

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, )  
)  
v. ) I.D. No. 0605023366  
)  
GERARD SZUBIELSKI, )  
)  
Defendant. )  
)  
)

Submitted: October 31, 2014  
Decided: January 30, 2015

Amended Motion for Postconviction Relief  
***DENIED***

Christopher Parker, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, *Attorney for the State.*

Christopher S. Koyste, Law Office of Christopher S. Koyste LLC, Wilmington, DE, *Attorney for the Defendant.*

DAVIS, J.

This 30<sup>th</sup> day of January, 2015, upon consideration of the Motion for Postconviction Relief, the Amended Motion for Postconviction Relief, the Memorandum of Law in Opposition to Defendant Gerald Szubielski's Petition for Post-Conviction Relief, Petitioner Gerard Szubielski's Reply to the State's Memorandum in Opposition to Petitioner's Amended Motion for Postconviction Relief, and, the entire record in this case:

1. The Motion for Postconviction Relief and the Amended Motion for Postconviction Relief are Gerard Szubielski's fourth motion seeking relief under Rule 61 of the Superior Court Rules of Criminal Procedure, but only his first motion since he was resentenced on March 9, 2012.

## FACTS

2. On May 25, 2006, after dark, Mr. Szubielski was involved in a vehicle chase with the New Castle County Police Department. During the chase, which reached speeds in excess of 90 miles per hour, Mr. Szubielski sped into a lighted construction zone, lost control of the vehicle, and struck Ron Cirillo. Mr. Cirillo was sent flying through the air and onto a construction vehicle, and suffered serious injuries. After striking Mr. Cirillo, Mr. Szubielski fled on foot, and was apprehended by officers a short time later.

3. On January 1, 2007, a jury found Mr. Szubielski guilty of Assault in the First Degree.<sup>1</sup>

4. On March 2, 2007, the Court granted the State's motion to declare Mr. Szubielski a habitual offender pursuant to 11 *Del. C.* § 4214(b), and sentenced Mr. Szubielski to life imprisonment.

5. Both at the trial and sentencing Mr. Szubielski was represented by James Haley, Esquire ("Trial Counsel").

## PROCEDURAL BACKGROUND

6. On August 14, 2007, Mr. Szubielski filed his first *pro se* motion for postconviction relief (the "First Rule 61 Motion") under Superior Court Criminal Rule 61 ("Rule 61").<sup>2</sup> In the First Rule 61 Motion, Mr. Szubielski claimed, that he received ineffective assistance of counsel because his Trial Counsel failed to inform him in writing of his right to appeal his March 2, 2007 sentence, and that Trial Counsel failed to have the vehicle involved in the accident tested for a malfunction.<sup>3</sup> The Court requested that Trial Counsel file an affidavit in response to Mr. Szubielski's allegations. Trial Counsel filed an affidavit and averred that

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<sup>1</sup> 11 *Del. C. Ann.* § 613.

<sup>2</sup> *State v. Szubielski*, No. 0605023366 2008 WL 2582888, at \*1 (Del. Super. Ct. June 20, 2008).

<sup>3</sup> *Id.*; D.I. 27.

although Mr. Szubielski never requested that an appeal be filed on his behalf, Trial Counsel admitted that he had failed to advise Mr. Szubielski in writing of his right to appeal.<sup>4</sup>

7. The Court granted Mr. Szubielski's First Rule 61 Motion on October 22, 2007.<sup>5</sup> In doing so, the Court vacated the earlier sentence, resentenced him to the same terms and conditions, but made the effective date October 22, 2007, thereby allowing Mr. Szubielski thirty days from that date to file an appeal to the Supreme Court.<sup>6</sup> Mr. Szubielski was not present at the resentencing, nor was counsel appointed for the purposes of filing a direct appeal.<sup>7</sup>

8. Mr. Szubielski did not file an appeal within thirty days.<sup>8</sup>

9. On June 2, 2008, Mr. Szubielski filed his second *pro se* Motion for Postconviction Relief (the "Second Rule 61 Motion").<sup>9</sup> In the Second Rule 61 Motion, Mr. Szubielski claimed that he never received the Court's earlier decision that permitted him thirty days to file an appeal.<sup>10</sup> Mr. Szubielski sought appointment of counsel to assist him in filing an appeal.<sup>11</sup> Mr. Szubielski also raised four grounds for relief that: (1) that his attorney failed to investigate mechanical problems with his vehicle, which, if the jury believed the testimony, would have affected the jury's determination of guilt; (2) that the Judge failed to have an adequate colloquy with Mr. Szubielski; (3) that Mr. Szubielski's attorney failed to file a notice of appeal to the Supreme Court pursuant to Supreme Court Rule 26, failed to advise Mr. Szubielski of his right to appeal, and failed to withdraw if he believed that an appeal was without merit; and (4) that Mr. Szubielski should have been charged with vehicular assault rather than assault in the first

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<sup>4</sup> *State v. Szubielski*, Affidavit of James J. Haley, Jr., Esq. at ¶24 (Del. Super. Ct. Oct. 5, 2007) ("Affidavit"); D. I. 33.

<sup>5</sup> *State v. Szubielski*, 2008 WL 2582888, at \*1.

<sup>6</sup> *Id.*

<sup>7</sup> D.I. 64.

<sup>8</sup> *State v. Szubielski*, 2008 WL 2582888, at \*1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

degree.<sup>12</sup> On June 20, 2008, the Court denied Mr. Szubielski's Second Rule 61 Motion.<sup>13</sup> The Superior Court held that Szubielski's claim was procedurally barred, and that Szubielski could not overcome the presumption that the order was properly mailed to him.<sup>14</sup>

10. Mr. Szubielski appealed the denial to the Delaware Supreme Court (the "Supreme Court"). On December 11, 2008, the Supreme Court dismissed Mr. Szubielski's appeal for failure to file a timely notice of appeal.<sup>15</sup>

11. On April 27, 2010, Mr. Szubielski filed his third Motion for Postconviction Relief (the "Third Rule 61 Motion"). Mr. Szubielski claimed that (1) there was an unauthorized amendment of the indictment, and that only a grand jury may make a substantial change or addition to an essential element of the crime, (2) the failure to appoint counsel for his First Rule 61 Motion and Second Rule 61 Motion violated his Sixth Amendment rights, and (3) that he never received the October 2007 resentencing order.<sup>16</sup> In response, the State took the position that Mr. Szubielski should be appointed counsel and resentenced to allow for direct appeal.<sup>17</sup> After the State filed its response, Mr. Szubielski wrote to the Court enclosing a letter and mail log from prison support services at the James T. Vaughn Correctional Center.<sup>18</sup> These documents showed that Szubielski did not receive any legal mail in October 2007 or November 2007.<sup>19</sup>

12. The Court referred the matter to a commissioner for proposed findings of facts and conclusions of law pursuant to Superior Court Rule 62.<sup>20</sup> The commissioner recommended

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Szubielski v. State*, 963 A.2d 139 (Table) 2008 WL 5191812 at \*1 (Del. December 11, 2008).

<sup>16</sup> D.I. 50.

<sup>17</sup> *Szubielski v. State*, 300,2011 36 A.3d 350 (Table) 2012 WL 218950 at \*1 (Del. January 24, 2012).

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

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*2.

that Mr. Szubielski's motion for postconviction relief be denied. The Court adopted this recommendation and denied the motion for postconviction relief.<sup>21</sup>

13. Mr. Szubielski appealed to the Supreme Court.<sup>22</sup> The State responded to Mr. Szubielski's motion for appointment of new counsel on appeal with evidence that neither Mr. Szubielski nor his trial counsel received a copy of the 2007 resentencing order.<sup>23</sup>

14. Given the evidentiary showing that Mr. Szubielski did not receive any legal mail in October 2007, and the State's concession that Mr. Szubielski was denied effective assistance of counsel, and the opportunity to pursue a direct appeal, the Supreme Court remanded the case for appointment of counsel and resentencing.<sup>24</sup> The Supreme Court did not address the remaining contentions in Mr. Szubielski's Third Rule 61 Motion.

15. On March 9, 2012, the Court resentenced Mr. Szubielski to life imprisonment as a habitual offender. The Court also appointed counsel to represent Mr. Szubielski for the appeal.

16. Mr. Szubielski appealed to the Supreme Court. On appeal, Mr. Szubielski raised four points: (1) the prosecutor's questions during cross examination implied that the defense had a duty to corroborate their asserted facts, which constituted impermissible burden shifting in violation of the Fourteenth Amendment of the United States Constitution and article 1, section 7 of the Delaware Constitution; (2) the prosecutor's closing argument repeatedly stating that there was no corroboration of Mr. Szubielski's asserted facts was prosecutorial misconduct amounting to improper burden shifting in violation of the Fourteenth Amendment of the United States Constitution and article 1, section 7 of the Delaware Constitution; (3) the prosecutor's "improper comments" throughout the trial amounted to prosecutorial misconduct warranting reversal; and

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<sup>21</sup> *State v. Szubielski*, Order, I.D. No. 0605023366 (Del. Super. Ct. May 31, 2011).

<sup>22</sup> *Szubielski v. State*, 2012 WL 218950 at \*2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

(4) the repetitive errors by the prosecutor during trial amounted to a persistent pattern of prosecutorial misconduct compromising the integrity of the trial process, and warranting reversal.<sup>25</sup>

17. The Supreme Court denied the appeal. The Supreme Court held that Mr. Szubielski subjected himself to the prosecutor's permissible questions and argument on the lack of corroboration, when Mr. Szubielski raised the defense that he should not be held responsible because his striking Mr. Cirillo was an accident due to mechanical failure.<sup>26</sup> The Supreme Court also held that the prosecutor's remarks did not constitute plain error.<sup>27</sup> Therefore, the Supreme Court affirmed Mr. Szubielski's sentence.<sup>28</sup>

18. On December 30, 2013, Mr. Szubielski filed his fourth Motion for Postconviction Relief (the "Fourth Rule 61 Motion").<sup>29</sup> Mr. Szubielski claims that he received ineffective assistance of counsel, because of Trial Counsel's failure to investigate. The Court appointed counsel ("Rule 61 Counsel") to represent Mr. Szubielski on the Fourth Rule 61 Motion.<sup>30</sup>

19. On July 28, 2014, Mr. Szubielski, through Rule 61 Counsel, filed Petitioner Gerard Szubielski's Amended Motion for Postconviction Relief ("Amended Fourth Rule 61 Motion"). The Amended Fourth Rule 61 Motion claims that (1) Trial Counsel was ineffective by failing to object to the Amendment of the Indictment, (2) Trial Counsel was ineffective by failing to investigate the mechanical problems of the vehicle, and (3) that Mr. Szubielski's right to a fair trial was denied due to cumulative due process error.<sup>31</sup>

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<sup>25</sup> *Szubielski v. State*, No. 190,2012 82 A.3d 730 (Table) 2013 WL 6211807 at \*2 (Del. November 26, 2013).

<sup>26</sup> *Id.* at \*4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at \*5.

<sup>29</sup> D.I. 109.

<sup>30</sup> D.I. 114.

<sup>31</sup> D.I. 123.

20. On September 30, 2014, the State filed a Memorandum of Law in Opposition to Defendant Gerald Szubielski's Petition for Post-Conviction Relief under Delaware Superior Court Rule 61.<sup>32</sup>

21. On October 31, 2014, Mr. Szubielski filed Petitioner Gerard Szubielski's Reply to the State's Memorandum in Opposition to Petitioner's Amended Motion for Postconviction Relief.<sup>33</sup> In this reply, Mr. Szubielski addresses arguments made by the State and requests an evidentiary hearing. Mr. Szubielski contends an evidentiary hearing is necessary so that evidence can be presented on Mr. Szubielski's claim of ineffective assistance of counsel for failure to investigate the mechanical problems of the vehicle and to address the State's purportedly unsupported claims that any investigation of the vehicle would result in a determination that the vehicle was functioning properly.

#### **STANDARD OF REVIEW**

22. Rule 61 governs motions for postconviction relief. Before addressing the substantive merits of any claim for postconviction relief, the Court must determine whether Mr. Szubielski has satisfied the procedural requirements of Rule 61.<sup>34</sup> Rule 61(i) establishes four procedural bars to postconviction relief: (1) a motion for postconviction relief may not be filed more than one year after the judgment of conviction is final; (2) any ground for relief not asserted in a prior postconviction proceeding is barred; (3) any ground for relief not asserted in the proceedings leading to the judgment of conviction is barred; and (4) any ground for relief previously adjudicated in any proceeding is barred.<sup>35</sup> The procedural bars contained in Rule 61(i)(1-4) may be rescinded only if there is a means by which to do so in the applicable

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<sup>32</sup> D.I. 125.

<sup>33</sup> D.I. 127.

