IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. #0110011346A
v.	)	
TEREK R. DOWNING,	)	
Defendant	)	

Submitted: March 9, 2006
Decided: June 9, 2006

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

R. David Favata, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Terek R. Downing, Smyrna, Delaware, *pro se*.

COOCH, J.

This 9th day of June, 2006, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. Terek R. Downing ("Defendant") was arrested on October 26, 2001, and then indicted on December 31, 2001, for Robbery First Degree (two counts), Possession of a Deadly Weapon During the Commission of a

Felony (two counts), Possession of a Deadly Weapon by a Person Prohibited,[1] Conspiracy Second Degree, and Assault Second Degree. Defendant was found guilty at trial in September of 2002 of all charges, except, of course, of the severed charge of Possession of a Deadly Weapon by a Person Prohibited. On November 1, 2002, Defendant was sentenced to 2 years at Level V on each of the two Robbery First Degree charges, 5 years at Level V on each of the two Possession of a Firearm During the Commission of a Felony charges, 8 years at Level V suspended after 1 year, followed by decreasing levels of supervision, on the Assault First Degree charge, and 1 year at Level V, suspended immediately for Level II on the Conspiracy Second Degree charge. The total sentence at Level V incarceration is 15 years. Defendant appealed his conviction on the ground that the trial court erred by not granting Defendant's motion for a mistrial based on an alleged *Brady* violation.[2] On July 8, 2003, the Delaware Supreme Court affirmed the convictions.[3]

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[1] A motion to sever this charge was filed the day of trial and was granted by the Court.

[2] *Downing v. State*, 2003 WL 21663704 (Del. Supr.) (citing *Brady v. Maryland*, 373 U.S. 83 (1963).

[3] *Id.* (affirming trial court's denial of defendant's motion for a mistrial, which was based on defendant's claimed prejudice that so-called *Brady* evidence of a witnesses exculpatory statement was not produced until the morning of trial and was defendant's only claim on direct appeal, because of a lack of prejudice to defendant).

2. Defendant filed this timely motion for postconviction relief pursuant to Superior Court Criminal Rule 61 on October 25, 2005. Defendant alleges five grounds upon which he requests relief, which are set forth here *in toto*:

> 1. Prosecutor Misconduct – States top witness Ericka Garnett claims that I threaten to kill her, but I was not charge [sic] with that. The Judge said something on this but never made an official ruling. So the ADA ran with this. She also said I wrote a letter about the crime saying I did it, but this letter was never produced. Were as I produced a letter were witness apologized for putting me in here [sic]. During states closing he used all of this along with calling me names such as a coward.
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> 2. Right to confront witness against him was denied – Detective James Diana was not at trial but at a football game. The victims in the case said thing that they said the told him [sic], but at previous hearings under oath he said otherwise. The jury was unable to see and hear the detective say these things were not true. Cross examination has value in exposing falsehood and bringing out truth in the trial of a criminal case.
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> 3. Identification Tainted and Suggestive – (1) Detective aready and a arrest warrant [sic], (2) Identification took place two days later at the store and the det[ective] was by himself. Identification tainted by unnessarily [sic] suggestive confrontation, results in denial of due process of law.
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> 4. *Brady* Violation – The tape statement of Ericka Garnett had a lot of things that could and should have been investigated. (1) Her phone. The police had the cell phone the record could have been check and still can [sic]. She said calls were made. (2) The two stores that she said she went to, 7-11 and Forman Mills, should have tapes of who was with her. That just two main things but I never got to see or investigate what was on the tape. The Police and the State play both sides of the fence. First saying she was a suspect which would have given me right to the tape under Rule 16 Co-defendant [sic]. Then they say she is a witness and I'm not entitled to the tape.
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> 5. Ineffective assistance of counsel – I wrote Mr. Goff so many times about a suppression hearing. The tape statement he said he did not know anything about, but when I asked him about it he said I couldn't see it. Then at trial all of a sudden it a [sic] tape with all this stuff on it. I could never understand how my face was pick out of a line up, when it was said the mask never came off [sic]. So I kept asking for a suppression hearing because I knew the ID was false. Now at a suppression hearing or evidentiary hearing it would have come up about the change of stories and

> or conflicting stories. Instead I get blindsided at trial. And if we didn't get the hearings he could have at least interviewed the victims. He didn't interview or investigate anyone or anything. Even on direct appeal I wrote him and told he I wanted all of these grounds, but he didn't put any of it in. Even the *Brady* violation he didn't put all the facts I wanted. When I wrote the court they told me he must file. They even wrote him about filing my appeal making him aware of is [sic] obligation. Mr. Goff failed to conduct any investigation which denied me of key facts and evidence. I told the court about my concerns about Mr. Goff before trial but nothing was done. All of this is supported by the court docket and trial transcripts. Every letter I wrote Mr. Goff I sent it to the Prothontary Office. If you get these letters you will see. I was told not to take the stand because of my record. I know now that was a big mistake.

