

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	RK10-04-0402-01
v. _____	)	Att. Murder 1 <sup>st</sup> (F)
	)	RK10-04-0403-01
DAEMONT L. WHEELER,	)	PFDCF (F)
(ID. No. 0911008949)	)	RK10-04-0404-01
	)	RK10-04-0405-01
Defendant.	)	PFBPP (F)

*Submitted: October 2, 2013*  
*Decided: October 3, 2013*

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

Daemont L. Wheeler, *Pro se*.

*Upon Consideration of Defendant's*  
*Motion For Postconviction Relief*  
*Pursuant to Superior Court Criminal Rule 61*  
**DENIED**

YOUNG, Judge

**ORDER**

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

1. The Defendant, Daemont L. Wheeler ("Wheeler"), was found guilty following a jury trial on April 7, 2011, as charged, of one count of Attempted Murder in the First Degree, 11 *Del. C.* § 531; one count of Possession of a Firearm During the Commission of a Felony, 11 *Del. C.* § 1447A; and two counts of Possession of a Deadly Weapon by a Person Prohibited, 11 *Del. C.* § 1448. The State filed a motion to declare Morrison a Habitual Offender pursuant to 11 *Del. C.* § 4214(A). Following a hearing, the motion was granted on June 30, 2011, and the Defendant was sentenced to life in prison on the Attempted Murder charge and to an additional thirty-eight years incarceration on the remaining charges.

2. Wheeler, through new counsel, appealed his conviction to the Delaware Supreme Court. The issues raised on appeal were summarized by the Supreme Court as follows:

In this direct appeal, Wheeler argues that his Sixth Amendment right to confrontation was violated when the Superior Court admitted into evidence hearsay statements by persons who did not testify at the trial. Wheeler's argument raises two distinct questions: whether the testimony presented violated the hearsay rule and whether that testimony violated the Sixth Amendment's Confrontation Clause. We have concluded that both questions must be answered in the affirmative. We have also concluded, however, that the erroneous admission of

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the testimonial hearsay evidence was harmless.<sup>1</sup>

The Supreme Court, on February 7, 2012, affirmed Wheeler's conviction and sentence.<sup>2</sup>

3. Wheeler then filed the instant Motion for Postconviction Relief pursuant to Superior Court Rule 61. In his motion the defendant raised the following grounds for relief: 1) Ineffective assistance of trial Counsel; 2) Ineffective assistance of direct appeal; 3) Speedy Trial violation; and 4) Prosecutorial Misconduct.

4. The Court referred this motion to Superior Court Commissioner Andrea M. Freud pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of facts and conclusions of law.

5. The Commissioner has filed a Report and Recommendation concluding that the Motion For Postconviction Relief should be denied, because it is procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and as previously adjudicated and barred by Rule 61(i)(4).

6. Defendant filed his Appeal from the Commissioners findings on August 27, 2013.

7. The State responded.

**NOW, THEREFORE**, after *de novo* review of the record in this action, and for reasons stated in the Commissioner's Report and Recommendation dated August

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<sup>1</sup> *Wheeler v. State*, 36 A.3d 310, 312 (Del. 2012).

<sup>2</sup> *Id.* at 320.

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20, 2013,

**IT IS ORDERED** that the Commissioner's Report and Recommendation is adopted by the Court, and the Defendant's Motion for Postconviction Relief is **DENIED.**

/s/ Robert B. Young

J.

RBV/lmc

oc: Prothonotary

cc: The Honorable Andrea M. Freud

R. David Favata, Esq.

Andre M. Beauregard, Esq.

Bernard J. O'Donnell, Esq.

Daemont L. Wheeler, JTVCC

File

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR KENT COUNTY**

<b>STATE OF DELAWARE</b>	)	
	)	RK10-04-0402-01
v.	)	Att. Murder 1 <sup>st</sup> (F)
	)	RK10-04-0403-01
<b>DAEMONT L. WHEELER</b>	)	PFDCF (F)
	)	RK10-04-0404-01
Defendant.	)	RK10-04-0405-01
ID. No. 0911008949	)	PFBPP (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.

Daemont L. Wheeler, *Pro se*.

FREUD, Commissioner  
August 20, 2013

The Defendant, Daemont L. Wheeler (“Wheeler”), was found guilty, following a jury trial on April 7, 2011, as charged, of one count of Attempted Murder in the

First Degree, 11 *Del. C.* § 531; one count of Possession of a Firearm During the Commission of a Felony, 11 *Del. C.* § 1447A; and two counts of Possession of a Deadly Weapon by a Person Prohibited, 11 *Del. C.* § 1448. The State filed a motion to declare Wheeler an habitual offender pursuant to 11 *Del. C.* § 4214(A). Following a hearing the Court declared Wheeler an habitual offender. On June 30, 2011, Wheeler was sentenced to life in prison on the Attempted Murder charge and to an additional thirty-eight years incarceration on the remaining charges.

Wheeler, through new counsel, appealed his conviction to the Delaware Supreme Court. The issues raised on appeal were summarized by the Supreme Court as follows:

In this direct appeal, Wheeler argues that his Sixth Amendment right to confrontation was violated when the Superior Court admitted into evidence hearsay statements by persons who did not testify at the trial. Wheeler's argument raises two distinct questions: whether the testimony presented violated the hearsay rule and whether that testimony violated the Sixth Amendment's Confrontation Clause. We have concluded that both questions must be answered in the affirmative. We have also concluded, however, that the erroneous admission of the testimonial hearsay evidence was harmless.<sup>3</sup>

The Supreme Court, on February 7, 2012, affirmed Wheeler's conviction and

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<sup>3</sup> *Wheeler v. State*, 36 A.3d 310, 312 (Del. 2012).

sentence.<sup>4</sup>

## FACTS

Following are the facts as set forth by the Delaware Supreme Court:

On November 13, 2009, Herbie Davis was shot in the back and leg several times while he was in the kitchen of Tricia Scott's home near Dover. Davis lived in Wilmington but stayed at Scott's home occasionally and considered her his fiancée. Davis and Scott were planning on Davis moving into her home. Several of Tricia Scott's children, including Shani and Amber, and grandchildren, also lived with her.

Wheeler was Amber's boyfriend and frequently stayed in Amber's bedroom in the basement of Scott's home. In 2009, Amber gave birth to a baby, fathered by Wheeler. Davis testified that he and Wheeler did not get along after Davis told Wheeler that he should get a job to help support Amber, the baby, and the household.

Davis testified that shortly before the shooting on November 13, 2009, Wheeler had been downstairs with Amber. Davis and Shani were in the kitchen area. When Wheeler came upstairs, he had a disagreeable exchange with Davis before Wheeler walked out the back door. Davis then went out the front door to smoke a cigarette and returned several minutes later.

Davis testified that after he returned and was talking with Shani in the kitchen area, Wheeler came up behind him and shot him several times<sup>FN1</sup> after saying, 'I really don't like you.' After shooting, Davis, Wheeler fled. Davis fell to the kitchen floor and

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<sup>4</sup> *Id.* at 320.

told Shani that he could not feel his legs. Shani called 911 and applied pressure to Davis' leg. When Amber rushed upstairs to the kitchen, after hearing the gun shots, Shani told her: 'Daemont just shot Herbie—Mr. Herbie.'

FN1. At the shooting scene, the Delaware State Police Detective found a total of six shell casings. A forensic firearms examiner testified that the six shell casings were all fired from the same weapon, a 9 mm semi-automatic

At 8:55 p.m. on November 13, 2009, Delaware State Police Corporal Thomas Lamon was dispatched to investigate a report that someone had been shot. Corporal Lamon was the first police officer to arrive at Trisha Scott's home. When Corporal Lamon entered the residence, he saw Davis on the kitchen floor surrounded by blood. Shani was kneeling over Davis. Corporal Lamon testified that Davis and Shani were the only people in the kitchen, and that Shani 'was clearly upset, shaken.' Davis told Corporal Lamon, 'Daemont shot me.'

Delaware State Police Detective Mark Ryde was the chief investigating officer. When he arrived at the Scott residence, Detective Ryde conducted separate recorded interviews of Trisha Scott's two daughter, Shani and Amber. Those interviews were conducted in Detective Ryde's police car.

After the on-scene investigation concluded, Detective Ryde attempted to locate the suspect, Wheeler. After Detective Ryde was unable to locate Wheeler at two addresses, he prepared an arrest warrant. That arrest warrant was placed in the National Crime Index Center database.

On November 23, 2009, Detective Ryde received information that Wheeler might be at a certain apartment in Harrington, Delaware. The apartment house was owned by Mary Zachery. Detective Ryde obtained a search warrant. Inside the unoccupied apartment, Detective Ryde found a document and prescription medication with Wheeler's name. Later, Detective Ryde conducted an unrecorded interview of Mary Zachery at State Police Troop No. 3.