<sup>34</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>35</sup> Super. Ct. Crim. R. 61(i).

subsection of Rule 61.<sup>36</sup> Absent such relief, Rule 61(i)(5) provides additional reprieve from the procedural bars described in Rule 61(i)(1-3).<sup>37</sup> Under Rule 61 (i)(5), “[t]he bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claims 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>38</sup> Claims alleging ineffective assistance of counsel meet the “fundamental fairness” and “miscarriage of justice” exceptions of Rule 61(i)(5).<sup>39</sup>

23. To prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel’s performance was deficient and that the deficiency prejudiced the defendant.<sup>40</sup> To establish deficient performance, a petitioner must demonstrate that counsel’s representation “fell below an objective standard of reasonableness.”<sup>41</sup> To establish prejudice, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>42</sup>

## DISCUSSION

### A. Procedural Hurdles

24. Mr. Szubielski’s Fourth Rule 61 Motion and Amended Fourth Rule 61 Motion are not procedurally barred, as this represents Mr. Szubielski’s first Rule 61 filing since being resentenced on March 9, 2012. That sentence became final on November 26, 2013, when the Supreme Court affirmed the sentence.

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<sup>36</sup> *State v. MacDonald*, 2007 WL 1378332 \*4 (Del. Super. Ct., May 9, 2007).

<sup>37</sup> *Id.*

<sup>38</sup> Super. Ct. Crim. R. 61(i)(5).

<sup>39</sup> *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

<sup>40</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>41</sup> *Id.* at 688.

<sup>42</sup> *Id.* at 691.

**B. Trial Counsel was not ineffective for failing to object to the indictment**

25. Mr. Szubielski first claims that Trial Counsel was ineffective for failing to object to the amendment of the indictment by the State.

26. The charge at issue in the indictment read as follows:

ASSAULT FIRST DEGREE in violation of Title 11,  
Section 613 of the Delaware Code as amended.

Gerald Szubielski, on or about the 25<sup>th</sup> day of May, 2006, in the County of New Castle, State of Delaware, did recklessly engage in conduct which created a substantial risk of death to Ronald Cirillo by running into him with a car, which conduct caused physical injury to Ronald Cirillo.

27. After Mr. Szubielski was indicted, the State sought to add the term “serious” between “caused” and “physical.” Trial Counsel agreed to the change without objection. Mr. Szubielski claims that this change altered the substance of the indictment, which could only be done by the grand jury, and his Trial Counsel was ineffective in agreeing to the change without objection.

28. Mr. Szubielski’s argument is without merit. The indictment contained the title and section of the charge, as such Mr. Szubielski and Trial Counsel were on notice as to which section Mr. Szubielski was being charged under.

29. The Supreme Court examined this issue in *Maddox v. State*.<sup>43</sup> In *Maddox* the defendant contended that the indictment charging him with attempted first degree robbery was constitutionally defective because it did not include the term “displayed” what appeared to be a deadly weapon.<sup>44</sup> The indictment, however, specifically identified 11 Del. C. § 831(a)(2) as the

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<sup>43</sup> *Maddox v. State*, 977 A.2d 898 (Table) 2009 WL 2323490 at \*2 (Del. July 30, 2009).

<sup>44</sup> *Id.*

crime that defendant was charged with committing and included the name of the offense.<sup>45</sup> The Supreme Court held that an indictment containing the official citation to the statute and the name of the offense was sufficient information to put a defendant on notice of the crime with which he was charged even though an element of the crime was omitted from the indictment.<sup>46</sup>

30. Mr. Szubielski attempts to distinguish *Maddox*; however, Mr. Szubielski provides no authority for his arguments. *Maddox* relies, in part, on *Malloy v. State*.<sup>47</sup> The decision in *Malloy* provides why *Maddox* applies here, and why Mr. Szubielski's claim in the Amended Fourth Rule 61 Motion fails. In *Malloy*, the Supreme Court upheld a conviction where the indictment failed to include a necessary element of the crime.<sup>48</sup> The Supreme Court held that the failure to include the necessary element did not mean the defendant's conviction should be overturned where the indictment included an official citation to the statute, the name of the offense and the crime charged.<sup>49</sup>

31. Moreover, in *Malloy*, the Supreme Court rejected the defendant's argument that he lost the protections of the grand jury because not all the elements were contained in the indictment. The Supreme Court stated that "[t]here is a strong presumption that the grand jury has faithfully performed its duty in returning an indictment" and "[m]erely pointing to an omission, probably caused by prosecutorial negligence" does not override that presumption.<sup>50</sup>

32. The indictment in this case provided full notice to Mr. Szubielski of the charge that he was asked to defend against. Moreover, Mr. Szubielski has not met his burden of overcoming the strong presumption that the grand jury faithfully performed its duty in Mr.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*2, n. 6.

