SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

June 12, 2006

Darnell A. Davis
SBI No. 00182713
Sussex Correctional Institute
P.O. Box 500
Georgetown, DE 19947

E. Stephen Callaway, Esquire
Public Defender's Office
14 The Circle
Georgetown, DE 19947

Adam D. Gelof, Esquire
Department of Justice
114 East Market Street
Georgetown, DE 19947

RE: State of Delaware v. Darnell A. Davis
Def. ID#: 0307017279A

Date Submitted: March 9, 2006

Dear Mr. Davis and Counsel:

This is my decision on Darnell A. Davis' ("Davis") motion for postconviction relief. Davis was charged with Rape in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Aggravated Menacing, Unlawful Sexual Contact in the First Degree, Possession of a Deadly Weapon by a Person Prohibited, Unlawful Imprisonment in the First Degree and Endangering the Welfare of a Child. The charges arose out of Davis' rape of Yalisha Joynes ("Joynes"). Joynes and Davis did not know each other. However, they ended up spending the night together. The next day, Davis, on the pretext of showing Joynes "something," led her into a small building and, while brandishing a stick, forced her to undress and perform oral sex on him. Davis was convicted by a jury of the lesser-included offenses of Rape in the Second Degree and Unlawful Sexual Contact in the Third Degree. I sentenced Davis to 26 years at supervision level V, suspended

after serving 20 years at supervision level V for decreasing levels of supervision. The Supreme Court affirmed Davis' convictions on September 19, 2005.[1] This is Davis' first motion for postconviction relief and it was filed in a timely manner.

Davis has presented all of his grounds for relief in terms of claims of ineffective assistance of counsel. Davis was represented by E. Stephen Callaway, Esquire ("Callaway"). Davis alleges that Callaway failed to (1) object to the State's request for a jury instruction on the lesser-included offense of Rape in the Second Degree; (2) object to the wording of the jury instruction on the offense of Rape in the Second Degree; (3) preserve Davis' ability to file a meaningful appeal; and (4) produce mitigating factors at the sentencing. Callaway filed an affidavit responding to the allegations. Given the non-factual nature of the allegations, I have concluded that it is not necessary to hold a hearing.

The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.[2] In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.[3] First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.[4] Second, the defendant must show that the deficient performance prejudiced the defense.[5] Further, a defendant "must make and substantiate concrete

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[1] *Davis v. State,* 2005 WL 2296598 (Del. Supr.).

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

[3] *Strickland*, 466 U.S. at 687.

[4] *Id.* at 687.

[5] *Id.* at 687.

allegations of actual prejudice or risk summary dismissal."[6] It is also necessary that the defendant "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 when viewing that representation.'"[7] There is no procedural bar to claims of ineffective assistance of counsel.[8]

I. The Lesser-Included Offense

Davis alleges that Callaway was ineffective because he failed to object to the State's request for a jury instruction on the lesser-included offense of Rape in the Second Degree. The State originally charged Davis with Rape in the First Degree under Del.C. §773(a)(2)(a). This charge was based on, among other factors, the State's belief that Davis raped Joynes during the commission of a felony. The felony was Possession of a Deadly weapon During the Commission of a Felony. The deadly weapon was a stick. At the close of the evidence, the State asked the Court to instruct the jury on the lesser-included offense of Rape in the Second Degree under 11 Del.C. §772(a)(1), believing that the jury may conclude that the stick was not a deadly weapon. Callaway did not object because he did not think there was a basis to do so. The Court granted the State's request.

Superior Court Criminal Rule 30 states that "[a]t the close of evidence or at any time during the trial as the court reasonably directs, any party may file written requests that the court instruct the

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[6] *State v. Coleman*, 2003 WL 22092724 (Del. Super.).

[7] *Coleman*, 2003 WL at *2, *quoting Strickland*, 466 U.S. at 689.

[8] *Coleman*, 2003 WL at *1, *citing State v. Johnson*, Del. Super. Ct., Cr. A. No. 97-10-0164(R1), Graves, J. (August 12, 1999) at 2; *State v. Gattis*, Del. Super. Ct., Cr. A. Nos. IN90-05-1017 to 1019, Barron, J. (December 28, 1995) at 7, *aff'd*, 637 A.2d 1174 (Del. 1997).

jury on the law as set forth in the requests." The Supreme Court in *State v. Cox*[9] stated that "the trial judge must give a lesser-included offense instruction at the request of either the defendant or the prosecution - even over the objection of the other party - if the evidence presented is such that a jury could rationally find the defendant guilty of the lesser-included offense and acquit the defendant of the greater offense."[10] A jury could have concluded that the stick was not a deadly weapon. Given this, and Joynes' testimony that Davis forced her to perform oral sex on him, a jury could have found that Davis was only guilty of Rape in the Second Degree. Thus, it was appropriate to instruct the jury on this offense. Even if Callaway had of objected, it would have been pointless because the State was clearly entitled to a jury instruction on the lesser-included offense of Rape in the Second Degree.