In January 2010, in an effort to locate Wheeler, Detective Ryde contacted the United States Marshall's Task Force. Wheeler was apprehended on January 27, 2010, in Wayne County, Michigan. After waiving an extradition hearing, Wheeler was returned to Delaware on February 17, 2010.

At trial, in April 2011, Wheeler elected not to testify, and the defense rested without presenting any witnesses.

### *Victim's Eyewitness Identification*

The first witness at Wheeler's trial was the shooting victim, Davis. During his direct examination, Davis identified Wheeler for the jury as the man who came from behind and shot him multiple times while Davis was standing in the kitchen of Tricia Scott's home talking to Shani. Davis turned around after he was shot. He testified: 'I seen his face. I seen the gun,' which was described as a silver semi-automatic. Davis also testified that he recognized Wheeler's voice and that before the shooting, Davis heard Wheeler shout 'I really don't like you.' Davis repeated his identification of Wheeler as the shooter at several other points during his direct testimony. For example, Davis testified that he had immediately identified Davis as the

shooter to Trooper Lamon when the trooper arrived at the scene and found Davis wounded on the kitchen floor. On cross-examination, Davis added: ‘I knew who shot me,’ and ‘I seen him shoot me....’

### *Victim Relates Excited Utterance*

Davis also testified that after he was shot, Amber Scott immediately came upstairs to the kitchen from the basement. According to Davis, Shani Scott told Amber that ‘Daemont just shot Herbie—Mr. Herbie.’ Defense counsel raised a hearsay objection to Davis relating what eyewitness Shani Scott told her sister, Amber. Herbie Davis also testified without objection that Shani Scott told the troopers who first arrived at the scene that Wheeler had shot Davis. Those statements are not at issue in this appeal. The trial judge overruled the objection stating: ‘Well, I think that would qualify as a present sense reaction to what the scene was at the time.’ When the prosecutor added that Shani’s statement to her sister immediately after the shooting also qualified for admission as an excited utterance, the trial judge agreed.<sup>5</sup>

### **WHEELER’S CONTENTIONS**

Next, Wheeler filed the instant Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61. In his motion, he raises the following grounds for relief:

Ground one:           Ineffective assistance of trial Counsel,  
6<sup>th</sup> Amendment.

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<sup>5</sup> *Wheeler*, 36 A.3d 310, 312-314.

See supporting Memorandum of Law.

Ground two: Ineffective assistance of direct appeal Counsel, 6<sup>th</sup>.  
See supporting Memorandum of Law.

Ground three: Speedy Trial violation, 6<sup>th</sup> Amendment.  
See supporting Memorandum of Law.

Ground four: Prosecutorial Misconduct, Rule 16 discovery and inspection, Rule 26.2, Speedy trial 6<sup>th</sup> Amendment, Abuse of discretion – trial Judge, Insufficient Evidence, all being argued through ineffective assistance of direct appeal Counsel.

### **DISCUSSION**

Under Delaware law, the Court must first determine whether Wheeler has met the procedural requirements of Superior Court Criminal Rule 61(I) before it may consider the merits of the postconviction relief claims.<sup>6</sup> Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.<sup>7</sup> Wheeler’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 Wheeler’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.

Several of Wheeler’s claims were previously raised. In each case this Court or

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<sup>6</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

<sup>7</sup> Super. Ct. Crim. R. 61(i)(1).

the Supreme Court found his claims meritless. Specifically Wheeler's fourth claim concerning the admissibility of hearsay testimony was addressed by the Supreme Court on appeal. This claim for relief is barred by Rule 61(i)(4).

In order for Wheeler to invoke the "interest of justice" exception to Rule 61(i)(4), he must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him, the previous ruling was clearly in error or the factual basis for the previous ruling has changed in such a way that renders the earlier ruling fundamentally unjust.<sup>8</sup> The court is not required to reconsider an issue simply because the defendant has "refined or restated his claim."<sup>9</sup> Thus, only if Wheeler can establish that ". . .the previous ruling was clearly in error or there was an important change in circumstances, in particular, the factual basis for issue previously pose," is he entitled to review.<sup>10</sup> Wheeler has failed to allege any facts or legal developments which would justify review under the "interests of justice" exception, therefore he is not entitled to relief and each of these claims are procedurally barred.

