# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR NEW CASTLE COUNTY

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| STATE OF DELAWARE | |
| v. | I.D. #0107010230 |
| ROBERT K. GARVEY, | |
| Defendant | |

Submitted: February 27, 2006
Decided: May 25, 2006

Upon Defendant's Motion for Postconviction Relief.
**DENIED.**

**ORDER**

Martin B. O'Connor, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Robert K. Garvey, Smyrna, Delaware, *pro se*.

COOCH, J.

This 25th day of May, 2006, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. Robert K. Garvey ("Defendant") was arrested on July, 15, 2001, and then indicted on August 13, 2001, for Murder First Degree (two counts), Robbery First Degree, Attempted Robbery First Degree, Conspiracy First

Degree, Conspiracy Second Degree, Possession of a Firearm During the Commission of a Felony (two counts), and Carrying a Concealed Deadly Weapon (two counts). Defendant was indicted along with four other co-defendants: Donial Fayson, Rebecca King, Leonard Manlove and Tracy Vanderworker. The State prosecuted the Murder First Degree charges as capital cases.

2. On November 15, 2001, a trial in this case was scheduled for October 23, 2002. However, during an office conference on August 13, 2002, counsel for co-defendant Donial Fayson, Joseph A. Gabay, Esquire requested a stay of co-defendants' criminal proceedings, which was granted by the Court.[1] The stay was unopposed by Defendant. On September 12, 2002, then-President Judge Ridgely issued Administrative Directive No. 2002-1, which effectively stayed all trials and penalty hearings in First Degree Capital Murder cases until the Delaware Supreme Court could determine certified questions of law in the case of *Brice v. State*.[2] Pursuant to that Directive, Defendant's original trial was stayed and ultimately was rescheduled. On January 16, 2003, the Delaware Supreme Court answered

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[1] Office Conference Proceeding, Docket Item ("D.I.") 32, Goldstein, J. (Aug. 13, 2002).

[2] 815 A.2d 314 (Del. 2003) (holding that amendments made in 1991 to 11 *Del. C.* § 4209 were constitutional in light of the United States Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002)).

the certified questions of law that were at issue in *Brice*.[3] Then, on January 27, 2003, then-President Judge Ridgely rescinded Directive No. 2002-1 and issued Administrative Directive No. 2003-4, which lifted the stay on pending First Degree Capital Murder cases. The Court then scheduled a new trial date of September 23, 2003. On February 25, 2003, the Superior Court found that a conflict existed between Defendant and his Public Defender counsel, James Brendan O'Neill, Esquire and James D. Nutter, Esquire, and they were allowed to withdraw as counsel.[4] Jan A. T. Van Amerongen, Jr.,

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[3] *Id.* at 326-27.

[4] The genesis of the conflict in part was Defendant's accusation that "pretrial counsel James Brendan O'Neill, Esq. verbally assaulted the defendant and used racial comments on more than one occasion during there [sic] attorney-client interviews." Def.'s Mot. for Postconviction Relief at 3. Defendant also claims that Mr. O'Neill was dishonest with Defendant regarding his right to a speedy trial. In an effort to obtain new counsel, Defendant filed numerous complaints with Mr. O'Neill's employer, the Public Defender of the State of Delaware and the Office of Disciplinary Counsel, and also filed multiple motions for the appointment of new counsel. Mr. O'Neill denies Defendant's allegations. However, he did acknowledge that he used a word that could be construed as evidencing racial prejudice or bias during an interview with Defendant. Mr. O'Neill explains, as he did to the Office of Disciplinary Counsel, that he the word to explain the preferred course of trial strategy and that it was not directed to Defendant. *See* O'Neill Aff., D.I. 191, ¶ 8. Based on Mr. O'Neill's representations, the Office of Disciplinary Counsel dismissed Defendant's complaint. However, because of that complaint coupled with Defendant's myriad requests for new counsel, the Superior Court found that there was a conflict between Defendant and his Public Defender counsel. *See* Letter to the Court from Joseph A. Gabay, Esq. (Feb. 13, 2003), D.I. 57.

