

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID. No. 1005009912
	)	
ANDRE WALKER,	)	
	)	
Defendant.	)	

Submitted: October 22, 2012  
Decided: January 24, 2013

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT  
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE DENIED.**

Caterina Gatto, Deputy Attorney General, Department of Justice, Wilmington, Delaware,  
Attorney for the State.

Andre Walker, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 24th day of January, 2013, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. In November 2010, following a Superior Court jury trial, Defendant Andre Walker was found guilty of first degree robbery, possession of a deadly weapon during the commission of a felony, two counts of aggravated menacing, criminal mischief, and resisting arrest. On January 21, 2011, Defendant was sentenced as a habitual offender, pursuant to 11 *Del. C.* §4214(b), on the first degree robbery conviction to life imprisonment. Defendant's total sentence on all the charges was life imprisonment plus 10 years at Level V, followed by decreasing levels of probation.

2. Defendant filed a direct appeal to the Delaware Supreme Court. On September 6, 2011, the Delaware Supreme Court affirmed the decision of the Superior Court.<sup>1</sup>

3. On January 28, 2011, Defendant filed a motion for sentence reduction.<sup>2</sup> By Order dated February 14, 2011, the Superior Court denied Defendant's motion for sentence reduction. The Superior Court ruled that the sentence imposed was mandatory and could not be reduced or suspended and that the sentence was appropriate for all the reasons stated at the time of sentencing.<sup>3</sup>

### **FACTS**

4. The facts giving rise to these charges are set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal.<sup>4</sup> As stated by the Delaware Supreme Court, the record at trial fairly established that Defendant Walker had approached a cashier in the garden center of a Home Depot store on May 13, 2010 with a bucket and a hatchet.

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<sup>1</sup> *Walker v. State*, 2011 WL 3904991 (Del.).

<sup>2</sup> See, Superior Court Docket No. 22.

<sup>3</sup> Superior Court Docket No. 24.

<sup>4</sup> *Walker*, 2011 WL 3904991, at \*1.

After the cashier rang up the items, Defendant grabbed the cashier and held up the hatchet, ordering the cashier to open the register. Defendant then struck the cashier in the head with the flat side of the hatchet and then used the blade to break open the register.<sup>5</sup>

5. In addition to threatening the cashier with the hatchet, Defendant also threatened a customer with the hatchet who happened to walk up to the cashier while the robbery was in progress.<sup>6</sup> Defendant grabbed several hundred dollars from the register and then ran to the parking lot, where he threatened several other store patrons with the hatchet before fleeing.<sup>7</sup>

6. Shortly thereafter, Defendant was apprehended by police officers several blocks away from the store with the hatchet in this hand and \$370 in his pocket. Defendant attempted to flee and struggled with police as they tried to arrest him. Several eyewitnesses testified at trial, including the cashier who suffered a concussion, and positively identified Defendant as the man with the hatchet.<sup>8</sup>

#### **DEFENDANT'S RULE 61 MOTION**

7. On January 23, 2012, Defendant filed this motion for postconviction relief. Thereafter, Defendant filed amendments to his motion of two occasions: one amendment was filed in March 2012 and the other in April 2012. In the subject motion, as amended, Defendant appears to raise six claims.

First, Defendant contends that his counsel provided ineffective assistance because the evidence was insufficient to support a conviction for first degree robbery because it was not established at trial that the victim sustained "serious physical injury".

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<sup>5</sup> *Id.*

<sup>6</sup> November 16, 2010 Trial Transcript, pgs. 52-60.

<sup>7</sup> *Walker*, 2011 WL 3904991, at \*1.

<sup>8</sup> *Id.*

Second, there was prosecutorial misconduct because the prosecutor allowed evidence of serious physical injury of the victim to be presented to prove the offense of Robbery First Degree without presenting medical records that the victim sustained any injury.

Third, defense counsel was ineffective in failing to compel the State to produce Brady material consisting of a surveillance video of the incident from Home Depot.

Fourth, defense counsel was ineffective for failing to move for a mistrial or appeal based on the victim's inconsistent statements and potential perjury related to the offense of Robbery First Degree.

