

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,)
) ID. No. 0608013125
 v.)
)
 BRIAN WATERMAN)
)
 Defendant.)

Submitted: October 13, 2010

Decided: January 13, 2011

R. David Favata, Esquire, Department of Justice, Dover, Delaware, Attorney for the State of Delaware

Brian Waterman, Pro Se

Upon Motion of Defendant for Postconviction Relief - DENIED

HERLIHY, Judge

ORDER

Upon consideration of defendant's Motion for Postconviction Relief, the Commissioner's Report and Recommendation, and the record in this case, it appears:

1. The defendant was found guilty by a jury of one count of Rape in the First Degree, 11 Del. C. § 772; fifteen counts of Rape in the Second Degree, 11 Del. C. § 773; one count of Continuous Sexual Abuse, 11 Del.C. § 778; and one count of Dangerous Crimes Against a Child, 11 Del.C. § 779. He was sentenced to 190 years in prison suspended after serving 177 years, 175 years of which were minimum, non-suspendable.

2. The defendant filed an appeal with the Delaware Supreme Court. In his appeal, Waterman raised two claims of error. The first was that four pages of the victim's journal should not have been allowed into evidence, as the remaining pages were unavailable. The second claim was that the Court erred in allowing the videotape of the interview of the

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child victim at the Children's Advocacy Center to be admitted into evidence for the jury to use during its deliberations.. The defendant's conviction and sentence was affirmed by the Delaware Supreme Court.¹ The defendant next filed a Motion for Postconviction Relief in which he raised three grounds for relief, all of which were based on ineffective assistance of counsel.

3. Waterman's Motion for Postconviction Relief was referred to the Court Commissioner Andrea M. Freud for proposed findings and recommendation pursuant to 10 *Del. C.* § 512(b)(1)(b) and Superior Court Criminal Rule 61(a)(5). The Court appointed new counsel for Waterman who briefed the matter before the Commissioner.

4. After a thorough review of the matter, the Commissioner recommended that the Court deny the defendant's current Motion for Postconviction Relief as procedurally barred under Rule 61(i)(3) and (4).

5. A copy of the Commissioner's report dated September 17, 2010 is attached hereto. The defendant did not file an Appeal From Commissioner's Findings of Fact and Recommendations or otherwise seek a review.

NOW, THEREFORE, IT IS ORDERED that:

- a. Even without an appeal, I have conducted a de novo review of the proceedings. I adopt the well-reasoned Commissioner's Report and Recommendation; and
- b. The defendant's Motion for Postconviction Relief is denied.

Judge

Enclosure

cc: Honorable Andrea M. Freud
R. David Favata, Esquire
Brian Waterman
Prothonotary

¹ *Waterman v. State*, 956 A.2d 1261 (Del. 2008).

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IN AND FOR KENT COUNTY

STATE OF DELAWARE)	RK-06-09-0424-01
)	Rape 1 st (F)
)	RK-06-09-0425-01 through
v.)	RK-06-09-0439-01
)	Rape 2 nd (F)
)	RK-06-09-0440-01
BRIAN L. WATERMAN)	Cont. Sex. Abuse (F)
ID No. 0608013125)	RK-06-10-0063-01
Defendant.)	Dangerous Acts (F)

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

R. David Favata, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Thomas D. Donovan, Esq., Donovan & Hopkins, for Defendant.

FREUD, Commissioner
September 17, 2010

The Defendant, Brian L. Waterman (“Waterman”), was found guilty following a jury trial on September 7, 2007, of one count of Rape in the First Degree, victim less than twelve years old, 11 *Del. C.* §773; fifteen counts of Rape in the Second Degree, victim less than twelve years old, 11 *Del. C.* § 772; one count of Continuous Sexual Abuse, 11 *Del. C.* § 778; and one count of Dangerous Crimes Against a Child, 11 *Del. C.* § 779. Sixteen counts of Rape in the Fourth Degree and sixteen counts of Incest were dismissed or *nolle prossed* prior to trial.

