

January 17, 2002

Elizabeth R. McFarland, Esquire  
Deputy Attorney General  
Department of Justice  
Carvel State Office Building  
820 N. French Street  
Wilmington, DE 19801

Karl Haller, Esquire  
Office of the Public Defender  
Mellon Bank Building  
The Circle  
Georgetown, DE 19947

Carole Davis, Esquire  
Deputy Attorney General  
Department of Justice  
114 East Market Street, Suite 210  
Georgetown, DE 19947

**RE: Nyles Jarmon v. State of Delaware**  
**Def. ID #9509022629**  
**Motion for Post Conviction Relief (R-2)**

Dear Counsel:

On February 13, 2001, Nyles Jarmon filed a pro se motion for post conviction relief. Based upon the issues raised I appointed Mr. Haller to represent Mr. Jarmon. Because of schedules and the case falling between the cracks in the Attorney General's Office, the briefing was not completed until December 10, 2001. This is the Court's decision denying Mr. Jarmon's Motion for Post Conviction Relief.

This case has an extensive history. In March 1996 the defendant was found guilty of delivery of cocaine, conspiracy, delivery of cocaine, trafficking in cocaine and possession of paraphernalia. He was found not guilty of possession of a firearm during the commission of a felony. With the benefit of a presentence investigation the defendant was subsequently sentenced to a minimum mandatory period of 33 years, due to a prior conviction. On appeal, the Delaware Supreme Court reversed and remanded for a new trial. Upon re-trial the State elected to try only the two delivery of cocaine charges. Following a trial the defendant was found guilty of Count 1 Delivery of Cocaine, and not guilty of Count 2, which was also Delivery of Cocaine. The conviction required a 15 year minimum mandatory sentence. The defendant was sentenced to 25

years incarceration with credit for time served. After serving the required 15 years, the balance was suspended for probation. On direct appeal, Mr. Jarmon's conviction was affirmed. Jarmon v. State, No. 420, 1997, Berger J. (Sept. 8, 1998) ORDER Through both trials and the appeals Mr. Jarmon was represented by the same defense attorney.

At the trials the State alleged that Mr. Jarmon made two separate controlled buys. The first was to an undercover police officer and later on the same day the State alleged a second controlled buy was made to another police officer.

When the State indicted the defendant they used identical language for both delivery of cocaine charges. In the first trial, defense counsel filed a Bill of Particulars as to the "who, what, when, and where" of these two identical charges because the indictment as written did not identify which count went with which delivery. The State answered, referring to the arrest warrant, and noted the place, and that Detectives Grow and Harris were the undercover police officers. The State did not specify which count went with Detective Grow and which count went with Detective Harris. Prior to the first trial the defense again raised this issue. The State reported that it would designate Detective Grow on the first delivery charge (which was Count 2 in the indictment for that trial) and Detective Harris for the second delivery charge (which was Count 4 of that indictment). The State informed the Defense that they were going in the same order that the alleged buys were made and that was Detective Grow and then subsequently about a half an hour later the allegation that a buy was made by Detective Harris.

When the case came back for a retrial and the State narrowed the charges to the deliveries of cocaine, the language in the deliveries of cocaine remained identical as to the language of the first indictment, i.e. the persons to whom the deliveries were allegedly made was not set forth. The case was tried in September 1997, and on September 24, the defendant was found guilty of Count 1, Delivery of Cocaine, and not guilty of Count 2, Delivery of Cocaine. The evidence presented by the State was done in chronological order with Detective Grow testifying first about the alleged buy, and then Detective Harris testifying as to the second alleged transaction, which occurred later, but on the same day.

Subsequently, the defendant filed several non-Rule 61 motions seeking relief, such as a motion for new trial and a request for modification of sentence. These were denied.

#### GROUNDS ALLEGED IN THE RULE 61 MOTION

Ground 1: The defendant alleges that the indictment was defective in that the indictment did not contain essential facts to enable him to sufficiently defend against the State's case and upon conviction or acquittal to establish a judgment for purposes of

double-jeopardy. Because both counts of the indictment are identical and the jury was never formally told which transaction to attach to Count 1 and likewise Count 2 the defendant alleges the indictment was fatally flawed.

Ground 2: The defendant, piggy-backing on Ground 1, alleges that the Court failed to instruct the jury as to the necessary elements of the crime because the instructions failed to include the specific times and the specific person to whom the drugs were allegedly delivered.

Ground 3: The defendant alleges that his minimum mandatory sentence of 15 years was an enhanced sentence, but he never received a hearing that he was entitled to as a matter of law.

Ground 4: The defendant alleges that his attorney was ineffective for failing to raise Grounds 1, 2 and 3 at trial or on appeal.

#### PROCEDURAL BARS

First, I am going to discuss Ground 3, the failure to have a hearing to establish the defendant's prior conviction, which was the basis for the enhanced sentence of 15 years for the delivery conviction. The history of the case and the transcripts are helpful to establish why this claim is procedurally barred and to my mind, frivolous. When the defendant was convicted in the first trial the Court had the benefit of a presentence investigation. Counsel had access to the presentence investigation and it clearly set forth his prior record. When the defendant was convicted the second time the defendant, through his attorney, asked for immediate sentencing and stated "It is our position that immediate sentence is appropriate to do the 15 years". The defendant was then sentenced to 25 years, suspended upon completing the 15 years. In other words, the defendant, with a full knowledge of his own record and the background of the presentence investigation asked for immediate sentencing and recognized that he faced the 15 year mandatory sentence on the delivery. (Transcripts Volume B of the sentencing September 24, 1997, B-97)

