendant having filed his motion for post-conviction relief, it appears that:

(1) On February 4, 2000, defendant was convicted of Attempted Murder First Degree, Kidnapping First Degree, Unlawful Sexual Intercourse First Degree, and Unlawful Sexual Contact First Degree. On April 7, 2000, defendant was sentenced to two consecutive life sentences for the Attempted Murder and Unlawful Sexual Intercourse in the First Degree convictions, and an additional two years at Level 5 for the kidnapping conviction.

(2) The facts of the case were set forth in detail in the Delaware Supreme Court decision in defendant's direct appeal and will not be repeated here.[1]

(3) On May 4, 2000, defendant, by and through his attorney Joseph M. Bernstein, Esquire, appealed his conviction and sentence to the Delaware Supreme Court.

(4) On February 14, 2001, the Supreme Court remanded the case to this Court for the limited purpose of determining as a matter of law whether the evidence at trial established a temporal sequence of restraint of the victim's liberty substantially more than ordinarily incident to the underlying crimes for the charge of kidnapping to be submitted to the jury.[2]

(5) On May 11, 2001, this Court found that the testimony of the victim was insufficient to satisfy the analysis in *Weber*.[3] On September 6, 2001, the Supreme Court affirmed the conviction, and vacated the judgment of conviction for kidnapping.[4]

(6) On June 23, 2004, defendant filed a *pro se* motion for postconviction relief with this Court.[5] Defendant asserts six claims: incompetence to stand trial; ineffective assistance of counsel -failure of counsel to file an appeal and failure of counsel to present an alibi defense; evidentiary errors; prosecutorial misconduct; extreme emotional distress; and ineffective assistance of counsel – violation of defendants right to counsel.[6]

(7) As to incompetence to stand trial, defendant contends that at the time of trial he lacked the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparations of his defense. The crux of defendant's argument is that he exhibited irrational thinking when he refused a plea

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[1] *Gronenthal v. State*, 779 A.2d 876, 877-79 (Del. 2001) ("Gronenthal I").

[2] *Id*. at 883.; *see also Weber v. State*, 547 A.2d 948, 959 (Del. 1988).

[3] *State v. Gronenthal*, 2001 WL 789656 (Del. Super.).

[4] *Gronenthal I*, 779 A.2d at 883-84.

[5] *Gronenthal v. State*, Cr.A. Nos. IN98-08-1792, IN98-08-0990, IN98-08-0991, Motion for Postconviction Relief (June 23, 2004) ("Defendant's Motion").

[6] *Id.*

offered by the State and insisted on pleading guilty to all charges indicted, and thus did not understand the consequences of his actions.[7]

Approximately two months prior to trial, on December 17, 1999, defendant was evaluated by Dr. Alexander Zwil, M.D. ("Dr. Zwil"), for his competency to stand trial. The defendant had known psychiatric problems stemming from his service in Vietnam. Although the evaluation suggests defendant experienced certain mental disorders, in applying the *McGarry* criteria,[8] Dr. Zwil concluded that Defendant was competent to stand trial.[9] The standard for legal competency is codified in 11 *Del. C.* § 404 (a). The test is whether Defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.[10] No competency hearing was

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[7] Defendant also includes in his Motion for Postconviction Relief material related to medical grievances that he filed with the Department of Corrections. I find these materials irrelevant to the discussion of his competence to stand trial as they are unrelated in time to the time of the trial. The grievance was filed in January 1999 and appears related to events that occurred in November 1998. As the trial took place in February 2000, I find the information irrelevant to any claim of Defendant regarding his medical status and competence at the time of trial.

[8] The *McGarry* questions, are as follows:

> Performance of defendant role may require the ability to
> 1. Consider realistically the possible legal defenses.
> 2. Manage one's own behavior to avoid trial disruptions.
> 3. Relate to attorney.
> 4. Participate with attorney in planning legal strategy.
> 5. Understand the roles of various participants in the trial.
> 6. Understand court procedure.
> 7. Appreciate the charges.
> 8. Appreciate the range and nature of possible penalties.
> 9. Perceive realistically the likely outcome of the trial.
> 10. Provide attorney with available pertinent facts concerning the offense.
> 11. Challenge prosecution witnesses.
> 12. Testify relevantly.
> 13. Be motivated toward self-defense.

