

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE                    )  
  )  
                  v.                            )     ID No. 9607013218 WCC  
  )  
KEVIN HILL,                            )  
  )  
                  Defendant.            )

Submitted: October 29, 2007  
Decided: January 31, 2008

**On Defendant’s Motion for Postconviction Relief - DENIED**

**MEMORANDUM OPINION**

James Apostolico, Department of Justice, 820 North French Street, Wilmington, Delaware 19801.

Kevin Hill, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware, 19997. *Pro se.*

**CARPENTER, J.**

Before the Court is Mr. Hill'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. Hill's arrest and subsequent conviction stem from a robbery and shooting on July 13, 1996, at the Great Wall Chinese Restaurant in Wilmington. That evening the Defendant, along with his co-defendants, conspired to rob the Great Wall, rode their bicycles to the vicinity of the restaurant, donned ski masks and entered with guns raised. Almost as soon as the group entered the Restaurant, the Defendant fired a shot which killed an employee, Xiong Zheng. One of his co-defendants then forced the store owner, Tommy Tiong, to open the cash register at gunpoint. The group then fled with approximately two hundred dollars, which they later divided up between them.

As a result of his involvement in the shooting and robbery, the Defendant was indicted on the following charges: Robbery in the First Degree, Conspiracy in the Second Degree, two counts of Murder in the First Degree, and six counts of Possession of a Firearm During the Commission of a Felony. At his jury trial, Hill's co-defendants testified to numerous statements made by and about the Defendant, including multiple admissions by the Defendant that he was the shooter, and various

reasons why he shot the victim. Additionally, a box of .45 caliber bullets was found during a search of Defendant's bedroom. An FBI ballistic expert testified that the victim was shot with a .45 caliber bullet.<sup>1</sup> The jury found the Defendant guilty of all charges and on May 8, 1998 he was sentenced to two life sentences, plus thirty years, followed by an additional two years of probation.<sup>2</sup>

On appeal, the Supreme Court affirmed Hill's convictions and a mandate was issued on July 1, 1999.<sup>3</sup> On October 29, 2007, the Defendant filed this Motion for Postconviction Relief. Defendant seeks appointment of counsel and transcripts of his trial, claiming his felony murder conviction should be vacated pursuant to the Supreme Court's decision in *Williams v. State*.<sup>4</sup> In *Williams*, the Supreme Court held that the "in furtherance of" language of the Delaware felony murder statute requires a murder occur not only in the course of the felony, but also to "help move the felony forward."<sup>5</sup> In *Chao v. State* the Supreme Court found the holding in *Williams* applies

---

<sup>1</sup>*Hill v. State*, 734 A.2d 158 , 1999 WL 507075, at \*3 (Del. June 14, 1999) (TABLE).

<sup>2</sup>*Id.* at \*1.

<sup>3</sup>*Id.* at \*6.

<sup>4</sup>818 A.2d 906 (Del. 2003).

<sup>5</sup>*Id.*, at 913. *See* 11 *Del. C.* §636(a)(2) "A person is guilty of murder in the first degree when...[i]n the course of and in furtherance of the commission or attempted commission of a felony..., the person recklessly causes the death of another person."

retroactively.<sup>6</sup> While the Court would normally dismiss the Defendant’s motion as time barred under Rule 61(i)(1)<sup>7</sup>, as it was filed by Defendant more than eight years after his conviction became final, Rule 61(i)(5)<sup>8</sup> provides an exception to the procedural bars of Rule 61(i). Referred to as the “fundamental fairness” exception, Rule 61(i)(5) has been applied where the right relied upon was recognized for the first time after a direct appeal.<sup>9</sup> Therefore, pursuant to Rule 61(i)(5) it is appropriate for the Court to analyze the Defendant’s claim under the current interpretation of Delaware’s felony murder statute.