II. The Rape in the Second Degree Jury Instruction

Davis alleges that Callaway was ineffective because he did not object to the wording of the jury instruction on the offense of Rape in the Second Degree. Davis argues that the Court did not give the jury all of the elements of the offense. Rape in the Second Degree under Del.C. §772(a)(1) is defined as follows:

> "A person is guilty of rape in the second degree when the person intentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent."

The Court's instruction to the jury was as follows:

> **RAPE IN THE SECOND DEGREE**
> The pertinent definition of Rape in the Second Degree in the Criminal Code is as follows:

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[9] *State v. Cox*, 851 A.2d 1269 (Del. 2003).

[10] *Cox*, 851 A.2d at 1275.

> "A person is guilty of rape in the second degree when the person intentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent."

In order to find the defendant guilty of Rape in the Second Degree, you must find the following elements have been proven beyond a reasonable doubt:

1. The defendant engaged in sexual intercourse with Yalisha Danniall Joynes on the date alleged in the information. I have previously defined "sexual intercourse" for you.

AND

2. The intercourse occurred without Yalisha Danniall Joynes' consent.

AND

3. The defendant acted intentionally. I have previously defined "intentionally" for you.

If, after considering all of the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all of the elements which I have just stated, at or about the date and place stated in the information, you should find the defendant guilty of Rape in the Second Degree. If you do not so find, or if you have a reasonable doubt as to any of the elements of this offense, you must find the defendant not guilty of Rape in the Second Degree, and you may consider the lesser included offense of Rape in the Forth Degree.

The instruction clearly contains all of the elements of Rape in the Second Degree under §772(a)(1). Davis is complaining because the Court did not instruct the jury on Rape in the Second Degree under §773(a)(2). Davies' complaint is unfounded. No one asked for a jury instruction on Rape in the Second Degree under §773(a)(2). The State only requested a jury instruction under §773(a)(1). The jury instruction given by the Court contained all of the elements that were necessary to find Davis guilty of Rape in the Second Degree based on what the State requested and the evidence in the case. Many of the elements under §773(a)(2) were not applicable. There was simply no basis for Callaway to object to the instruction as given.

III. Appealable Issues

Davis alleges that Callaway was ineffective because he failed to preserve any issues for appeal. Callaway withdrew his representation during the direct appeal pursuant to Supreme Court

Rule 26(c) because he could not find any appealable issues. The Supreme Court conducted its own review of the record and determined that the appeal was wholly without merit and devoid of any arguably appealable issues. The Supreme Court was satisfied that Callaway examined the record and that no arguably appealable issues existed.[11] Moreover, Davis had not identified any issues that Callaway should have raised.

IV. Mitigating Factors

Davis alleges that Callaway was ineffective because he did not produce any mitigating factors at sentencing. Davis states that he (1) is mildly retarded, (2) has a personality disorder, (3) has passive-aggressive and anti-social traits, and (4) attended special education classes throughout school. According to Callaway, Davis never told him or his staff about any such problems. Callaway added that at no time during his representation of Davis did he give him any reason to believe that he suffered from any such problems. Davis also did not present these matters to the Court when given an opportunity to do so at sentencing. Other than making these naked allegations, Davis has not offered any evidence that he actually suffers from any such problems. Davis was also interviewed by the Investigation Services Office in connection with the preparation of a pre-sentence report. The report does not indicate that Davis mentioned any such problems to the staff. Moreover, the report does not support Davis' allegations. It indicates that Davis had a substance abuse evaluation on August 10, 2000, and that no treatment was recommended. It also indicates that Davis had a psychological evaluation on February 19, 2002, and that no psychiatric diagnosis was found. The Investigative Services Office could not get Davis' school records because the school that he attended had already destroyed them. Under the circumstances, there was no reason for Callaway

[11] *Davis,* 2005 WL 2296598 at *3.

to suspect that Davis suffered from any problems that should be investigated further for sentencing. Moreover, it does not appear that Callaway would have found anything if he had looked.

CONCLUSION

I have concluded, for the reasons set forth herein, that Davis' allegations are without merit and that Callaway's performance was not deficient. Davis' motion for postconviction relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley