

through the back seat. Johnson then gave Norton a 9 mm gun, and Cole a .22 caliber gun. Johnson took a 9 mm gun.

The three men walked to the alleyway between 23rd and 24th Streets. The destination for the sting proved to be a residence at 105 East 23rd Street, the home of Shaheed Nurridin, a well-known drug dealer. As it turned out, Shaheed Nurridin had recently moved out of his parents' home, and was not present at the time of the crime.

Cole climbed onto the roof over the one-story porch behind the house, removed a screen, and gained entrance to a bedroom on the second floor of the house. The bedroom was not occupied. Cole then descended the stairs and opened the back door, allowing Johnson to enter, later followed by Norton. Cole ascended the stairway again, with Johnson behind him.

Devon and Isaiah Jones, ages 14 and 10, were awake. They had been watching TV and were planning to sneak downstairs to have some cereal. As Devon opened his bedroom door, he saw a person wearing a stocking cap coming up the stairs. He slammed the door shut, braced himself against his bed and put his feet against the door to keep the intruder out. He also started shouting while the intruder kicked his bedroom door from the hallway. The children's parents, Benjamin Jones ("Jones") and Ethelda Nurridin ("Nurridin") were asleep in a nearby bedroom. Jones was awakened by the ruckus and walked onto the upstairs landing where he was shot three times and fell, face down, to the floor. Nurridin followed Jones, and she too was shot. She fell face up onto Jones. Nothing was removed from the house. The intruders fled.

Devon had a telephone in the bedroom. He called 911 while continuing to hold his bedroom door shut. He told the dispatcher that an intruder was in his house and that

his parents were shot. He was afraid to open his door because he was not sure whether the shooter was still there. The police arrived quickly and broke into the house. Jones was transported to the hospital as he was still alive. He died shortly thereafter. Nurrudin was dead at the scene.

A neighbor, hearing the initial ruckus through an open window, looked out and saw three men leaving the alleyway behind between 23rd and 24th Streets. She called 911 and reported what she saw to the police.

The principle shooter in the crime was Cole. Johnson was also on the upstairs landing. The evidence is that Cole fired six shots from his .22 caliber gun, and Johnson fired a single shot from a 9 mm gun. The shots struck the upper body areas of the two fallen parents. Later investigation demonstrated that a third gun, a different 9 mm, was fired, as a casing from the third gun was located near the bottom of the stairs. That gun was fired by Norton. Norton testified that he fired the gun into the air in order to be a participant in the crime, something he felt he needed to do for his own safety.

Initially there were no suspects in the case. But ballistics soon proved that two of the guns used on 23rd Street were the same as two guns used nine days previously at a home invasion robbery at 1348 Lancaster Avenue. A fingerprint of Cole, found on the window broken to gain access to the house at 1348 Lancaster Avenue, linked Cole to that crime.

During a police stop on November 12, 2001, a gun was found under a vehicle occupied by Johnson. That gun proved to match the casing found at the bottom of the stairway on 23rd Street. That gun linked Larry Johnson to the 23rd Street murders.

The police arrested Norton. He eventually gave a statement, explaining the crime and providing the evidence necessary to convict Cole and Johnson.

Johnson was found guilty of:

- Count I, Conspiracy Second Degree;
- Count II, Burglary First Degree;
- Count III, Possession of a Firearm During the Commission of a Felony (Burglary);
- Count VIII, Murder First Degree (Felony/Burglary – Benjamin Jones);
- Count IX, Possession of a Firearm During the Commission of a Felony (Felony Murder);
- Count X, Murder First Degree (Felony/Burglary – Ethelda Nurrudin); and
- Count XI, Possession of a Firearm During the Commission of a Felony (Felony Murder).

Johnson was found not guilty of:

- Counts IV and VI, the intentional murders of Jones and Nurrudin, and the associated weapons charges

The verdict indicates that the jury concluded that Cole and Johnson entered the home on 23rd Street intending to commit a Burglary. Acquittal of Cole and Johnson on the intentional murder charges suggests that the jury found that the State did not prove their intent was to commit murder. The convictions of Felony Murder necessitated the second part of the proceedings, a penalty hearing.

The Penalty Phase

A penalty phase hearing was conducted to secure the jury's recommendation as to the penalty to be imposed. The jury's verdict at the guilt phase had established as a matter of law two statutory aggravating factors: (1) the murder was committed when the defendant was engaged in the commission of, or attempt to commit the crime of burglary; and (2) the defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths were the probable consequence of the defendant's conduct.

Because the State had proven at least one statutory aggravating factor, the jury was asked to vote on whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweighed the mitigating circumstances found to exist.

Johnson's Aggravating Circumstances

To demonstrate additional aggravating circumstances, the State elicited testimony from several police officers involved in the investigation of the defendants' past crimes. A Dover police officer testified about an armed robbery of a convenience store in Dover in 2000, in which Johnson was one of three males involved. Johnson plead guilty to Robbery First Degree and Robbery Second Degree.

