IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. # 91009844DI
v.	)	
CHRISTOPHER R. DESMOND,	)	
Defendant	)	

Submitted: May 8, 2006
Decided: August 2, 2006

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

ORDER

Thomas E. Brown, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Christopher R. Desmond, Smyrna, Delaware, *pro se*.

COOCH, J.

This 2nd day of August, 2006, upon consideration of Defendant's sixth motion for postconviction relief, it appears to the Court that:

1. Defendant was convicted by a jury on November 9, 1992, of ten counts of Robbery in the First Degree, two counts of Conspiracy in the

Second Degree, ten counts of Possession of a Deadly Weapon During the Commission of a Felony ("PDWDCF"), ten counts of Possession of a Deadly Weapon by a Person Prohibited ("PDWBPP"), three counts of Theft (felony), and one count of Escape Third Degree.[1] These charges arose out of a series of robberies at three supermarkets committed in 1991 in northern New Castle County. The jury was unable to reach a verdict on two counts of Robbery in the First Degree, two counts of PDWDCF, two counts of PDWBPP, one count of Conspiracy and two counts of Theft (felony) stemming from an additional supermarket robbery and pharmacy robbery in 1990 and 1991 and a mistrial was declared as to those latter nine counts.

2. At the conclusion of the State's case, Defendant moved for a judgment of acquittal pursuant to Super. Ct. Crim. Rule 29(a) as to the twelve counts of PDWDCF and the twelve counts of PDWBPP on the grounds that 1) the alleged gun used during the various robberies was never recovered, 2) the alleged gun was never discharged during the robberies and 3) there was no testimony from anyone with personal familiarity with the alleged gun that it was in fact "real." The motion was denied, from the bench, after oral argument on October 30, 1992. Defendant renewed the motion after the

[1] All of the relevant facts and procedural history recited here are excerpted from this Court's order denying Defendant's Fifth Motion for Postconviction Relief. *State v. Desmond*, 2005 WL 578816 (Del. Super.).

close of all of the evidence on November 5, 1992, and it was again denied. The Court issued a post-trial opinion denying defendant's motion for judgment of acquittal on the twelve counts of PDWDCF and the twelve counts of PDWBPP on December 17, 1992.[2]

3. Defendant's convictions have spawned much litigation. The Delaware State Supreme Court affirmed defendant's conviction on direct appeal on November 14, 1994.[3] A motion for rehearing was denied in December 1994. Then, Defendant's first motion for postconviction relief was denied.[4] Defendant's writ of habeas corpus before the United States District Court for the District of Delaware was also denied.[5] Defendant's second motion for postconviction was denied.[6] In July 2001, this Court also denied defendant's motion for a writ of habeas corpus. A writ of certiorari was then dismissed by the Delaware Supreme Court.[7] The Delaware Supreme Court also affirmed this Court's denial of Defendant's motion for

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[2] *State v. Desmond*, 1992 WL 390600 (Del. Super.).

[3] *Desmond v. State*, 654 A.2d 821 (Del. 1994).

[4] *State v. Desmond,* 1995 WL 717628 (Del. Super.), *aff'd,* 692 A.2d 411 (Del. 1996).

[5] *Desmond v. State*, 1999 WL 33220036 (D. Del.).

[6] *Desmond v. State,* Del. Super., ID #91009844DI, Cooch, J. (Dec. 4, 2000), *aff'd*, 768 A.2d 468 (Del. 2001).

[7] *In re Desmond,* 782 A.2d 263 (Del. 2001).

writ of habeas corpus.[8] Then, Defendant's third motion for postconviction relief was denied.[9] Defendant's fourth motion for postconviction relief was denied.[10] Finally, Defendant's fifth motion for postconviction relief was also denied.[11] The Court notes that Defendant has now made 12 motions to various courts since his conviction. Nine of those motions have been made after the three-year limit to file postconviction motions provided by Superior Court Criminal Rule 61.

4. Defendant filed this motion for postconviction relief, his sixth, pursuant to Superior Court Criminal Rule 61 on September 14, 2005. Defendant sets forth two claims in support of his motion. First, Defendant claims that this Court has inconsistently applied the procedural bars of Rule 61(i) in previous cases.[12] Specifically, Defendant refers to two cases, *State v. Keith*[13] and *State v. Lawrence*,[14] that were before this Court in which a pending motion for postconviction relief was resolved before this Court

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[8] *Desmond v. Snyder,* 788 A.2d 527 (Del. 2001).

