

STATE OF DELAWARE,)
)
Plaintiff,)
)
)
v.) Cr. ID. No. 0601021343A
)
)
JAMAIEN MONROE,)
)
Defendant.)

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

Michael C. Heyden, Esquire, 1201 N. King Street, Wilmington, Delaware, 19801,
Attorney for Defendant Jamaïen Monroe.

PARKER, Commissioner

This 6th day of March, 2014, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

PROCEDURAL HISTORY

On November 14, 2007, Defendant Jamaïen Monroe was indicted on charges stemming from two separate shootings involving the same victim, Andre "Gus" Ferrell. Defendant Monroe was charged with attempted murder first degree and firearms offenses related to the first shooting of Ferrell on January 26, 2006. Defendant Monroe was also indicted on murder first degree, firearms offenses, and multiple counts of reckless endangering first degree and endangering the welfare of a child arising from the April 2, 2007 shooting that killed Ferrell.

On March 16, 2009, a Superior Court jury found Defendant Monroe guilty of Murder in the First Degree and related charges stemming from the April 2, 2007 shooting. The Superior Court jury found Defendant Monroe not guilty of the Attempted Murder in the First Degree and related charges stemming from the January 26, 2006 shooting. Defendant Monroe was sentenced to life imprisonment plus twelve years.

In the subject action, as more particularly set forth below in the Fact Section of this opinion, the conflict between the victim Ferrell and Defendant Monroe began with an uncharged attempted robbery of Ferrell by Defendant Monroe on January 25, 2006. It then continued with the attempted murder of Ferrell by Defendant Monroe the next day, January 26, 2006. It then ended fifteen months later, on April 2, 2007, with the murder of Ferrell by Defendant Monroe.

Prior to trial, Defendant Monroe filed a Motion *in Limine* to exclude evidence of the uncharged attempted robbery of Ferrell by Monroe on January 25, 2006. The court

held a pretrial hearing on Defendant's motion. The Superior Court denied the motion.¹ The Superior Court held that the evidence of Defendant Monroe's involvement in the necklace robbery was "plain, clear, and conclusive" and could tend to show that Defendant was involved in the necklace robbery the day before the alleged attempted murder, and therefore, had a motive to murder, or to attempt to murder, Ferrell.²

On April 2, 2009, a Motion for a New Trial was filed by Defendant Monroe. The only issue raised by Defendant in his motion for a new trial was whether the jury appropriately heard "plain, clear and conclusive" evidence of the prior uncharged necklace robbery at trial. This motion was denied on May 14, 2010.³

Defendant filed a direct appeal to the Delaware Supreme Court. On September 14, 2011, the Delaware Supreme Court affirmed the judgment of the Superior Court.⁴ On October 4, 2011, the Delaware Supreme Court issued its mandate to the Superior Court directing the affirmance of the judgment of the Superior Court.⁵

Thereafter, Defendant filed the subject motion for postconviction relief.

FACTS

The facts giving rise to these offenses, as set forth by the Delaware Supreme Court in its opinion on Defendant's direct appeal⁶, are as follows:

The facts are stated in chronological order. They begin with an uncharged attempted robbery of Ferrell by Monroe. They continue with the attempted murder of Ferrell by Monroe the next day. The facts end fifteen months later with the murder of Ferrell by Monroe.

¹ See, *State v. Monroe*, 2010 WL 1960123, at *1 (Del.Super.).

² *Id.*

³ *State v. Monroe*, 2010 WL 1960123 (Del.Super.).

⁴ *Monroe v. State*, 28 A.3d 418 (Del. 2011).

⁵ Superior Court Docket No. 210.

⁶ *Monroe v. State*, 28 A.3d 418, 423-425 (Del. 2011).

On January 25, 2006, in the early evening, Ferrell, along with his friends, Jonathan Wisher (“Wisher”), Ronald Wright, and “Sal,” went to the G & P Deli at 28th and Market Streets in the City of Wilmington. As Ferrell and Ronald Wright walked towards the deli, they passed by Monroe, Kason Wright and an unknown person. Ferrell and Ronald Wright went into the deli.

Ferrell left the deli before Ronald Wright. At trial, the State presented circumstantial evidence that Ferrell got into a struggle with Ronald Wright and Monroe during an attempt to steal Ferrell’s necklaces. Ferrell was left bleeding from the back of the head and his necklace chain was broken. The unknown individual remained in the area and said he had no knowledge of an attempt to rob Ferrell. No criminal charges were filed.

On January 26, 2006, around 12:30 p.m., Ferrell, his uncle “Tony” Wisher, Ronald Wright, and “Sal” were driving in the City of Wilmington. After dropping off his uncle and picking up his brother, Aaron Mummert (“Mummert”), Ferrell drove to the area of 23rd and Carter Streets. As they turned left onto Carter Street, they saw a green Suburban parked partially on the sidewalk on the left side of the street. Some of the occupants of Ferrell’s vehicle saw Monroe in the backseat of the Suburban holding a .38 caliber revolver.

At this time, someone named “Brownie” came out into the street, encouraging Ferrell to stop and talk. Ferrell stopped in front of and to the right of the Suburban. The State presented evidence at trial that while Ferrell and “Brownie” were talking, Monroe fired five or six shots towards Ferrell’s vehicle. Upon hearing the shots, Ferrell sped off. Bullets hit his car and Ferrell was shot in the back.

Ferrell drove to his grandmother’s house at 28th and Washington Streets. He was taken from there to the hospital. Bullet holes were found on the driver’s side of Ferrell’s car. Warrants were issued for Monroe’s arrest for attempted murder, but efforts to apprehend him were unsuccessful.

Fifteen months later, on the evening of April 2, 2007, Ferrell, his girlfriend, Shameka Brown (“Brown”), and his son went to the Village of Crofton in Newark, Delaware to pick up Ferrell’s and Brown’s minor daughter. While driving, Brown noticed her co-worker, Ronise Saunders (“Saunders”), driving a later-model boxed-shaped white car. The two acknowledged each other and kept driving, Saunders towards Lexington Green Apartments where she lived, and Ferrell towards the Village of Crofton.

After picking up their child, Ferrell and Brown went to Derrs' Market ("Derrs"), located in the Taylortowne Shopping Center in Newark, Delaware, across the street from the Lexington Green Apartments. As Ferrell and Brown drove into Derrs' parking lot, they again saw the white car, this time driven by Saunders' boyfriend (Monroe), backing out of a parking space and exiting Derrs' parking lot. Ferrell parked his car in front of Derrs and went inside. Brown remained in the passenger seat of the car with the two children in the backseat.

Ferrell was in Derrs for approximately five minutes and returned to his car. He stood outside the driver's side with the door open, speaking with Brown. As Ferrell was about to get into the car, Brown saw someone wearing a white t-shirt, blue jeans, and a partially red-colored baseball cap. That person was holding a gun in his right hand. He approached Ferrell from behind, shot him four or five times, and then ran toward the Lexington Green Apartments.

New Castle County Police Officer Jane Paolo ("Officer Paolo") was the first police officer to arrive at the scene. She arrived within a minute or two of getting the dispatch of a shooting. Officer Paolo attempted CPR and confirmed that Ferrell had no pulse. Officer Paolo took Brown and the children to her patrol vehicle. At this time, Brown told Officer Paolo that the shooter looked like her co-worker's (Saunders') boyfriend.

At the time of the shooting, several people were in the parking lot, including Katharine Meier ("Meier"), who was going to the liquor store to purchase lottery tickets. As Meier was exiting her car, she heard five loud bangs coming from the area of Derrs. She heard screaming and turned to see Ferrell lying next to his car in front of Derrs. From approximately twenty yards away, Meier noticed a medium-tall, husky, black man with a pudgy face, wearing a white t-shirt, blue jeans, and a red and white baseball cap, backing away and then walking quickly through the parking lot. She went into the liquor store to ask someone to call 911. When Meier came back outside, she saw that same person running across the street into the Avalon Building of the Lexington Green Apartments.

Around the time of the homicide, Kimberly Klosowski ("Klosowski") and Diamonyell Bateman ("Bateman") were sitting outside their Lexington Green apartment buildings. Klosowski was watching the children playing in the front of the Drury building of the Lexington Green Apartments. She saw a black man, wearing a white t-shirt, blue jeans, and a red cap, running from the Edison building, through the Avalon building and into the parking lot of Derrs. Within the next thirty seconds, Klosowski saw the same man running back towards the apartment complex and through the Avalon building. Bateman was sitting at the

picnic tables in front of the Lasalle building when she heard gunshots and saw a black man with a white t-shirt and red baseball hat run from Derrs towards the laundromat.

