

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	I.D. No. 0410013428A
	:	
	:	
PAUL A. FAHMY,	:	
	:	
Defendant.	:	

Submitted: November 29, 2007

Decided: January 22, 2008

*Decision upon Defendant's Motion for Postconviction Relief*

MEMORANDUM OPINION

Paul A. Fahmy, Delaware Correctional Center

James Kriner, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for the State.

Michael C. Heyden, Esquire, Wilmington, Delaware.

DEL PESCO, J.

On July 12, 2007, Paul A. Fahmy (“defendant”) filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”) alleging ten grounds for relief. For the reasons set forth below, the defendant’s Motion for Postconviction Relief is DENIED.

*Factual and Procedural Background*

The record supports the following summary of facts. In October 2004, Charles Morgan (“Morgan”) and Darnell Lane (“Lane”) had been friends for about three weeks. One evening, they were drinking and driving with Mitzy Osorio (“Osorio”), Morgan’s one-time girlfriend, in her car. At one point during their drive, Morgan stopped at a friend’s house and exited the car. Alone in the vehicle, Lane and Osorio engaged in a conversation. Lane propositioned Osorio for oral sex; she declined his overture. He asked to borrow the CD player in the back seat of her car, but she rejected that request as well. Lane was dropped off at his house later that night. While leaving the car, he took the CD player. After the car had pulled away from Lane’s house, Osorio realized the CD player was gone. She told Morgan about the missing player and advised him of Lane’s unwelcome sexual advances. They were both angry. Osorio demanded that Morgan retrieve the CD player from Lane.

A few days later, on October 14, 2004, the defendant, Morgan and Lane drove to Osorio’s residence in Osorio’s car, which Morgan had borrowed. At that time, Lane had known the defendant for about three weeks as well. While in front of her house, Osorio and Lane argued about whether Lane had permission to take the CD player. Lane returned the player and the three men then went driving around town. They were drinking. Morgan drove to a secluded, wooded area in New Castle County where he and the defendant lured Lane into the woods. As they walked, Morgan put his arm around Lane and told him that they were “going to meet up

with these girls and do something.”<sup>1</sup> In the woods, the defendant shot Lane in the back of the head. The shot was not fatal. Hearing the shot, Lane turned around. The defendant and Morgan were standing five feet away staring back at him. Lane then heard a second gunshot and saw a flash coming from the defendant. Realizing he was the target, Lane turned from his assailants and ran to the nearest house where the residents called for an ambulance. Lane was taken to a hospital where he was interviewed by the police. From a photo line-up, he identified the defendant and Morgan as the assailants.

The defendant and Morgan were arrested the next morning. They were both charged with attempted murder in the first degree and possession of a firearm during the commission of a felony. The case proceeded to trial against both defendants. On January 27, 2006, a jury found both the defendant and Morgan guilty on both counts. The defendant was sentenced on March 24, 2006. The sentence for attempted murder first degree was 15 years at level five, the minimum mandatory sentence, plus two years of probation. The sentence on the weapon charge was 5 years at level five, the first three years of which is minimum mandatory time. On October 5, 2006, the Supreme Court affirmed the defendant’s conviction.<sup>2</sup> The defendant’s attorney at trial and on appeal was Michael C. Heyden, Esquire.

On July 12, 2007, the defendant timely filed a *pro se* Motion for Postconviction Relief in this Court pursuant to Rule 61. He asserts ten grounds for relief: (1) ineffective assistance of counsel; (2) lack of a fair and unbiased trial; (3) improbable cause [sic]; (4) coercion of witnesses; (5) abuse of the judge’s discretion; (6) prosecutorial misconduct; (7) perjured testimony; (8) denial of the right to confront witnesses; (9) insufficiency of evidence; and (10) inadmissible interpretive narrative.

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<sup>1</sup> Trial Tr. 38, Jan. 25, 2006.

<sup>2</sup> *Fahmy v. State*, 909 A.2d 594 (Del. 2006).

### *Ineffective Assistance of Counsel*

The defendant alleges four acts which he believes amount to ineffective assistance of counsel: (1) that counsel failed to present defendant's motion for sentence modification; (2) that counsel did not confer with him sufficiently before trial; (3) that counsel discussed the case with witnesses without the defendant's consent; and (4) that counsel failed to file a pre-trial motion seeking severance.

