

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
HECTOR S. BARROW and	§	ID. NO. 9506017661
JERMAINE BARNETT,	§	ID. NO. 9506017682
	§	
Defendants.	§	

**OPINION AND ORDER**

**ON THE DEFENDANTS'  
MOTIONS FOR POSTCONVICTION RELIEF**

**Submitted: August 5, 2005**

**Decided: December 6, 2005**

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**Toliver, Judge**

Before the Court is the Defendants' Motions for Postconviction Relief which have been consolidated for disposition. Upon consideration of the Defendants' motions and the State's response, that which follows is the Court's resolution of the issues so presented.

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**STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS**

On June 25, 1995, Tom Smith, co-owner of Black Sheep Sports, a business involving the buying and selling of firearms, was killed during the robbery of that store. Arrested shortly thereafter were Jermaine Barnett, Hector Barrow, and Lawrence Johnson, all from New York City, New York. Each was initially indicted by the Grand Jury on August 7, 1995 and charged with having committed Murder First Degree/Intentional, Murder First Degree/Felony-Recklessness, Murder First Degree/Felony-Criminal Negligence, Robbery First Degree, Burglary Second Degree, Conspiracy First Degree, Conspiracy Second Degree and Possession of a Firearm During the Commission of a Felony. Barrow and Barnett were reindicted on February 18, 1997 for reasons unrelated to the legal viability of the original indictment.

After a four-week trial, beginning April 17 and concluding May 15, 1997, Barrow and Barnett were convicted on all the above mentioned counts. The first degree murder conviction resulted in the imposition of death sentences.

On direct appeal, the Delaware Supreme Court reversed the

intentional murder convictions on the basis that the admission of Johnson's redacted statement violated the Defendants' right to confront the witnesses against them as guaranteed by the Sixth Amendment of the U.S. Constitution and Article I, § 7 of the Delaware State Constitution. Separate error was found in the Superior Court's refusal to permit Barnett to present evidence of his cooperation as mitigation in the penalty phase. However, the Supreme Court did find that there was sufficient evidence, absent the disputed statement, to support the conviction of felony murder as to both Barnett and Barrow. The affirmance of the felony murder convictions required a new penalty hearing because of the Confrontation Clause violations.

The second penalty phase hearing was held June 26 through June 28, 2001. On January 4, 2002, after reviewing the evidence and weighing all other relevant factors, this Court imposed life sentences on both Defendants for the convictions of felony murder/first degree. The Defendants now seek relief from the convictions and sentences.

Defendant Barrow, filed his motion for postconviction relief on January 27, 2005, pursuant to Superior Court Criminal Rule 61 (hereinafter referred to by rule only). Defendant Barnett, filed a similar motion on January 31, 2005. Although filed separately, these motions were consolidated for disposition. The Defendants collectively claim that they are entitled to the

relief sought due to the following: (1) ineffective assistance of counsel; (2) prosecutorial vouching and misconduct; (3) convictions against the legal weight of the evidence; (4) trial court bias and partiality; and (5) imposition of an illegal sentence. Defendant Barrow further argues that circumstances of his arrest violated the fourth amendment prohibition against warrantless searches and seizures.

The State responded to the motions by letter dated August 4, 2005. It contends that the claims of ineffective assistance of counsel and trial court bias should fail because the Defendants make only general and conclusory assertions which fall short of meeting the requisite burden of proof. The claims of prosecutorial vouching and misconduct, convictions against the legal weight of evidence, and the illegal arrest of Barrow have been previously and extensively litigated thus barred by Rule 61 the State further argues. Lastly, the State contended that since the Supreme Court found sufficient independent evidence for the felony murder convictions, and the minimum sentence for such convictions is life imprisonment, the proper sentence was imposed.

### **DISCUSSION**

Before the Court can reach the merits of a motion for postconviction relief, the movant must overcome the substantial

procedural bars contained in Rule 61(I).<sup>1</sup> Under Rule 61(I)(1), postconviction claims for relief must be brought within three years of the final conviction of the movant, unless the movant asserts a retroactively applicable Constitutional Right that is newly recognized.<sup>2</sup> Any ground for relief not asserted in a prior postconviction motion is thereafter barred unless consideration of the claim is necessary in the interest of justice.<sup>3</sup> Further, grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for procedural default, and (2) prejudice from any violation of the movant's rights.<sup>4</sup> Any ground for relief that was formerly adjudicated in the proceedings leading to judgment of conviction or in a prior postconviction proceeding is thereafter barred from consideration, unless reconsideration of the claim is warranted in the interest of justice.<sup>5</sup>

The procedural bars set forth in Rule 61(I)(1)-(3) may also be lifted where the defendant establishes a colorable claim that there

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<sup>1</sup> *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990); *Saunders v. State*, 1995 WL 24888, at \*1 (Del. Supr.).

