

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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May 18, 2017

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RE: **State vs. Donta Vickers**
ID #1308012233 (R-1)

Dear Counsel:

Donta Vickers (“the Defendant”) has filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). The Court sees no reason to conduct an evidentiary hearing on the issues raised and this is its decision on the merits.

Procedural Background

On October 13, 2015, the Defendant timely filed his first Motion for Postconviction Relief. The Defendant’s underlying convictions are for serious crimes of violence including home invasion, attempted robbery in the first degree, assault in the second degree, and three counts possession of a firearm during the commission of a felony. In a nutshell, the Defendant committed a home invasion and, unprovoked, shot the victim in the leg. Because of his

convictions for prior felonies, the Defendant received a nondiscretionary life sentence pursuant to 11 *Del. C.* § 4214(b). The Defendant's conviction was affirmed by the Delaware Supreme Court on June 11, 2015,¹ and the mandate returning the case was filed on June 29, 2015.

After the Defendant filed his Motion for Postconviction relief, the Court appointed counsel who necessarily had to review the entire record in exercising due diligence. An Amended Motion for Postconviction Relief was filed on December 15, 2016. Trial counsel filed a Rule 61(g) affidavit and the State and defense have submitted responses. The final submission was docketed May 5, 2017.

Discussion

The Defendant alleges trial counsel was ineffective because (i) he failed to challenge or seek the suppression of the show-up identification of the Defendant; (ii) he failed to move to admit a gun shot residue test showing there was no gunshot residue on the Defendant's hands; and (iii) he failed to investigate potential impeachment evidence against an investigating officer.

All three grounds for relief are based on allegations of ineffective assistance of counsel. Claims premised upon ineffective assistance of counsel must satisfy a two pronged test. The Defendant has the burden of showing trial counsel's representation fell below an objective standard of reasonableness and that trial counsel's professional errors or mistakes prejudiced the Defendant.² The Defendant must overcome the "strong presumption" that the representation was reasonable.³

¹ *Vickers v. State*, 117 A.3d 516 (Del. 2015).

² *Strickland v. Washington*, 466 U.S. 668 (1984).

³ *Brooks v. State*, 40 A.3d 346, 354 (Del. 2012).

Merits

1. *Ground One: Trial Counsel Failed to Move to Suppress the “Show Up” Identification*

In the minutes leading up to the crime, the victim was engaged in sexual intercourse with a female prostitute known to him as “Neta” when the woman received a phone call. Neta took the call and then left the bedroom briefly. When she returned, the victim locked the bedroom door and they resumed having sex. A few minutes later, a man broke down the bedroom door, entered the bedroom, pointed a gun at the victim, and demanded money. The intruder had covered his face with a black cloth – or “doo-rag” – but the victim could still see his face in the light, and recognized him as the Defendant. The victim also saw a second, larger man hiding outside the bedroom but did not see the second man’s face. The victim told the Defendant he had money in his pants’ pocket. After procuring the victim’s cash, the Defendant shot the victim in the leg. The victim saw three people running toward the Perdue plant on Savannah Drive, where the victim knew the Defendant lived.

Following the shooting, the victim called 911. The victim told the police the person who shot him was the Defendant, a man with whom he used to work. The victim also told the police where the Defendant lived.

The ambulance used to transport the victim to the hospital was diverted by the Defendant’s house where the Defendant was being taken into custody. The victim identified the Defendant as being the person who broke into his house and shot him. The Defendant argues this show-up identification was impermissibly suggestive and created a likelihood of misidentification that also tainted the victim’s in-court identification.

Case law establishes that show-up identifications are “necessary to the proper functioning

of the criminal justice system.”⁴

An identification procedure will not pass constitutional muster where it is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” That a confrontation is suggestive, without more, however, cannot amount to a due process violation; the unnecessarily suggestive identification procedure must also carry with it the increased danger of an irreparable misidentification. In other words, if the Court determines under the totality of the circumstances that a line-up is impermissibly suggestive, but nonetheless reliable, evidence of the confrontation will not be excluded at trial.⁵

Thus, there is a two part inquiry: (1) whether the confrontation was unnecessarily suggestive; and (2) did a substantial likelihood of misidentification exist.⁶ “The question of suggestiveness is invariably fact-driven.”⁷

In this case, the victim told the police he knew the Defendant. The victim had worked with the Defendant. The Defendant has distinctive large eyes (so-called “bug eyes”) and is easily recognizable. The victim knew where the Defendant lived, which was not far from the victim’s residence. The victim knew that the Defendant and the prostitute who “set up” the home invasion resided in the same boarding house. As a result of this information, which the victim provided to the investigating officers, the police diverted the ambulance to the Defendant’s house for the

⁴ *Richardson v. State*, 673 A.2d 144, 147-48 (Del. 1996).

