IN THE SUPREME COURT OF THE STATE OF DELAWARE

TZE POONG LIU,	§	No. 204, 2012
	§	
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 88001915DI
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 23, 2013
Decided: January 31, 2013

Before **HOLLAND**, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 31st day of January 2013, upon consideration of the parties' oral arguments, their briefs, and the record in this case, it appears to the Court that:

1. Tze Poong Liu, the defendant-below ("Liu"), appeals from a Superior Court order denying his second Superior Court Criminal Rule 61 motion for post-conviction relief ("Rule 61 motion").[1] On appeal, he claims that his trial counsel was ineffective because counsel convinced him to withdraw his appeal from the order denying his first Rule 61 motion, and instead, to file a motion for a new trial. Liu withdrew his appeal on his counsel's recommendation, but his counsel never

[1] SUPER. CT. CRIM. R. 61.

moved for a new trial. We hold that his counsel's conduct constituted ineffective assistance of counsel under *Strickland v. Washington*,[2] and reverse and remand for further proceedings in accordance with this Order.

2. This Court has previously narrated the underlying facts in *Liu v. State*[3] and *Chao v. State*.[4] We do not repeat them here, and limit our recital to the facts relevant to this phase of the proceeding.

3. After this Court affirmed Liu's Murder First Degree and Felony Murder convictions on direct appeal,[5] Liu filed a Rule 61 motion *pro se*.[6] The Superior Court denied that motion in February 1995.[7] Liu appealed from that 1995 order denying him post-conviction relief.

4. Liu's trial counsel also represented Liu in his 1995 direct appeal.[8] Counsel recommended that Liu voluntarily dismiss that appeal and instead move for a new trial. In July 1995, Liu followed his counsel's advice and withdrew his appeal. Counsel, however, never moved for a new trial. In November 1995, Liu

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[2] 466 U.S. 668 (1984).

[3] 628 A.2d 1376 (Del. 1993).

[4] 604 A.2d 1351 (Del. 1992).

[5] *Liu v. State*, 628 A.2d 1376 (Del. 1993).

[6] *See State v. Liu*, 2012 WL 2192939, at *1 (Del. Super. Feb. 29, 2012).

[7] *State v. Liu*, 1995 WL 413449 (Del. Super. Feb. 17, 1995).

[8] *See State v. Liu*, 2012 WL 2192939, at *2 (Del. Super. Feb. 29, 2012).

moved for a new trial *pro se*. The Superior court forwarded the motion to Liu's counsel, who took no action. In February 1996, Liu moved to have his trial counsel dismissed and new counsel appointed. The court denied that request.[9]

5. Six years passed. During that period, Liu wrote numerous letters to the trial court,[10] his counsel having never moved for a new trial. In August 2007, Liu filed a second *pro se* Rule 61 post-conviction motion. This time the trial court appointed new counsel, who filed a restated second Rule 61 post-conviction motion in January 2008.

6. Liu's second Rule 61 motion asserted four claims. In ruling on those claims, the trial court, on February 29, 2012, reduced Liu's Felony Murder convictions to Manslaughter[11] on the basis of *Williams v. State;*[12] but denied Liu's other claims.[13]

7. On appeal from that order, Liu asserts only a single claim — that he received ineffective assistance from his trial counsel in connection with withdrawing his appeal from the denial of his Rule 61 motion. Liu contends that his trial counsel undertook to move for a new trial after Liu withdrew (on counsel's

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[9] *See id.*

[10] *See id.* at *3.

[11] *State v. Liu*, 2012 WL 2192939, at *1 (Del. Super. Feb. 29, 2012).

[12] 818 A.2d 906 (Del. 2002).

[13] *State v. Liu*, 2012 WL 2192939, at *1 (Del. Super. Feb. 29, 2012).

advice) his Rule 61 appeal, but counsel never did. Liu claims that his counsel was constitutionally ineffective and for that reason, his convictions should be reversed and a new trial granted.

8. We review a Superior Court order denying a motion for post-conviction relief for abuse of discretion.[14] We review questions of law *de novo*.[15] The United States Constitution guarantees effective assistance of counsel to a defendant in a criminal case.[16] To successfully demonstrate ineffective assistance of counsel, a defendant must demonstrate: 1) his attorney's "representation fell below an objective standard of reasonableness," and 2) resulting prejudice, *i.e.*, a "reasonable probability" that his attorney's deficient representation affected the outcome of the judicial proceedings.[17]

9. The trial court held that the conduct of Liu's trial counsel fell below an objective standard of reasonableness.[18] That court also held, however, that Liu could not demonstrate the prejudice required to establish ineffective assistance of

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[14] *Claudio v. State*, 958 A.2d 846, 850 (Del. 2008) (internal citation omitted).

[15] *Id.* (internal citation omitted).

[16] U.S. CONST. amend. VI; *see also Strickland v. Washington*, 466 U.S. 668, 686 (1984) (internal citation omitted).

[17] *Strickland*, 466 U.S. at 688, 694.

[18] *State v. Liu*, 2012 WL 2192939, at *9-10 (Del. Super. Feb. 29, 2012).

counsel, because (the court found) there was no reasonable probability that Liu's motion for a new trial, if prosecuted, would have been granted.[19]

10. We agree that the conduct of Liu's trial counsel violated the first prong of *Strickland v. Washington*.[20] Liu voluntarily withdrew his 1995 Rule 61 appeal on the condition that his trial counsel would move for a new trial, yet trial counsel never did so. We disagree, however, with the trial court's conclusion that Liu was not prejudiced by his trial counsel's deficient representation. Trial counsel himself believed — and advised Liu — that a motion for new trial may have merit. Specifically, trial counsel advised Liu that there was "virtually no possibility that [Liu would] win the [1995] appeal, but a chance does exist that a Motion for [a] New Trial will be granted." Liu relied on that advice, and eight years later, has yet to receive the benefit of a properly lawyered and presented new trial motion.

11. We accordingly reverse and remand with leave for Liu, with the assistance of counsel, to file and prosecute a proper motion for a new trial in the Superior Court. Because of the ineffective assistance of Liu's trial counsel, the trial court shall consider Liu's motion for a new trial without regard to any procedural bars that may otherwise apply.

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[19] *Id.* at *10.

[20] *Strickland*, 466 U.S. at 668.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and **REMANDED** for further proceedings in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice