

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL E. KEYSER,	§
	§ No. 378, 2012
Defendant Below,	§
Appellant,	§ Court Below—Superior Court
	§ of the State of Delaware,
v.	§ in and for Kent County
	§
STATE OF DELAWARE,	§ Cr. ID 0310021647
	§
Plaintiff Below,	§
Appellee.	§

Submitted: January 6, 2014
Decided: March 20, 2014

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 20th day of March 2014, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-below/appellant, Michael Keyser, has appealed from the Superior Court's denial of his first motion for postconviction relief. A Superior Court jury convicted Keyser in 2004 of Murder in the First Degree and Conspiracy in the First Degree for the murder of Kimberly Holton. Despite the jury's 10-2 vote in favor of a death sentence, the Superior Court sentenced Keyser to life imprisonment. This Court affirmed Keyser's convictions and sentence on direct

appeal.¹ Thereafter, with the assistance of appointed counsel, Keyser moved for postconviction relief, which the Superior Court denied on June 29, 2012. This appeal followed.²

(2) Keyser's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Keyser's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Keyser's attorney informed him of the provisions of Rule 26(c) and provided Keyser with a copy of the motion to withdraw and the accompanying brief. Keyser also was informed of his right to supplement his attorney's presentation, and has raised several issues for this Court's consideration. Having responded to the position taken by Keyser's counsel, and also to the issues raised by Keyser, the State has moved to affirm the Superior Court judgment.

(3) Our standard and scope of review applicable to a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law relating to arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at

¹ *Keyser v. State*, 893 A.2d 956 (Del. 2006).

² Prior to the filing of his notice of appeal, the Superior Court permitted Keyser's appointed postconviction counsel to withdraw from further representation. After Keyser filed a pro se opening brief on appeal and the State filed a motion to affirm, this Court, *sua sponte*, appointed counsel to represent Keyser in this proceeding.

least arguably appealable issues that it can be decided without an adversary presentation.³

(4) The State's trial evidence reflects that, on September 29, 2003, Keyser drove Kimberly Holton to a motel in Dover. At the motel, Keyser and Jacob Jones both had sex with Holton. Afterward, Keyser held down Holton's legs while Jones suffocated her. The two men then wrapped Holton's body in a blanket, bound the blanket in duct tape, and put Holton's body in the trunk of Jones' car. Jones later rented an airplane and disposed of Holton's body in the Atlantic Ocean. On October 8, 2003, Holton's body was discovered three miles off the coastline of Cape May, New Jersey.

(5) Jones committed suicide on October 20, 2003. On October 24, 2003 and October 27, 2003, Keyser voluntarily turned himself in to the police and gave taped interviews. Keyser was read his Miranda rights before both interviews and waived his right to counsel on both occasions. The gist of Keyser's statements implicated Jones as the mastermind behind Holton's murder. Keyser told police that he helped Jones kill Holton because he was afraid of him, and because Jones had threatened to kill him and his girlfriend if Keyser refused to help. Police did not arrest Keyser until after his second interview.

³ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(6) Keyser has raised four issues for the Court's consideration on appeal.⁴ First, he contends that his trial attorneys were ineffective for failing to conduct an adequate pretrial investigation and because one of his attorneys fell asleep during jury selection. Second, he claims that his trial attorneys failed to inform him of the State's plea offer. Third, he argues that counsel failed to object to unspecified evidence. Finally, he contends that counsel failed to move to suppress evidence.

(7) In reviewing the Superior Court's denial of postconviction relief, this Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.⁵ Rule 61(i)(3) bars litigation of any claim that was not asserted in the proceedings leading to the judgment of conviction, unless the defendant can establish cause for the procedural default and prejudice. Claims of ineffective assistance of counsel, however, are excused from this requirement because these claims generally cannot be raised at trial or on direct appeal.⁶

(8) To prevail on claims of ineffective assistance of counsel, a defendant must establish that (i) his counsel's representation fell below an objective standard

⁴ Keyser raised several issues in the postconviction motion filed in the Superior Court that he does not raise in his brief on appeal. Specifically, those issues were prosecutor misconduct, judicial misconduct, judicial error in admitting photographs of Holton's body, and ineffective assistance of counsel based on: (i) counsel's alleged abusive and coercive behavior; (ii) counsel's failure to move for a change of venue; (iii) counsel's failure to move to disqualify the judge; and (iv) counsel's failure to raise jury-related issues. Because Keyser did not include these issues in his response to his counsel's opening brief, those claims are deemed waived on appeal. *Murphy v. State*, 623 A.2d 1150, 1152 (Del. 1993).