[9] *State v. Desmond,* 2002 WL 31814550 (Del. Super.), *aff'd*, 818 A.2d 970 (Del. 2003).

[10] *State v. Desmond*, 2004 WL 838854 (Del. Super.), *aff'd*, 854 A.2d 1158 (Del. 2004).

[11] *State v. Desmond*, 2005 WL 578816 (Del. Super.), *aff'd*, 873 A.2d 1099 (Del. 2005).

[12] Def.'s Mot. for Postconviction Relief 1.

[13] ID No. 9904017767, Cooch, J. (May 14, 2003).

[14] ID No. 9706017912, Cooch, J. (April 29, 2004).

rendered an opinion on the motion. In both of those cases, each defendant had pled guilty to Robbery First Degree, but, due to a substantive change in one of the elements of Robbery First Degree,[15] both of those defendants were allowed to withdraw their guilty pleas and be sentenced to a lesser crime. Defendant claims that such an action is in violation of the rule of law that requires a court to apply the procedural bars consistently to every Rule 61 motion.[16] Second, Defendant argues that the State "intentionally with-held evidence[,]"[17] namely the identities of informants who had given the police information about the Defendant. Defendant claims that this is "favorable exculpatory evidence which would have changed the outcome of [the] trial."[18]

5. The State argues that Defendant's claim that this Court is inconsistently applying the procedural bars of Rule 61 "must fail."[19] The

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[15] The substantive change to the Robbery First Degree statute was discussed in Defendant's fifth motion for postconviction relief. *State v. Desmond*, 2005 WL 578816 (Del. Super.), *aff'd*, 873 A.2d 1099 (Del. 2005). Case law had created a two-part analysis to determine whether the defendant had "displayed" a weapon. First, the victim must subjectively believe the defendant has a weapon, and second, the defendant's threat must be accompanied by an objective manifestation of a weapon. Such a requirement was not necessary when Defendant was convicted. The pertinent statute, 11 *Del. C.* § 832(a)(2), was later amended to effectively overrule the judicially-created two-part test.

[16] *Id.* at 2.

[17] *Id.* at 5.

[18] Def.'s Reply 3.

State contends that because the trial court did not reach the merits of the respective motions for postconviction relief in *Keith* and *Lawrence*, and thus did not issue a binding judicial opinion in either case, the doctrine of *stare decisis* does not apply and the Court is not bound by the dispositions in those two cases.[20] Moreover, the State asserts that the outcomes of the *Keith* and *Lawrence* cases are not determinative here because they were the result of a substantive change in the required proof for a conviction of Robbery First Degree.[21] Specifically, after the change in law, both Keith and Lawrence qualified for a reduction in the charge and sentence, but, under the facts of his particular case, Desmond did not.[22]

6. When considering a motion for postconviction relief, the Court must first apply the procedural bars of Super. Ct. Crim. R. 61.[23] If a procedural bar exists, then the claim is barred and the Court should not consider the

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[19] State's Resp. 7.

[20] *Id.* at 3, 7 ("The end result in each case was a product of negotiations between the State and defense counsel, which did not involve a determination of a point of law by the court.").

[21] *Id.* 3-7.

[22] *Id.* 6-7 ("Desmond, *inter alia*, raised the [First Degree Robbery issue] in his fifth motion for post-conviction relief, and this Court specifically rejected the claim. The evidence was thus sufficient to satisfy the display element of robbery…").

[23] *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)).

merits of the postconviction claim.[24] Rule 61(i)(1) provides that "a motion for postconviction relief may not be filed more than three years after the judgment of conviction is final…"[25] 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 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."[26]

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[24] *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).

[25] Effective July 1, 2005, the period within which to bring Rule 61 petitions is changed to a one-year limitation from the previous three-year limitation.

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

7. As to Defendant's first claim, this Court finds that there is no merit to the argument that this Court has been inconsistently applying the procedural bars of Rule 61 and, thus, Defendant's first ground for relief is **DENIED.** Although this claim could be procedurally barred by Rule 61(i)(1), as this motion far exceeds the three-year time limit for filing a Rule 61 motion, and 61(i)(4),[27] because the State was asked specifically to respond to Defendant's argument regarding *Keith* and *Lawrence*, that argument will be dealt with here. This Court agrees with the State for two reasons. First, under the doctrine of *stare decisis*, the outcomes of both *Keith* and *Lawrence* are not dispositive here as there was no judicial opinion issued by this Court on the merits of the respective motions. As the State says, the result was the product of a process of negotiation between the State and defense counsel.