State v. Shields, 593 A.2d 986, 1000 fn. 23 (Del. Super. 1990).

[9] Psychiatric Evaluation of Bruce Gronenthal, performed by Alexander S. Zwil, M.D., Delaware Psychiatric Center Forensic Unit, Dec. 17, 1999 at 4-5. (Filed under Seal)

[10] *Shields*, 593 A.2d at 1004 (internal citation omitted).

requested or conducted because there was no bona fide doubt as to the defendant's competence to stand trial.[11]

On the day of trial, the prosecutor and defense counsel requested a period of time to consider a plea offer. The time was made available. Instead of accepting the plea, defendant insisted on entering a plea of guilty to all the charges. The following colloquy then took place after the jury had been impaneled, but before commencement of the trial:

> MR. BERNSTEIN: As you know, for the past 45 minutes or so, I have been having some discussions with Ms. Showalter about resolving this case by way of a plea.
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> I have had discussions with Mr. Gronenthal about a plea. The last discussion I had was basically that Mr. Gronenthal did not wish to accept the plea offer which the State tendered in writing, but wanted to simply offer to plead guilty to all of the charges in the indictment.
>
> Now, I don't know whether Mr. Gronenthal has changed his mind about that since I spoke with him five minutes ago. And he is the only one who can answer that.
>
> THE COURT: Mr. Gronenthal, please come up to the podium.
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> EXAMINATION BY THE COURT
>
> BY THE COURT:
>
> Q. I'm unclear as to your preferences at this time. I understood that you had previously been offered a plea prior to this week, sometime last week, for your consideration, which you had rejected, which, of course, is your privilege. And, therefore, the State has presented you with another offer. And your attorney now tells me that you are not interested in that offer, but want to plead to all of the charges.
>
> Now, I would like to hear from you what it is that you want to do.
>
> A. What I wanted to do and what I can do are two different things. I just by – pleading guilty to all of the – all of the charges that – that – that in the original

[11] *Williams v. State*, 378 A.2d 117 (Del. 1977); *cert. denied* 436 U.S. 908 (U.S.Del. May 15, 1978).

indictment. I don't want any of this stuff every – every time they want to change the plea, drop this, that, and then add other, you know, add charges. I want – they want me to plead guilty. I'm pleading guilty to all the original charges then.

Q. Well, Mr. Gronenthal –

A. I'm not doing the plea agreement in which they are substituting – you know, they are just changing things when they think they are going to do this. They are about to put somebody on the stand that they know is going to perjure themselves. And I'm not even interested in that part of the case. That's totally irrelevant. But I am interested in the fact there is going to be – two other people on the stand today are going to be on the stand and that this – this testimony, even though it is not relevant to the case itself, is going – is going to be harmful to other – to other people. And I – I – I – I just been – the whole way – the whole reason for me taking this to trial, which probably could have been settled two years ago, or almost two years ago, 20 months ago, if I had an attorney to start with, which I didn't, although I – supposedly I invoke my Miranda rights. I could talk to an attorney. I talked to one attorney, my first attorney, not Mr. Bernstein, for five minutes in that six month where he walked – walked away as he was telling me he is no longer my attorney because he went supposedly in open court and got himself dismissed. Open court to me is a court in which the defendant would be in, in that court, and when I asked –

Q. Mr. Gronenthal, you're getting into a subject that is way, way off the mark here. This is a very simple crossroad that we are at now.

A. You asked me a question. I was trying to explain.

Q. You're not responding to my question.

A. Yes, I am.

Q. You wandered way, way off.
This is the point. We got a jury sitting in a room ready to try this case.

A. I already said I would plead guilty –

Q. Well, it makes no sense –

A. – to you.

Q. – it makes no sense for you to enter a plea to everything charged when you have been offered a plea that doesn't carry as severe a penalty.