### ***Discussion***

The question before the Court is whether there was sufficient evidence presented at trial to support a finding that the murder of Xiong Zheng was committed in order to “facilitate,” or help move the robbery forward. A review of the testimony

---

<sup>6</sup>“We conclude that in the interest of justice, *Williams* must be applied retroactively, because Chao may have been convicted for acts that do not constitute felony murder.” *Chao v. State*, 931 A.2d 1000, 1000 (Del. 2007).

<sup>7</sup>Rule 61(i)(1) acts as a time bar to any claim for relief not filed within one year of the defendant’s conviction becoming final. For judgments of conviction that became final prior to July 1, 2005, a defendant has three years in which to file his postconviction motion. Thus, the latter rule applies to Mr. Hill’s motion, as his conviction became final in 1999.

<sup>8</sup>“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.)

<sup>9</sup>*Younger v. State*, 580 A.2d 552, 555 (Del. 1990)(citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989)).

of Hill's co-defendants is helpful in resolving the question, and a comparison of the evidence presented at trial in *Williams* and its progeny reveal the facts of Defendant's case can be easily distinguished, and supports the felony murder conviction.

Before discussing the individual testimony of Hill's co-defendants about the shooting, it is important to put the events of July 13, 1996 into context. The Defendant, who was fifteen at the time, was smoking marijuana in the early evening with four of his friends when the group collectively decided to "rob somebody that night."<sup>10</sup> The Defendant had a gun and displayed it to his co-defendants while they were planning the robbery.<sup>11</sup> The group had originally planned to ride their bikes to Market Street and rob a drug dealer, but their plans changed when they met up with Aldrich Hackett, a man they knew from the neighborhood. It was Hackett who suggested robbing the Great Wall, and convinced everyone else to join him. He also had a gun that night. It was determined that Khalil Ameer-Bey and Rudo Pressley would be the lookouts because neither of them had masks to hide their faces.<sup>12</sup> At approximately ten-thirty the Defendant entered the Great Wall, along with Jamonn Grier, Maurice Cooper and Aldrich Hackett.

---

<sup>10</sup>Trial Tr. Dec. 4, 1997, testimony of Maurice Cooper at 121-22.

<sup>11</sup>Trial Tr. Dec. 5, 1997, testimony of Rudo Pressley at 106-07; Trial Tr. Dec. 4 1997, testimony of Tia Brown at 255-56.

<sup>12</sup>Trial Tr. Dec. 4, 1997, testimony of Maurice Cooper at 141-43.

While the testimony of Hill's co-defendants varies slightly as to what happened next, there is no question that during the robbery the Defendant discharged his gun killing the victim. Maurice Cooper testified that seconds after the Defendant entered the store the Defendant said "give it up" and then he heard a shot.<sup>13</sup> Jamonn Grier testified that as the group ran in, the Defendant held his gun "pointed, like, in the air in, like, firing position."<sup>14</sup> He heard the Defendant yell "It's a stick up. Give it up." Then he heard a shot.<sup>15</sup>

Khalil Ameer-Bey was not present when the robbery occurred, but testified that later that night Jamonn Grier, Rudo Pressley and Maurice Cooper "just said they just seen Kevin Hill fire a shot."<sup>16</sup> The following testimony of Ameer-Bey is particularly relevant to the question of the Defendant's intent:

Q: Okay, and what did they say to Kevin?

A: Someone, I don't remember who it was, asked Kevin why did he shoot the guy. Kevin said he was paranoid, he was scared and he thought the dude was reaching for something and that he heard a gunshot. So he just pulled the trigger.

---

<sup>13</sup>Trial Tr. Dec. 4, 1997, testimony of Maurice Cooper at 150-51.

<sup>14</sup>Trial Tr. Dec. 8, 1997, testimony of Jamonn Grier at 32.

<sup>15</sup>*Id.* at 29.

<sup>16</sup>Trial Tr. Dec. 5, 1997, testimony of Khalil Ameer-Bey at 48.

Q: The defendant said that he pulled the trigger?

A: Yes, he did.<sup>17</sup>

Likewise, Jamonn Grier testified the Defendant admitted to shooting the victim:

Q: So he did admit to pulling the trigger and said he didn't mean it?

