IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CURTIS WHITE,	)	
	)	
Defendant below,	)	
	)	
v.	)	
	)	Cr. A. No. 1209017723
STATE OF DELAWARE,	)	
	)	
Plaintiff below.	)	
	)	
	)	
	)	

Date Decided: January 26, 2017

On Defendant Below, Curtis White's Motion for Post Conviction Relief. **DENIED**.

ORDER

Brian J. Robertson, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State of Delaware.

Michael W. Modica, Esquire, Wilmington, Delaware, Attorney for Petitioner Curtis White.

SCOTT, J.

Background

Defendant, Curtis White (hereinafter "Defendant") was convicted of Reckless Endangering First Degree and firearm charges arising from an incident on September 24, 2012 near 26th and Monroe Streets in the City of Wilmington. Defendant appealed to the Delaware Supreme Court claiming that there was insufficient evidence to support a guilty verdict. The Supreme Court affirmed the jury's verdict and found the following facts.[1] Mr. White was standing with two other individuals on 26th and Zebley Street in Wilmington, Delaware when an off-duty Wilmington Police Detective, Brian Conkey was driving by. Conkey stopped at a stop sign and noticed three people on the corner of 26th and Zelbey Streets. Conkey drove through the stop sign and was parking his vehicle when he heard gun shots behind him. Conkey saw Defendant running around the corner and firing a gun, and stated that Defendant was not looking where the gun was aimed. Defendant subsequently got into a vehicle and drove away at a high rate of speed. A State Trooper identified and followed the vehicle, and the Trooper observed Mr. White exit the car and flee on foot. Eventually Defendant turned himself into police. Three gun casings were found at the scene of the crime, and one was found down the street. Police also found a bullet hole in a car parked in front of 512 W.

[1] *White v. State*, 2014 WL 637050, (Del. Feb. 6, 2014).

26th Street and a projectile fragment in the outside screen of 510 W. 26th Street. A piece of chipped brick was found on the porch of 512 W. 26th Street.

At trial Defense conceded that while Mr. White was a person prohibited, there was no support evidence for the reckless endangering charges. Defense argued that Defendant did not aim the weapon and was unaware of the occupants inside the homes. The jury ultimately convicted Defendant of Reckless Endangering First Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited[2] and other criminal mischief offenses related to the property damage from the bullet strikes. Defendant appealed to the Delaware Supreme Court, which subsequently affirmed the jury's guilty verdict, and subsequently filed this Motion for Postconviction Relief on August 6, 2014.

Parties' Contentions

Defendant's position is that Thomas Foley, Esquire, (hereinafter "Trial Counsel") should have requested the lesser included offense instruction for Reckless Endangering Second Degree. Defendant argues that he requested that Trial Counsel instruct the jury with the lesser included offense ("LIO"), and that the LIO was supported by the facts and law. Subsequently, if the jury found he was guilty of the LIO Defendant would have avoided mandatory incarceration and

[2] At trial the Parties' stipulated that Defendant was a person prohibited from possessing a firearm.

two felony convictions. The State argues that Defendant cannot show ineffective assistance of trial counsel. The State's argument relies on the idea that choosing to not instruct the jury with the LIO charge was a tactical decision within the "realm of professionally reasonable conduct."

Consideration of Rule 61 Procedural Bars

The Court must address Defendant's motion in regard to Rule 61(i) procedural requirements before assessing the merits of his motion.[3] Rule 61(i)(1) bars motions for postconviction relief if the motion is filed more than one year from final judgment. Defendant's Motion is not time barred by Rule 61(i)(1).[4] Rule 61(i)(2)[5] bars successive postconviction motions, which is also not applicable as this is Defendant's first postconviction motion. Rule 61(i)(3) bars relief if the motion includes claims not asserted in the proceedings leading to the final judgment.[6] This bar is also not applicable as Defendant claims ineffective assistance of counsel, which could not have been raised in any direct appeal.[7] Finally, Rule 61(i)(4) bars relief if the motion is based on a formally adjudicated ground.[8] This bar is also not applicable to Defendant's Motion.

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[3] Super. Ct. Crim. R. 61(i)(1).
[4] Mr. White's jury verdict was affirmed by the Supreme Court on February 6, 2014 and Mr. White filed this Motion on August 6, 2014.
[5] Super. Ct. Crim. R. 61(i)(2).
[6] Super. Ct. Crim. R. 61(i)(3).
[7] *See State v. Berry*, 2016 WL 5624893, at *4 (Del. Super. Ct. June 29, 2016); *see also Watson v. State*, 2013 WL 5745708, at *2 (Del. Oct. 21, 2013).
[8] Super. Ct. Crim. R. 61(i)(4).

