

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	CRIMINAL ACTION NUMBERS
v.)	
)	IN-91-09-0956-R3
JOE L. TRAVIS)	
)	
Defendant)	ID NO. 30109075DI

Submitted: November 9, 2007
Decided: February 4, 2008

MEMORANDUM OPINION

Upon Motion of the Defendant
*for Post-Conviction Relief - **DENIED***

HERLIHY, Judge

Defendant Joe Lewis Travis has filed his second motion for postconviction relief. The issue he now raises was not in his first motion.

Travis was convicted on February 11, 1992 of the intentional murder of Steven Shumate. The evidence at trial indicated his culpability was of an accomplice to his co-defendant, Lester Anderson.¹ Travis' conviction was affirmed on appeal.² In this motion, he claims his murder conviction and life sentence should be vacated. His claim is based on the State's failure to designate in the indictment a particular subsection of the first degree murder statute.³ This, Travis contends, meant that he was charged with and convicted of felony murder. He asserts the predicate felony for felony/murder was the separate charge of possession of a deadly weapon during the commission of a felony (PDWDCF).

During the trial, the Court dismissed the PDWDCF charge. This act, Travis contends, meant the predicate felony for felony murder should have led to the dismissal of the murder charge itself. Alternatively, he also argues that the dismissal of the PDWDCF charge could have meant that the jury should have been given the option to convict him of lesser charges. In addition, he makes a claim of ineffective assistance of

¹ *State v. Travis*, Cr.A. No. IN91-09-0956, Herlihy, J., (Del. Super. 1992).

² *Travis v. State*, Del. Supr., No. 199, 1993, Moore, J. (December 22, 1993)(ORDER).

³ 11 *Del. C.* § 636.

counsel for not objecting to the submission of the first degree murder charge to the jury after the PDWDCF charge was dismissed. The Court finds no merit in any of these arguments. Travis' second motion for post-conviction relief is **DENIED**.

Discussion

A

Prior to undertaking consideration of Travis' motion, the Court must first determine if there are any procedural bars to doing so.⁴ There are potentially two. The first is that this motion time barred.⁵ The mandate affirming Travis' conviction was issued in 1994. This motion was filed on October 23, 2007. Ordinarily that thirteen year gap would mean this Court need go no further. But there is a means of relief to that time bar:

(i) *Bars to relief*. (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.⁶

But before determining if that means of relief is available to Travis, the Court must examine the other potential bar to consideration of his second motion, namely that this motion is repetitive and the earlier motion did not raise the issue he now raises:

⁴ *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).

⁵ Superior Court Criminal Rule 61(i)(1) whether the former bar of three years or the one year bar promulgated in 2005 is used; *Jackson v. State*, 654 A.2d 829 (Del. 1995).

⁶ Super. Ct. Crim. R. 61(i)(1).

(i) *Bars to relief.* (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.⁷

The relief to these two procedural bars are interrelated for purposes of this motion and analysis. To understand why, the Court must provide context. Travis' current argument derives from the Delaware Supreme Court's opinion in *Williams v. State*.⁸ In that case the Supreme Court reversed its prior interpretation of the phrase "in furtherance of" found in the felony murder subsection of the first degree murder statute which read:

(a) A person is guilty of murder in the first degree when:

(2) In the course of an in the furtherance of the commission or attempted commission of a felony..., the person recklessly causes the death of another person.⁹

That subsection of the first degree statute was amended after and as a result of *Williams*. But the statute quoted above was as it appeared when the murder in this case occurred. And the interpretation which *Williams* reversed was the operative interpretation when this murder occurred.

Williams was decided in 2003 and, again, a post-conviction relief motion filed in 2007 would be barred. But, in 2007 in *Chao v. State*¹⁰ the Supreme Court held that

⁷ Super. Ct. Crim. R. 61(i)(2).

⁸ 818 A.2d 906 (Del. 2003).

⁹ 11 *Del. C.* § 636(a)(2).

¹⁰ 931 A.2d 1000 (Del. 2007).

Williams' re-interpretation should be retroactively applied.¹¹ Clearly, therefore, when it was held in 2007 that a right to retroactive interpretation would be recognized, Travis' motion filed in the same year is not time barred.

This sequence also demonstrates why consideration of Travis' current motion is warranted under the relief provision of "interest of justice" found in Rule 61(i)(2). When in *Chao* the Supreme Court determined that its 2003 *Williams* decision was to be applied retroactively, it employed the same "interest of justice" standard, though found in a different rule:

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.¹²

Rule 61(i)(2) and (i)(4) are two different bars to postconviction relief. But the basis for relief from these bars is the same. In 1994, on direct appeal, there was no way for Travis to know of the 2003 *Williams* re-interpretation nor in 1997-98 when he filed his first postconviction relief motion.

In sum, there are no procedural bars to consideration of Travis' second motion for postconviction relief.

¹¹ *Id.*

¹² Super. Ct. Crim. R. 61(i)(4).