A pre-sentence investigation report was ordered. On October 19, 2007, the Court sentenced Waterman to a total of 190 years incarceration suspended after 177 years, 175 of which were minimum mandatory, for probation.

A timely notice of appeal was filed. The Delaware Supreme Court affirmed the conviction on August 22, 2008.¹ As a result of the finding by the Supreme Court in its opinion, Waterman’s trial counsel sent a letter to the Court on August 25, 2008 stating:

I made an error in this Trial by failing to request redaction of Mr. Waterman’s statement **and** redaction of the child’s statement pursuant to Hassan-el v. State, 911 A.2d 385 (2006). I am requesting that the Court appoint Counsel for Mr. Waterman for the purpose of filing a Postconviction Motion (emphasis in original).

As a result of the letter, the Court appointed counsel to represent Waterman in filing a postconviction motion. Next, through appointed counsel, Waterman filed the pending motion for postconviction relief under Rule 61. In his motion, he raised

¹ *Waterman v. State*, 956 A.2d 1261(Del. 2008).

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three grounds for relief including ineffective assistance of counsel.

FACTS

The following is a summary of the facts as noted by the Supreme Court in its opinion affirming Waterman's conviction:

Brain Waterman lived at his step-grandmother's farm. Amy Taylor and her siblings regularly visited relatives at the farm and Amy knew Waterman as 'Uncle Brian.' Beginning when she was eight years old, Amy was sexually abused by Waterman. She did not tell anyone until more than a year later. When Amy's mother learned of the assaults, she suggested that Amy keep a journal and write about things that made her sad. Amy brought four pages from that journal to an interview with Diane Klecan, of the Children's Advocacy Center ('CAC'). Klecan videotaped the interview, during which Amy described Waterman's assaults. Amy agreed to let Klecan keep the journal pages, which also described the incidents. After the interview, Klecan turned the journal pages and the videotape over to the police.

Detective Mark G. Ryde, of the Delaware State Police, interrogated Waterman. Ryde restated Amy's allegations and told Waterman that Amy was being sincere, truthful, and honest. Ryde also explained that a 'high proportion' of victims in these cases tell the truth, and that Amy's recall of dates, places and facts 'are details that an 8-year-old can't make up, cannot lie about.' Throughout the interrogation, Waterman denied any improper contact with Amy.

Amy was the first witness at trial. The trial court allowed the jury to see her videotaped CAC interview, pursuant to

11 *Del. C.* § 3507, but the court stated that the videotape would not be allowed to go into the jury room. Later in the State's case, the audio tapes of Ryde's interrogation of Waterman were admitted into evidence and played for the jury. At the end of the trial, the court decided, over Waterman's objection, that the jury should have access to the CAC videotape during its deliberations. The jury convicted Waterman on multiple counts of rape and related crimes.²

WATERMAN'S CONTENTIONS

In his motion, Waterman raises the following three grounds for relief:

1. Ineffective for failing to request the victim's statement be redacted.
2. Ineffective for failing to request the defendant's statement be redacted.
3. Ineffective for not objecting to the admission of the journal because of contradictory testimony concerning when it was created.

DISCUSSION

Under Delaware law, the Court must first determine whether Waterman has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.³ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming

² *Waterman*, 956 A.2d at 1262-63 (internal citations omitted).

³ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

final.⁴ Waterman’s motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Waterman’s initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for the procedural fault and (2) prejudice from a violation of the movant’s rights.⁵ The bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim or miscarriage of justice stemming from a constitutional violation that “undermines the fundamental legality, reliability, integrity or fairness of the proceeding leading to the judgment of conviction.”⁶

Each of Waterman’s claims are premised on an allegation of ineffective assistance of counsel. These types of claims are not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Waterman, allege ineffective assistance of counsel in order to overcome the procedural default.

However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are

⁴ Super. Ct. Crim. R. 61(i)(1).

⁵ Super. Ct. Crim. R. 61(i)(3).

