

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE)
)
)
v.) ID No. 9805012046
)
JUSTIN BURRELL,)
)
Defendant.)

Submitted: July 5, 2007
Decided: October 31, 2007

On Defendant's Motion for Postconviction Relief - DENIED

ORDER

Dennis Kelleher, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware 19901.

Joseph M. Bernstein, Esquire, 800 N. King Street, Suite 302, Wilmington, Delaware 19801.

CARPENTER, J.

Before the Court is Justin Burrell’s (“Defendant”) Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). For the reasons set forth below, Defendant’s Motion for Postconviction Relief is Denied.

Factual and Procedural Background

Mr. Burrell’s arrest and subsequent conviction stem from a shooting that occurred on May 19, 1998 at a mobile home park north of Dover. The Defendant and a friend, William Scott, devised a plan to rob Scott’s former roommate, William Davis, who was living in a mobile home with Dolly and Dan Fenwick and their young son Danny. Scott knew Davis kept up to \$20,000 in cash from illegal drug sales in a safe under his bed in the mobile home. Scott drew a map for Burrell setting forth the layout of the Fenwick home and the location of the safe.

Subsequently the Defendant went to the Fenwick residence, disguised as a woman, and forced his way inside when Dolly Fenwick answered the door. Danny Fenwick, who was home sick from school, watched as Burrell hit his mother with a handgun and dragged her by the hair into Davis’ bedroom. During the course of the robbery Burrell shot Mrs. Fenwick in the back of the head at close range. Danny,

who was not harmed, went to a neighbor's house after Burrell left, and the police were called shortly thereafter.¹

Mr. Burrell was indicted on charges of Murder in the First Degree (2 counts), Robbery in the First Degree, Burglary in the Second Degree, Conspiracy in the Second Degree, and numerous counts of Possession of a Firearm During the Commission of a Felony. After testifying in his own defense at a jury trial, Mr. Burrell was convicted of Manslaughter as the lesser included offense of the intentional Murder First Degree, Murder in the First Degree (felony murder), Robbery in the First Degree, Burglary in the Second Degree, Conspiracy in the Second Degree, and four counts of Possession of a Firearm During the Commission of a Felony. Mr. Burrell received life imprisonment without the possibility of parole for his Murder First Degree conviction and fifty years of incarceration followed by probation for the remaining charges.

Upon subsequent appeal, the Supreme Court affirmed Mr. Burrell's convictions² and a mandate was issued on December 22, 2000. The Defendant filed his first Motion for Postconviction Relief on December 1, 2003, claiming the prosecutor's remarks at trial were prejudicial, and that the jury instructions were

¹ A more thorough narrative of the facts is set forth in the Court's previous decision on a motion to suppress and in the Supreme Court's direct appeal.

²*Burrell v. State*, 766 A.2d 19 (Del. 2000).

improper. This Court found these claims to be procedurally barred because they were not raised on the Defendant's direct appeal.³ This Court's denial of relief was affirmed by the Delaware Supreme Court.⁴

Mr. Burrell filed this second motion for postconviction relief on March 22, 2006, asking the Court to vacate his felony murder conviction on the ground that the murder was not committed "in furtherance of" the underlying felony of robbery. The Defendant bases his motion on the Supreme Court's decision in *Williams v. State*,⁵ which had not been decided at the time of Burrell's trial or direct appeal. The State's initial argument was that the *Williams* decision could not be applied retroactively and since that issue was before the Delaware Supreme Court in the *Chao v. State*⁶ matter, the parties requested that this decision be stayed until a ruling had been issued. The Supreme Court issued its decision in *Chao v. State* on June 20, 2007 and held that *Williams* indeed "must be applied retroactively" in the interest of justice.⁷ As such, the State's argument against non-retroactivity has now been decided, and while this postconviction petition has been filed nearly six years after the initial mandate was issued, the Court finds the Supreme Court decision in *Chao* provides a mechanism

³*State v. Burrell*, 2004 WL 2829038 (Del. Super.).

⁴*Burrell v. State*, 871 A.2d 1127 (Del. 2004).

⁵ 818 A.2d 906 (Del. 2002).

⁶ 2007 WL 1774963 (Del. Supr.).

⁷ *Id.* at 1.

for the Defendant to raise this issue under the fundamental fairness provision in Rule 61(i)(5).⁸

Discussion

The issue now before this Court is whether there was evidence introduced during the trial to support a finding that the murder of Dolly Fenwick was done with the intent to progress the robbery felony forward. To resolve this question, the Court has again reviewed the trial transcript and in particular the statements made by the Defendant during the trial as well as in his statement to the police shortly after the murder. In the Court's opinion, the Defendant's own version of the facts of this case support the felony murder conviction.