<sup>2</sup> Super. Ct. Crim. R. 61(I)(1). Note that the period within which to bring Rule 61 claims was changed from three years to one year, effective July 1, 2005. It applies to all cases where the judgment of conviction becomes final after that date.

<sup>3</sup> Super. Ct. Crim. R. 61(I)(2).

<sup>4</sup> Super. Ct. Crim. R. 61(I)(3).

<sup>5</sup> Super. Ct. Crim. R. 61(I)(4).

has been a "miscarriage of justice" under Rule 61(I)(5). A colorable claim of "miscarriage of justice" occurs when there is a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.<sup>6</sup> This exception to the procedural bars is very narrow and is only applicable in very limited circumstances.<sup>7</sup> The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."<sup>8</sup> In this case, the Court must agree with the State and defense counsel that the petitions filed by the Defendants are without merit.

The Defendants' motions are procedurally barred under Rule 61(I)(1) because they were filed "more than three years after the judgment of conviction [became] final." Because neither Defendant appealed his most recent sentence, those sentences became final on January 4, 2002. Since the Defendants do not claim that they are now entitled to the relief sought based on a retroactive application of a newly recognized constitutional right, their claims were barred as of January 3, 2005.

The Defendants' claims of prosecutorial vouching and misconduct along with the contentions that their convictions against legal weight of evidence are barred under Rule 61(I)(4)

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<sup>6</sup> Super. Ct. Crim. R. 61(I)(5).

<sup>7</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>8</sup> *Id.*

because they were previously litigated before the Supreme Court in 2000 during the Defendants' appeal of their initial convictions. Likewise, Barrow's claim of an illegal arrest is barred under Rule 61(I)(4) because that issue was previously litigated in a suppression motion before the Superior Court and on direct appeal. Those claims having been litigated and final decisions rendered, this Court finds that the interests have been served and there is no miscarriage of justice which warrants any further review.

The Defendants' claims that an illegal sentence was imposed upon them are also barred by Rule 61(I)(4). As stated above the Supreme Court found sufficient evidence for the felony murder convictions independent of the disputed statement. The Defendants were subsequently sentenced to life sentences, the minimum sentence for such convictions. As a result, the interests of justice do not warrant a review of the claims by this Court, nor does the Court find a miscarriage of justice based on the assertions so presented.

The record is unclear as to whether the issues of the trial court's bias or partiality were fully litigated or even raised at all. If they were fully litigated and resolved they are indeed barred by Rule 61(I)(4). In the event that the claims were not raised at all, Rule 61(I)(2) prohibits raising them at this time. Further, the claims that the trial court was biased or partial were only generally supported by conclusory assertions. Accordingly, there is no interest of justice which would warrant further review

of the claim, nor is the fairness or reliability of the proceedings in question which would justify review under Rule 61(I)(5).

Under the standard outlined in *Strickland v. Washington*,<sup>9</sup> the Defendants must first demonstrate that counsel's representation fell below an objective standard of reasonableness if their claim of ineffective assistance of counsel is to prevail.<sup>10</sup> Second, they must show that counsel's actions were prejudicial to the defense, creating a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.<sup>11</sup> The *Strickland* standard is demanding and under the first prong of the test, there is a "strong presumption that the representation was professionally reasonable."<sup>12</sup> The Defendants must also "[o]vercome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."<sup>13</sup>

The Defendants list various grounds in support of their claims of ineffective assistance of counsel, including counsels' failure to conduct a proper pretrial investigation and failure to provide an adequate defense. This Court's review of the record reveals

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<sup>9</sup> 466 U.S. 668 (1984).

<sup>10</sup> *Id.* at 694.

<sup>11</sup> *Id.*

<sup>12</sup> *Stone v. State*, 690 A.2d 924, 925 (Del. 1996); *Flamer* 585 A.2d at 753.

<sup>13</sup> *Strickland*, 466 U.S. at 689.



that the investigation, which was crafted and conducted by the defense, resulted in the suppression of key State's evidence and the ultimate reversal of the intentional murder convictions that had previously resulted in death sentences. Simply put, defense counsels' efforts literally saved the Defendants' lives, thereby evidencing, that counsels' representation did not fall below an objective standard of reasonableness.

The Defendants having failed to prove the first prong of the *Strickland* test, it not necessary to reach the second prong i.e., whether the defendants had been prejudiced by counsels' representation. Even if the Defendants had proven that defense counsel performed below the required standard, they have offered no credible evidence that the outcome of the trial would have been different or its integrity unchallenged if counsel had performed differently. Either way the result is the same.

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**CONCLUSION**

In light of the foregoing, the Court concludes that the Defendants have failed to establish a basis upon which the relief sought can be granted. Therefore, the motions must be, and hereby are, **dismissed**.

**IT IS SO ORDERED.**

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**CHARLES H. TOLIVER, IV**  
**JUDGE**

CHT, IV/lat  
oc: Prothonotary