Discussion

Delaware adopted the two-prong test proffered in *Strickland v. Washington* to evaluate ineffective assistance of counsel claims.[9] To succeed on an ineffective assistance of counsel claim, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."[10] The Court's "review of counsel's representation is subject to a strong presumption that representation was professionally reasonable."[11] The "benchmark for judging any claim of ineffectiveness [is to] be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[12]

Mr. White claims that "discharging a weapon at or near someone supports, as a matter of law, an instruction for Reckless Endangering Second Degree." Case law shows that Mr. White's contention is not absolute.[13] "Delaware law requires that before a trial court may instruct a jury on a lesser included offense, there must be a 'rational basis' in the evidence for a verdict acquitting the defendant of the

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[9] *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Albury v. State*, 551 A.2d 53 (Del. 1988).
[10] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990); *see also Strickland v. Washington*, 466 U.S. 668 (1984).
[11] *Id.*
[12] *State v. Wright*, 2015 WL 648818, (Del. Super. Ct. Feb. 12, 2015)(citations omitted).
[13] *State v. Gibison*, 1990 WL 127812, (Del. Super. Ct. Aug. 23, 1990).

charged offense and convicting him of the lesser offense."[14] The defendant must show more than a "factual basis" exists.[15] Therefore, "in order to give an instruction on a lesser included offense, the trial court must be satisfied that 'the evidence introduced in the case . . . support[s] a jury verdict convicting defendant of the lesser crime *rather than* the indicted crime."[16]

In the present case, Trial Counsel did not ask the Court for a LIO instruction albeit Defendant's request. Defendant argues, as a matter of law, Trial Counsel was obligated to comply with his request for a LIO instruction. However, he does not cite to any Delaware case law that supports this proposition.[17] Under Delaware law, "[j]ury instructions fall within trial strategy, which, so long as objectively reasonable, remain counsel's responsibility."[18] Trial Counsel's strategy was objectively reasonable. A person is guilty of Reckless Endangering in the First Degree, a class E felony, when the person recklessly engages in conduct which creates a substantial risk of death to another person.[19] Under 11 Del. C. § 603(a), a person is guilty of Reckless Endangering in the Second Degree, a class A misdemeanor, when the person recklessly engages in conduct which creates a

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[14] *Baker v. State*, 1993 WL 557951, at *6 (Del. Dec. 30, 1993).
[15] *Id.*
[16] *Id.*
[17] Defendant cites to *In Re Trombly*, 627 A.2d 855 (Vt. 1993), a Vermont case.
[18] *State v. Dickinson*, 2012 WL 3573943, at *7 (Del. Super. Ct. Aug. 17, 2012). "[J]ury instruction decisions are not universally held to be among Defendant's fundamental criminal trial rights." *Id.*
[19] 11 *Del. C.* § 604

substantial risk of physical injury to another person.[20] We learn from *Oney v. State* that the difference between the degrees of this crime is the magnitude of the risk of harm.[21] However, Trial Counsel's argument at trial did not focus on the degree of harm. Rather, he argued that the element of substantial risk of death was not present --nor did Defendant have conscious disregard of that risk--because he was not firing at any person in view. Defendant conceded at trial that he had a gun and that he was a person prohibited. Trial Counsel's affidavit states that he thought that Defendant would lose credibility with the jury if he argued that Defendant did not have a gun. Further, Trial Counsel believed it made no sense to argue that a bullet from a gun might only create a "substantial risk of physical injury." Trial Counsel stated that it did not seem plausible a jury would consider a bullet striking a person as resulting in any injury other than a "serious physical injury."

Defendant contends that Trial Counsel's ineffective assistance is demonstrated by his acknowledgement that he did not contemplate the gap between "physical injury" versus "death," and his assumption was that Reckless Endangering in the First Degree encompassed both "serious physical injury" and "death."[22] However, Trial Counsel again acknowledged that his tactic was to attack whether Defendant consciously disregarded a substantial risk that death

[20] 11 *Del. C.* § 603(a)(1)
[21] *See Oney v. State*, 397 A.2d 1374 (Del. Super. Ct. 1979).
[22] Letter from Trial Counsel Thomas Foley, Esq. to the Court, Mary 27, 2016.

would result. The Court struggles to see how, even upon request of the LIO instruction, the LIO would have been granted. Defendant fired a gun on a residential street at 5:30 in the evening. A bullet struck a parked vehicle, and occupied houses were in Defendant's line of fire. It's pure speculation that a bullet striking a person would cause only physical injury, as opposed to a substantial risk of death, and the evidence at trial did not support a distinction between substantial risk of death or physical injury in this case. Counsel made a tactical decision to argue that an element of the crime charged did not exist at all, and aimed to assure that his client did not lose credibility with the jury. Under Delaware law, jury instructions fall within the trial strategy, and because Defendant cannot show that Trial Counsel's representation fell below an objective standard of reasonableness, his Motion for Post Conviction Relief pursuant to Rule 61 is hereby **DENIED.**

IT IS SO ORDERED.

/S/ CALVIN L. SCOTT
The Honorable Calvin L. Scott, Jr.