B

In order to accomplish consideration of Travis' current motion, some context is needed. Travis was, along with co-defendant Anderson, originally charged as follows:

Count I. A Felony

MURDER IN THE FIRST DEGREE in violation of Title 11, Section 636 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, did intentionally cause the death of Steven Shumate by beating him about the head and body.

COUNT II. A FELONY

POSSESSION OF A DEADLY WEAPON DURING THE COMMISSION OF A FELONY in violation of Title 11, Section 1447 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, did knowingly possess a deadly weapon during the commission of a felony by possessing a bat, a deadly weapon, during the commission of Murder, as set forth in Count I of this indictment, which is incorporated herein by reference.

COUNT III. A FELONY

CONSPIRACY FIRST DEGREE in violation of Title 11, Section 513 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, when intending to promote the commission of a class A felony, Murder First Degree, in violation of 11 Del. C. Section 636, did agree with each other

that they would engage in conduct constituting said felony and did commit an overt act in pursuance of said conspiracy by beating Steven Shumate.¹³

At trial, this Court, over the State's objection, dismissed Count II, the PDWDCF charge holding that a baseball bat was not a deadly weapon. The case was submitted to the jury on the murder and conspiracy counts. Travis and Anderson were found not guilty of the conspiracy charge, but they were found guilty of intentional murder.

The State separately appealed the dismissal of the PDWDCF charge. This Court's decision was reversed and remanded to reinstate Count II.¹⁴ Ultimately, the State entered a nolle prosequi on that charge.¹⁵

Travis' argument, however, is premised on this Court's dismissal of the PDWDCF charge prior to the case going to the jury. The reinstatement later of Count II does not change the basic issue his motion raises.

That issue, nevertheless, lacks merit. Travis was not convicted of felony murder. He was convicted of intentional murder. There was no felony "imbedded" in the murder charge. *Williams* and *Chao* have no application to this case.

He further argues that the murder charge is defective in any event. The basis for that is that the indictment does not specify the particular subsection of § 636 he violated.

¹³ Indictment dated September 30, 1991.

¹⁴ *State v. Travis*, Del. Supr., No. 97, 1992, Walsh, J. (October 7, 1992)(ORDER).

¹⁵ Docket #38. June 4, 1993.

He is correct, it does not. But a comparison of Count I and the appropriate subsection in § 636 reveals this contention too lacks merit:

- (a) A person is guilty of murder in the first degree when:
 - (1) The person intentionally causes the death of another person.¹⁶

* * * * *

COUNT I. A Felony

MURDER IN THE FIRST DEGREE in violation of Title 11, Section 636 of the Delaware Code of 1974, as amended.

LESTER ANDERSON AND JOE LEWIS TRAVIS, on or about the 24th day of August, 1991, in the County of New Castle, State of Delaware, did intentionally cause the death of Steven Shumate by beating him about the head and body.¹⁷

The language in Count I clearly indicates that Travis was indicted under § 636(a)(1).

The Court has considered this claim only because of its interrelationship to the underlying *Williams/Chao* claims.

Also tied into that underlying claim are two others. The first is that the Count II's dismissal meant he should have been tried on a lesser included offense. Unrelated to the dismissal, the jury was given the option of finding him guilty of second degree murder or manslaughter. This option was given because of the evidence at trial relating to the circumstances of the killing, not because Count II was dismissed. Nevertheless, the jury's rejection of both of those lesser includeds makes this argument moot. This is aside from the fact that it lacks merit in its own right.

¹⁶ 11 *Del. C.* § 636(a)(1).

¹⁷ Indictment dated September 30, 1991.

Travis' final ground for postconviction relief is that his trial counsel was ineffective for not objecting to the Court's instructions regarding the first degree murder charge. At first blush, this ground would confront several procedural bars: timeliness, failure to raise, etc. But, it too is tied to his *Williams/Chao* claim: the conviction of first degree murder should be vacated due to those decisions.

When making a claim of ineffective assistance of counsel, Travis must show (1) counsel's representation fell below an objective standard of reasonableness, and that (2) but for counsel's errors, there is a reasonable probability the outcome of the proceedings would have been different.¹⁸ Travis must make concrete allegations of ineffectiveness and substantiate those allegations or risk summary dismissal.¹⁹

This ground for postconviction relief must also fail. It is premised, as noted, on the *Williams/Chao* ground which is without merit. That means had trial counsel raised the objection Travis now says she should have, it would have been overruled. It would have been overruled because *Williams/Chao* was not the law in 1992 and Travis was not charged with or convicted of felony murder. There was not then and there is not now a basis for this objection. Consequently, there could not have been nor could there now be a basis for counsel error. Failure to satisfy the first prong, that there was counsel error, means counsel was not ineffective.²⁰

¹⁸ *Strone v. State*, 690 A.2d 924, 925 (Del. 1996).

¹⁹ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

²⁰ *Richter v. State*, 704 A.2d 262 (Del. 1997); *cert. denied* 523 U.S. 1126, 118 S. Ct. 1814, 140 L.Ed.2d 951 (1998).

Conclusion

For the reasons stated herein, defendant Joe Lewis Travis' motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

J.