SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

November 29, 2005

John M. Franklin
SCI
P.O. Box 500
Georgetown, DE 19947

RE: State v. Franklin, Def. ID# 0304010407

DATE SUBMITTED: September 2, 2005

Dear Mr. Franklin:

Pending before the Court are the following motions of John M. Franklin ("defendant"): motion for postconviction relief filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"), motion for an evidentiary hearing on the Rule 61 motion, motion to expand the record to include a letter from his sister stating that he always was mentally "slow", motion for the retention of a psychiatrist to conduct a mental health evaluation on defendant, and motion for my recusal from considering the other motions. This is my decision denying all of the pending motions except the one to expand the record to include his sister's letter.

On February 25, 2004, after a six (6) day jury trial, the jury found defendant guilty of five (5) counts of rape in the first degree causing an injury, one (1) count of terroristic threatening, and one (1) count of endangering the welfare of a child. On February 25, 2004, this Court sentenced defendant as follows. On each rape in the first degree count, he was sentenced to twenty-five (25) years at Level 5, for a total of one hundred twenty-five (125) years; the first

fifteen (15) years of each sentence was mandatory as required by statute. 11 Del. C. § 4205. On the terroristic threatening conviction, the Court sentenced defendant to one (1) year at Level 5. On the endangering the welfare of a child conviction, it sentenced him to one (1) year at Level 5, followed by six (6) months at Level 3.

Defendant appealed to the Delaware Supreme Court. That Court affirmed the judgment of the Superior Court. Franklin v. State, Del. Supr., No. 106, 2004, Ridgely, J. (March 2, 2005).

The first motion I consider is the one to recuse myself. Set forth below is the law which guides my decision on this motion.

A judge is required to be impartial in actuality and in appearance. Canon 3C of the Delaware Judges' Code of Judicial Conduct codifies this standard. Therein, it is provided in pertinent part:

> Disqualification. (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) The judge has a personal bias or prejudice concerning a party....

As explained in Los v. Los, 595 A.2d 381, 384-85 (Del. 1991):

> Where the basis for the alleged disqualification is a claim, under Cannon 3C(1), that the Judge "has a personal bias or prejudice concerning a party," no per se or automatic disqualification is required. Previous contact between the judge and a party, in the same or a different judicial proceeding, does not require automatic disqualification. [Citations omitted.] To be disqualified the alleged bias or prejudice of the judge "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." [Citation omitted.] ...
>
> When faced with a claim of personal bias or prejudice under Canon 3C(1) the judge is required to engage in a two-part analysis. First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality. [Citation omitted.]

The fact that adverse rulings were made against a defendant in the previous proceedings does not provide a reason for recusal. Weber v. State, 547 A.2d 948, 952 (Del. 1988), reargu. den., 571 A.2d 948 (Del. 1988); Brown v. State, 840 A.2d 641 (Del. 2003); Manchester v. State, Del. Supr., No. 351, 1997, Berger, J. (April 3, 1998); In the Matter of the Petition of Joseph A. Wittrock for a Writ of Prohibition, 649 A.2d 1053 (Del. 1994); Haskins v. State, Del. Supr., No. 188, 1991, Moore, J. (Aug. 19, 1991); State v. Fink, Del. Super., Def. ID# 0003008673, Vaughn, R.J. (July 19, 2002) at 2-3. Previously having sentenced a defendant is not enough to require recusal. Miller v. State, Del. Supr., No. 236, 1994, Hartnett, J. (May 9, 1995). Again, to repeat one of the holdings in Los v. Los, 595 A.2d at 384, the alleged bias or prejudice "`must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" Accord Jackson v. State, 684 A.2d 745, 753 (Del. 1996); State v. Fink, Del. Super., Def. ID# 0005008005, Vaughn, J. (June 14, 2002) at 5-6, aff'd, 817 A.2d 781 (Del. 2003).