However, before reviewing that testimony, it is important to put the circumstances surrounding the shooting in its factual context. After the Defendant forced his way into the trailer of the victim, he hit her several times with a gun that he was carrying in his hand. He then grabbed her by the hair and with the gun pointed at her head, forced her to the bedroom belonging to William Davis. After threatening to kill both her and her son if she did not comply and show him where the

⁸“The [procedural] bars to relief . . . shall not apply to a . . . colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.” *See State v. Kirk*, 2004 WL 396407 (Del. Super.).

money was located, the victim got on her knees to reach under the bed to retrieve a safe. At this point the Defendant is still restraining the victim by holding her by the hair and the gun is pointed at her head as he stands over her. As Dolly Fenwick is attempting to put the safe and other money into a bookbag brought by the Defendant, it appears that she made some movement that the Defendant perceived as threatening and gave him the impression she intended to either resist or perhaps pull a gun from under the bed. To counteract this perceived resistance or threat, the Defendant, according to his own testimony, made a movement intending to strike her with the gun which at that point discharged causing her death.

It is in this factual context that the statements of the Defendant are particularly enlightening. In a statement to the police shortly after the shooting in May of 1998, he stated:

She pulled the safe out and started putting it in the bag. And then when I was going toward her, she kind of pushed me, and I went to go hit her, and at some point as he had the safety on too, I figured there was no bullets in it. I went to hit her. The gun went down. I guess my finger hit the trigger. I heard a shot, looked down and her head kind of moved up and back down and she just dropped.⁹

⁹Trial Tr. (Aug. 23, 1999) at 17-18.

Later during the statement the Defendant stated:

I had the – I had her hair in my left hand and the gun in my right. When I went to pull the gun up, it went off. The safety was also supposed to have been on.¹⁰

During the trial the Defendant testified and was questioned about the events and the statements he had made to the police. In this testimony it becomes clear the Defendant thought that there may be a gun in the Fenwick's trailer.

Q. You thought they might have a gun in there, didn't you?

A. At one point it crossed my mind because I was told earlier in the day, or I overheard a conversation, Bill's brother saying that, "What about the gun," and he said no – I think Bill said they got it in the store or something and Norm was like, "Are you sure," and Bill was, like, "yeah".

Q. And you thought if there was a gun in there that they might get the gun and hurt you.

A. Yes, it crossed my mind.¹¹

Later in the cross-examination of the Defendant:

Q. You yelled at Dolly Ann Fenwick "Where is the safe."

A. Yes.

Q. And she said "under the bed," correct?

¹⁰*Id.* at 20.

¹¹*Id.* at 38-39.

A. Not at first, no.

Q. Then you yelled at her again?

A. Yes.

Q. And you told her to get the safe.

A. Yes.

Q. And put it in a bag.

A. Yes.

Q. Now, at this point, Miss Fenwick is on her knees, right?

A. Yes.

Q. She's facing away from you

A. Yes.

Q. You're behind her.

A. Yes.

Q. You still have her hair in your hand.

A. Yes.

Q. And she's pulling the safe out.

A. Yes.

Q. And at that point, you thought to yourself they might have a gun under there.

A. It crossed my mind, yes.

Q. And you thought that if there's a gun under there, they could shoot you.

A. Yes.¹²

Later in his testimony the Defendant explained “[s]omehow she [Fenwick] had like pulled me back and that's when I went to pull back my hand” and the gun discharged.

The Court finds that even under the Defendant's own version, he reacted to Ms. Fenwick's movement which he perceived as threatening and intended to prevent her from resisting his demand to put the money and safe in his bookbag and to prevent her from interfering with the robbery. This conduct intended to quash the victim's

¹²*Id.* at 43-44.

resistance to the robbery clearly meets the requirements of progressing the robbery forward and complies with the mandates of the *Williams* decision. As such, not only did the shooting occur during the commission of the robbery, it was done in furtherance of the robbery by eliminating the perceived threatening conduct of the victim so that the robbery could be completed.

Conclusion

The Court finds that the facts of this case continue to support the Defendant's felony murder conviction consistent with the Supreme Court's recent interpretation of the meaning of the "in the course of" and "in furtherance of" language of 11 Del. C. §636(a)(2) as retroactively applied by the *Chao* decision. As such, the Defendant's Petition is again DENIED.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.