⁶ Super. Ct. Crim. R. 61(i)(5).

distinct, albeit similar, standards.⁷ The United States Supreme Court has held that:

[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not “[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance”[;] [i]neffective assistance of counsel, then, is cause for a procedural default.⁸

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two-part analysis enunciated in *Strickland v. Washington*⁹ and adopted by the Delaware Supreme Court in *Albury v. State*.¹⁰

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.¹¹ Second, under *Strickland* the movant must show there is a reasonable degree of probability that, but for counsel's unprofessional error, the outcome of the

⁷ *State v. Gattis*, 1995 WL 790961, at *3 (Del. Super. Dec. 28, 1995).

⁸ *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

⁹ 466 U.S. 668 (1984).

¹⁰ 551 A.2d 53, 58 (Del. 1988).

¹¹ 466 U.S. at 687-88.

proceedings would have been different, that is, actual prejudice.¹² In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.¹³

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.¹⁴ However, the showing of prejudice is so central to this claim that the *Strickland* court stated “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”¹⁵ In other words, if the Court finds that there is no possibility of prejudice, even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.¹⁶ Furthermore, the defendant must rebut a “strong presumption” that trial counsel’s representation fell within the “wide range of reasonable professional assistance,” and this Court must eliminate from its consideration the “distorting effects of hindsight when viewing that representation.”¹⁷

In the case at bar, Waterman attempts to show cause for his procedural default by relying on his trial counsel’s assertion that she erred in not requesting that

¹² *Id.* at 694.

¹³ *See, e.g., Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

¹⁴ *Strickland*, 466 U.S. at 687.

¹⁵ *Id.* at 697.

¹⁶ *Gattis*, 1995 WL 790961, at *4.

¹⁷ *Strickland*, 466 U.S. at 689.

Waterman and the victim's statements be redacted. In regard to prejudice, Waterman simply states that allowing the unredacted versions of the two statements and allowing the journal in to evidence were prejudicial. He notably fails to explain how or why they were prejudicial or how they adversely effected the outcome of the trial. Waterman simply argues that because his attorney admitted an error, that prejudice flows from the error. As Waterman's prior counsel noted in her response that while she claimed she made an error, she made no determination as to whether or not her error adversely effected the trial. Additionally, the Supreme Court found that although the statements should have been redacted, the error was harmless. Waterman gives no explanation or evidence that the outcome of the trial would have been different if the statements had been redacted or the journal not been entered into evidence. Waterman has clearly failed to demonstrate prejudice as a result of his counsel's errors. This failure is fatal to Waterman's motion. I have reviewed the entire file and trial transcript and find, as did the Supreme Court, that there was an abundance of evidence against Waterman and that the victim's testimony was clear and bolstered by the additional witness. I find no prejudice to Waterman in this case. His motion is therefore procedurally barred.¹⁸

Additionally Waterman's claims concerning the statements are merely refinements of the issues which were rejected by Delaware Supreme Court in his direct appeal. Waterman has merely raised the same issue through ineffective assistance of counsel claims. The Supreme Court has already ruled that the error in

¹⁸ See, e.g. *Wright v. State*, 671 A. 2d 1353, 1356 (Del. 1996).

admitting the unredacted statements was harmless error beyond a reasonable doubt. This issue has been previously resolved and is therefore barred by Rule 61(i)(4). Furthermore, I find that consideration is not warranted in the interest of justice and Waterman has offered no reasons for me to believe that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.¹⁹

CONCLUSION

After reviewing the record in this case, it is clear that Waterman has failed to avoid the procedural bars of Rule 61(i). Consequently, I recommend that Waterman's postconviction motion be *denied* as procedurally barred by Rule 61(i)(3) and (4) for failure to prove cause and prejudice and as previously adjudicated.

Commissioner Andrea Maybee Freud

oc: Prothonotary
cc: Hon. Jerome O. Herlihy
R. David Favata, Esq.
Sandra W. Dean, Esq.
Thomas D. Donovan, Esq.
File

¹⁹ *State v. Fogg*, 2002 WL 31053868 (Del. Super. Sept. 10, 2002), *aff'd*, 817 A. 2d 804 (Del. 2002).