The objectivity is viewed, not through the defendant or his attorney's eyes, but from an objective observer's viewpoint. State v. Phillips, Del. Super., Def. ID# 0201017168, Ableman, J. (July 3, 2003) at 12-13. As explained in State v. Phillips, supra at 16-17:

> [T]here is a compelling policy reason for a judge not to disqualify herself at the behest of a party who claims an appearance of prejudice, without a factual or reasonable objective basis to do so. In the absence of genuine bias, a litigant should not be permitted to shop for a judge of his or her choosing. ... In short, the orderly administration of justice cannot be subject to a party's self-created, unsupported claims of prejudice or the appearance of bias.

A party must set forth facts showing impartiality or the claim fails. Bennett v. State, Del. Supr., No. 110, 1994, Holland, J. (December 19, 1994); Browne v. State, Del. Super., Def. ID# 93K00678, Ridgely, P.J. (May 11, 1993), aff'd, Del. Supr., No. 184, 1993, Moore, J. (Dec. 30,

1993).

In the case at hand, defendant argues that the trial court "show's [sic] appearance of impropriety" and that the trial court will not treat his Rule 61 motion fairly. In support thereof, he argues the following. This Judge has presided over three trials where he was a defendant.[1] This Judge made pretrial rulings in the case at hand which favored the State of Delaware ("the State"). Those rulings were with regard to prior bad acts, and they allowed for testimony beyond the bad acts which "contaminated the integrity and fairness of the trial." It was clear during sentencing that this Judge "harbored strong feeling [sic] about Franklin's drinking and acts against his wife" and the Judge "apparently viewed the rape of Mrs. Franklin as an attack on the judicial process." Finally, he believes the Judge's comments at sentencings in October, 2003[2] and February, 2004, prejudice him from receiving a full and fair review of this Rule 61 motion.

I have reviewed the transcript of the January 30, 2004, sentencing of defendant on his driving under the influence conviction in State v. Franklin, Def. ID# 0304010407A. I have

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[1]At one point, the following charges were pending against defendant in one case: rape first causing an injury (5 counts); terroristic threatening; endangering the welfare of a child; driving under the influence (fourth offense); unlawful sexual contact in the third degree (2 counts); and sexual harassment. I granted defendant's motion to sever the various charges to prevent prejudice to him. The order provided that the rape first, terroristic threatening and endangering the welfare of a child charges would be tried in one trial (State v. Franklin, Def. ID# 0304010407C); the unlawful sexual contact in the third degree and sexual harassment charges would be tried at another trial (State v. Franklin, Def. ID# 0304010407B); and the driving under the influence charge would be tried at a third trial (State v. Franklin, Def. ID# 0304010407A). I presided over each trial. Defendant was convicted of the driving under the influence charge and the charges in the case at hand. He was acquitted of the unlawful sexual contact in the third degree and sexual harassment charges.

[2]Defendant was convicted of driving under the influence on October 28, 2003, and sentenced thereon on January 30, 2004. Apparently, it is this sentencing of January 30, 2004, to which defendant is referring.

reviewed the transcripts of the trial and the sentencing in this matter. I have reviewed the Presentence Report which was prepared in connection with defendant's sentencing on the driving under the influence conviction. I presided over three trials involving defendant and sentenced him in two of those cases as well as on a violation of probation in another case. My exposure to defendant through these judicial proceedings has led me to conclude he has an alcohol problem and when drinking, he commits crimes. Because defendant has continued to drink and commit crimes over a long period of time, I concluded the safety of the community was of paramount importance and he was not the type of person who should be returned to the community. I also concluded he obsessively wanted to control one of the victims and would pose a danger to her if not incarcerated. I expressed these opinions at the time I sentenced defendant in this case. I have no other opinions regarding defendant. I do not have any personal bias or prejudice towards him. I am satisfied that I can consider the pending motions free of bias or prejudice.

Furthermore, there is absolutely nothing in the record or in defendant's motions which would provide any objective basis for concluding that the Court's consideration of these postconviction matters will inhibit the public's confidence and integrity in the judicial system. To restate, defendant has not set forth any facts or evidence which would establish a lack of impartiality.

In conclusion, I deny the motion to recuse.

I now turn to the merits of the motion for postconviction relief, which contains two claims of ineffective assistance of counsel. Since this is the first time defendant could advance these claims, they are not procedurally barred.