To prevail on a postconviction relief claim based on ineffective assistance of counsel, the defendant is required to show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.<sup>3</sup> The defendant must satisfy the proof requirements of both prongs in order to succeed on an ineffective assistance of counsel claim. Failure to do so as to one prong will render the claim unsuccessful, and the Court need not address the remaining prong.<sup>4</sup> To show that counsel's representation fell below an objective standard of reasonableness, the defendant bears a heavy burden. He must overcome the strong presumption that his counsel's representation was professionally reasonable.<sup>5</sup>

The defendant charges his counsel with ineffective assistance because he failed to file a motion for modification of sentence. A motion to modify a sentence addresses a sentence which is illegal or was imposed in an illegal manner, it does not relate to a judgment of conviction—the essence of Rule 61. The defendant has failed to show that the sentence imposed was illegal or imposed in an illegal manner. The bulk of his sentence is minimum mandatory time. He filed a *pro se* motion to modify sentence which was denied. His argument lacks merit.

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<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

<sup>4</sup> *Id.* at 697.

<sup>5</sup> *Id.* at 689.

Second, the defendant asserts that his attorney did not confer with him sufficiently before trial. Responding to this allegation, his attorney states that he wrote five letters and held three teleconferences with the defendant to discuss the case. Counsel also explained that the defendant's defense was not complicated: he claimed that he was not present during the commission of the crime. The defendant has failed to explain how further conferences would have changed the outcome of the trial and he has failed to show how counsel's representations fell below an objective standard of reasonableness. Conclusory allegations, such as this one, are insufficient to support a motion for relief.<sup>6</sup>

The defendant believes counsel provided ineffective assistance when his attorney spoke to witnesses, specifically, his mother and father, without his consent. His mother and father were alibi witnesses who testified in his defense. It was his counsel's obligation to speak with all witnesses in preparation for trial. Again, the defendant has not demonstrated how counsel's representations fell below an objective standard of reasonableness nor has he demonstrated how, but for counsel's unprofessional conduct, the result of the trial would have been different.

The defendant's final allegation of ineffective assistance of counsel is that he was denied a fair trial because his attorney did not file a motion for severance. To prevail on this claim, the defendant must overcome a "strong presumption that counsel's conduct was reasonable or could have been considered sound trial strategy at the time."<sup>7</sup> The Court will not review actions of counsel through a lens of hindsight,<sup>8</sup> and if trial counsel investigated both the law and facts and made reasonable strategic choices at the time of the trial, those choices are "virtually unchallengeable."<sup>9</sup> Counsel decided not to sever the case in order to prevent co-defendant

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<sup>6</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>7</sup> *Strickland*, 466 U.S. at 689.

<sup>8</sup> *Id.* at 687.

<sup>9</sup> *Id.* at 690.

Morgan from testifying against the defendant. Counsel's strategy was successful in that Morgan did not testify against the defendant at trial. This tactical decision has a rational basis in fact. The defendant's allegation is without merit.

#### *Other Claims*

The balance of the petitioner's claims are matters which he seeks to bring within the purview of a Rule 61 motion on the grounds that his attorney should have addressed them on appeal. Since each argument either was presented and decided on appeal, or lacks merit, there is no basis for a finding of ineffective assistance of counsel.

#### *Lack of a Fair and Unbiased Trial*

The defendant alleges that "[o]ne African-American is not enough to give the defendant a racially balanced jury." He objects to the *result* of the selection process, not the selection process itself. A defendant is not entitled to a jury panel that fits the exact racial make up of his neighborhood or city. The Delaware Constitution and 10 *Del. C.* § 4501 guarantee that a defendant's jury would be selected at random from a fair cross section of the population.<sup>10</sup> He is not guaranteed a perfectly representative jury. The nature of random selection makes it inevitable that a jury may on occasion fail to represent the exact demographic make-up of the community.<sup>11</sup> The defendant has failed to show an irregularity in the selection of the jury. Without such a showing, he is not entitled to relief for his claim.

Next, the defendant alleges that the jurors' thought processes were biased and that they "indulged in forbidden behavior." Rule 61 provides a remedy only in those circumstances where there is a "sufficient factual and legal basis for a collateral attack upon a criminal conviction . . .

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<sup>10</sup> Del. Const. art. I, § 4; *Gattis v. State*, 637 A.2d 808, 815 (Del. 1994).

<sup>11</sup> *Riley v. State*, 496 A.2d 997, 1009 (Del. 1985).

.”<sup>12</sup> The defendant fails to support his allegations with specific facts or evidence in the record. The allegations are merely conclusory and are insufficient to support postconviction relief.

The defendant also alleges that the Court was biased at trial and held “preconceived notions.” He supports that claim with a statement he claims I made at sentencing. He claims I said that I had no doubt the defendant was guilty. I may have made such a statement, given the force of the evidence in this case, but no transcript has been provided. The statement does not constitute a basis for postconviction relief.

*“Improbable Cause”*

To the extent the Court can decipher, the defendant claims that there was “no probable cause provided to include the defendant in this heinous situation” and that the Grand Jury was impartial because he was indicted without any basis. The defendant has not provided a sufficient factual and legal basis for a consideration of this conclusory claim.

*Coercion*

The defendant alleges that law enforcement officers coerced Lane to identify the defendant as the assailant from the photograph line-up. He claims that it would have been “nearly impossible to identify the defendant [from the photograph in the line-up which was taken before Lane knew the defendant] unless [Lane] was coaxed by the law enforcement officer(s)” because the defendant appeared different from the line-up photograph at the time he knew Lane. The defendant’s statement is conclusory, unsubstantiated and insufficient to support his claim for relief.

The defendant also alleges that the prosecutor coerced testimony from Sergeant John W. Treadwell and Detective Williams during rebuttal testimony. The defendant’s father testified that on the day the defendant was arrested he told the Sergeant that his son was home with him at

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<sup>12</sup> Super. Ct. Crim. R. 61(a)(1).

the time of the incident. The Sergeant's rebuttal testimony was that the defendant's father never approached him that day to make that comment. The defendant's mother testified that she did not admit her son's responsibility for the crime. The Detective's rebuttal testimony was that the defendant's mother said at the defendant's preliminary hearing, "I'm sorry, I'm sorry what happened."<sup>13</sup> The jury had the opportunity to see these witnesses and assess their demeanor. Defendant's allegation of coercion is conclusory, unsubstantiated and insufficient to support his motion for postconviction relief.

#### *Abuse of Judge's Discretion*

To the extent that I can understand the substance of this claim, it appears that the defendant alleges that I "abused [my] discretion" by not examining the jurors sufficiently about an out-of-court jury conversation overheard by a court interpreter. The interpreter thought he overheard three jurors discussing whether Osorio could hear without the assistance of an interpreter. The interpreter could not identify any of the people he saw. After questioning each juror individually about whether such a conversation took place, counsel for the defendant requested a mistrial. I denied the request citing no factual basis to exclude any juror.

In cases of juror misconduct, a defendant is entitled to a new trial only where the circumstances are so egregious as to be inherently prejudicial, or where the defendant can show that the misconduct caused actual prejudice.<sup>14</sup> Where the juror misconduct did not involve the communication of information outside the evidence presented at trial, this Court has held that there was no inherent prejudice in the juror's misconduct.<sup>15</sup> The inquiry at trial did not support the conclusion that any jurors—as opposed to spectators—had engaged in a conversation about Ms. Osorio's ability to understand the proceedings without the assistance of an interpreter. As

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<sup>13</sup> Trial Tr. 195, Jan. 26, 2006.

<sup>14</sup> *Miller v. State*, 2005 WL 1653713, at \*2 (Del. July 12, 2005).

<sup>15</sup> *Durham v. State*, 867 A.2d 176, 179-80 (Del. 2005).

soon as I was notified of potential juror impropriety, I inquired of each juror whether they had engaged in any conversation as described by the interpreter. All jurors denied participating. The defendant's argument that the questioning of jurors was "lackadaisical [sic] and insufficient" is not supported by the record. His allegation is without merit.

#### *Prosecutorial Misconduct*

The defendant alleges two acts of prosecutorial misconduct: (1) that the prosecutor asked the defendant's father if he had visited the incarcerated defendant while the trial was pending; and (2) that the prosecutor coerced the testimony of Detective Teresa Williams by allowing her to sit at the prosecutor's table throughout trial.

The defendant's claims premised on prosecutorial misconduct are procedurally barred under Rule 61(i)(3). Defendant has not shown cause for failing to raise these claims at a prior proceeding, nor has he shown that "there was a 'substantial likelihood' that, if [the issues had been raised] during his appeal, the outcome of his case would have been different."<sup>16</sup> Even if the Court assumes the defendant satisfied the cause prong, the defendant has not made any showing of a "substantial likelihood" that the outcome of his trial or direct appeal would have been different.