Upon review of Defendant's motion, all of the above grounds are 1) unsupported by any facts, 2) conclusory or 3) have been formerly adjudicated and, thus, the motion is **DENIED.**

3. When considering a motion for postconviction relief, the Court must first apply the procedural bars of Super. Ct. Crim. R. 61.[4] If a procedural bar exists, then the claim is barred and the Court should not consider the merits of the postconviction claim.[5] Rule 61(i)(4) provides that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, [or] in an appeal … is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice."[6] The

[4] *Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990)(citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

[5] *Saunders v. State*, 1995 WL 24888 (Del. Supr.); *Hicks v. State*, 1992 WL 115178 (Del. Supr.); *State v. Gattis*, 1995 WL 790961 (Del. Super.) (citing *Younger v. State*, 580 A.2d at 554).

[6] Super. Ct. Crim. R. 61(i)(4).

"interest of justice" exception of Rule 61(i)(4) has been "narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish [the defendant]."[7] To prevail under this exception, "the movant must show that subsequent legal developments have revealed that the trial court lacked the aforementioned authority to convict or punish."[8] Finally, Rule 61(d)(4) provides that "[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal."[9] Under Delaware law, claims for postconviction relief that are completely conclusory in nature may be summarily dismissed on that basis.[10]

4. As to the first ground, Defendant's claims that the State improperly called Defendant's girlfriend to testify that Defendant had threatened her prior to her testimony in the trial. However, Defendant fails to point to any facts in the record or to any legal precedent that would support his claim.

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[7] *State v. McKamey*, 2003 WL 22852614, at *4 (Del. Super. Ct.)(quoting *State v. Wright*, 653 A.2d 288, 298 (Del. Super. Ct. 1994)(citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990))).

[8] *Id.* (citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990) (citing comparatively *Davis v. United States*, 417 U.S. 333, 342 (1974))).

[9] Super. Ct. Crim. R. 61(d)(4).

[10] *See Jordan v. State*, 1994 WL 466142 (Del. Supr.); *State v. Brittingham*, 1994 WL 750341, * 2 (Del. Super.) (citing *Younger v. State*, 580 A.2d at 556 (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel)).

Thus, Defendant's claim of prosecutorial misconduct is completely conclusory and, thus, is **DENIED**.

5. As to the second ground, Defendant claims that he was denied his right to confront a witness when the lead detective in the case did not testify at trial. However, statements made by the detective were nonetheless admitted into evidence without objection by Defendant. Defense counsel, in his affidavit, stated that he had discussed allowing the statements made by the absent detective to come into evidence.[11] "Defendant agreed that this strategy was a good one, because it appeared to show that the state's chief detective did not think the case was important enough to merit his attendance."[12] Although this ground is styled as a violation of the right to confront a witness, it is more of an ineffective assistance of counsel claim. Defendant essentially alleges that counsel should not have allowed the State's chief detective to forego his testimony at trial and, thus, avoid cross-examination.

6. To succeed on an ineffective assistance of counsel claim, Defendant must show both (a) that "counsel's representation fell below an objective standard of reasonableness" and (b) "that there is a reasonable probability

[11] Goff Aff. ¶ 3.

[12] *Id.*

that, but for counsel's unprofessional errors, the result of the proceeding would be different."[13] Defendant must satisfy the proof requirements of both prongs in order to succeed on an ineffective assistance of counsel claim; failure to do so as to one prong will render the claim unsuccessful and the court need not address the remaining prong. Defendant must prove his allegations by a preponderance of the evidence.[14] Moreover, allegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel; the defendant must allege concrete allegations of actual prejudice and substantiate them.[15] Also, any "review of counsel's representation is subject to a strong presumption that the representation was professionally reasonable."[16] In that vein, there is a strong presumption that defense counsel's representation constituted sound trial strategy.[17]

7. This Court finds that defense counsel's tactic to not object to the absence of the State's chief detective on the case constituted an appropriate exercise of trial counsel's professional judgment. It is clear from defense

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[13] *Albury v. State*, 551 A.2d 53, 58 (Del. 1998) (quoting *Strickland*, 466 U.S. at 688, 694).