Officer Paolo transported Brown to the New Castle County Police Department and left her with Detective Diane Smith (“Detective Smith”), the chief investigating officer. Officer Paolo told Detective Smith about Brown’s statement that the shooter looked like her co-worker’s (Saunders’) boyfriend. Brown’s initial description of the shooter was that of a stocky black male, who was taller than Detective Smith (approximately 5’5”), with minimal facial hair and a caramel complexion, wearing a red, blue, and white hat, each panel of the hat with a different color. Brown selected Monroe as Ferrell’s assailant out of a six-person photographic lineup. Two days later, Meier went to the New Castle County Police Department. After viewing a six-person lineup, Meier identified Monroe’s photograph as most like the man that she saw walking in the parking lot and running in the area of the Lexington Green Apartments.

Videotape from the Derrs’ store depicted a man who looked like Monroe, wearing a black and red jacket in the market, in the immediate area prior to Ferrell’s arrival. During a search of Saunders’ apartment, located in the Lexington Green Apartments in the Edison Building, the police found a jacket fitting the description of the one seen in the videotape.

Further investigation revealed that Saunders owned a 1987 white four-door Mercury Marquis. The white Mercury Marquis was found unoccupied in Chester, Pennsylvania on April 10, 2007. Despite police attempts to find Saunders after Ferrell’s homicide, she was not located before the February 2009 trial date.⁷

DEFENDANT’S RULE 61 MOTION

On September 25, 2012, Defendant filed a *pro se* motion for postconviction relief along with a supporting memorandum of law. Defendant then filed an amendment to his motion. Thereafter, Defendant Monroe filed a motion for the appointment of counsel which the court granted on December 28, 2012. On April 29, 2013, Defendant’s

⁷ *Monroe v. State*, 28 A.3d 418, 423-425 (Del. 2011).

appointed counsel filed an amended Rule 61 motion entitled “Memorandum Report in Support of Defendant’s Motion for Postconviction Relief.”

Before making a recommendation, the record was enlarged and Defendant’s trial counsel was directed to submit an Affidavit responding to Defendant’s ineffective assistance of counsel claims. In turn, the State was directed to, and did, file a response to the motion. On January 27, 2014, Defendant’s Rule 61 counsel filed a reply thereto.⁸ In addition, after the briefing was completed, the Defendant, *pro se*, filed correspondence with the court seeking to highlight, emphasize and expand upon various points raised in his Rule 61 motion.⁹

In the subject motion, Defendant, with the assistance of appointed counsel, raises several ineffective assistance of counsel claims. These claims will be addressed below.

To prevail on an ineffective assistance of counsel claim, the 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.¹⁰ 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.¹¹

⁸ See, Super.Ct.Crim.R. 61(g)(1) and (2).

⁹ Superior Court Docket No. 239- Defendant’s Letter to Defense Counsel and Reply to State’s Answer.

¹⁰ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

¹¹ *Id.* at 687-88, 694.

When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.¹²

Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹³ An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.¹⁴

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 assistance.¹⁵ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.¹⁶

In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from the defense counsel's perspective at the time decisions were being made.¹⁷ It is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.¹⁸ A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided.¹⁹

The United States Supreme Court recognized that there are countless ways to provide effective assistance in any given case. The United States Supreme Court

¹² *Strickland*, 466 U.S. at 697.

¹³ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁴ *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

¹⁵ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

¹⁶ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¹⁷ *Stickland*, 466 U.S. at 688-89.

¹⁸ *Stickland*, 466 U.S. at 688-89.

¹⁹ *Stickland*, 466 U.S. at 688-89.

cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, trial counsel observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel and with the judge.²⁰

Even the best criminal defense attorneys would not defend a particular client in the same way. Consequently, defense counsel must be given wide latitude in making tactical decisions.²¹ Counsel's representation must be judged by the most deferential of standards. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.²²

It is against this backdrop that each of Defendant Monroe's claims for relief are considered.

First Claim: Trial Counsel was Ineffective for Failing to Renew the Motion in Limine to Exclude Evidence Concerning the Uncharged Robbery or to Renew the Motion to Sever the Charges.

Defendant's first claim alleges that trial counsel was ineffective for failing to renew the motion *in limine* to exclude the testimony of Jonathan Wisher and Ronald Wright regarding the necklace robbery which allegedly occurred the night before the January 2006 shooting. Defendant further claims that his trial counsel was ineffective for failing to reassert their motion to sever the charges.

The Superior Court held a pretrial hearing on Defendant's motion *in limine* to exclude evidence of the January 25, 2006 necklace robbery. Defendant's trial counsel

²⁰ *Harrington v. Richter*, 131 S.Ct. 770, 787-788 (2011).

²¹ *Harrington v. Richter*, 131 S.Ct. 770, 788-789 (2011).

²² *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

filed a motion *in limine* contending that the evidence related to the necklace robbery was not “plain, clear and conclusive” under the *Getz* rubric.²³

Before the trial, the State indicated that it would seek to introduce evidence, pursuant to Delaware Rule of Evidence (“D.R.E”) 404(b), of a prior uncharged attempted robbery of Ferrell by Defendant Monroe, to show additional evidence of Monroe’s motive to murder Ferrell. It is well established that evidence of other crimes is not, in general, admissible to prove that the defendant committed the offense charged.²⁴ Despite this general prohibition on evidence of “other crimes, wrongs or acts”, D.R.E. 404(b) provides that evidence of other crimes, wrongs or acts may be admissible for other purposes, such as proof of motive.²⁵ In *Getz*, the Delaware Supreme Court held that evidence of uncharged misconduct can be admitted under D.R.E. 404(b) if certain criteria is established.²⁶

Prior to the trial, Defendant Monroe filed a motion *in limine* to exclude evidence of the attempted robbery of Ferrell. The Superior Court held a pretrial hearing, at which the State called three witnesses, Ronald Wright, Jonathan Wisher, and Kason Wright. Based on their combined testimony, the Superior Court concluded that the facts of the uncharged attempted robbery were supported by “plain, clear and conclusive evidence.” The Superior Court denied Defendant’s motion *in limine* and ruled that the attempted robbery would be admissible as evidence of motive during Monroe’s trial for the attempted murder and actual murder of Ferrell.

²³ *Getz v. State*, 538 A.2d 726 (Del. 1988).

²⁴ *Monroe v. State*, 28 A.2d 418, 426 (Del. 2011).

²⁵ *Monroe v. State*, 28 A.2d 418, 426-427 (Del. 2011).

²⁶ *Getz v. State*, 538 A.2d, 726, 734-735 (Del. 1988).

In making that ruling, the Superior Court specifically noted the significance of Kason Wright's videotaped statement to the police. In Kason Wright's videotaped statement, which the State introduced into evidence at the hearing, pursuant to 11 *Del. C.* § 3507, Kason Wright stated that he was with Defendant Monroe when Monroe attempted to rob Ferrell on January 25, 2006.²⁷

At trial, Ronald Wright and Jonathan Wisher testified consistently with their pretrial testimony at the hearing on Monroe's motion *in limine*. Kason Wright, however, as he was beginning to testify, invoked his Fifth Amendment right against self-incrimination. Since Kason Wright did not testify to anything substantive, his videotaped statement to the police was inadmissible at trial.

Following Defendant Monroe's conviction for Ferrell's murder, Monroe moved for a new trial, asserting that the jury did not hear "plain, clear and conclusive" evidence of the prior uncharged attempted robbery, and therefore, no evidence of that crime should have been admitted at trial. The Superior Court denied Monroe's motion for a new trial, ruling that even without the testimony of Kason Wright, the testimony of Jonathan Wisher and Ronald Wright provided the "plain, clear and conclusive" evidence of Monroe's motive for the attempted murder and the actual murder of Ferrell.²⁸

On direct appeal to the Delaware Supreme Court, Defendant Monroe claimed that his right to a fair trial before an impartial jury was violated when the evidence presented at trial did not clearly and convincingly establish the State's proffered "other crime" evidence of motive, due to the unwillingness of Kason Wright to testify at trial.²⁹

²⁷ See, *State v. Monroe*, 2010 WL 1960123, at *1 (Del.Super.).

²⁸ *State v. Monroe*, 2010 WL 1960123, at *1, *24 (Del.Super.); *Monroe v. State*, 28 A.3d 418, 429-430 (Del. 2011).

²⁹ *Monroe v. State*, 28 A.3d 418, 422 (Del. 2011).

Following a *de novo* review, the Delaware Supreme Court held that even without the testimony of Kason Wright, the eyewitness testimony of Jonathan Wisher and Ronald Wright constituted plain, clear and conclusive circumstantial evidence of Monroe's attempt to rob Ferrell and that, therefore, the evidence of the attempted robbery was properly admitted at trial.³⁰

It is important to emphasize that even though Jonathan Wisher and Ronald Wright were permitted to testify about the attempted robbery on January 25, 2006, the day before the shooting on January 26, 2006, Defendant Monroe was found not guilty of any of the charges stemming from the January 26, 2006 shooting of Ferrell.

Defendant, in his Rule 61 motion, has re-raised and restated this claim, that the JonathanWisher/Ronald Wright testimony should not have been admitted at trial regarding the attempted necklace robbery. In the subject motion, Defendant has merely recouched this claim as an ineffective assistance of counsel contention.

First, this claim is procedurally barred pursuant to Superior Court Criminal Rule 61(i)(4). This claim was already raised and adjudicated by the Superior Court in Defendant's motion for a new trial and thereafter by the Delaware Supreme Court on direct appeal. Defendant merely re-raises, re-states and recouches this claim as an ineffective assistance of counsel contention even though it has already been fully and thoroughly considered. The court is not required to re-examine claims that already received full, substantive, and thorough resolution simply because the claim has now been refined, restated and recouched as an ineffective assistance of counsel claim.³¹ This

³⁰ *Monroe v. State*, 28 A.3d 418, 429-430 (Del. 2011).

³¹ *Johnson v. State*, 1992 WL 183069, at *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

claim is procedurally barred. Moreover, this claim has already been found by the Superior Court, and thereafter by the Delaware Supreme Court, to be without merit.

Second, in their joint Affidavit, Defendant's trial counsel denied that their conduct was deficient in any respect or that Defendant suffered any prejudice thereby denying him a fair trial.³² Trial counsel had filed a motion *in limine* to exclude the evidence related to the necklace robbery which was denied. Even though the Superior Court's denial was based largely on the videotape of Kason Wright, and Kason Wright refused to testify at trial, defense counsel thought that Defendant was in a good position.³³

Trial counsel believed that the testimony of Jonathan Wisher and Ronald Wright provided scant evidence of the robbery, or for that matter, of the attempted murder. They believed that through cross-examination, they could expose flaws and inconsistencies in their testimony.³⁴ In fact, Defendant Monroe was found not guilty of the attempted murder which took place the day after the robbery. It was the robbery and the attempted murder the following day that was the subject of the testimony from Jonathan Wisher and Ronald Wright.

Trial counsel also believed that they had preserved the *Getz* issue through their pretrial motion so that if Monroe had been convicted on the attempted murder charge, the issue would have been preserved for postconviction motions.³⁵ As a matter of fact, the *Getz* issue was fully considered by the Delaware Supreme Court on direct appeal. The Delaware Supreme Court held that even without the testimony of Kason Wright, the

³² Superior Court Docket No. 231- Affidavit of Patrick J. Collins and Jennifer-Kate M. Aaronson.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

eyewitness testimony of Jonathan Wisher and Ronald Wright constituted plain, clear and conclusive circumstantial evidence of Monroe's attempt to rob Ferrell and that, therefore, the evidence of the attempted robbery was properly admitted at trial.³⁶

As previously discussed, there are two prongs to the *Strickland* test. The first is that there must be a showing that counsel's conduct fell below a standard of reasonableness, and the second prong is there must be a finding of prejudice as a result of the deficient performance. Trial counsel's conduct does not appear to be deficient in any respect nor has Defendant shown any actual prejudice allegedly as a result thereof. Even if defense counsel had renewed the motion at trial, it was found to be without merit by the Delaware Supreme Court on direct appeal. Moreover, Defendant was acquitted of all the charges that were the subject of Jonathan Wisher and Ronald Wright testimony (ie. the robbery which led to the attempted murder the following day).

It appears that Defendant Monroe further claims that when Kason Wright did not testify at trial, defense counsel should have immediately requested a mistrial. Again, even without the testimony of Kason Wright, the Superior Court and thereafter the Delaware Supreme Court held the attempted robbery testimony from Jonathan Wisher and Ronald Wright was properly admitted.³⁷ There was no basis for a mistrial. Moreover, Defendant Monroe was acquitted of the charges that Jonathan Wisher and Ronald Wright testified about. Defendant Monroe has not established that counsel was deficient for not having requested a mistrial or that he suffered any actual prejudice resulting therefrom.

³⁶ *Monroe v. State*, 28 A.3d 418, 429-430 (Del. 2011).

³⁷ *State v. Monroe*, 2010 WL 1960123, at *1, *24 (Del.Super.); *Monroe v. State*, 28 A.3d 418, 429-430 (Del. 2011).

Defendant also claims that trial counsel was ineffective for not renewing their motion to sever the attempted murder case from the murder case. This claim, now recouched as an ineffective assistance of counsel contention, was raised on direct appeal and is now procedurally barred by Rule 61(i)(4). The Delaware Supreme Court after fully, thoroughly and carefully considering the issue, held that severance of the charges was properly denied.³⁸ This claim is procedurally barred and without merit.

Second Claim: Trial Counsel Was Ineffective for Failing to Request A Mistrial After Kason Wright Invoked His Fifth Amendment Rights and Refused to Testify.

Defendant's second claim is that trial counsel was ineffective for failing to request a mistrial after Kason Wright invoked his Fifth Amendment rights and refused to testify. In support of this ground, Defendant asserts that the jury could have thought that Kason Wright was afraid to testify or, alternatively, that the jury could have thought that Defendant Monroe was guilty by association with Kason Wright.

In their joint Affidavit, Defendant's trial counsel explained that they made the tactical decision not to seek a mistrial because given their impressions and observations of the trial, they thought Kason Wright's refusal to testify coupled with the testimony by other witnesses would actually prove to be helpful rather than harmful to the defense.³⁹

Defendant's trial counsel elaborated that at trial, the Kason Wright "drama" played out largely in front of the jury. Kason Wright first "pled the Fifth". Then he was brought out again and requested counsel. Finally, he requested a conference with his mother. Then he never appeared again. He looked and acted like a person with

³⁸ *Monroe v. State*, 28 A.3d 418, 425-428 (Del. 2011).

³⁹ Superior Court Docket No. 231- Affidavit of Patrick J. Collins and Jennifer-Kate M. Aaronson, at *2.

something to hide- namely, his guilt for the necklace robbery and possibly the attempted murder.⁴⁰ The day after the necklace robbery, Jonathan Wisher and Ronald Wright stated that they were driving around looking for Kason Wright.⁴¹ Defense counsel believed that Kason Wright's refusal to testify coupled with the testimony of Jonathan Wisher and Ronald Wright was helpful to the defense.⁴²

Defense counsels' decision does not appear to be deficient in this regard. Great weight and deference are given to tactical decisions by trial counsel. There is a strong presumption that defense counsels' conduct constituted sound trial strategy. Defendant has failed to overcome this strong presumption.

Moreover, even if defense counsels' decision not to seek a mistrial was deemed deficient, Defendant has failed to establish actual prejudice as a result thereof. It appears that defense counsels' tactical decision that Kason Wright's refusal to testify coupled with the testimony of Jonathan Wisher and Ronald Wright did, in fact, prove to be helpful to the defense. Defendant was acquitted of all the charges related to the attempted murder that occurred the day after the robbery, which would have been the subject of the testimony from Kason Wright, and was the subject of the testimony from Jonathan Wisher and Ronald Wright.

Here, there is no showing that trial counsels' conduct was deficient or that Defendant suffered actual prejudice as a result of counsels' alleged deficiency. Defendant's ineffective assistance of counsel claim on this issue fails to meet either prong of the *Strickland* standard and should be denied.

⁴⁰ Superior Court Docket No. 231- Affidavit of Patrick J. Collins and Jennifer-Kate M. Aaronson, at *2.

⁴¹ Superior Court Docket No. 231- Affidavit of Patrick J. Collins and Jennifer-Kate M. Aaronson, at *2.

⁴² Superior Court Docket No. 231- Affidavit of Patrick J. Collins and Jennifer-Kate M. Aaronson, at *2.

Third Claim: Trial Counsel Was Ineffective for Failing to Request A Mistrial After Receipts were Found in the Pocket of a Jacket.

Defendant's third claim is that trial counsel was ineffective for failing to request a mistrial after receipts for automobile repairs were found by the jury in the pocket of a jacket that was in evidence. One of the receipts had the name "Jamar Dawson" on it.⁴³ The receipt was for automobile repairs performed at a local Pep Boys shop. Defendant contends that this receipt was "an explosive piece of evidence that Monroe could have used to his advantage." Monroe could have argued that the receipt had someone else's name on it and therefore the receipt and the black jacket belonged to someone else. Defendant contends that having this piece of evidence that was previously unknown and unaccounted for, discovered by the jury was a substantial detriment to Monroe.⁴⁴ Defendant acknowledges, however, that the receipt could also have been extremely harmful to Defendant.⁴⁵

On April 2, 2007, the evening of the murder of Ferrell, videotape from the Derrs store depicted a man who looked like Defendant Monroe, wearing a black and red jacket in the market, in the immediate area prior to Ferrell's arrival. During a search of Saunders' apartment (Defendant Monroe's girlfriend's apartment), located in the Lexington Green Apartments in the Edison Building, the police found a jacket fitting the

⁴³ See, March 16, 2009 Trial Transcript, at pgs. 2-13.

⁴⁴ See, Superior Court Docket No. 238- Defendant's Reply Memorandum Report, at pgs. 1-2.

⁴⁵ See, Superior Court Docket No. 227- Defendant's Memorandum Report in Support of His Motion for Postconviction Relief, at pg. 7.

description of the one seen in the videotape.⁴⁶ The receipt at issue was found by the jury inside this jacket pocket.

In their joint Affidavit, defense counsel represented that the receipt was not subject to cross examination and no foundation was laid for its admission. Certainly the fact that the jury found the receipt was problematic for the defense. On the other hand, the jury had been deliberating for quite a while, and defense counsel believed that the jury was receptive to the defense case. Defense counsel knew that if they sought a mistrial and it was granted, the State would shore up its case at the retrial. The jury on the retrial could have been more or less receptive to the defense case than the current jury. Defense counsel made the strategic decision not to move for a mistrial and to settle for a curative instruction instead.⁴⁷

Choices of trial strategies and tactics are insufficient to establish ineffective representation even though others might have made different choices and such choices may be subject to criticism. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.⁴⁸

This is the type of quintessential strategic decision made by trial counsel based on their observations, perceptions, and overall impressions of the trial that is not to be second-guessed. These seasoned, experienced attorneys were in the trenches, they saw the trial unfold, they watched the witnesses testify, they observed the demeanor of the witnesses and that of the jury, they had a feel for the proceeding that only those in the throes of the trial could have.

⁴⁶ *Monroe v. State*, 28 A.3d 418, 425 (Del. 2011).

⁴⁷ See, Superior Court Docket No. 238- Defendant's Reply Memorandum Report, at pgs. 2-3.

⁴⁸ *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011).

Based on their experience, expertise, impressions and observations, they made the decision that the case was probably not going to get any better on a retrial, that the State would shore up its weaknesses, and made a decision to settle for a curative instruction rather than seek a mistrial. The jury was then instructed to ignore the receipts. The jury is, of course, presumed to have followed the court's curative instruction.⁴⁹

There are various different ways this receipt could have been viewed by the jury, and various different ways both the State and defense counsel could have argued what this receipt suggested. The defense could have argued that the receipt should be viewed as exculpatory in that it was the shooter's black jacket which contained a receipt with someone else's name on it. It could have been viewed as evidence of guilt and the State could have argued that the receipt further supports that Defendant was using an alias to prevent capture from the police. Or it could have been viewed as a non-issue on either side of the equation, and it could have been argued that it was Defendant's jacket and the receipt simply belonged to someone else.

Defense counsel made a strategic decision and should not be faulted for their decision. Defense counsel must be given wide latitude in making tactical decisions. It is all too easy to second-guess counsels' decision after conviction. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys may not agree on the way this issue should have been handled. Defense counsel must be judged by the most deferential of standards and there is a strong presumption that defense counsels' decision constituted sound trial strategy. Defendant, in this case, has not overcome that heavy burden.

⁴⁹ See, *Monroe v. State*, 28 A.3d 418, 428 (Del. 2011).

In addition to failing to establish that counsels' strategic trial decision fell below an objective standard of reasonableness, Defendant has also failed to show any actual prejudice allegedly as a result thereof. The evidence could have been viewed in various different ways: both favorable and detrimental to Defendant.

The conduct of defense counsel does not appear to be deficient nor has Defendant shown any actual prejudice allegedly as a result thereof.

In this case, for those claims that are procedurally barred, Defendant has failed to overcome the procedural bar 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.⁵⁰ The defendant bears the burden of proving that he has been deprived of a substantial constitutional right.⁵¹ In this case, Defendant Monroe 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.

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

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
cc: Patrick J. Collins, Esquire
Jennifer-Kate M. Aaronson, Esquire

⁵⁰ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

⁵¹ *Id.*