Thus the defendant acknowledged the appropriateness of the enhanced penalty and can't now complain otherwise. I find Ground 3 is therefore procedurally barred under Rule 61(i)(3) because the defendant has not explained cause for the procedural default nor has he explained prejudice. The defendant can not escape this procedural bar by merely alleging his attorney was ineffective. Under Strickland v. Washington 466 U.S. 668 (1984), the defendant must prove two separate things in order to establish ineffective assistance of counsel. First, the defendant must establish that his lawyer made mistakes, the analysis being from a reasonable and objective view point. Second, he must establish that his attorney's mistakes actually prejudiced him; that is that

those mistakes probably affected the outcome of the trial. Based upon the aforementioned information known to all parties I do not find that his trial attorney committed any error. Nor has the defendant shown any prejudice. He was sentenced for what he was, and if he is resentenced through the benefit of a hearing the defendant has not shown any reason as to why this enhanced penalty would not be applicable. He has not denied his prior drug conviction. Ground 3 is therefore procedurally barred under Rule 61(i)(3).

Grounds 1 and 2 will be considered together because both of these claims substantially overlap. Again, in Ground 1 the defendant alleges the indictment is faulty in that it does not allege such facts as to the commission of the crime that he is called upon to defend and therefore will not bar a subsequent prosecution for the same offense. In Ground 2 he alleges the instructions were erroneous in that the instructions did not delineate which count went with which alleged buy (which detective) thereby undermining the jury's ability to intelligently perform its duty and resulting in an unfair trial.

In applying any procedural bars of Rule 61 to these claims I find that Rule 61(i)(3) is relevant. Any claim concerning a defect in the indictment should be brought to the Court's attention prior to trial. Any claim of inadequate or erroneous jury instructions should be made by way of an objection at the time the Court offers the jury instructions and/or by way of an objection following the giving of the jury instructions. In this case the defense made no objection to either the indictment language or the instructions. The defendant argues that the cause for not making these objections and preserving the issue for appeal is because his attorney was ineffective. For the reasons I state below, I find that the attorney was not ineffective; nor do I find that the defendant has established any prejudice. Therefore the defendant cannot avoid the procedural bar of Rule 61(i)(3). He makes some interesting arguments as to the violations of his rights, but when it gets down to the application of the violation of his rights to any prejudice his arguments become conclusory.

As to the avoidance of the bar of Rule 61(I)(3) by blaming his lawyer, the Court must again look to Strickland v. Washington, 466 U.S. 668 (1984). I do not find that the defendant has met either prong of Strickland in that I do not find he has shown that his attorney committed error under an objective standard nor do I find that Mr. Jarmon has been prejudiced.

Mr. Jarmon had the same attorney in his first trial, his first appeal, his second trial, and his second appeal. In the first trial the defendant was informed of the place of the alleged sales and that they were made to Detective Grow and Detective Harris. On the morning of the first trial the State informed the Court and Mr. Gill that it would proceed in chronological order and the first alleged buy would involve Detective Grow, and the second alleged buy, which occurred about a half an hour later would pertain to Detective Harris.

When we fast-forward to the second trial there was no Bill of Particulars filed by the defense, nor was there any complaint concerning the indictment. I find this to be reasonable because the defendant was fairly on notice of the State's position set forth when the case was tried the first time. This is the same case being retried.

While it was not specifically spelled out for the jury, I do not think it was unreasonable for the jury to infer that Count 1 considered the testimony of the first buy and Count 2 involved the second buy. In light of this background, I do not find that Mr. Jarmon's attorney was in any way negligent or in any way committed error in not raising these issues to the trial judge or to the Supreme Court following Mr. Jarmon's conviction on Count 1. Therefore, Mr. Jarmon has not established the first prong under Strickland.

Nor can Mr. Jarmon establish the second prong of Strickland because he cannot establish any prejudice. The indictment in fact put the defendant on notice as to what he was called upon to defend and it does effectively preclude subsequent prosecutions for the offenses occurring on September 27, 1995, the date the State alleged both deliveries were made. At the second trial the defendant had the benefit of an indictment, a Bill of Particulars, and State's designation of which detective went with which count in the first trial; and significantly the defendant had the benefit of the first trial as to the alleged deliveries. Therefore the defense had much more information available at the second trial than would normally be available. The defendant fully defended both counts, alleging that the detectives had mistakenly identified him. The jury considered the evidence and was satisfied that the State had established Jarmon's guilt in Count 1, but was not convinced of the defendant's guilt in Count 2 and found him not guilty. It is thus clear that the jury considered the counts separately based upon the evidence. It is also clear that the State, having taken the defendant to trial on these two deliveries, would be barred by double jeopardy from attempting to retry the defendant in the future. Yes, it would have been preferable if the indictment had clearly delineated which count went with which detective, and likewise it would have been better if the instructions had clarified this for the jury. But, since the defendant has not shown his ability to defend these charges was in any way prejudiced, any error was harmless.

Finally, I note that as to the prejudice prong, the defendant was given the opportunity by the Court to show an error or prejudice as to either of the alleged sales. If he could show error or prejudice in either sale, then he would have had a strong Rule 61 argument. If there was no error or prejudice shown in either of the alleged drug transactions then the Rule 61 argument fails. The defendant has not presented anything to show he was prejudiced and his claim is only theoretical.

Ground Four alleges ineffective assistance of counsel. This is denied for the reason stated above. Defendant's Motion for Postconviction Relief is denied.

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IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

THG/jfg

oc: Prothonotary