SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: December 16, 2006
Decided: March 2, 2006

STATE OF DELAWARE	)	
	)	
v.	)	ID#: 9503004907
	)	
ANDRE A. RIVERA,	)	
	)	
Defendant.	)	

ORDER

Upon Defendant's Third Motion for Postconviction Relief - -
SUMMARILY DISMISSED

Defendant is serving four, consecutive life sentences. They were imposed in 1995 after a jury convicted him of four counts of Burglary Second Degree, and the court determined that Defendant qualified for sentencing as a habitual offender, under 11 *Del. C.* § 4214(b). Defendant's conviction and sentence

were upheld on direct appeal in 1996.[1]

Defendant filed his first motion for postconviction relief in May 1996, which the court denied on July 31, 1997. Defendant filed his second motion for postconviction relief in July 2003, which the court denied on September 26, 2003. Defendant filed another pleading, in July 2005, which he denominated as a motion for modification of sentence. The court denied that motion on August 25, 2005.

Defendant filed this, his third motion for postconviction relief, on December 16, 2005. Now, he argues that he did not receive due process and a fair trial because the court "failed to question prospective jurors about racial prejudice when movant (Andre A. Rivera) stood accused of a violent crime." Similarly, Defendant argues that the jury should have been instructed "concerning racial prejudice."

I.

The court, under Superior Court Criminal Rule 61(d), preliminarily considered Defendant's latest motion. For several reasons, discussed below, the motion is subject to summary dismissal under Rule 61(d)(4).

First, Defendant's motion is barred under Rule 61(i)(1) because it was

---

[1] *Rivera v. State*, 676 A.2d 906 (Del. 1996).

filed more than one year after the judgment of conviction became final. Second, the motion is barred under Rule 61(i)(2) because it is repetitive in the sense that Defendant should have raised the current arguments in his original postconviction proceeding, as required by Rule 61(b)(2). Third, the motion is barred under Rule 61(i)(3) because Defendant's grounds for relief were not asserted in the proceedings leading to the judgment of conviction, and Defendant has not shown cause for relief from the procedural default and prejudice from violation of his rights.

Defendant was represented by counsel at trial and on direct appeal. Defendant's concerns about his jury's selection and the jury instructions should have been raised before or during trial, and again on appeal. If Defendant thought that his lawyer was ineffective for failing to raise those claims, then Defendant was required to have raised that issue during his first postconviction relief proceeding.

Finally, Defendant's conclusion to the contrary notwithstanding, he has not made a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction.[2] Presumably, Defendant's attempt to challenge the jury's selection and instruction on the law from

---

[2] Superior Court Criminal Rule 61(i)(5).

more than ten years ago was sparked by the recently decided *Phillips v. State*.[3] That decision concerns the court's refusal to screen prospective jurors for potential bias.

In several ways, *Phillips* is distinguishable. For example, although Burglary Second Degree is classified as a violent crime for sentencing purposes, this case involved no actual violence; Defendant never even accosted his victims. Nor was this a case where Defendant's word was pitted against his victims'. Furthermore, Defendant is Hispanic.

Most importantly, the court's docket and its notes do not show that Defendant requested *voir dire* on racial bias. Nor did he ask for a jury instruction about it. *Phillips* is clear that the screening requirement is triggered by a request. The court is not required to perform the *voir dire* on its own initiative.[4]

Taking the nature of this case and the State's evidence into account, the court would not have expected requests along the lines now suggested by Defendant. By the same token, the court's failure to give the *voir dire* and jury

---

[3] *Phillips v. State*, 888 A.2d 232 (Del. 2005).

[4] *Id.* ("[The] trial judge [must] question prospective jurors about racial prejudice when: (1) the defendant stands accused of a violent crime; (2) the defendant and victim are members of different racial groups; and (3) the defense attorney specifically requests the trial court to question the jurors during *voir dire* concerning potential racial prejudice." (Quoting *Filmore v. State*, 813 A.2d 1112, 1117 (Del. 2003))).

instruction, *sua sponte*, was not error. Nor was it insensitive, much less unfair.

This was not a violent, "he said – she said." Civilian witnesses saw Defendant committing a burglary. They called the police and, moments later, Defendant was caught red-handed, with the proceeds from that burglary and others. Moreover, although not dispositive, it bears mention that Defendant did not testify. That means the jury did not have to weigh Defendant's word against the testimony of others. Considering the damning and unrefuted evidence, it is difficult to imagine how any reasonable jury could side with Defendant. Thus, in this case, concern about juror bias is theoretical, at most.

For the foregoing reasons, Defendant's Third Motion for Postconviction Relief is ***SUMMARILY DISMISSED***.

IT IS SO ORDERED. The Prothonotary shall notify Defendant.

_____

Judge

oc: Prothonotary (Criminal Division)
pc: Paul Wallace, Deputy Attorney General
Andre A. Rivera, *Pro Se* Defendant - DCC