<sup>48</sup> *Malloy v. State*, 462 A.2d 1088, 1092-93 (Del. 1983).

<sup>49</sup> *Id.* at 1093.

<sup>50</sup> *Id.* at 1094.

Szubielski's case. As such, Trial Counsel did not commit an error in failing to object to the amendment of the indictment as it was clear from the beginning what the State would argue.

**C. Trial Counsel was not ineffective for failing to investigate alleged mechanical problems with the vehicle**

33. Mr. Szubielski claims that he received ineffective assistance of counsel from Trial Counsel because Trial Counsel failed to investigate alleged mechanical problems with the vehicle that was involved in the May 25, 2006 accident.

34. In the Affidavit, Trial Counsel states that early in the representation Mr. Szubielski suggested that the vehicle may have malfunctioned, but that Mr. Szubielski never repeated that possibility in the subsequent conversations and correspondence.<sup>51</sup> Instead, Mr. Szubielski urged Trial Counsel to present a defense that his girlfriend, Margareta Martinez, who was a passenger in the vehicle, was the one who was in fact driving the car. Attached to the affidavit, Trial Counsel provided copies for the Court, of the correspondence with Mr. Szubielski, which confirms that Mr. Szubielski urged Trial Counsel to present the defense that Ms. Martinez was driving the vehicle.

35. Mr. Szubielski urged Trial Counsel to present that defense even after Trial Counsel met with Ms. Martinez, who indicated that she could not support the version of events that she was driving the vehicle in question on the night of May 25, 2006.<sup>52</sup> Only after the State completed its case-in-chief did Mr. Szubielski present Trial Counsel with a letter stating a new version of the collision which alleged malfunction of the vehicle.<sup>53</sup>

36. Based on the communication between Mr. Szubielski and Trial Counsel, the Court finds that Trial Counsel acted reasonably. The correspondence between Mr. Szubielski

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<sup>51</sup> Affidavit at ¶¶ 2-3.

<sup>52</sup> *Id.* at ¶¶ 14-15.

<sup>53</sup> *Id.* at ¶¶ 18.

and Trial Counsel reveals that only after the State completed its case-in-chief did Mr. Szubielski urge Trial Counsel to pursue a defense of vehicle malfunction. Because until then Mr. Szubielski insisted to Trial Counsel that he was not the driver of the vehicle, it was reasonable for Trial Counsel to make no investigation into the vehicle's condition.

**D. Mr. Szubielski's right to a fair trial was not denied due to cumulative error**

37. Mr. Szubielski has not shown that his Trial Counsel was ineffective in either failing to object to an amendment that had no impact on the charge which Mr. Szubielski would face, or in failing to investigate mechanical error on a vehicle that Mr. Szubielski consistently stated that he did not drive. As such there was no cumulative error in this matter, and Mr. Szubielski's right to a fair trial was not denied.

**E. An evidentiary hearing is not needed here.**

38. In his reply, Mr. Szubielski requests an evidentiary hearing. Mr. Szubielski contends an evidentiary hearing is necessary so that evidence can be presented on Mr. Szubielski's claim of ineffective assistance of counsel for failure to investigate the mechanical problems of the vehicle and to address the State's purportedly unsupported claims that any investigation of the vehicle would result in a determination that the vehicle was functioning properly.

39. In determining to deny the Amended Fourth Rule 61 Motion, the Court has assumed that Trial Counsel did not investigate the purported mechanical problems of the vehicle. The Court has explained above why that is not relevant given the pre-trial exchanges between Trial Counsel and Mr. Szubielski. As such, there is no need for an evidentiary hearing on whether Trial Counsel failed to investigate any mechanical failures of the vehicle.

40. Finally, the Court's decision here does not rely on any of what Mr. Szubielski contends are factually unsupported claims of the State. For example, the Court has not found that the Amended Fourth Rule 61 Motion is procedurally barred. In addition, the Court has not based its decision on whether evidence was presented (anywhere) that the vehicle had no mechanical problems.

41. Under these circumstances, the Court does not need to hold an evidentiary hearing to determine whether Trial Counsel investigated purported mechanical failures and/or the procedural history and record of this case (all of which is in possession of the Court) or what was, or was not, presented at trial.

#### CONCLUSION

42. Based on the foregoing, IT IS ORDERED that the Motion for Postconviction Relief, and the Amended Motion for Postconviction Relief are **DENIED**.

/s/ *Eric M. Davis*

Eric M. Davis  
Judge