IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : Def. ID# 9810001541

v. :

STEVEN A. BROUGHTON :

MEMORANDUM OPINION

DECISION DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

DATE SUBMITTED: June 28, 2005

DATE DECIDED: September 30, 2005

James W. Adkins, Esquire, Department of Justice, 114 E. Market Street, Georgetown, DE 19947

Steven A. Broughton, pro se, Delaware Correctional Center, 1181 Paddock Road, Smyrna, DE 19977

E. Stephen Callaway, Office of Public Defender, 14 The Circle, Georgetown, DE 19947

Stokes, J.

Pending before the Court is a motion for postconviction relief which defendant Steven A. Broughton ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). This is my decision denying the motion.

FACTS

On or about October 2, 1998, defendant was arrested on charges of rape in the first degree; kidnapping in the first degree; attempted robbery in the first degree; assault in the third degree; and terroristic threatening. On August 18, 1999, a jury found defendant guilty as charged. The Delaware Supreme Court outlined the evidence in its decision affirming the convictions:

> One morning at about 6:00 a.m., Broughton walked into the laundromat where Donna Truitt was working. He grabbed Truitt by the throat and demanded money. When Truitt told Broughton that there was no money, Broughton dragged her by the throat into the back room. Truitt struggled and Broughton squeezed her throat so hard that Truitt briefly lost consciousness. While in the back room, Broughton pulled Truitt's clothes off and raped her. When he was finished, Broughton warned Truitt that he would kill her if she told anyone.

Broughton v. State, Del. Supr., No. 515, 1999, Berger, J. (Feb. 1, 2001) at 2.[1]

On the day he was arrested, defendant gave a voluntary statement.[2] He provided the following information. He did not have sex with anyone on the morning of October 2, 1998. He

[1]The Supreme Court issued its mandate on February 20, 2001.

[2]This statement was introduced into evidence at trial.

left "Janet's" house in the early morning hours in order to be home by 3:25 a.m. His brother, Thomas "Tuffy" Broughton, and his mom were up when he got there. He went to bed and did not go out at all after going to bed. He awoke at 10:30 a.m. Latoya "Toy" Terry, Tuffy's girlfriend, was there when he awoke. He and Toy went to the laundry mat at around 11:30 to 12:30 on the morning of October 2, 1998.

The statement thereafter reads as follows:

> Q. Did you go to the laundry mat before you went home at 03:25 a.m.
>
> A. Why would I go to the laundry mat when its [sic] not even open.
>
> Q. Did you at any time of the early morning hours of 10-2-98 go in the Williams Coin Op Laundry Mat prior to 1130 or 1230 that morning.
>
> A.. No.
>
> Q. Do you always use the Williams Coin Op Laundry Mat to wash your dirty clothes.
>
> A. Yea. ... I know the old lady that limp [sic], that wears glasses. I think it [sic] Doris's sister or Clarences [sic]. I ain't sure.
>
> Q. Do you know what time the laundry mat opens
>
> A. No.
>
> Q. Do you use the laundry mat on a weekly basis.
>
> A. I like to where [sic] all my stuff. I don't wash my clothes every week.
>
> ***
>
> Q. Did you have sex with anyone during the early morning hours of 10-2-98.
>
> A. No.
>
> Q. Did you get back up after you [sic] mom took Tuffy to work.

A. No.

***

Q. Do you know where you were prior to going to Janets [sic].

A. My house. I went from my house to Janet's house.

Q. Do yo [sic] know the person [sic] name you had sex with during the early morning hours of 10-2-98.

A. No. Noboy [sic] I didn't have sex with nobody.

BREAK 6:12 PM 10-2-98

RESUME 6:32 PM 10-2-98

***

Q. Were you home at 4:00 a.m. on 10-2-98.

A. Yea.

Q. Why did your mother tell us you weren't home.

A. Maybe because my mother got right up off the couch and went out.

Defendant stated he understood every question and he did not wish to make any corrections to the statement. Even after being charged, defendant stuck to his defense that he did not have sex with the victim. In his affidavit, defendant's trial counsel states that as of October 27, 1998, after being charged with the crimes, defendant continued to deny the charges to his defense team. It was only after testing established that defendant had sex with the victim on October 2, 1998, that defendant changed his defense to one of consensual sex.

At trial, defendant was the sole witness for the defense. His defense was that he had consensual sex with the victim sometime before 3:30 a.m. on October 2, 1998. He testified that

the victim provided him sex in exchange for drugs. However, he did not have any drugs to give her. According to him, the victim falsely accused him of the crimes because he failed to provide the drugs and he belittled her after the sex.

Besides the story that he and the victim had consensual sex in exchange for drugs, there were other areas of defendant's testimony which differed from his initial statement to the police:

1) He seldom washed his clothes at the laundry; instead, his mother would do them versus he used the laundry mat to wash his dirty clothes.

2) He previously had provided the victim with cocaine using his girlfriend as a go-between versus no mention of such information.

3) The laundry mat was open at 3:15 that morning and he would not know the laundry mat normally did not have lights on at 3:15 a.m. nor would he know the operating hours of the laundry mat versus his questioning why he would go there before 3:25 when it was not even open.

At trial, defendant maintained he did not tell the Delmar Police the whole truth when he was interviewed because it was none of the officer's business with whom he had sex, he was concerned about his girlfriend finding out about it, he thought he was being questioned on drug charges, not a rape charge, and he would not tell the police the missing information "in the field of work ... [he] was in." Defendant, however, called these rationales into question by his own testimony. He testified that the police told him about the rape charge during a break in the interview. After that break, he had the opportunity to change his statement. Instead, he responded "No" to the question of whether there were any corrections in the statement that he wished to make.

Defendant also stated on cross-examination that his brother Thomas "Tuffy" Broughton knew he got home at 3:30 but Thomas Broughton was not at the trial that particular day.

When asked if his version of the story was true, why did the victim not immediately name him as the attacker, he maintained she did not know him even though she had been buying drugs from him via his girlfriend for about a year.

After sentencing, defendant appealed to the Supreme Court and raised two issues:

> (i) there was insufficient evidence to support independent convictions on the kidnapping charge and the underlying rape and assault charges; and (ii) the jury instruction on kidnapping was an incorrect statement of the law.

Broughton v. State, supra at 1.

On February 9, 2004, defendant commenced this postconviction proceeding by filing his initial motion. He thereafter submitted a memorandum, which included affidavits in support of some of his arguments. E. Stephen Callaway, Esquire ("trial counsel") responded thereto by affidavit. Later in this opinion, I address each of defendant's arguments. However, in order to provide a context for those arguments, it is necessary first to touch upon a few of his arguments pertinent to the affidavits and to summarize the contents of the affidavits he provided as well as trial counsel's affidavit.

Defendant states that he provided trial counsel with the names of the following persons to talk to: Betty Broughton, Thomas Broughton, Latoya Terry, Janet and Alice Wilson, Bryan Daniels, Alex Nichouls,[3] Brian Bratten, and Lawrence Polk. He also states the following persons were present for his trial but Mr. Callaway told them to leave because their testimony was not needed: Thomas Broughton, Betty Broughton, and Bryan Daniels.

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[3]He also spells this name as "Nichols".

Defendant submitted the affidavits of Thomas Broughton, Betty Broughton, Bryan Daniels, and Brian Bratten. I detail below the contents of the affidavits.

1) Thomas Broughton - The date of his affidavit is May 2, 2003. He was going to testify that defendant arrived home at 3:30 a.m. on the morning in question. He also witnessed the victim receive drugs from defendant on the corner of the house, in the back of the house, and at the laundry mat.

2) Betty Broughton - Her affidavit is dated January 21, 2004. Mr. Callaway interviewed her at her home. She told him that defendant was at home at 4:00 a.m. and did not leave while she was there. She left for work between 6:15 a.m. and 6:30 a.m. while defendant was still asleep. I digress here to note that in his statement, defendant explains that his mother would have told the police he was not home at 4:00 a.m. "[m]aybe because my mother got right up off the couch and went out."

3) Bryan Daniels - This affidavit is dated December 6, 2002. He would have testified he had known the victim for a long time and he has witnessed the victim meet with defendant on several occasions in his backyard and along the building to receive drugs.

4) Brian Bratten - His affidavit was dated October 31, 2000. He was willing to testify he had seen the victim meet defendant on the side street and along side of his house to receive drugs. Unlike the other three, Mr. Bratten does not contend that he was present before trial but was told to leave.

These affidavits are conclusory. Significantly, not one of these persons states that he or she told defendant's trial counsel that he or she would testify to the information set forth in the affidavit. This omission means that defendant has not established that trial counsel was aware of

to what these persons allegedly would testify. Nonetheless, if considered, they would establish defendant to be a drug dealer, not a "hustler", contrary to his testimony. ("So I'm basically what I call a hustler, a runner, not a dope dealer.") Furthermore, they contradict defendant's trial testimony that he did not supply drugs directly to the victim. Instead, he testified the drugs were delivered to the victim via his girlfriend, Melody, whom he labeled a "go-between".[4]

Because defendant has not submitted affidavits from Alex Nichouls, Latoya Terry or Lawrence Polk, the Court ignores defendant's unsupported contentions as to what those persons might have said.

Trial counsel's affidavit is alternatively summarized and quoted below.

> When he [defendant] was interviewed by my staff on October 27, 1998, he denied all of the charges. He said he had alibi witnesses saying he was with them at the time of the offense. He provided us with the names of Betty Broughton, Thomas Broughton, Latoya Terry, and Janet and Alice Wilson.
>
> On November 10, 1998, my investigator spoke with Beth [sic] Broughton, the Defendant's mother, Thomas Broughton, the Defendant's brother and Latoya Kimbal Terry. His mother and brother were able to verify the times the Defendant came and went. Latoya, who was also at the house that morning was also able to tell about going to the laundry between 10 and 11 am on the day in question.
>
> Attempts were made to locate Janet and Alice Wilson by sending them letters and calling the telephone numbers we were given by the Defendant. In August of 1999, my investigator was sent to serve them with subpoenas for the trial. At that time he located Alice Wilson at the IGA store in Delmar and Janet Wilson at the Delmar Shore Stop. Both told my investigator they were not going to be any help to the Defendant because they were not going to lie for him.
>
> We also were given the name of Bill Beale who lived at #7 East East Street in Delmar. My investigator when [sic] there and was told there was no such person at [sic] Bill Beale. The only males that lived at that address were Turvor Beal and his father James Beal both of whom claimed no knowledge of the Defendant or

[4]Significantly, he omits his girlfriend's name from being identified to the defense team as a witness for anything.

this matter.

Mr. Callaway then explains that it was after this time and after an analysis of semen located in the victim's vagina was determined to belong to defendant that defendant then told the story that the sexual encounter was consensual.

Mr. Callaway then states:

> The Defense subpoenaed Betty Broughton, Thomas Broughton, Latoya Terry, Janet Wilson, Alice Wilson, and Bill Beale. I have examined my file and I do not find where Mr. Broughton ever gave me the names of Bryan Daniels, Bryan Bratten or Lawrence Polk as potential witness. Mr. Broughton claims I called Mr. Nichols by phone but was unable to reach him. I don't recall this happening nor do I have any record of this in my file.
>
> No one has ever stated to me having seen the Defendant and victim being together nor has anyone ever said they saw the Defendant giving or receiving drugs from the victim.
>
> Exhibit D is an affidavit from Thomas Broughton. My staff and I interviewed Mr. Thomas Broughton prior to trial. He never made the statement about seeing the Defendant with the victim or ever made the statement about the Defendant giving the victim drugs to either my investigator or myself. Exhibits F and G are statements from Brian Bratten and Bryan Daniels. The first time I ever heard their names is when I read the Post Conviction Petition of the Defendant.
>
> The Defendant admitted having sex with the victim at the laundry mat at or near the time of the alleged crime. He claims it was done in exchange for drugs. There was no one present when this took place. Betty Broughton, Thomas Broughton, and Latoya Terry each would have been able to testify as to the Defendant's movements on the day of the crime but none were able to testify about what happened at the laundry mat. NONE OF THEM EVER SAID THEY WERE AWARE OF THE DEFENDANT GIVING THE VICTIM DRUGS FOR SEX. [Emphasis in original.]

Defendant responds as follows.

With regard to the assertions that witnesses would have testified that they saw defendant and the victim having contact before the rape, defendant states:

Callaway claims none of the witnesses said they had seen me and the victim together nor did anyone say I had sold her drugs, but the question is now, did he ask?!

Thus, defendant supports trial counsel's position that no witnesses ever told him before the trial that they had evidence which could bolster defendant's contention that he previously had sold the victim drugs.

Defendant admits the name of Bill Beale was incorrect; he should have given trial counsel the name of James Beale. He disputes he did not give Mr. Callaway the names of Bryan Daniels, Brian Bratten, Lawrence Polk and Alex Nichouls. That dispute is irrelevant for the following reasons. First, he has not provided an affidavit from Lawrence Polk or Alex Nichouls. Second, he has not established that Brian Bratten or Bryan Daniels told trial counsel before the trial that they had seen the victim meet with the defendant to receive drugs.

DISCUSSION

Since the Court can resolve this matter without a hearing, the case is ready for decision. I will address each claim below and deal with the procedural bars within those claims.[5] The three

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[5] In 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 in 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

year time bar in effect when defendant filed his motion does not preclude defendant's claims. Rule 61(i)(1).

I first address the claims which defendant does not place within the context of ineffective assistance of counsel.

Defendant alleges there was insufficient evidence of attempted robbery in the first degree. However, he did not raise that claim on appeal. Thus, it is procedurally barred by Rule 61(i)(3). Since defendant does not make any effort to overcome the procedural bar, the claim fails.

Defendant alleges there was insufficient evidence on the kidnapping and rape charges. He raised those issues on appeal, and the Supreme Court found against him. These issues have been adjudicated previously; thus, they are barred. Rule 61(i)(4). Since defendant has made no effort to overcome this procedural bar, these claims fail.

Defendant argues his sentence was excessive. That issue should have been raised on appeal. Defendant does not seek to overcome the procedural bar of Rule 61(i)(3). The failures to raise the issue on appeal and to overcome the procedural bar of Rule 61(i)(3) result in a denial of that claim.

(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.

I now turn to the ineffective assistance of counsel claims. In a few situations, defendant seeks to overcome the procedural bar for failing to raise the claim before the trial court or on appeal by asserting trial counsel was not effective. 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.

Defendant makes several arguments with regard to the waiver of his preliminary hearing and the waiver of his right to indictment by a Grand Jury. Upon the advice of John F. Hyde, Assistant Public Defender, defendant waived his right to a preliminary hearing and indictment by the Grand Jury.

He first argues that Mr. Hyde was not his attorney. That is not correct. The Public

Defender's office was representing him. Mr. Hyde, a member of that office, was his attorney.

Defendant argues he was coerced to waive his preliminary hearing and it was not a knowing and intelligent waiver because Mr. Hyde falsely told him he would be better off waiving and he failed to tell him the Grand Jury would not indict.

Defendant does not produce any evidence of coercion; the coercion claim fails. The waiver form clearly stated that he was waiving indictment and the matter would proceed by information. Thus, defendant cannot show he was not informed of this information. Defendant actually did receive the benefits of these waivers: the case proceeded quicker than it otherwise would have and the defense received discovery information, including the police report, sooner than it otherwise would have. Trial counsel was not ineffective.

Even if the Court assumed trial counsel was ineffective, defendant has not established any prejudice. He speculates the charges could have been lessened or dropped if he had had a preliminary hearing or if the Grand Jury had considered the case. He cannot show that to be the case, particularly when the State met, at the trial, a much greater burden than was required at preliminary hearing or a Grand Jury proceeding. This claim fails.

Defendant interweaves several arguments regarding trial counsel's representation of him. He argues that trial counsel did not adequately investigate the case with regard to the victim's bad reputation, did not adequately confer with defendant, did not interview and/or present witnesses who corroborated his case, did not present the correct defense, was ineffective in cross-examinations, was ineffective in openings and closings, failed to object to the lack of corroborating evidence of attempted robbery, and failed to get blacks on the jury.

Defendant's most substantial claims are that trial counsel did not call witnesses to

corroborate parts of his defense.

First, defendant argued that others had seen the victim buying drugs from him. Defendant did not testify that way; instead, he said Melody was his go-between. To have produced these other witnesses would have resulted in trial counsel impeaching his own client. Furthermore, as I concluded in the earlier portion of this decision, defendant never established that anyone told the defense team, before the trial, that they had seen the victim and defendant engage in drug transactions. Defendant's only response is that trial counsel should have asked. The reasonableness standard does require a trial attorney who is unaware that a witness has certain information to ask about that information. Nor does it require a trial attorney to produce witnesses who would impeach his own client. This claim fails.

The second area of corroboration concerns that of time. Defendant has produced only one piece of information which might help him in this case, that being his mother's affidavit that he was home at 6:15 - 6:30 that morning.[6] This area suffers from the same defect as the other. There is nothing which establishes that defendant's mother told trial counsel her son was home at 6:15 - 6:30. Since defendant has not clearly established trial counsel was in possession of this alleged information, he has not established ineffectiveness with regard to his trial counsel.

Even if trial counsel had been aware of this information, it was reasonable for defense counsel not to call the mother. The information that was in evidence regarding the defendant's mother and timing was that she said defendant was not home at 4:00 a.m. and that his mother had gone out at 4:00. Her testimony would have been subject to attack and would have resulted in

[6]His brother's information that defendant came home at 3:30 in the morning is of no help to defendant. He could have gone back out. His location at the time the victim alleges the crimes occurred is what is significant.

further emphasizing the inconsistencies between defendant's statement and his trial testimony. As trial counsel concluded, since the mother did not witness the episode, the best thing to do was to call only the defendant to testify and let the jury decide who was telling the truth. That decision was reasonable under the circumstances. I conclude there was no ineffective assistance of counsel in this situation.

Even if trial counsel was ineffective for not calling the mother, defendant cannot show the outcome of the trial would have been different. Again, as noted, the testimony of the mother was problematical in light of other evidence that she or defendant were not at home around 4:00 a.m. There is nothing about the mother's statement in her affidavit that defendant was at home between 6:15 and 6:30 which establishes the jury would have found defendant not guilty. This claim fails.

Defendant contends that his trial counsel advanced a "was not present and did not commit the crimes" defense when the actual defense was consensual sex resulting in retaliatory accusations by the victim. The Court's recollection of this case, which is supported by a review of the transcripts, including those of the opening and closing statements, is that trial counsel did present the desired defense. At no point does defense counsel attempt to assert or argue that defendant did not have sex with the victim. The defense did question the DNA expert witness, but the questioning sought clarification of testimony; it did not seek to discredit the expert.

Trial counsel clearly had a backup plan should the jury disbelieve defendant's version of events. That backup plan was to obtain convictions on lesser-included offenses.

Trial counsel adequately cross-examined witnesses and pointed out inconsistencies. Defendant, with 20-20 hindsight, seeks to review numerous statements made and advances

arguments within the context of his version of the facts. The jury rejected his version of the facts. The Court does not conduct a "Monday morning quarterback" review of the case.

In light of defendant's statements to the police and the subsequent results of the DNA testing, I conclude trial counsel's defense of defendant was reasonable. Defendant has not established ineffective assistance of counsel.

Defendant argues trial counsel was ineffective with regards to the jury. He maintains that his jury was all white and trial counsel did not have any blacks put on the jury. He also vaguely maintains the jury was biased against him. That vague allegation fails.

Only six of the sixty-eight members of the jury panel were black. The defense used all six of its strikes. Petitioner unreasonably and without a factual basis claims that the top of the alphabet contains only the names of white people and by calling jurors alphabetically, he was deprived of black jurors. The premise of this argument is meritless. The claim fails.

Defendant asserts that the prosecutor was guilty of misconduct, and trial counsel was ineffective for failing to object to it. He alleges:

> Prosecution used language during closing arguments that prejudiced the defendant. Prosecution demanded jury, during closing arguments, to find defendant guilty of attempted robbery, so they could also find defendant guilty of 1rst [sic] degree rape. Didn't allow jury to choose.

A review of the closing arguments shows that defendant incorrectly characterizes the prosecutor's argument. The premise is incorrect; the claim fails.

Defendant argues trial counsel was ineffective for not objecting to errors of the trial court. He alleges the trial court, during sentencing, "called defendant out of is [sic] name and said he had a need for criminal treatment." At sentencing, the Court called defendant a predator. There

was no basis for trial counsel to object to that label. This claim fails.

Defendant also argues trial counsel was ineffective for not objecting to the Court's response to a jury question. Defendant's assertions with this regard are too vague to address. Even if the Court assumed trial counsel was ineffective, defendant has failed to establish prejudice in that he has not shown how the outcome of the trial would have been anything other than what it was. This claim fails.

For the foregoing reasons, the Court denies defendant's motion for postconviction relief.

IT IS SO ORDERED.

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Richard F. Stokes