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁶ *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985).

of reasonableness; and (ii) but for counsel's unprofessional errors, the outcome of his trial would have been different.⁷ A defendant must set forth and substantiate concrete allegations of actual prejudice⁸ to overcome the "strong presumption" that his attorneys' representation was professionally reasonable.⁹

(9) Keyser first claims that his attorneys were ineffective for failing to conduct an adequate pretrial investigation and because one of his lawyers fell asleep during jury selection. Keyser asserts that the pretrial investigation was deficient because his lawyers did not: (i) investigate whether the injuries to Holton's body were consistent with being pushed from an airplane; (ii) obtain Dover Air Force base records to confirm Jones' whereabouts on the night he allegedly dumped Holton's body from a plane; (iii) investigate tidal patterns to determine if the location where Holton's body was discovered was consistent with the body being pushed from an airplane; (iv) investigate Keyser's mental health; (v) interview Keyser's girlfriend regarding Keyser's alleged intoxication prior to his statements to the police; and (vi) investigate evidence that Holton was seen alive after the alleged date of her death.

(10) Keyser's contention that his trial attorneys were ineffective because one of his lawyers fell asleep during jury selection was not raised in his postconviction

⁷ *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).

⁸ *Younger v. State*, 580 A.2d at 556.

⁹ *Strickland v. Washington*, 466 U.S. at 689.

motion in the Superior Court. Similarly, his claim that his trial attorneys were ineffective for failing to investigate evidence that Holton was seen alive after the alleged date of her death was not raised in his postconviction motion below. We will not consider either of these claims for the first time on appeal absent a showing of plain error,¹⁰ which is error apparent on the face of the record and so fundamental and serious that it affected the outcome of the trial.¹¹ Keyser's contentions, however, are entirely conclusory. They lack any factual support or citation to the record. We find no plain error and reject these two newly-raised claims.

(11) We also find no abuse of the Superior Court's discretion in rejecting Keyser's five remaining allegations of ineffective assistance based on his attorneys' alleged failure to investigate. The Superior Court found that defense counsel made objectively reasonable efforts to confirm that Holton had been killed before the disposal of her body. The Superior Court also found that counsel acted reasonably in determining that there was no basis to seek suppression of Keyser's statements to the police based either on his mental health or his intoxication. Keyser's allegations concerning his lawyers' alleged ineffective pretrial

¹⁰ DEL. SUPR. CT. R. 8 (2013).

¹¹ *See Roy v. State*, 62 A.3d 1182, 1191 (Del. 2012).

investigation are all conclusory and unsupported by the record. Accordingly, we reject these claims.

(12) Keyser's second claim on appeal is that his attorneys were ineffective by misinforming him of the State's plea offer and for failing to make the counteroffer that Keyser had requested. The State offered to allow Keyser to plead guilty to one charge of Murder in the Second Degree with a sentence recommendation of twenty-five years in prison, to be suspended after serving eighteen years and six months for decreasing levels of supervision. Although Keyser now contends that his attorneys misinformed him of the plea, he offers no specific information about any inconsistencies between what his lawyers told him and what actually was included in the written plea offer. We therefore find nothing to support Keyser's claim of error. The plea offer made to Keyser was very generous for a defendant facing a capital murder trial and possible death sentence. We agree with the Superior Court that Keyser's attorneys did not act unreasonably in failing to make the unusual counteroffer¹² that Keyser wanted them to make because the State had a strong case against Keyser and had no reason to accept Keyser's one-sided counter proposal.

(13) Keyser's two remaining claims are that his trial attorneys were ineffective for failing to object to evidence and for failing to suppress evidence.

¹² In the Rule 61 petition he file in the Superior Court, Keyser asserted that he had asked his lawyers to draft a plea agreement that would exculpate Keyser if new evidence was found.

Keyser fails to articulate on appeal what evidence his attorneys failed to object to or should have moved to suppress. In his Superior Court petition, Keyser argued that his attorneys should have objected to the admission of a chain found wrapped around Holton's ankles and a store surveillance video showing Keyser with Holton shortly before her murder. Keyser also argued that his attorneys should have moved to suppress his taped statements. As the Superior Court found, however, there was no basis to object to the admission of either the chain or the surveillance videos. The chain of custody of the chain was established at trial, and to the extent Keyser argues that he was not the person seen in the video surveillance, that contention goes only to the weight of the evidence and not its admissibility and is an issue of fact for the jury to determine.¹³

(14) Furthermore, Keyser's taped statements, which were made voluntarily before Keyser was even arrested, reflect that Keyser was properly Mirandized and reflected no evidence of intoxication or mental illness. The Superior Court allowed counsel extended time to uncover any evidence that Keyser may have attempted to contact a lawyer while he was at the police station. Further investigation did not unearth any new evidence. Accordingly, there was no basis for counsel to file a motion to suppress Keyser's voluntary statements. We therefore reject this claim of ineffective assistance of counsel.

¹³ See *Jeffers v. State*, 934 A.2d 908, 911 (Del. 2007).

(15) This Court has reviewed the record carefully and concluded that Keyser's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Keyser's counsel has made a conscientious effort to examine the record and the law and has properly determined that Keyser could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice