

On December 20, 2008, Defendant Joseph Taye struck and killed Michelle Smith while Taye was driving southbound on Route 13. Smith had been rendering emergency aid to a downed motorcyclist in the grass median strip dividing the highway. Taye was driving a BMW by using a 33-inch long wooden stick to operate the gas and brake pedals because he is paralyzed from the waist down. Taye did not undertake any special classes to drive in this condition. The BMW had not been modified to be operated by a paraplegic.

Smith was an emergency-responder who was rendering first aid and emergency assistance at the scene of an one-vehicle accident involving a motorcycle. Smith parked her emergency vehicle in the roadway several feet past the downed motorcyclist, and Smith activated her vehicle's emergency lights. A police car arrived at the scene soon after Smith. The police officer parked on an angle between the two leftmost lanes approximately 15 to 30 feet behind Smith's vehicle to protect those at the motorcycle accident scene. The emergency lights on the police vehicle also were activated.

Taye was driving in the left lane closest to the median. Taye drove past a fire truck that was traveling to the motorcycle accident scene, also with its emergency lights flashing and with its siren audible. The vehicle traveling in front of Taye swerved out of the left lane to avoid hitting the parked police vehicle. Taye's vehicle remained in the left lane, hit the parked police vehicle, and struck Smith. Smith died from several blunt force injuries. Taye's BMW also struck the downed motorcyclist who survived the blow.

Taye's vehicle continued southbound on Route 13 while moving toward the right shoulder. The vehicle came to an uncontrolled stop about 400 feet after hitting Smith. A driver from another car pulled Taye out of Taye's car and put Taye into the other driver's own vehicle. Taye and the other driver left the accident scene in the other driver's vehicle. Taye's wheelchair

was found in the rear passenger compartment of the deserted BMW. Also found in the BMW was the long wooden stick Taye used to operate the vehicle.

At the time of the accident, Taye did not have a valid driver's license. Taye's license had been revoked prior to his becoming a paraplegic. The BMW that Taye was operating was registered to Taye's girlfriend. In 2007, Taye had been involved in a similar accident in Maryland, after which Taye abandoned his car at the scene but left behind his wheelchair and the stick he used to operate the vehicle. At the time of the Delaware criminal trial, the Maryland case had not been resolved. In the Delaware trial, the State filed a motion *in limine* to admit evidence involving the Maryland accident under Delaware Rule of Evidence 404(b). Evidence of prior bad acts is not admissible pursuant to Rule 404(b) to show character in conformity therewith; however, such evidence may be used to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Joseph Hurley, Esquire, Taye's trial counsel ("Defense Counsel"), argued that evidence of the prior accident in Maryland was inadmissible.

The Trial Court ruled that the evidence of the Maryland accident was admissible on the issues of Taye's identity as the driver of the BMW, to establish his state of mind as reckless, and to show consciousness of guilt.¹ On the other hand, evidence of the Maryland accident was not admitted to prove that Taye was of bad character. Taye filed a motion for reargument stating that the 404(b) prior bad conduct should be excluded if Taye conceded the issues of identity and recklessness. The Trial Court denied reargument.²

Taye waived his right to a trial by jury, and the case proceeded as a bench trial. At the conclusion of the State's case, Defense Counsel moved for a judgment of acquittal. While

¹ *State v. Taye*, 2009 WL 3022148, at *7, (Del. Super. Sept. 23, 2009).

² *State v. Taye*, 2009 WL 3309027, at *4, (Del. Super. Oct. 6, 2009).

arguing that motion, Defense Counsel conceded for the purposes of the motion that Taye was the driver and conceded that Taye's conduct in operating the vehicle was reckless. Defense Counsel sought acquittal for the Murder First Degree charge on the grounds that Smith was not a firefighter acting in the line of duty when she was struck and killed.

If Smith had not been acting as a firefighter in the line of duty when she was struck and killed, then the most serious charge Taye faced for the reckless killing of Smith was that of Manslaughter.³ However, if Smith was a firefighter in the line of duty, then the same state of mind—recklessness—elevates the crime from Manslaughter to Murder in the First Degree.⁴ To convict Taye of Murder in the Second Degree, the State had to prove that Taye recklessly caused the death of Smith under circumstances which manifested a cruel, wicked and depraved indifference to human life.⁵ The Trial Court, acting as the fact-finder in the bench trial, made the determination that Smith was a firefighter acting in the line of duty, which required only that the State prove that Taye acted recklessly in killing Smith in order to convict him of Murder in the First Degree.⁶ Taye was also convicted of Manslaughter.⁷ Taye was acquitted of Murder in the Second Degree.

The Trial Court found that Taye “was not able to respond as would a non-paraplegic to emergency situations.”⁸ The Trial Court found that Taye was driving too closely to the vehicle in front of him, which heightened the risk of Taye not being able to respond to traffic

³ 11 *Del. C.* § 632 (1).

⁴ 11 *Del. C.* § 636 (a) (4).

⁵ 11 *Del. C.* § 635.

⁶ *State v. Taye*, 2009 WL 4017638, at *5-6 (Del. Super. Nov. 20, 2009).

⁷ Taye was also convicted of Assault in the First Degree, Reckless Endangering in the First Degree, Leaving the Scene of a Collision Resulting in Death, and Driving While License Suspended or Revoked.

⁸ *Taye*, 2009 WL 4017638, at *9.

conditions.⁹ The Trial Court also found that Taye intentionally went off the roadway to pass the fire truck, whose lights were flashing. In addition, “[t]here [was] no way Taye could not have seen the emergency lights for some distance ahead of him before passing [the firetruck].”¹⁰ The police car was clearly visible and Taye made no effort to slow down, or if he did attempt to slow down using the stick, Taye was unsuccessful.¹¹ The Trial Court found that Taye was reckless because he was aware of and consciously disregarded a substantial risk that he would come upon an accident scene and strike and kill someone.¹²

Taye appealed his convictions to the Delaware Supreme Court. Jennifer-Kate Aaronson, Esquire (“Appellate Counsel”) represented Taye on the appeal. Appellate Counsel sought reversal of Taye’s conviction for Murder in the First Degree on the grounds that Smith was not a firefighter acting in the lawful performance of her duties at the time she was struck and killed.¹³ No other issue was raised on appeal. The Court affirmed Taye’s conviction and held that Smith was a firefighter acting in the lawful performance of her duties at the time she was struck and killed.¹⁴

After the Delaware Supreme Court affirmed Taye’s conviction on direct appeal, Taye filed the Motion for Postconviction Relief now pending. Taye contends that Defense Counsel and Appellate Counsel were ineffective in violation of his constitutional right to counsel.

⁹ *Id.* at 8.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Taye v. State*, 21 A.3d 41, 43 (Del. 2011).

¹⁴ *Id.* at 44.

Standard of Review

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test established in *Strickland v. Washington*.¹⁵ Specifically, the movant must show that (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁶ The movant must overcome the strong presumption that counsel’s conduct was professionally reasonable.¹⁷ Failure to prove either prong renders the claim insufficient.¹⁸ Moreover, to avoid summary dismissal, the movant must provide concrete allegations of prejudice, including specifying the nature of the prejudice and the adverse affects actually suffered.¹⁹

Taye’s Claim of Ineffective Assistance of Counsel Involving Taye’s Waiver of a Jury Trial

Taye now claims that he did not waive his constitutional right to a trial by jury voluntarily, knowingly, and intelligently. The State contends that Taye waived his right to a trial by jury. The executed waiver was presented to the Trial Court and an extensive colloquy took place on the record. Taye acknowledged that he read the stipulation and understood his waiver of a jury trial. Taye confirmed that he understood the right to a jury trial, acknowledged that he discussed the waiver with Defense Counsel, stated that he reviewed written material prepared by Defense Counsel, and confirmed that he had sufficient time to review his options. Finally, Taye informed the Trial Court that he was satisfied with the legal advice provided by Defense Counsel.

¹⁵ 466 U.S. 668 (1984).

¹⁶ *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (quoting *Strickland*, 466 U.S. at 688, 694).

¹⁷ *Id.* at 59.

¹⁸ *State v. Johnson*, 1996 WL 527306, at *2 (Del. Super. June 26, 1996).

¹⁹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

Taye argues that his waiver was not knowing, intelligent and voluntary because, when he made the decision to waive his right to a jury at the beginning of the trial, he was not aware that Defense Counsel also would concede Taye's identity as the driver and would concede that Taye's conduct was reckless. Taye now claims that there may have been reasonable doubt as to whether he was the driver or the passenger of the BMW because witnesses described someone similar to him getting in a car and leaving the accident scene, but did not identify him as the driver of the BMW. The State contends that it was established beyond a reasonable doubt that Taye was the driver of the BMW that struck and killed Smith.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that, but for counsel's alleged error, he would have been acquitted.²⁰ If substantial evidence exists that supports the defendant's conviction, the defendant's claim is undermined.²¹ In order for a defendant to waive his right to a jury trial, the waiver must be "an intelligent and voluntary waiver in writing."²² The waiver of the right to trial by jury is considered intelligent and voluntary when defendant is aware of the nature of the right and the implications of choosing to waive that right, which may be established when the Court engaged defendant in a colloquy.²³ In claiming ineffective assistance of counsel for defendant's waiver of the right to trial by jury, the defendant bears the burden of proving that his counsel was unreasonable and whether counsel's deficiency prejudiced defendant's waiver of a trial by jury.²⁴ If counsel was deficient,

²⁰ *Couch v. State*, 945 A.2d 593, (Table) (Del. 2008).

²¹ *Id.*

²² *Davis v. State*, 809 A.2d 565, 569 (Del. 2002); Super. Ct. Crim. R. 23(a).

²³ *Id.* at 569-72.

²⁴ *State v. Couch*, 2007 WL 987403, at *3 (Del. Super. Mar. 30, 2007), *aff'd*, 945 A.2d 593 (Table) (Del. 2008).

then any deficiency is cured when the Court engaged in a colloquy with defendant, ensuring that the defendant understood his right to a jury trial and the consequences of the waiver.²⁵

The Court finds that Taye's waiver of a jury trial was voluntary, knowing, and intelligent. Taye executed a Stipulation of Waiver of Jury and engaged in an extensive colloquy with the Trial Court acknowledging that he read and understood the waiver. First, given the 404(b) evidence of prior bad conduct and the allegations regarding Taye's criminal conduct at the time Smith was killed, Defense Counsel made the strategic decision to present the matter to a judge and not a jury. Next, despite the concession of Taye's recklessness and identity during argument on the motion for judgment of acquittal, Defense Counsel argued at the conclusion of the trial that the State did not meet the burden of proof beyond a reasonable doubt for a conviction. This argument would have remedied the slightest harm caused by the concessions. Regardless, the Trial Court did not rely upon Defense Counsel's concessions in making its findings of guilt. Rather, the Trial Court relied on the record evidence presented, finding that the State proved Taye's recklessness and identity beyond a reasonable doubt.

Furthermore, substantial evidence supports Taye's conviction. Witnesses testified that Taye was observed driving the BMW on other occasions.²⁶ Taye was identified by a witness as the sole occupant of the car that struck and killed Smith.²⁷ Taye's wheelchair was found in the car along with the 33-inch stick Taye used to operate the vehicle.²⁸

Taye argues that, had the case been presented to a jury, the concession of his identity could have been made in a motion for a judgment of acquittal to the trial judge, but the jury would still have been able to make determinations regarding the identity of the driver and Taye's

²⁵ *Couch*, 2007 WL 987403, at *4.

²⁶ *Taye*, 2009 WL 4017638, at *4.

²⁷ *Id.*

²⁸ *Id.*

state of mind. However, Defense Counsel believed that the complexity surrounding the legal definition of a firefighter including the nuanced legal argument “would go over [the jury’s] heads.”²⁹ In addition, Defense Counsel was concerned that the jury would sympathize with Smith, a mother, and her family. Defense Counsel explained that he has advised a client to waive trial by jury in Superior Court only a handful of times, due to the particular facts of a particular case.³⁰

Furthermore, Defense Counsel stated that it was clear that the State “carried that very minimal burden”³¹ to demonstrate recklessness and identity in the context of a motion for judgment of acquittal, but that the burden of proof for the State is very different in the context of a *prima facie* case.³² Accordingly, it was a reasonable defense strategy to concede recklessness and identity for the purpose of a motion for judgment of acquittal that focused on the legal definition of firefighter but argue at the conclusion of trial that Taye should be acquitted because the State failed to prove recklessness and identity beyond a reasonable doubt.³³ The State argues that the Trial Court “did, in fact, assess the available degrees in culpability supported by Delaware law and based its conclusions that Defendant was reckless on the evidence adduced at trial.”³⁴

Taye has not met the two-prong test of *Strickland v. Washington*. The strategy to present the case to the judge and not to a jury was reasonable. Taye’s waiver of his right to a trial by jury was knowing, intelligent and voluntary. The Trial Court’s detailed findings of fact and conclusions of law support the convictions.

²⁹ Evid. Hrg. Tr. at p. 44.

³⁰ *Id.* at p. 46.

³¹ *Id.* at p. 47.

³² *Id.* at p. 44-47.

³³ *Id.* at p. 47-48.

³⁴ State’s Answering Brf. at p. 16.

Taye's Claim of Ineffective Assistance of Counsel Involving Taye's Waiver of His Right to Testify as a Witness at Trial

Taye now claims that the waiver of his right to testify was not a voluntary decision because Taye made this decision after he heard Defense Counsel concede Taye's identity and state of mind when Defense Counsel presented the motion for judgment of acquittal. Taye argues that he did not want to undermine his counsel by testifying contrary to Defense Counsel's presentation. Taye claims that there is a fine line between negligence and reckless conduct and that there was genuine doubt over whether Taye acted recklessly. Therefore, according to Taye, he should have testified about his state of mind. Because he was unable to testify without contradicting Defense Counsel, Taye argues that Defense Counsel was ineffective.

The State contends that Taye understood that the decision whether or not to testify was his decision alone. According to the State, Defense Counsel discussed the consequences of testifying with Taye; Taye participated in a colloquy with the trial judge that confirmed Taye's understanding of the ramifications of his decision not to testify; and Taye told the trial judge that Taye understood the decision that he was making.

Allegations of ineffective assistance of counsel regarding a voluntary waiver of a right to testify can be "belied by the record."³⁵ If the record indicates that the defendant had a full understanding and appreciation of the decision not to testify, the waiver requirement is satisfied.³⁶ The decision is one to be made by the defendant.³⁷ If the defendant makes the decision to waive his right to testify and the Court engages in a colloquy with the defendant to

³⁵ *Weston v. State*, 918 A.2d 339, at *1 (Table) (Del. 2007).

³⁶ *Id.*

³⁷ *Erskine v. State*, 65 A.3d 616, at *2 (Table) (Del. 2013).

determine whether the waiver is knowing and voluntary, then the defendant cannot show cause or demonstrate prejudice suffered as a result of his decision.³⁸

Taye cannot establish cause or prejudice. Taye engaged in a colloquy with the Trial Court. Taye stated that he understood the consequences of not testifying. Taye also stated that he was making the decision not to testify. Taye's trial and appellate strategy was to challenge Smith's status as a firefighter killed in the line of duty. Therefore, Taye's decision not to testify was consistent with his trial strategy.

Taye has not met the two-prong test of *Strickland v. Washington*. The strategy of not testifying as a witness and being subject to cross-examination was reasonable. Presumably, Taye would have had to admit that he was the driver of the BMW if he had testified. Defense Counsel challenged the State's evidence on this important element of the State's case. Taye's waiver of his right to testify was knowing, intelligent and voluntary. Moreover, the Trial Court's detailed findings of fact and conclusions of law support the convictions.

Taye's Claim that Appellate Counsel was Ineffective by Failing to Challenge on Appeal the Admission of Evidence Concerning the Previous Accident

Taye argues that Appellate Counsel was ineffective for failing to appeal the Trial Court's ruling to admit 404(b) evidence of the 2007 Maryland automobile accident. Taye now argues that the decision to admit the Maryland accident should have been appealed to the Delaware Supreme Court because the evidence had no probative value and was highly prejudicial.

The Delaware Supreme Court recently noted that, "[a]lthough a defendant is entitled to effective assistance of counsel on appeal, this does not mean that his attorney must raise every

³⁸ *Id.*

nonfrivolous issue.”³⁹ A defendant can only show that his appellate counsel ineffectively represented him where counsel does not pursue issues on appeal that are clearly stronger “than those issues the attorney presented.”⁴⁰ The defendant does not have a constitutional right to compel his counsel to raise issues that counsel believes are frivolous or weak.⁴¹ Counsel is entitled to present the appeal based on counsel’s independent and professional strategic judgment.⁴²

Appellate Counsel, like Defense Counsel, focused her efforts on the critical legal issue of whether or not Smith was acting as a firefighter in the line of duty when she was struck and killed. Appellate Counsel had concluded that raising other issues, including the trial court’s decision to admit evidence of the Maryland accident pursuant to Rule 404(b), would dilute Taye’s appellate argument on the more important issue of whether recklessly killing Smith amounted to Murder in the First Degree. Appellate Counsel discussed with Taye the appellate strategy of challenging Smith’s status as a firefighter. The Delaware Supreme Court concluded that Smith was a firefighter.⁴³

Thus, Appellate Counsel exercised her sound professional judgment in choosing which claim was strongest and most effective for appeal. Appellate Counsel’s strategy for appeal, which was consistent with Defense Counsel’s strategy at trial, was to question whether Smith was a firefighter pursuant to the criminal statute. Appellate Counsel was not required to appeal every one of the Trial Court’s rulings, especially when Appellate Counsel determined that

³⁹ *Ploof v. State*, 75 A.3d 811, 831 (Del. 2013) (citing *Jones v. Barnes*, 463 U.S. 745, 754 (1983)).