Another officer testified that Johnson plead guilty to Conspiracy Second Degree in connection with a Robbery at the Fairfax Shopping Center in 1996. Johnson was one of three males who pushed a 54 year old woman to the ground as she got into her car and stole her cell phone.

A third officer testified about a near-fatal traffic accident in 1994 on East 30th Street in Wilmington. The incident involved Johnson, who at the age of 14, lost control of the vehicle he was operating at a high rate of speed, causing it to cross over the double-yellow line and strike an oncoming car. Johnson plead guilty to Vehicular Assault Second Degree.

Johnson's Mitigating Evidence

As evidence of mitigation for Johnson, his fiancée, sister, mother, and a psychologist testified. Leigh McComb, Johnson's fiancée, testified that they have been engaged for one year and still plan to marry. She visits him at prison often, sometimes along with Johnson's mother, nieces and nephews. Even though he will spend the remainder of his natural life in prison, she stated that she will not abandon him.

Rhakia Johnson, his older sister, testified that Johnson talks with her children about the mistakes he made in the past and encourages them not to take the same path.

Kathleen Johnson, his mother, stated that Johnson's father had been incarcerated most of his son's life and she has seen Johnson make the same bad choices. However, she pleaded to spare her son's life because he is such a big part of their family.

Finally, Johnson offered the testimony of Dr. Pedro Ferreira, a psychologist. Dr. Ferreira's evaluation of Johnson lasted for approximately three hours and focused on his intelligence, and personality and cognitive functioning in a clinical psychiatric analysis. Dr. Ferreira noted that Johnson earned a GED, and demonstrated an intelligence level in the upper limits of the average range. Johnson suffers from an anti-social disorder due to his family background, specifically his father's incarceration, demonstrating a pattern of interrelated family issues. Johnson has no learning disabilities, and knows the difference between right and wrong. In his opinion, by spending the remainder of his natural life in jail, Johnson will gain maturity and boundaries that will enable him to become rehabilitated.

The Jury's Recommendation

At the close of the penalty phase evidence, the jury was instructed on the law.

Because at least one statutory aggravating factor was found as a matter of law, the jury was only asked to consider whether the aggravating circumstances outweighed the mitigating circumstances to warrant the death penalty. Following deliberations, the jury returned a verdict of 1-11 in favor of life imprisonment for Johnson.

Johnson's Motion for Post-Conviction Relief

On June 27, 2006, Johnson filed claims for postconviction relief with this Court. In his motion, Johnson asserts seven grounds for relief. Claims (1), (3) and (4) allege that the court committed reversible error by: (1) allowing the prosecution to introduce evidence that appellant possessed a weapon despite having been acquitted of the charge in a previous trial; (3) prohibiting defense counsel from introducing the results (acquittal) of a weapons charge that state sought to introduce to prove identity and; (4) failing to analyze evidence of a prior bad act in accord with the Delaware Rules of Evidence prior to admitting it into evidence. Claims (2),(5),(6), and (7) allege ineffective assistance of counsel.

Procedural Bars to Post-Conviction Relief

Johnson's motion for postconviction relief is controlled by Superior Court Criminal Rule 61. The analysis begins by applying the rules governing procedural requirements before giving consideration to the merits of the underlying claim.¹ The claims of legal error, (1), (3) and (4), relate to evidentiary matters. All were or could have been raised on direct appeal. In order for Johnson to raise the issues for the first time in his present petition for postconviction relief, he is required to show "cause" for

¹ *Flamer v. State*, 585 A.2d 736, 747 (Del. 1990).

relief from his failure to present the issues on direct appeal and “actual prejudice” resulting from the alleged error.²

Johnson fails to demonstrate, or even argue in his motion, that if the issues had been raised on appeal, the outcome would have been different.

Johnson is procedurally barred from asserting claims (1), (3) and (4) for relief under Rule 61(i)(3).

Ineffective Assistance of Counsel

Johnson raises four different claims (2), (5), (6) and (7) of ineffective assistance of counsel as grounds for postconviction relief. In claim (2) Johnson alleges that counsel was unprepared for trial. In claim (5) Johnson alleges that counsel failed to meet with him prior to trial to discuss trial defense and did not provide him with Rule 16 despite numerous requests. In claim (6) Johnson alleges that counsel failed to allow him to contribute to the direct appeal or consult with him prior to filing the appeal. Finally, in claim (7), Johnson alleges that counsel failed to hire a ballistics expert.

To prevail on a postconviction relief claim based on ineffective assistance of counsel, Johnson is required to meet both prongs of the test set forth in *Strickland v. Washington*.³ That is, a movant must show both “that counsel’s representation fell below an objective standard of reasonableness,” and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁴

² *Id.*, See also, Superior Court Criminal Rule 61(i)(3) states:
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 (B) prejudice from violation of the movant's rights.

³ *Strickland v. Washington*, 466 U.S. 668.

⁴ *Id.* at 688, 694.