A. It's not the question of whether it does. It's whether – it's whether what – what the State is saying – if the State believes what they are saying is true, if the State believes I did these two kidnappings and I did this attempted murder and stuff, then that's what I'm pleading to. The State is saying I did this and I'm pleading to it. And that's – you know, that's my final offer. I don't want to sign – I don't want to sign a plea that is going to make them a little better because they took something off my thing if a – that's what they want.

Q. Your concern is not how the State looks. That's just not your problem. What you should be concerned about is what this does to you.

A. It doesn't matter. You know, 15, 30 years doesn't matter.

Q. Well, that's – that's clearly an irrational assessment.

A. To you. To you.

Q. And, therefore, it seems to me we ought to get on with the trial and let the jury decide the case.

A. I'm not allowed to plead guilty?

Q. You're allowed to plead guilty.

A. I'm pleading guilty then to all the charges.

Q. Well, you can do that tomorrow, but right now let's get on with the trial because your refusal to accept a plea that has half the minimum sentence is irrational.

A. Okay.

Q. And it suggests to me that you are doing this for inappropriate reasons. And I am not going to allow you to delay the trial any longer –

A. I'm not delaying.

Q. – just because you want to stake out your claim for something that is irrational.

A. Okay. I would just like to put my objection on the record.

Q. Well, your objection is noted, but right now we're going to continue the trial. I simply am not persuaded –

A. Okay.

Q. – that you understand the consequences of a plea to every charge at this point. And on that basis I couldn't accept it anyway.

A. I do understand the consequences.

Q. Take your seat. Let's get started.[12]

I observed at the time that Defendant appeared to be attempting to manipulate the proceedings and delay the trial. There was concern in my mind that the defendant doubted that the victim would have the courage to testify, and delaying proceedings was a method of adding to her stress. In order to eliminate any attempt to manipulate the trial, the trial commenced, but defendant was given the opportunity to accept the plea later in the day.[13] He did not ask later to enter a plea.

[12] Trial Transcript, Feb. 2, 2000 at pp. 3-8.

[13] The record reflects that just before court was adjourned for the day, the State noted that their current plea offer would remain open until 5:00pm that day, which allowed the defendant over three hours to confer with his attorney. At that point the Court stated,

> So this is what I think we ought to do. I think we ought to reconvene later in the day if after your – you'll have an opportunity now. I'll be away from the courthouse for a couple of hours. I'll be back at 4:00. And I'll be available at 4:30. And I would ask that [the defendant] be kept here, not transported. And if he is interested in entering a plea to all charges and accepting responsibility for all charges, then I'll be happy to entertain a

The submission by the State to this Rule 61 application makes a similar point: "While the Defendant's willingness the morning of trial to plead guilty to all charges appears "irrational," it can be just as easily attributed to his desire to avoid a trial and the presentation of emotional and embarrassing testimonial evidence by the State's witnesses."[14]

I am satisfied that Defendant was able to have meaningful consultations with defense counsel in order to assist in his defense and that he had both a rational and factual understanding of the charges against him, the trial proceedings and the consequences of a conviction.

Defendant raises in his motion the assertion that "during the week prior to and during my trial in February 2000 Gander Hill stopped my medications not under doctor's orders."[15] In his response to the motion, Joseph M. Bernstein, the defendant's attorney, says: "I was aware that Mr. Gronenthal was on medication, but I was not aware the medication had been stopped.[16] There is nothing in the record to support this factual assertion which comes four years after the trial.

The defendant's first ground for postconviction relief is without merit.

(8) Defendant next asserts ineffective assistance of counsel because counsel failed to file an appeal. Defendant's assertion is incorrect. The record demonstrates that

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plea, but there is no point in accepting or scheduling a plea if he is not going to accept responsibility for the charges.

Id. at p. 126.

[14] Letter from State dated March 3, 2005.

[15] Defendant's Motion, p. 2.

[16] Bernstein's letter to the Court dated Sept. 16, 2004.

Mr. Bernstein filed an appeal to the Delaware Supreme Court on behalf of the defendant on May 4, 2000,[17] which was subsequently ruled on by the Court.[18]

(a) Defendant next argues that counsel should have called witnesses to expose the lies that the State produced. Defense counsel replies that Defendant never provided him with an alibi defense or the names of any alibi witnesses. The State argues this claim is procedurally barred, pursuant to Superior Court Criminal Rule 61(i)(3).