⁵ *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (citations omitted).

⁶ *Richardson v. State*, 673 A.2d at 147.

⁷ *Id.*

show-up identification.

Even assuming *arguendo* that the identification was impermissibly suggestive, the Defendant has not shown there was a substantial likelihood of misidentification. The Defendant was not a stranger to the victim. The victim knew the Defendant and told the police where they could find him. There was no danger of misidentification at trial because the Defendant admitted being at the scene.

Moreover, trial counsel aggressively challenged the victim's identification as not credible at trial. Trial counsel questioned the victim about the victim's use of intoxicants that might have affected his ability to identify accurately his assailant. Trial counsel emphasized the discrepancies between the victim's description of his assailant's clothing (navy shirt, smoking a cigarette) and the testifying police officer observations of the Defendant (shirtless, handcuffed behind his back).

Under the circumstances, I find trial counsel was not ineffective for failing to file a motion to suppress the show up identification.

2. *Ground Two: Trial Counsel Failure to Introduce the Exculpatory Gunshot Residue Test*

After his identification and arrest, the Defendant told the police he had, in fact, been involved in the home invasion but was not shooter. He also confided in the police that he would probably have gunshot residue on his hands because he handled the gun immediately after the shooting. Per trial counsel's Rule 61(g) affidavit and the State's response, the Court now knows the State did not initially test the gunshot residue swabs. Trial counsel has also informed the Court that the Defendant told trial counsel he did not want the swabs tested. Ultimately, however, the State tested the swabs and the results were somewhat inconclusive. Both defense counsel and the prosecutor could have argued the results supported his respective theory of the case.

Most importantly, trial counsel Rule 61(g) affidavit makes clear that his trial strategy was to encourage the State to narrow its theory of the case so that the State would have to prove the Defendant was the actual shooter. Trial counsel wished to avoid the State expanding its case to encompass accomplice liability. As trial counsel notes, in the Defendant's statement to the police, which was shown to the jury, the Defendant admitted to handling the gun moments after the shooting. Trial counsel was successful: prior to trial, the State agreed to proceed solely on the theory that the Defendant was the shooter. Trial counsel and the State agreed not to present the inconclusive gunshot residue test results. Trial counsel did not want to introduce this evidence for fear of the State then deciding to pursue accomplice liability. Accomplice liability would have been hard to dispute in light of the Defendant's admissions.

Obtaining an agreement from the State not to pursue accomplice liability was sound trial strategy and, essentially, the Defendant's only hope of obtaining an acquittal.

To satisfy the first prong of the *Strickland* analysis, the defendant must establish that his counsel's representation fell below an objective standard of reasonableness. "Doing so requires overcoming a strong presumption that counsel's conduct falls within the wide range of reasonable profession assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."⁸

The Defendant is not able to overcome this burden. Trial counsel was not ineffective; in fact, trial counsel's efforts to take accomplice liability off the table was very effective. This claim is denied.

⁸ *Redden v. State*, 150 A.3d 768, 773 (Del. 2016) (internal quotation marks and citations omitted).

3. *Ground Three: Trial Counsel's Failure to Cross-Examine Officer Cordrey As To His Disciplinary Record*

The Defendant was convicted in his second trial. The first trial ended in a mistrial after a Facebook post made by another officer of the Georgetown Police Department attacking Officer Cordrey's credibility was discovered. The Court reviewed the personnel files of the officers involved. The Court discovered an investigation into an Officer Chris Story of the Georgetown Police Department for making a false allegation. The Court informed trial counsel of its findings and the State chose not to call Officer Story as a witness.

The defense argues that Officer Cordrey should have been questioned about his history of insubordination. Officer Cordrey had been disciplined for insubordination after misrepresenting the subject of a meeting with a town council member.

Trial counsel's Rule 61(g) affidavit succinctly address the reason why Officer Cordrey's history of insubordination was not raised at trial: Any connection between the officer's insubordination and/or credibility was not an issue because the officer's credibility was never an issue at trial. Trial counsel had to navigate the rough waters created by the Defendant's admissions to the police and the victim's identification of the Defendant.

Trial counsel's decision to focus on the theory that the Defendant was not the actual shooter versus the credibility of a testifying officer was reasonable. The Defendant's conclusory claim that a credibility attack on the officer would have successfully dismantled the State's case is without merit. In this Motion, the Defendant has not pointed to any specific testimony of Officer Cordrey that, if discredited, would have potentially made a difference in this trial.

Trial counsel was not ineffective for failing to impeach Officer Cordrey's credibility.

Conclusion

The Defendant's Motion for Postconviction Relief is denied. IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

cc: Prothonotary