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.

The Supreme Court recently has expressed the necessity of obtaining an affidavit from trial counsel where a defendant asserts claims of ineffective assistance of counsel. Guinn v. State, Del. Supr., No. 52, 2005, Holland, J. (Sept. 7, 2005) at 5; Horne v. State, Del. Supr., No. 520, 2004, Holland, J. (Aug. 5, 2005) at 5-6. The affidavit requirement is important to the first prong of defendant's burden. However, because I rule that defendant cannot establish the prejudice prong even if he shows trial counsel was ineffective, no need exists for the affidavit to be provided.

Defendant's first argument is that trial counsel was ineffective because she failed to object to an immediate sentencing and failed to offer mitigating evidence at his sentencing. The only non-conclusory argument he advances in connection with this claim is that trial counsel should have produced mitigating evidence that he was mentally slow. In support thereof, he seeks to include in the record a letter from his sister explaining that he was mentally slow.[3]

As defendant correctly notes, this Court sentenced defendant immediately upon his conviction. In January, 2004, the Court had reviewed the previously-referenced Presentence

[3]This letter does not establish his family was poor and was unable to obtain help for him, which is an argument he seems to make.

Report which the Investigative Services Office prepared upon defendant's conviction on a felony driving under the influence charge. This Court noted the day before the verdict was returned in this case that it would be a waste of taxpayer resources to require the preparation of another Presentence Report merely a month after the last report had been submitted and announced that the Court was prepared to sentence defendant should he be convicted. Transcript of February 24, 2004, proceedings at F-99. The Court also stated: "So that means that if there is anything that you want to say tomorrow from the defense's viewpoint, you should be ready. I just wanted to give you a heads-up." Id.

I will assume that trial counsel should have presented the mitigating evidence defendant references. However, he cannot establish the outcome would have been different. The Court was aware, through the Presentence Report, that defendant was of below average intelligence. Since the Court already had that information when it sentenced defendant, defendant cannot establish prejudice and this claim fails.

Defendant next argues that trial counsel was ineffective because she failed to file a motion that this Court recuse itself from presiding over the trial in this matter. In support thereof, he argues as follows. This Judge presided over two other trials of defendant before this one took place. The Trial Court had prior knowledge of defendant's drinking, mood swings, and prior "bad acts". The Trial Court knew too much prejudicial information to be making pretrial rulings or presiding over the trial. Finally, it is obvious this Judge "harbored strong feelings about Franklin's prior D.U.I., Drinking and mood swings against his wife."

I will assume that trial counsel should have filed the motion to recuse. Defendant, however, cannot meet the prejudice prong; i.e., he cannot show that the outcome of the trial

would have been other than what it was.

I refer defendant to the standards for recusal set forth earlier. I also note these additional principles. "[A] judge's participation in prior proceedings involving a defendant does not per se disqualify his participation in subsequent, unrelated proceedings." Weber v. State, 547 A.2d at 952. Furthermore, as explained in State v. Fink, Del. Super., Def. ID# 0003008673, Vaughn, J. (July 19, 2002), at 2-3:

> It is generally held that the fact that a judge has presided over an earlier trial involving a defendant does not disqualify that judge from presiding over a later trial involving the same defendant. [Citation and footnote omitted.]

I can conclusively state that I would not have granted a motion to recuse. I did not then, and I do not now, feel personal bias or prejudice towards defendant. Furthermore, defendant has not cited any fact which demonstrates that the Court's participation as the trial judge in this case inhibited the public's confidence and integrity in the judicial system.

Since defendant cannot establish the prejudice prong, this claim fails also.

For the foregoing reasons, I deny defendant's motion for postconviction relief. In light of the foregoing, no need exists for an evidentiary hearing, and I deny that request, also. Finally, because defendant did not present any evidence or argument to support the appointment of a psychiatrist, I deny that motion.

In conclusion and for the foregoing reasons, I deny each of defendant's pending motions with the exception of the motion to expand the record to include his sister's letter.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Carole J. Dunn, Esquire
Adam D. Gelof, Esquire