Although it appears that Mr. O'Neill used the word in an effort to build rapport with his client, and that at the time the word was said Defendant may not have taken umbrage, an attorney must nevertheless be careful to refrain from acts or words that might be erroneously construed as a "manifest[ation of] racial[] bias or prejudice towards any participant in the legal process." *Principles of Professionalism for Delaware Lawyers* A.2. *Cf. Miller v. Town of Milton*, 2006 WL 839407, slip copy (D. Del. Mar. 31, 2006) (granting a new trial, in spite of substantial evidence supporting the jury's verdict, in part where, because of defense counsel's use of the same word, albeit in a different context

Esquire and Jennifer-Kate Aaronson, Esquire were appointed as Defendant's new trial counsel and would represent Defendant throughout the trial and the appellate process. The September 23, 2003, trial date was then reaffirmed after consulting with Defendant's newly appointed counsel. Defendant then filed various motions including a motion to suppress that challenged Defendant's arrest as lacking probable cause, which was then referred to Superior Court Judge John E. Babiarz, Jr. On June 9, 2003, that motion to suppress was denied.[5] Jury selection then commenced on September 23, 2003, as scheduled and the trial began on September 29, 2003. On October 22, 2003, Defendant was found guilty on all of the charges. Then, after a three-day penalty phase, on October 30, 2003, the jury recommended a life sentence, with three out of twelve jurors voting in favor of imposing the death penalty. A Motion for Judgment of Acquittal was filed by Defendant's trial counsel in a timely fashion, but was denied by this Court on December 4, 2003.[6] On December 17, 2003, Defendant was sentenced to life in prison. Defendant appealed his conviction to the Delaware Supreme

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than used here, because the "court cannot conclude with any confidence that the overlay of defense counsel's conduct during trial did not unfairly influence and prejudice the jury against plaintiff").

[5] *State v. Garvey*, ID No. 010701023, Babiarz, J., D.I. 75 (June 9, 2003).

[6] *State v. Garvey*, ID No. 0107010230, Cooch, J., D.I. 130 (Dec. 4, 2003) ("Motion for Judgment of Acquittal [by] Defendant is denied for all reasons stated on the record.").

Court on grounds that are not raised in the instant motion for postconviction relief. On April 28, 2005, the Delaware Supreme Court affirmed Defendant's conviction.[7]

3. Defendant filed this *pro se* motion for postconviction relief pursuant to Superior Court Criminal Rule 61 on September 16, 2005. Defendant sets forth four grounds upon which he requests postconviction relief, all of which are based on ineffective assistance of counsel. Defendant claims that (1) counsel for Defendant failed to raise a violation of Defedant's right to speedy trial on direct appeal,[8] (2) counsel on direct appeal failed to challenge the Superior Court's June 9, 2003, denial of Defendant's motion to suppress that challenged Defendant's arrest as lacking probable cause,[9] (3) counsel on direct appeal failed to raise Defendant's claim that the search of his gym bag, which contained the probable murder weapon, violated Defendant's Fourth Amendment rights,[10] and (4) counsel failed to appeal the Court's December 4, 2003, denial of Defendant's Motion for Judgment of

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[7] *Garvey v. State*, 873 A.2d 291 (Del. 2005) (affirming the trial court's denial of defendant's (1) motion to suppress a post-arrest statement and (2) motion to declare a mistrial, and ruling that it was not plain error that the jury had arguably inconsistent findings in the guilt and penalty phases of the trial).

[8] Def.'s Mot. for Postconviction Relief 2, 8.

[9] *Id.* at 17.

[10] *Id.* at 24-26.

Acquittal.[11] Upon review of Defendant's Motion, all of the above grounds are meritless and thus, the motion is **DENIED.**

4. When considering a motion for postconviction relief, the Court must first apply the procedural bars of Super. Ct. Crim. R. 61.[12] If a procedural bar exists, then the claim is barred and the Court should not consider the merits of the postconviction claim.[13] Super. Ct. Crim. R. 61(i)(2) provides that "[a]ny ground for relief that was not asserted in a prior postconviction proceeding … is thereafter barred, unless consideration of the claim is warranted in the interest of justice." Rule 61(i)(3) provides that "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, [or] in an appeal … is thereafter barred, unless the movant shows (A) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant's rights." The procedural bar of Rule 61(i)(3) can potentially be overcome by Rule 61(i)(5), which provides that "[t]he bar[] to relief in paragraph[] … (3) … shall not apply to a colorable claim that there was a miscarriage of justice because of a

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[11] *Id.* at 28.

[12] *Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990)(citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

[13] *Saunders v. State*, 1995 WL 24888 (Del. Supr.); *Hicks v. State*, 1992 WL 115178 (Del. Supr.); *State v. Gattis*, 1995 WL 790961 (Del. Super.) (citing *Younger v. State*, 580 A.2d at 554).

constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." This "fundamental fairness" exception contained in Rule 61(i)(5) is "a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after [a] direct appeal."[14] However, although Rule 61(i)(3) could arguably apply here to bar Defendant's claim, the procedural bars of Rule 61 do not apply to a claim of ineffective assistance of counsel as it is a "constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceeding."[15]

5. To succeed on an ineffective assistance of counsel claim, Defendant must show both (a) that "counsel's representation fell below an objective standard of reasonableness" and (b) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different."[16] Defendant must satisfy the proof requirements of both prongs in order to succeed on an ineffective assistance of counsel

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[14] *Younger*, 580 A.2d at 555.

[15] Super. Ct. Crim. R. 61(i)(5). *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (stating that proof an ineffective assistance of counsel claim "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

[16] *Albury v. State*, 551 A.2d 53, 58 (Del. 1998) (quoting *Strickland*, 466 U.S. at 688, 694).

claim; failure to do so as to one prong will render the claim unsuccessful and the court need not address the remaining prong. Defendant must prove his allegations by a preponderance of the evidence.[17] Moreover, allegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel; the defendant must allege concrete allegations of actual prejudice and substantiate them.[18] Finally, any "review of counsel's representation is subject to a strong presumption that the representation was professionally reasonable."[19]

6. Defendant's first claim is that counsel was ineffective by failing to raise on direct appeal a violation of Defendant's right to a speedy trial. The Court must look at four factors when determining whether a defendant's right to a speedy trial was violated: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant."[20] The issue is whether defendant's claim

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[17] *State v. Wright*, 653 A.2d 288, 294 (Del. Super. Ct. 1994).

[18] *Jordan v. State*, 1994 WL 466142 (Del. Supr.) (citing *Younger v. State*, 580 A.2d at 556) (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel); *State v. Brittingham*, 1994 WL 750341 (Del. Super.) (same).

[19] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

[20] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker v. Wingo*, 402 U.S. 514, 530 (1972)).

that his right to a speedy trial was violated has any merit and, if so, whether counsel was ineffective by not so arguing on appeal.[21]

7. Here, the time period between when the Defendant was arrested, July 15, 2001, and when his trial began, September 23, 2003, totals roughly two years and three months. However, one of the main reasons for the delay and subsequent rescheduling of Defendant's trial was Administrative Directive No. 2002-1, which stayed all pending capital murder cases in Delaware at that time.[22] At least one other Delaware Court has found that the period of time that a case is stayed pursuant to an Administrative Directive, such as the one here, should not be included in the time period used for the speedy

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[21] At least one Delaware case has dismissed a claim that a defendant's right to a speedy trial was violated on that the grounds that it was procedurally barred, under Rule 61(i)(3), because it was not raised on direct appeal. *Browne v. State*, 2003 WL 21364452, *1 (Del. Supr.) (holding that where a new replacement public defender requested a continuance, a trial was set at the mutual convenience of prosecutor and defense counsel and defendant failed to show any prejudice from the delay, defendant had "failed to establish any justification for … consideration of his procedurally defaulted speedy trial claim). Here, however, Defendant's speedy trial claim is intertwined with an ineffective assistance of counsel claim and, under Rule 61(i)(5), should be decided on the merits. *See* Wayne R. LaFave, et al., *Criminal Procedure* § 18.1(d) (2d ed. 1999) ("Failure of defense counsel to raise a speedy trial objection could in some circumstances constitute ineffective assistance of counsel, which perhaps explains why appellate courts not infrequently assess speedy trial claims even when there was no timely motion for dismissal below.").

[22] *See* Nutter Aff., D.I. 194, ¶ 6 ("Mr. O'Neill and I did not object to the stay because we felt that the Delaware Supreme Court's resolution of the *Ring* issues could benefit [Defendant] by making him ineligible for the death penalty."). Defendant was represented by different counsel at the time of the certification than during the trial and appellate process.

trial analysis.[23] As to the remainder of the pertinent time period, much of the delay was a direct result of the need to reschedule the trial after the stay was lifted, which, as the State contends, "was out of the hands of both the State and defense counsel."[24] Defendant asserted his right to a speedy trial twice. The first was made on August 4, 2001,[25] which was less than one month after his arrest and, as the State correctly argues, was "premature."[26] The second was apparently docketed on January 29, 2003 and referred to the late Judge Haile L. Alford.[27] No other docket entry pertaining to that motion was recorded. However, that motion was filed immediately after the stay was lifted, when the scheduling of all other previously-stayed capital murder

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[23] *State v. Gattis*, 1995 WL 790761, * 7 (Del. Super.) (denying defendant's claim of ineffective assistance of counsel for failing to assert defendant's right to a speedy trial, in part, because defendant was part of a certification of question of law process, which resulted in a stay similar to that of the case at bar), *aff'd*, 697 A.2d 1174, 1180 (Del. 1997) ("For purposes of a speedy trial analysis, delays not attributable to the State should be subtracted from the time period in question.").