A: Yes, because at one point . . . we all was, like, asking him, Did you do it? He was like, I didn't mean to do it. I didn't mean to do it. He just kept said he didn't mean it, he didn't mean to shoot him.<sup>18</sup>

Rudo Pressley made a similar statement during his testimony regarding the shooting:

Q: And what did Kevin Hill say when asked why he did it?

A: Said he had to do it.<sup>19</sup>

The Court finds that, while varied, the testimony of Hill's co-defendants proves that the shooting of Xiong Zheng was done in order to move the robbery along. That the Defendant thought Zheng was reaching for a weapon, or felt he "had to do it," only lends more support to the argument that the shooting would allow the Defendant and his co-defendants to more easily complete the robbery.

---

<sup>17</sup>*Id.* at 49.

<sup>18</sup>Trial Tr. Dec. 8, 1997, testimony of Jamonn Grier at 42.

<sup>19</sup>Trial Tr. Dec. 5, 1997, testimony of Rudo Pressley at 120.

The facts of the present case are easily distinguishable from *Williams* and *Chao*, where the Supreme Court vacated the defendants' felony murder convictions because the murders were not "in furtherance of" the underlying felony. In *Williams*, the defendant's underlying felony was the burglary of the home of his girlfriend's co-worker, where his girlfriend had been staying since they had an argument days before. Upon entering the home, he shot his girlfriend twice, killing her. The Court found that the murder was not committed to further the completion of a burglary, rather, Williams' sole purpose in entering the home was to murder his girlfriend. The Court held that "where a burglary is alleged to be the felony on which the felony murder charge is predicated. . . the burglary must have an independent objective that the murder facilitates."<sup>20</sup>

Likewise, in *Chao*, evidence pointed to arson as the means of committing intentional murder, not vice versa, and the Supreme Court applied *Williams* retroactively to vacate the defendant's felony murder convictions.<sup>21</sup> In a similar case, *State v. Kirk*, the Superior Court found the Defendant was entitled to postconviction relief under *Williams* because three unintended arson victims were not killed by the Defendant with the intent to help the arson progress. "Simply put, the Defendant did

---

<sup>20</sup>*Williams*, 818 A.2d at 908. "Had his purpose been to steal jewelry and [his girlfriend] was killed to facilitate this thievery, a case for felony murder would exist." *Id.* at 913.

<sup>21</sup>*Chao*, 931 A.2d at 1003.



not cause the deaths of the three members of the Rivera family in order to promote or further the fire that he started. . . .”<sup>22</sup>

The facts of the Defendant’s case, as described by his co-defendants at trial, clearly fits the Supreme Court’s current interpretation of the felony murder statute. The facts in *Williams*, *Chao* and *Kirk* are distinguishable from Defendant’s case. Had Defendant entered the Great Wall that night with the intent to kill Xiong Zheng, and then decided to take some cash from the register as an afterthought, he may have had a case for relief under *Williams*. On the contrary, not only was the murder of Xiong Zheng committed in the course of the robbery, but it was committed with the intent to help move the robbery forward. The testimony that the Defendant thought the victim was reaching for something, perhaps a weapon, supports the argument that Hill was eliminating an obstacle that stood in the way of he and his friends ultimately taking money out of the cash register. Furthermore, testimony that the Defendant “had to do it” suggests he intended to quell any resistance to their completion of the robbery.

---

<sup>22</sup>*State v. Kirk*, 2004 WL 396407, \*6 (Del. Super. Feb. 26, 2004).

***Conclusion***

The Court having found that in spite of the Supreme Court’s recent interpretation of the “in furtherance of” language of 11 *Del. C.* §636(a)(2) as retroactively applied by the *Chao* decision, the facts of this case continue to support the Defendant’s felony murder conviction. The Defendant has not therefore set forth a “colorable claim” required by Rule 61(i)(5), and the Defendant’s Petition is DENIED. Consequently, Defendant’s requests for counsel and transcripts are DENIED.

IT IS SO ORDERED

---

Judge William C. Carpenter, Jr.