Wheeler's remaining grounds for relief were not raised earlier and they are consequently barred by Rule 61(i)(3). Grounds for relief not asserted in the

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<sup>8</sup> See *Weedon v. State*, 750 A.2d 521, 527-28 (Del. 2000); *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

<sup>9</sup> *State v. Skinner*, 607 A.2d 1170, 1172 (quoting *Riley v. State*, 585 A.2d 719, 721 (Del. 1990)).

<sup>10</sup> *Weedon*, 750 A.2d at 527.

proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.<sup>11</sup> The bars to relief are inapplicable to a jurisdictional challenge or "to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."<sup>12</sup>

Only Wheeler's first and second claims are premised on allegations of ineffective assistance of counsel. Wheeler has therefore alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. However Wheeler gives no reason for his failing to have raised his third ground for relief earlier and consequently it is procedurally barred for his abject failure to allege cause or prejudice. Wheeler's ineffective assistance of counsel claim is not 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 Wheeler, 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

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<sup>11</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>12</sup> Super. Ct. Crim. R. 61(i)(5).

the test for cause and prejudice are distinct, albeit similar, standards.”<sup>13</sup> 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 the responsibility for the default be imputed to the State, which may not ‘conduc[t] 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.<sup>14</sup>

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*<sup>15</sup> and adopted by the Delaware Supreme Court in *Albury v. State*.<sup>16</sup>

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.<sup>17</sup> Second, under *Strickland* the movant must show there is a reasonable degree of

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<sup>13</sup> *State v. Gattis*, 1995 WL 790961 (Del. Super.).

<sup>14</sup> *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

<sup>15</sup> 466 U.S. 668 (1984).

<sup>16</sup> 551 A.2d 53, 58 (Del. 1988).

<sup>17</sup> *Strickland*, 466 U.S. at 687; see *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.<sup>18</sup> 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.<sup>19</sup>

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.<sup>20</sup> 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."<sup>21</sup> 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.<sup>22</sup> Furthermore, Wheeler 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

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<sup>18</sup> *Id.*

<sup>19</sup> See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at \*1 (Del. Supr.)).

<sup>20</sup> *Strickland*, 466 U.S. at 687.

<sup>21</sup> *Id.* at 697.

<sup>22</sup> *State v. Gattis*, 1995 WL 790961 (Del. Super.).

when viewing that representation."<sup>23</sup> Wheeler has only made conclusory allegations of prejudice arising from his counsel's alleged ineffective representation and has not made any concrete allegations. Therefore his claims are clearly barred by Rule 61(i)(3).

Wheeler's allegations regarding his Trial counsel's representation are skeletal and conclusory. The record shows that Trial counsel prepared amply for trial as demonstrated in the record and counsel's affidavit. Furthermore, Wheeler has failed to allege how, but for Trial counsel's actions, the outcome of the trial would have been different. Given the abundance of eyewitness evidence in this case any prejudice suffered is harmless as noted by the Supreme Court on direct appeal.

As to Appellate counsel, Wheeler alleges that "Appellate counsel has failed to raise meritorious issues." This statement is the epitome of a skeletal and conclusory allegation. Appellate counsel has submitted a complete affidavit which includes some of his review of the record and conclusions concerning meritorious grounds. Appellate counsel has an obligation to the Court and is not required to raise meritless claims simply because Wheeler wanted him to raise them.

In sum, Wheeler has failed to meet the procedural requirements of Superior Court Criminal Rule 61 and/or failed to allege how his attorneys' performances fell below an objective standard of reasonableness. Nor did Wheeler make concrete allegations of actual prejudice resulting from ineffective assistance of counsel. Clearly Wheeler has failed to overcome the bars of Rule 61(i)(3).

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<sup>23</sup> *Strickland*, 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

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## CONCLUSION

After reviewing the record in this case, it is clear that Wheeler has failed to avoid the procedural bars of Rule 61(i). A review of his counsels' affidavits clearly shows that counsel represented Wheeler in an exemplary fashion and were in no way ineffective. Consequently, I recommend that Wheeler's motion be denied as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and as previously adjudicated and barred by Rule 61(i)(4)

/s/ Andrea Maybee Freud

Commissioner

AMF/dsc

oc: Prothonotary  
cc: Hon. William L. Witham, Jr.  
R. David Favata, Esq.  
Andre M. Beauregard, Esq.  
Bernard J. O'Donnell, Esq.  
Daemont L. Wheeler, VCC  
File