[24] State's Resp. at 12.

[25] *See* Def.'s Mot. for Postconviction Relief at Ex. B-1.

[26] State's Resp. at 14. *See also Mills v. State*, 2006 WL 1027202, * 3 (Del. Supr.) (finding that although defendant had asserted his right to a speedy trial two months after his arrest, he had failed to properly assert his right as that assertion failed to "affect[] the outcome of a scheduling decision").

[27] Def.'s Mot. for Speedy Trial, D.I. 53. The motion, in its entirety, reads: "COMES NOW, the defendant, pro se, and respectfully requests that he be given his right to a speedy trial pursuant to Article I, Section 7 of the Delaware Constitution by having his case promptly scheduled for trial."

cases was not yet resolved.[28] As neither of those assertions would "affect the outcome of a scheduling decision," the third factor of the analysis cannot be considered. Also, before the trial and after the stay had been lifted, Defendant himself requested and received the appointment of new counsel.[29] Although such appointment seems to be an alleged reason for the delay, keeping in mind the "strong presumption that [counsel's] representation was professionally reasonable,"[30] this Court finds that the delay was necessary for Defendant's newly-appointed counsel to adequately prepare Defendant's case.[31] Defendant argues that because of the long delay between his arrest and trial prejudiced him because he was unable to call certain witnesses at trial because contact with them had been lost during the stay;[32] however, Defendant's trial counsel asserts that "at no time prior to or during trial did

[28] *See* Letter to Colleen Norris, Esq. and J. Brendan O'Neill, Esq. from the Hon. Jerome O. Herlihy (Jan. 30, 2003), D.I. 54 (setting up a "special call of the calendar concerning trial dates for capital and non-capital first degree cases").

[29] *See State v. Whitfield*, 2005 WL 1953029 (Del. Super.) (holding that delays due to scheduling conflicts and continuances requested by defendant do not constitute deliberate attempts by the State to delay the trial that might implicate defendant's right to a speedy trial). Defendant had moved for appointment of new counsel numerous times. Thus, it was to his benefit that new counsel was actually appointed.

[30] *Flamer*, 585 A.2d at 753.

[31] Aaronson Aff., D.I. 189, ¶ 8 ("When I was appointed, the trial date had already been set. Counsel would not have had an adequate opportunity to prepare for trial had the trial date been earlier than September 23, 2003.").

[32] Def.'s Mot. for Postconviction Relief at 12.

[Defendant] provide me with the names of the witnesses contained in the Petition [for postconviction relief]."[33] Importantly, even assuming that the time period is long, Defendant has failed to show any prejudice from the delay. Defendant also argued that the delay had been difficult for him because he spent the entire time in maximum and super-maximum security, and that other aspects of prison life were difficult for him.[34] However, those allegations are completely conclusory. In sum, Defendant's claim that his right to a speedy trial was violated is meritless and as such failure to raise such an issue on appeal does not constitute ineffective assistance of counsel. Defendant's first ground for postconviction relief is **DENIED**.

8. Defendant's second ground is that his appellate counsel did not challenge a trial court decision that denied a motion to suppress an arrest that was allegedly made without probable cause. At the suppression hearing, defense counsel argued that co-Defendant Fayson was not credible because her initial statement to the authorities, which was the basis for Defendant's warrantless arrest, was uncorroborated and inconsistent. However, on June 9, 2003, Judge Babiarz found, after weighing the credibility of all of the witnesses, that the arrest was made with the sufficient probable cause and

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[33] Van Amerongen Aff., D.I. 192, ¶ 7. *See also* Aaronson Aff. ¶ 9 ("At no time did [Defendant] indicate the existence of exculpatory witnesses nor provide counsel with the names of any witnesses…").

[34] Def.'s Mot. for Postconviction Relief at 11, 12.

denied the motion to suppress. The issue is whether Defendant's appellate counsel's decision to not raise that issue on appeal fell below an objective standard or reasonable professional conduct. This Court finds that it did not.

9. The trial court's evaluation of the credibility of witnesses and the denial of Defendant's motion to suppress would be given great deference and be reviewed under a "clear error" standard on appeal.[35] "An appellate court may reject the fact finder's choice between conflicting evidence only where there is something wrong with the choice. When findings are based on determinations regarding the credibility of witnesses, the level of deference is even higher."[36] Here, Defendant's appellate counsel were certainly aware of these legal principles and appropriately exercised their discretion, and presumably followed their appellate trial strategy, by not challenging the trial court's denial of Defendant's motion to suppress.[37] Counsel's conduct did not fall below an objective standard of reasonable professional conduct. Thus, ground two is meritless and, as such, is **DENIED**.

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[35] *Banther v. State*, 823 A.2d 467, 483 (Del. 2003).

[36] *Id.* (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985)).

[37] Van Amerongen Aff. ¶ 8 ("Co-counsel and I reviewed in detail the record and issues to raise on appeal. We also reviewed the issues identified by [Defendant]. We concluded that the issues sought to be included by [Defendant] were not meritorious."). *See also* Aaronson Aff. ¶ 11.

9. In ground three, Defendant argues that the warrantless search and seizure of his gym bag violated the Fourth Amendment. However, the search of Defendant's gym bag, which produced the probable murder weapon, was lawful as it was searched incident to Defendant's arrest. In Delaware, "[a] warrantless search, to be valid, must fall within a recognized exception to the warrant requirement of the Fourth Amendment."[38] A warrantless search incident to arrest is a recognized exception to the warrant requirement.[39] "The United States Supreme Court justified the search incident to arrest exception when it stated '[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; the intrusion being lawful, a search incident to the arrest requires no additional justification … it is the fact of the lawful arrest which establishes the authority to search.'"[40] In this situation, the warrantless search and seizure of the gym bag, which contained the probable murder weapon and was within the arrestee's immediate control, was lawful as it

[38] *Coley v. State*, 2005 WL 2679329, * 1 (Del. Supr.) (holding that because the officer had probable cause to make the arrest, the incident search was lawful even before the arrest was made) (citing *Ortiz v. State*, 2004 WL 2741185 (Del. Supr.))

[39] *Id.* (citing *Chimel v. California*, 395 U.S. 752 (1969)). *See also Traylor v. State*, 458 A.2d 1170, 1173 ("In order to protect himself and to prevent the concealment or destruction of evidence, an arresting officer may search the arrested person and 'the area from within which he might gain possession of a weapon or destructible evidence.'") (quoting *Chimel*, 395 U.S. at 763).

[40] *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

was done immediately after Defendant's arrest. Given the Court's denial of Defendant's motion to suppress the arrest as lacking probable cause, it is clear that the arrest of Defendant was made with the requisite probable cause. On appeal, Defendant's argument would have amounted to a frivolous claim.[41] Defendant's appellate counsel's failure to raise this issue on appeal cannot be said to be ineffective as the decision did not fall below an objective standard of reasonableness nor did it result in prejudice to the Defendant. Defendant's third ground for relief is **DENIED**.

10. Defendant's fourth argument is that appellate counsel was ineffective for failing to appeal this Court's denial of Defendant's Motion for Judgment of Acquittal. However, as the State points out, Defendant "provides no evidence or argument to support the allegation that counsel were ineffective for failing to raise this issue on appeal. He fails to articulate even a basic theory as to why he would have been successful on appeal."[42] Allegations that are entirely conclusory are legally insufficient to prove ineffective

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[41] Van Amerongen Aff. ¶ 8. *See also* Aaronson Aff. 12 ("Briefing more than twenty issues which had no merit would have detracted greatly from the meritorious issues raised on appeal.").

[42] State's Resp. to Def.'s Mot. 20. *See also* Van Amerongen Aff. ¶ 10 ("At trial, the evidence of guilt was overwhelming.").

assistance of counsel.[43] Therefore, Defendant's fourth claim of ineffective assistance of counsel is conclusory and, thus, is **DENIED**.

12. For the reasons stated, Defendant's Motion for Postconviction Relief is **DENIED.**

**IT IS SO ORDERED.**

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Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
James D. Nutter, Esquire
James Brendan O'Neill, Esquire
Jan A. T. Van Amerongen, Jr., Esquire
Jennifer-Kate Aaronson, Esquire

[43] *See Younger*, 580 A.2d at 556.