[14] *State v. Wright*, 653 A.2d 288, 294 (Del. Super. Ct. 1994).

[15] *Jordan v. State*, 1994 WL 466142 (Del. Supr.) (citing *Younger v. State*, 580 A.2d at 556) (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel); *State v. Brittingham*, 1994 WL 750341 (Del. Super.) (same).

[16] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

[17] *Id.* at 753-54.

counsel's affidavit that the representation did not fall below an objective standard of reasonableness. Nor did the decision prejudice defendant; in fact, Defendant agreed with defense counsel's strategy. Based on these reasons, Defendant's second ground for relief is **DENIED.**

8. As to the third ground for relief, Defendant claims that the methods in which he was identified by photograph were suggestive and, therefore, should have been suppressed. An improper pre-trial identification procedure that would result in the inadmissibility of the identification is (1) unnecessarily suggestive and (2) likely to result in a misidentification.[18] "A suggestive photo array, without more, does not amount to a due process violation."[19] Although the first ground asserted by Defendant is difficult to understand, it appears that he alleges that a detective already had an arrest warrant and that the identification in which the store clerk picked Defendant out of a photo array was suggestive and confrontational. However, Defendant points to no facts in the record that support these allegations. Defendant's trial counsel asserts that neither of those identifications was

[18] *Clayton v. State*, 2006 WL 141027, *1 (Del. Supr.) (holding that random photograph identification was neither suggestive nor likely to be unreliable where witness was positive in the identification and had time to see defendant in a well-lit area despite a three-month delay between the crime and the identification).

[19] *State v. Short*, 2005 WL 2841613, * 2 (Del. Super.) (holding that a photo identification was reliable because the witness had seen the defendant before and easily identified her photograph).

suggestive.[20] Moreover, the identification was not likely to result in a misidentification as one of the witnesses who had identified Defendant was in fact a friend of the Defendant's.[21] For these reasons Defendant's third ground is **DENIED.**

9. As to the fourth ground, Defendant claims that a *Brady* violation occurred when the State failed to produce a tape recorded statement of Defendant's girlfriend until the morning of trial. However, this claim is barred under Rule 61(i)(4) as it was formerly adjudicated. This was one of the only issues that defense counsel apparently deemed to have merit on appeal. On the morning of trial, Defendant moved for a mistrial because of the prejudice to the Defendant for the State's failure to produce the *Brady* material. This Court denied that motion. The Supreme Court then affirmed on Defendant's direct appeal of his convictions.[22] Nor has Defendant demonstrated that the "interest of justice" exception applies. Defendant has not provided evidence of a subsequent legal development that shows that the trial court lacked the authority to convict Defendant. This issue is

[20] Goff Aff. ¶ 1.

[21] *See Id.*

[22] *Downing*, 2003 WL 21663704 (holding that, even assuming that the statement was *Brady* material, Defendant suffered no prejudice to its production on the day of trial).

procedurally barred as having been formerly adjudicated and, thus, Defendant's fourth ground is **DENIED.**

10. Defendant's fifth ground for relief is an ineffective assistance of counsel claim. As stated above, to succeed on an ineffective assistance of counsel claim, Defendant must show both (a) that "counsel's representation fell below an objective standard of reasonableness" and (b) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different."[23] Moreover, allegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel; the defendant must allege concrete allegations of actual prejudice and substantiate them.[24]

11. Here, Defendant's claim that trial counsel was ineffective is completely conclusory. Defendant alleges that counsel did not request a suppression hearing nor did he include the issues on appeal that Defendant wanted him to argue. Although Defendant claims that "[a]ll of this is supported by the court docket and trial transcripts," Defendant fails to point to concrete facts that support his claim. Instead, Defendant's trial counsel represents that he "raised the only appellate issue which [he] believed had

[23] *Albury v. State*, 551 A.2d 53, 58 (Del. 1998) (quoting *Strickland*, 466 U.S. at 688, 694).

[24] *Jordan v. State*, 1994 WL 466142 (Del. Supr.) (citing *Younger v. State*, 580 A.2d at 556) (holding that conclusory allegations are legally insufficient to prove ineffective assistance of counsel); *State v. Brittingham*, 1994 WL 750341 (Del. Super.) (same).

any strength."[25] Defendant's claim of ineffective assistance of counsel is conclusory and, thus, is **DENIED**.

12. For the reasons stated, Defendant's Motion for Postconviction Relief is **DENIED.**

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Robert M. Goff, Esquire

[25] Goff Aff. ¶ 4.