The Detective's presence at the counsel table was appropriate given her role as the chief investigating officer in this case.<sup>17</sup> There is no evidence of coerced testimony. The defendant's conclusory allegations do not provide a sufficient factual or legal basis for a collateral attack upon his conviction.

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<sup>16</sup> *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

<sup>17</sup> *Taylor v. State*, 849 A.2d 405, 408 (Del. 2004)(citing *Hamann v. State*, 565 A.2d 924, 929-30 (Del. 1989)).

### *Perjured Statements*

The defendant alleges that Lane and Osorio committed perjury when they gave inconsistent statements at trial. The jury is the sole judge of the credibility of the witnesses and it is responsible for resolving conflicts in the testimony.<sup>18</sup> The defendant's allegations are insufficient to support the motion for postconviction relief.

### *Right to Confront Witnesses*

The defendant alleges that he was denied a fair trial "by not having all of the key witnesses presented on the stand." He complains that the prosecution did not call Nicole Bundy, Jessica Vega or Stephanie Cherico to testify. The prosecutor has no duty to call any particular witness to disclose material that is non-exculpatory.<sup>19</sup> The State must prove its case beyond a reasonable doubt. It did so.

### *Insufficiency of Evidence*

The defendant's claim for insufficiency of evidence is barred under Rule 61(i)(4) because the argument was already raised and rejected by the Delaware Supreme Court on direct appeal. Any ground for relief that was formerly adjudicated is barred unless reconsideration of the claim is warranted in the interest of justice.<sup>20</sup> The "interest of justice" exception has been narrowly defined to require the movant to show that the court lacked the authority to convict or punish the movant.<sup>21</sup> The defendant has proffered no factual basis to demonstrate such an interest. Thus, this claim is procedurally barred.

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<sup>18</sup> *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

<sup>19</sup> *Liket v. State*, 719 A.2d 935, 937 (Del. 1998).

<sup>20</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>21</sup> *State v. McKamey*, 2003 WL 22852614, \*4 (Del. Super. Nov. 23, 2003), *aff'd*, 847 A.2d 1121 (Del. 2004).

### *Inadmissible Interpretive Narrative*

The defendant's final ground for relief is that the State offered inadmissible interpretive narrative of a conversation between Detective Williams and Osorio. The State called Osorio as a witness at trial. The prosecutor asked Osorio about a conversation she had with Detective Williams after the shooting. Osorio could not remember the date, time or content of her purported statement to the detective. The State interrupted her testimony and called Detective Williams to the stand. The purpose was to introduce into evidence, pursuant to 11 *Del. C.* § 3507, a statement made to Detective Williams by Osorio.

The Supreme Court, upon reviewing the conviction of co-defendant Morgan, held that admission of the section 3507 statement was improper. Morgan was granted a new trial. He later pled to a single count of conspiracy first degree. The section 3507 statement, described in full by the Supreme Court,<sup>22</sup> focused on the nature of Osorio's relationship with Morgan. Because he was convicted as an accomplice, the evidence as to his state of mind was based on inferences drawn from his conduct.

In support of [accomplice liability] the State submits that the record reflects that Morgan: borrowed Osorio's car the evening of the shooting; invited Lane to accompany him and Fahmy for a ride; and drove to a wooded area. Once out of the car, Morgan "put his hand around" Lane and said, "Darnell, we going [sic] to meet up with these girls." When the trio got into the woods and stopped, prompting Lane to ask where the girls were, Morgan reassured him that "they're coming."<sup>23</sup>

By contrast, the defendant's culpability was based on the victim's observation of the defendant shooting the gun at Lane. Lane testified:

Well, when I turned around in shock and I looked. And they was [sic] – they was kind of just like staring at me. Then I heard a gun go off. I saw sparks come from

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<sup>22</sup> *Morgan v. State*, 922 A.2d 395 (Del. 2007).

<sup>23</sup> *Id.* at 400-01.

– come from Paul. So I kind of figured that they were shooting at me. So I turned around and I ran.<sup>24</sup>

The defendant has failed to demonstrate how the admission of the section 3507 statement harmed him beyond a reasonable doubt. The statement admitted into evidence under section 3507 was a statement pertaining only to the relationship between Osorio and Morgan. The statement was completely irrelevant to the defendant’s defense. His allegation is without merit.

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<sup>24</sup> Trial Tr. 40, Jan. 25, 2006. Lane identified “Paul” as the defendant. *Id.*