[27] Rule 61(i)(4) provides that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, [or] in an appeal … is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice." The "interest of justice" exception of Rule 61(i)(4) has been "narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish [the defendant]." *State v. McKamey*, 2003 WL 22852614, at *4 (Del. Super. Ct.)(quoting *State v. Wright*, 653 A.2d 288, 298 (Del. Super. Ct. 1994)(citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990))). To prevail under this exception, "the movant must show that subsequent legal developments have revealed that the trial court lacked the aforementioned authority to convict or punish." *Id.* (citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990) (citing comparatively *Davis v. United States*, 417 U.S. 333, 342 (1974))).

This ground, the applicability of the substantive change in the Robbery First Degree law, was already decided in this Court's denial of Defendant's fifth motion for postconviction relief. *State v. Desmond*, 2005 WL 578816 (Del. Super.), *aff'd*, 873 A.2d 1099 (Del. 2005). The effect of the *Keith* and *Lawrence* results were briefly discussed in footnote 6 of that order, but will be analyzed more fully here.

Second, as stated by the Delaware Supreme Court in Defendant's direct appeal of his convictions:

> [e]xamining the evidence presented in the light most favorable to the State, we find the circumstantial eyewitness testimony sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Desmond, in fact, possessed a deadly weapon. The record reflects that most of the witnesses viewed the weapon at close range and for extended periods of time. The substantial similarity of their detailed descriptions of the weapon enabled a rational trier of fact to conclude that what Desmond appeared to possess was, in fact, a deadly weapon.[28]

There is sufficient evidence to show that Defendant actually displayed a weapon during the robbery, which makes the change in the law regarding the required proof for the "display" element of Robbery First Degree irrelevant here. The defendants in both *Keith* and *Lawrence*, on the other hand, both qualified for a reduction of sentence as the amended display element was not satisfied. Therefore, Defendant's first ground for relief is **DENIED.**

8. Defendant's second ground for relief, that the State intentionally withheld evidence that would have affected the outcome of the case, is also procedurally barred by 61(i)(1) and (3). This effectively is a *Brady* claim and it appears that Defendant raises it for the first time here.[29] To succeed on this ground, Defendant must show that "some external impediment"

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[28] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

[29] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the State may not withhold from a defendant exculpatory evidence that is material either to guilt or punishment).

which prevented him from raising the claim and that he was prejudiced in that the outcome would have changed had the issue been raised before.[30] Although Defendant claims that he has only "discovered within the past few months" the information allegedly withheld by the State, he does not indicate why this information has only just come to his attention and raised for the first time here. Thus, the "cause" prong is not met.[31] Moreover, Defendant has not shown that disclosure of the information would have changed the outcome of the trial. In fact, there is case law to support the notion that Defendant would not have been entitled to the information had it actually been asked for during trial.[32] Moreover, Defendant has not articulated an adequate basis for relief under the "miscarriage of justice" of justice as he has not shown that the information sought would have changed the outcome of the trial. For those reasons, Defendant's second ground for postconviction relief is **DENIED.**

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[30] Super. Ct. Crim. R. 61(i)(3) (requiring movant to show "[c]ause for relief from procedural default" and "[p]rejudice from violation of the movant's rights"). *See also Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

[31] Super. Ct. Crim. R. 61(i)(3)(A).

[32] *Potter v. State*, 1991 WL 316937 (Del. Supr.) (affirming trial court's denial of motion for postconviction relief on grounds that defendant was not entitled to identity of confidential informant because informant was not a witness at trial nor a party to the criminal offense and where defendant had not shown that such information was favorable to him).

9. For the foregoing reasons, Defendant's sixth motion for postconviction relief is **DENIED.**[*]

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services

[*] After Defendant had submitted his reply brief, he asked the Court to grant his motion for postconviction relief based on the recent United States Supreme Court case of *Holmes v. South Carolina*, 126 S.Ct. 1727 (U.S. May 1, 2006). The *Holmes* court held that a criminal defendant's constitutional rights are violated where an evidence rule provides that a defendant may not introduce evidence of third-party guilt where the prosecution has introduced forensic evidence that, if believed by the jury, strongly supports a guilty verdict. However, that case in inapposite to the one at bar and will not be discussed here.