I note that this is brought as a claim for ineffective assistance of counsel. Because such claims cannot be brought on direct appeal,[19] the State's contention that this claim is procedurally barred for failure to raise it on direct appeal is incorrect. However, I find the claim is without merit. Defendant still has not identified any witnesses that counsel should have called who would have exonerated him. Even if he had, "[t]he mere fact that other witnesses might have been available is not sufficient ground to prove ineffective assistance of counsel."[20]

This was not a close case. The identification of the perpetrator was not at issue. the Crime was discovered almost immediately and the defendant's responsibility was unmistakable.

This ground for postconviction relief is without merit.

(9) Defendant next asserts that the Court erred in permitting the jury to hear testimony from a fellow inmate, Nicholas M. David ("David"), which defendant contends was gained in violation of the 4th, 5th, and 6th amendments to the United States

[17] *Gronenthal v. State*, Notice of Appeal, No. 210, 2000, May 4, 2000.

[18] *See supra* notes 1, 2, and 4.

[19] *DuRoss v. State*, 494 A.2d 1265, 1267 (Del. 1985).

[20] *Flamer v. State*, 585 A.2d 736, 756 (Del. 1990) (internal citation omitted).

Constitution. David testified concerning allegedly incriminating statements Defendant made when they were both incarcerated.

This claim is procedurally barred by Rule 61(i)(3) as it was not asserted in the appeal to the Supreme Court.

(10) Defendant next asserts ineffective assistance of counsel for failure to present the defense of extreme emotional distress. Defendant appears to argue he suffers from a mental infirmity that does not rise to the level of insanity, but that should shield him from responsibility for his actions. Defense counsel admits that he did not consider presenting the defense of extreme emotional distress to the attempted murder charge. Counsel agrees that such a defense could have been presented, but that it would have required Defendant to admit he attempted to kill the victim.[21]

Extreme emotional distress is a mitigating defense that reduces, but does not eliminate, the charge.[22] The defense requires Defendant show that there is a reasonable explanation for the existence of extreme emotional distress.[23] Additionally, the event that triggers the distress must be something external from the accused and cannot have been brought about by the accused's own mental disturbance.[24] Defendant has not made a factual showing sufficient to suggest that such a defense existed. The circumstances of the crime do not suggest a reasonable basis for the crime external to the accused. Nor do the circumstances of the crime suggest that there was anything different about the day of

[21] *See* 11 *Del. C.* § 641 ("the fact that the accused intentionally caused the death of another person under the influence of extreme emotional distress is a mitigating circumstance, reducing the crime of murder in the first degree . . . to manslaughter. . ." (emphasis added)); *see also Ross v. State*, 2001 Del. LEXIS 58, at *7.

[22] *State v. Moyer*, 387 A.2d 194, 196 (Del. 1978) (noting statute reduced first degree murder to manslaughter).

[23] *Boyd v. State*, 389 A.2d 1282, 1288, *cert. denied*, 439 U.S. 969 (Del. 1978).

[24] *Moore v. State*, 456 A.2d 1223, 1226 (Del. 1983).

the crime to provide a trigger for distress – the day was just like any other day, except for the fact that Defendant's wife and son were not present, giving Defendant an opportunity to attack Smith.

Even if Defendant could make a showing that the decision of counsel not to present this defense fell below the standard for a reasonable level of assistance, Defendant cannot show that but for this allegedly ineffective assistance, the result would have been different.[25] I find this ground for postconviction relief of Defendant is without merit.

(12) Defendant's final ground for postconviction relief is titled "ineffective counsel/violation of defendant's sixth amendment." This ground is a restatement of the grounds for relief asserted in the previous claims. Having found the previous grounds to be without merit, I find this ground for postconviction relief is also without merit.

WHEREFORE, the Court finds no need for a hearing on this matter. The Court finds no grounds for postconviction relief. Defendant's Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Christina M Showalter, Esquire (DOJ)
Joseph M. Bernstein, Esquire
Bruce Gronenthal (Delaware Correctional Center)

[25] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).