⁴⁰ *Id.* at 832 (citing *Fautenberry v. Mitchell*, 515 F.3d 614, 642 (6th Cir. 2008)).

⁴¹ *Scott v. State*, 7 A.3d 471, 479 (Del. 2010) (citing *Jones*, 463 U.S. at 751).

⁴² *Id.*

⁴³ *Taye*, 21 A.3d at 42.

challenging other rulings would be frivolous and would dilute the strongest and most important argument.

Taye's claim of ineffective assistance of Appellate Counsel fails. Taye has not met the two-prong test of *Strickland v. Washington*. The appellate strategy of choosing the strongest legal issue to present on appeal was a reasonable strategy. Taye has not demonstrated that he was prejudiced by this strategy.

Taye's Claim that Appellate Counsel Was Ineffective Because She Did not Challenge the Trial Court's Rationale that the Defendant's Behavior was Reckless

Taye claims that Appellate Counsel was ineffective by failing to challenge the Trial Court's findings. Specifically, Taye contends that Appellate Counsel should have argued that driving without a license and using a stick to operate the vehicle were actions that were *mala prohibita*, not *mala per se*, because a person can carefully operate a motor vehicle in this manner and without a license. In addition, Taye argues that leaving the scene of the accident does not demonstrate that the driver was reckless in causing the accident because leaving the scene of an accident is an action that occurs after an accident and does not pertain to the driver's state of mind at the time of the accident. Taye claims that the vehicle in front of him obstructed his view. Taye contends that when the vehicle moved into the right lane, Taye had only a split second to decide whether to swerve to the left and hit the police vehicle or swerve to the right.

The State contends that the Trial Court assessed the available degrees of culpability supported by Delaware law and correctly concluded that there was substantial evidence that Taye recklessly killed Smith. In addition, the State argues that the Trial Court's conclusion that the State did not meet its burden of proof to establish the enhanced recklessness element for Murder in the Second Degree demonstrates that the Trial Court based its verdict on all facts and circumstances presented.

A finding of recklessness requires that the defendant was “aware of and consciously disregard[ed] a substantial and unjustifiable risk” that death would result from his conduct.⁴⁴ The State is required to demonstrate that the risk was of such a nature and degree that the defendant's disregard of the risk was a gross deviation from the standard of conduct that a reasonable person would observe under the same circumstances.⁴⁵

The Trial Court held that Taye was reckless because he drove without a license, drove without any special training for using a stick to manipulate the fuel and braking functions, used a stick to operate a vehicle that had not been specially designed to be operated by a paraplegic, and left the scene of the accident.⁴⁶ In addition, the Trial Court ruled that Taye drove too closely behind the car in front of him, passed a fire truck that had its emergency equipment activated, and crashed into a clearly visible police car with its emergency equipment also activated.⁴⁷ Then, Taye left the scene of the accident.⁴⁸ According to the Trial Court, the prior 2007 Maryland accident indicated that Taye was aware of the danger he created while driving.⁴⁹ The Trial Court's decision was supported by substantial evidence and Appellate Counsel was reasonable in the decision not to challenge the Trial Court's findings on appeal.

Taye's claim of ineffective assistance of counsel fails. Taye has not met the two-prong test of *Strickland v. Washington*. There was ample evidence to support the convictions.

Conclusion

Taye's waivers of his right to a jury trial and his right to testify at trial were knowing, intelligent, and voluntary. Any defect that may have been present in Taye's waivers of his right

⁴⁴ 11 Del. C. § 231(e).

⁴⁵ *Id.*

⁴⁶ *Taye*, 2009 WL 4017638, at *6, *8.

⁴⁷ *Id.* at *8.

⁴⁸ *Id.*

⁴⁹ *Id.*

to a jury trial and right to testify were cured when the Trial Court engaged in an extensive colloquy with respect to each waiver. Taye's claims of ineffective assistance of Defense Counsel and Appellate Counsel fail. These lawyers exercised sound professional judgment on Taye's behalf. Taye suffered no prejudice as a result of the strategies pursued by counsel. Appellate Counsel was reasonable to focus on a single critical issue.

NOW, THEREFORE, this February 26, 2014, the Motion for Postconviction Relief of Defendant Joseph Taye is hereby DENIED.

IT IS SO ORDERED.

Andrea L. Rocanelli

Honorable Andrea L. Rocanelli