As to claim (2), that his attorney Anthony Figliola was unprepared for trial, Johnson argues that “[b]ecause counsel didn’t investigate prior to trial he couldn’t argue convincingly that the weapon shouldn’t be used against defendant at trial.”⁵ Mr. Figliola has responded that, “[c]ounsel was definitely prepared for trial, was aware of the prior conviction and also aware of the ballistics reports regarding the weapon.”⁶ In a letter to Johnson on February 11, 2005, Mr. Figliola states:

Regarding the introduction of your gun at trial, after hours of research, it was clear that the entry of the gun was permissible at your trial. The case law was clear that it was proper to present the evidence, that is why I did not raise the issue on appeal. Granted I thought it was a hot issue when it happened, but upon further review, it had no merit and that is why I did not raise it.

Johnson has failed to cite to any authority to support his argument that evidence of the gun seized from Johnson incidental to a stop which occurred two months after the murders should have been excluded at trial. He has not demonstrated how Mr. Figliola’s efforts fell below an objective standard of reasonableness or how the outcome of this case would have been affected.

As to claim (5), that Mr. Figliola failed to meet with him prior to trial to discuss trial defense or provide him with Rule 16, Mr. Figliola has responded that:

Mr. Johnson was supplied with Rule 16 evidence. It was given to him on more than one occasion and this allegation is without merit. Jenks Material is not available prior to trial and could not be given to him. Additionally it is defense counsels responsibility to prepare the defense and make strategical decision. It is not the right of the defendant unless in fact he is representing himself.⁷

I accept Mr. Figliola’s representations that materials were provided. Even if they were not, Johnson has failed to make a showing of prejudice.

⁵ See Johnson’s Memorandum of law in support of Rule 61 motion for post-conviction relief at 6.

⁶ Affidavit of Anthony A. Figliola, Jr. at 1.

⁷ *Id.* at 2.

As to claim (6), that Mr. Figliola failed to allow Johnson to contribute to the direct appeal or consult with him prior to filing the appeal, Mr. Figliola has responded that:

Counsel did not consult with Appellant in conducting the appeal. Independent review of the transcripts and the record was done by Counsel. Counsel filed what he believed to be the legitimate appeal arguments. Defendant was not consulted on the issues, however, his written requests were considered by Counsel. He was notified of the issues and supplied with the brief. Though not consulted he was made aware of Counsel's actions.⁸

“It is well established principle that counsel decides which issues to pursue . . . and there is no duty to raise every possible claim.”⁹ Raising losing issues “runs the risk of burying good arguments,” and the “process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.”¹⁰

In a letter dated December 2, 2004, Mr Figliola acknowledges receipt of correspondence from Johnson and indicates he did not believe the evidentiary issue regarding the gun to have merit. Mr. Figliola states in the letter, “[I] am well aware of the collateral estoppel argument. I knew it beforehand, I researched the issue and I did not believe it to be applicable.”¹¹ Johnson has not demonstrated that Mr. Figliola's efforts were incorrect, much less that his representation fell below an objective standard of reasonableness. Johnson also fails to explain in what way the outcome of his case would have been different if the issue had been raised on appeal.

⁸ *Id.*

⁹ *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3rd Cir. 1996) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

¹⁰ *Sistrunk*, 96 F.3d at 670 (quoting *Smith v. Murray*, 477 U.S. 527, 536 (1986); *Jones*, 463 U.S. at 751-752).

¹¹ See letter dated December 2, 2004, attached to Affidavit of Anthony A. Figliola, Jr.

The final claim alleges that Mr. Figliola was ineffective for failing to hire a ballistics expert to attack the State's evidence that the gun found near Johnson two and a half months after the murders was used in that crime. Mr. Figliola has responded that:

Counsel did not hire a ballistics expert due to the fact that the co-defendant had hired a ballistics expert and counsel believed that the additional expense of hiring an additional expert would serve no legitimate purpose. Counsel was permitted to review the ballistics documentation from co-defendant's expert, which in fact agreed with the State's expert. It served no basis to call said expert to validate the Court's [sic] findings. Additionally, the findings of the ballistic expert confirmed that the [casing] found at the bottom of the steps matched the weapon that was allegedly found on Larry Johnson in November. The evidence, allegedly, at worst put Johnson at the bottom of the steps and not at the top of the steps, shooting at victims, as co-defendant, Norton testified. Counsel believes that the verdict of the jury acquitting Larry Johnson of First Degree Intentional Murder was attributed to them believing that Johnson was not a shooter, as Norton had testified.

There is no indication from Johnson as to how the efforts of his counsel fell below an objective standard of reasonableness, or in what way the outcome of his case would have been different if Mr. Figliola had hired a ballistics expert. Johnson provides no basis for this Court to conclude the results of an additional ballistics expert would have been any different or would have affected the outcome of the case.

Johnson has failed to demonstrate any basis for postconviction relief.

The Petition is Denied.

IT IS SO ORDERED.

The Honorable Susan C. Del Pesco

Original to Prothonotary

xc: Larry E. Johnson, Jr.
Daniel R. Miller, Esquire
Anthony A. Figliola, Jr., Esquire