Fifth, defense counsel was ineffective for failing to object or to raise on appeal the prosecutor's alleged improper comments in closing arguments that allegedly constituted improper vouching.

Sixth, defense counsel was ineffective for failing to oppose the amendment of the State's indictment.

8. Before making a recommendation, the record was enlarged by directing Defendant's counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.<sup>9</sup>

9. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.<sup>10</sup> In order to protect the procedural integrity of

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<sup>9</sup> Super.Ct.Crim.R. 61(g)(1) and (2).

<sup>10</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

Delaware's rules, the court will not consider the merits of a post conviction claim that fails any of Rule 61's procedural requirements.<sup>11</sup>

10. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;<sup>12</sup> (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to a claim that the court lacked jurisdiction or to a colorable claim 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>13</sup> Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."<sup>14</sup>

11. Before addressing the procedural bars that exist in this case, and before addressing each of Defendant's specific claims, it is first noted that the underpinning of each of Defendant's claims raised in his Rule 61 motion is that because the victim did not suffer "serious physical injury", he could not properly be convicted of robbery first degree.

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<sup>11</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>12</sup> If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

<sup>13</sup> Super.Ct.Crim.R. 61(i)(5).

<sup>14</sup> Super.Ct.Crim.R. 61(i)(4).

12. However, the factual predicate upon which Defendant's Rule 61 motion is based is incorrect. There is no requirement that a victim suffer "serious physical injury" in order to support a conviction for first degree robbery.

13. As the Delaware Supreme Court already explained on Defendant's direct appeal, in order to prove first degree robbery, the State must establish beyond a reasonable doubt that a defendant, while in the course of committing theft, used or threatened to use force upon another person with the intent to prevent or overcome resistance to the theft and displayed what appeared to be a deadly weapon.<sup>15</sup>

14. Although a conviction for robbery in the first degree can be established if, while in the course of committing theft, the person causes physical injury to any person who is not a participant in the crime.<sup>16</sup> This is just one of the ways in which a conviction of first degree robbery can be established.<sup>17</sup> Even in the absence of any physical injury, a conviction of first degree robbery can be established when the defendant displayed a deadly weapon, like a hatchet, and either used or threatened to use it to commit the theft.<sup>18</sup>

15. In the subject case, the State in the indictment charged Defendant with Robbery First Degree as a result of "when in the course of committing theft, [Andre C. Walker] did use or threaten the immediate use of force upon Isabelle Charles, with the intent to compel said person to deliver up property . . . and in the course of the commission of the

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<sup>15</sup> *Walker*, 2011 WL 3904991, at \*3.

<sup>16</sup> 11 *Del.C.* § 832(a)(1).

<sup>17</sup> See, 11 *Del. C.* §832.

<sup>18</sup> 11 *Del.C.* § 832(a)(2)&(3).

crime or the immediate flight there from, [Andre C. Walker] displayed what appeared to be a hatchet, a deadly weapon. . . “<sup>19</sup>

16. As the Delaware Supreme Court already ruled: The evidence in this case reflected that Walker struck the cashier in the head with a hatchet, giving her a concussion, to prevent her from interfering with Walker’s theft from the register. This evidence was more than sufficient to sustain Walker’s conviction for first degree robbery.<sup>20</sup>

17. The factual predicate that a victim must suffer “serious physical injury” in order to support a conviction for first degree robbery is incorrect. The Delaware Supreme Court already ruled that there was sufficient evidence to support Defendant’s conviction for first degree robbery. It appears that Defendant has re-raised and restated his claim on the sufficiency of evidence to support his first degree robbery conviction and has recouched it as ineffective assistance of counsel claims, a prosecutorial misconduct claim, and as other Rule 61 claims. Defendant’s Rule 61 motion is procedurally barred as previously adjudicated and without merit.

18. The court is not required to re-examine claims that already received substantive resolution on direct appeal simply because the claim has now been refined, restated and recouched as an ineffective assistance of counsel claim and/or otherwise restated.<sup>21</sup>

19. To the extent that Defendant contends that he did not fully raise his claim on the sufficiency of the evidence to support his first degree robbery conviction, as now couched in various different ways, Rules 61(i)(2) and (3) would prevent this court from considering any additional arguments or claims not previously raised on direct appeal.

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<sup>19</sup> Superior Court Docket No. 2- June 21, 2010 Indictment.

<sup>20</sup> *Walker*, 2011 WL 3904991, at \*3.

<sup>21</sup> *Johnson v. State*, 1992 WL 183069, at \*1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

Defendant could have included anything he so desired on direct appeal. Indeed, after Defendant's counsel filed a no-merit brief on direct appeal, Defendant personally submitted numerous issues for the Delaware Supreme Court's consideration on direct appeal.<sup>22</sup>

20. At this juncture, Defendant's claims are procedurally barred. They are also without merit.

21. In the subject motion, Defendant claims that his counsel was ineffective for a variety of reasons all related to the insufficiency of the evidence of serious physical injury to the victim to support a first degree robbery conviction. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.<sup>23</sup> The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.<sup>24</sup>

22. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>25</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional

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<sup>22</sup> *Walker*, 2011 WL 3904991, at \*1.

<sup>23</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>24</sup> *Id.* at 687-88, 694.

<sup>25</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).



assistance.<sup>26</sup> Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>27</sup>

23. The United States Supreme Court recently reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v. Richter*,<sup>28</sup> the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.<sup>29</sup> The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.<sup>30</sup>

24. With these standards as the backdrop, we turn to Defendant's specific claims.

#### **DEFENDANT'S SPECIFIC CLAIMS**

25. Walker first complains that his counsel provided ineffective assistance because the evidence was insufficient to support a conviction for first degree robbery because it was not established at trial that the victim sustained "serious physical injury". This claim is without merit. As discussed above, there is no requirement that the victim sustain any physical injury, let alone serious physical injury, in order to support a conviction of Robbery First Degree. The Delaware Supreme Court already ruled on Defendant's direct

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<sup>26</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>27</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>28</sup> *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>29</sup> *Id.*, at \* 791.

<sup>30</sup> *Id.*

appeal that the evidence at trial was more than sufficient to support a conviction of robbery first degree.

26. Defendant's counsel was not deficient in any regard related to this claim. Defendant has not established that his counsel was deficient or that he suffered actual prejudice as a result thereof.

27. Defendant next claims that there was prosecutorial misconduct because the prosecutor allowed evidence of serious physical injury to be presented to prove an element of Robbery First Degree without presenting medical records and other proof that the victim sustained any injury. Again, as previously discussed above, the premise upon which this contention is based is incorrect. There is no requirement the victim sustain any injury, let alone serious physical injury, in order to support a conviction of First Degree Robbery. The Delaware Supreme Court already held that the evidence was "more than sufficient" to support Defendant's conviction for first degree robbery.<sup>31</sup> This claim is procedurally barred and without merit.

28. Defendant next claims that his counsel was ineffective in failing to compel the State to produce Brady material consisting of a surveillance video from Home Depot. Neither defense counsel<sup>32</sup> nor the State<sup>33</sup> is aware of the existence of any surveillance video that was not produced to defense counsel. Indeed, the surveillance video that existed was viewed by the jury at trial and was admitted into evidence.<sup>34</sup>

29. Defendant contends that his defense counsel was ineffective for failing to move for a mistrial or appeal based upon the victim's inconsistent statements and potential

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<sup>31</sup> *Walker*, 2011 WL 3904991, at \*3.

<sup>32</sup> Superior Court Docket No. 42, Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.

<sup>33</sup> Superior Court Docket No. 43, State's Response to Defendant's Motion for Postconviction Relief, at pg. 7.

<sup>34</sup> See, November 17, 2010 Trial Transcript, pgs. 16-34.

perjury related to the offense of Robbery First Degree. Defendant contends that the victim never mentioned to the police that she was hit in the head with the hatchet but that she testified at trial that Defendant hit her in the head with the hatchet. Defense counsel, in his Affidavit, represents that because injury to the victim is not an element to the charge of Robbery First Degree, defense counsel chose not to pursue this issue.<sup>35</sup>

30. The decision as to whether or not to call a witness, and how to examine and/or cross-examine witnesses who are called are tactical decisions.<sup>36</sup> Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>37</sup> Defendant has failed to overcome this strong presumption and his ineffectiveness claim must fail.

31. It was undisputed at trial that Defendant displayed a hatchet during the course of committing the theft. In fact, in addition to threatening the cashier with the hatchet, Defendant also threatened a customer with the hatchet who happened to walk up to the cashier while the robbery was in progress.<sup>38</sup> Defendant has failed to demonstrate how his counsel's representation fell below an objective standard of reasonableness and further failed to show any actual prejudice allegedly as a result thereof.

32. Defendant contends that his counsel was ineffective for failing to object or to raise on appeal the prosecutor's comments in closing arguments that amounted to improper vouching as it related to the victim and her physical injury. First, again whether or not the victim sustained any actual physical injury was not an element of any of the

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<sup>35</sup> Superior Court Docket No. 42, Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.

<sup>36</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

<sup>37</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>38</sup> November 16, 2010 Trial Transcript, pgs. 52-60.

charges against Defendant. Second, Defendant failed to provide any specifics regarding this conclusory, broad, unsupported allegation of improper vouching by the State.

33. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>39</sup> Defendant does not make any concrete factual allegations, let alone concrete allegations of actual prejudice.

34. Defendant's final contention is that defense counsel was ineffective for failing to oppose the amendment of the indictment. Defense counsel did not oppose the amendment of the indictment because he did not believe there was any good faith basis to do so.<sup>40</sup>

35. Superior Court Criminal Rule 7(e) permits the amendment of an indictment at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. In this case, minor amendments were made to the indictment in order to conform the indictment to the evidence at trial.<sup>41</sup> Only minor amendments were made at trial, no additional or different offense was charged, and the substantial rights of Defendant Walker were not prejudiced.

36. Defendant has failed to set forth any legal or factual basis to support a meritorious opposition to the amendment of the indictment. Defendant has failed to state what good faith basis existed to oppose the amendment of the indictment. Trial counsel does not have to raise meritless objections; in fact, counsel has an obligation not to do so.

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<sup>39</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, at \*2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

<sup>40</sup> Superior Court Docket No. 42, Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.

<sup>41</sup> November 17, 2010 Trial Transcript, pgs. 147-152.

Defendant has failed to meet his burden to establish that defense counsel's conduct was deficient nor has he established actual prejudice as a result from any alleged deficiency.

37. In this case, for those claims that are procedurally barred, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances."<sup>42</sup> The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."<sup>43</sup> The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the "interests of justice" require it to consider the otherwise procedurally barred claims for relief.<sup>44</sup>

38. Defendant's request for the appointment of counsel is hereby denied. Rule 61(e) permits the court to appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown. The Delaware Supreme Court has consistently held that there is no constitutional right to counsel in a postconviction proceeding.<sup>45</sup> The United States Supreme Court's decision in *Martinez v. Ryan*,<sup>46</sup> did not change Delaware's longstanding rule that defendants have no constitutional right to counsel in a postconviction proceeding.<sup>47</sup> Indeed, the United States Supreme Court in *Martinez* made it clear that when, like Defendant's Rule 61 motion, a Rule 61 motion is insubstantial,

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<sup>42</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>43</sup> *Id.*

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

<sup>45</sup> *Garnett v. State*, 1998 WL 184489 (Del.); *Cropper v. State*, 2001 WL 1636542 (Del.).

<sup>46</sup> *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

<sup>47</sup> See, *Martinez*, 132 S.Ct. at 1315-1320.

wholly lacking in merit, and wholly without any factual support, a request for the appointment of counsel is properly denied.<sup>48</sup>

39. Defendant's request for an evidentiary hearing is also denied. The parties' submissions and the evidentiary record were carefully, fully and thoroughly considered. Defendant's allegations were either reasonably discounted as not supported by the record, persuasively rebutted by defense counsel's Affidavit, or not material to a determination of Defendant's claims.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**

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Commissioner Lynne M. Parker

oc: Prothonotary  
cc: John S. Edinger, Jr., Esquire

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<sup>48</sup> *Id.*