



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAMAZAN SAHIN, )  
 )  
 Defendant-Below, )  
 Appellant, )  
 )  
 v. ) No. 357, 2012  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff-Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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## NATURE AND STAGE OF THE PROCEEDINGS

On October 16, 2007, the appellant, Ramazan Sahin, was arrested and subsequently indicted on 58 felony offenses including multiple counts of first degree rape and possession of a deadly weapon by a person prohibited. A2 at DI 1-7. Sahin's original appointed counsel was granted leave to withdraw in December 2008. A6-7 at DI 28-29. New counsel entered his appearance on January 9, 2009. A8 at DI 35. On May 19, 2009, Sahin waived his right to a jury trial. A11 at DI 56. A six-day non-jury trial began on May 21, 2009. A12 at DI 70. The State entered a *nolle prosequi* on all but twenty counts of the indictment prior to the start of trial. Tr. 5/21/09 at p. 3-6. The State entered a *nolle prosequi* on an additional count on May 26, 2009. Tr. 5/26/09 at 79-80. On June 1, 2009, the Superior Court judge found Sahin guilty of the remaining charges. A12 at DI 70. On August 14, 2009, the same Superior Court judge sentenced Sahin to life and 138 years in prison, followed by six months of probation. Ex. A to Op. Brf. The Delaware Supreme Court affirmed Sahin's convictions on appeal.<sup>1</sup>

On March 17, 2011, Sahin, through new counsel, moved for postconviction relief. A14 at DI 89. On July 13, 2011, Sahin's trial counsel submitted an affidavit in response to Sahin's allegations of ineffective assistance of counsel. A44-46. An

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<sup>1</sup> *Sahin v. State*, 7 A.3d 450 (Del. 2010).

evidentiary hearing was held on February 10, 2012 during which trial counsel gave a brief statement supplementing his affidavit. Hearing 2/10/12 at p. 3-13. On March 12, 2012, the Superior Court Commissioner issued her Report and Recommendation. B1-48. On June 5, 2012, the Superior Court judge adopted the Commissioner's findings and denied Sahin's motion for postconviction relief. B49-52.

### **SUMMARY OF THE ARGUMENT**

I. Argument I is denied. The Superior Court properly denied Sahin's motion for postconviction relief. Defense counsel was not ineffective because, his comments, though inappropriate, caused absolutely no prejudice to Sahin. Additionally, defense counsel's comments did not create an appearance of bias that affected the trial judge's ability to fairly assess Sahin's credibility. Sahin received a fair trial by an impartial judge and was convicted with overwhelming evidence.

## STATEMENT OF FACTS<sup>2</sup>

In February 2007, about 2:00 a.m., DD<sup>3</sup> opened the door to her room at the Fairwinds Motel on Route 40 in Bear, Delaware. DD, a prostitute, hoped to attract some customers. DD had consumed a few drinks and had smoked crack cocaine earlier in the evening. When she looked outside, DD thought she recognized a man, so she went over to his bluish-green Aerostar van to talk to him.<sup>4</sup> The man, later identified as Sahin, in the van was short with dark hair and dark eyes, and he spoke with an accent. DD asked the man if he wanted to go for a ride and he agreed. DD got into the van and they drove off, Sahin explaining that they would go to his parents' house. DD, who was tipsy, did not pay close attention to where they were going. Eventually, Sahin stopped the car, turned it around, and turned the lights out. He had parked by the C & D Canal on a dirt road in an unlighted area near Summit Bridge. DD asked for money before she would perform a sex act. When she realized that Sahin was not going to pay her, DD told him she had a knife (she did not actually have one). Sahin pulled out a knife, a type of switchblade,

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<sup>2</sup> The facts are taken verbatim from the *State's Answering Brief* in *Sahin v. State*, Del. Supr. Ct., No. 475, 2009. Citations to the record have been omitted.

<sup>3</sup> The sexual assault victims are all referenced by only by their initials.

<sup>4</sup> Sahin's father owned a spruce metallic green 2002 Ford Windstar. B5.



from the left side of the driver's seat. Holding the knife in his left hand, Sahin pushed DD toward the back. He forced her into the back seat where she was forced to perform oral sex while he held the knife. Sahin ejaculated. Sahin then made DD get out of the van and he drove off.

The next month, late at night on March 24, 2007, LS decided to go to the gas station to buy cigarettes. She had purchased the cigarettes and was walking along Route 13 near the Llangollen Apartments on her way back to her boyfriend's mother's house. A blue minivan pulled up and the driver asked LS if she wanted a ride. She did not. The minivan then pulled in front of her, cutting off her path, and the driver got out. The driver, Sahin, was holding a knife in his left hand. Sahin ordered LS into the minivan. LS complied, and Sahin drove off telling her to keep her head down as he held the knife by her throat (having moved the knife to his right hand). Sahin eventually drove onto a bumpy road, stopped and turned around. Sahin ordered LS into the back seat where he anally raped her. Sahin ejaculated. Sahin drove LS back to the area from which he had abducted her, but forced her to perform oral sex along the way. LS's boyfriend, who had become concerned when she had not returned from the gas station, went out looking for her. He found her by the Llangollen Apartments; she told him she had been raped and he notified police. Although LS could not

identify Sahin, DNA results from rectal swabs were consistent with Sahin's DNA.

In May 2007 at about 11:00 p.m. one night, SM, a prostitute, was standing outside of Hak's Sport Bar on Route 13 looking for a client. A two-door black sports car pulled up and SM got in. A man asked SM if she was willing to go to his home toward Route 896 for \$50 and she agreed. The man drove her down by the canal on a dirt road. SM asked for her money up front, and the man told her he would pay her after they got in the back of the car. Instead, he pulled out a knife. SM performed oral sex while the man held the knife in his left hand. He ejaculated. The man asked SM to engage in anal intercourse, but she refused, telling him that she was HIV positive. He asked SM to get out of the car to get paper towels from the trunk. When she got out, the man pulled away and left her. SM called 911 on her cell phone to report that she had been stranded; she did not report the rape. SM described the man who assaulted her as Indian or Iranian, in his late 20s or early 30s.

Later that same month, JM left a bar on Route 13 about midnight, after having consumed crack cocaine and several beers. JM drove south on Route 13, but ran out of gas. She decided to walk to a friend's house to get money for gas. As she walked north along the road, a black car with temporary tags pulled up and the driver offered her a ride. JM got in the car and asked

to be taken to the Beaver Brook Apartments right down the road. The driver, later identified as Sahin, made a U-turn and headed south. JM asked him where he was going, and he reached down by his door and pulled out a knife. Sahin put the knife to her throat. Sahin told JM he was taking her to his home in Becks Woods.<sup>5</sup> Eventually, however, they ended up on a dirt road by the canal. Sahin turned the car around and turned off the lights. Sahin switched the knife to his left hand and forced JM's head down into his lap where his penis was exposed. Sahin threatened to kill her, so JM performed oral sex. Then Sahin told her to pull down her pants, he climbed on top of her and engaged in vaginal intercourse. Sahin ejaculated. Afterward, Sahin told JM to get out of the car and get a paper towel out of the trunk. As soon as she got out of the car, Sahin drove off. JM walked until she saw a development, then she called 911. DNA results from a vaginal swab of JM were consistent with Sahin.

In August 2007, LT was standing by a bus stop on Route 9 outside the Rosegate community. She had consumed both crack cocaine and heroin earlier in the day. A black car pulled into the neighborhood, turned around and parked nearby. Although LT had earned enough money through prostitution that day and was ready to sleep, the driver, Sahin, offered her \$60 for a "blow job" so she got in his car. LT fell asleep, and when she woke

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<sup>5</sup> Sahin and his parents were living in Becks Woods in 2007.

up she discovered they were at the canal. Sahin pulled a knife out, held it toward her neck, and told her to remove her clothes. Sahin put on a condom and vaginally raped her. Afterwards, LT asked Sahin if he had any napkins and he told her to get them from the trunk. When she got out of the car, Sahin drove off. LT walked down the dirt road until she reached a highway. Someone picked her up and she got back home about 7:00 a.m.

On August 24, 2007, TP was "hanging out" at a bus stop on New Castle Avenue. A dark, two-door hatchback pulled up about 9:00 p.m. and the driver, Sahin, offered her \$200 to go to his house. TP got in and fell asleep. She awoke when the car stopped, but she did not know where she was because it was pitch black. Sahin pulled out a knife from the driver's door. He held the knife in his left hand. Sahin ordered her to take her clothes off. TP complied. Sahin transferred the knife to his other hand, climbed on top of her and vaginally raped her. He then raped her anally. TP finally pushed Sahin off and he rolled over and grabbed another knife. Sahin ordered her out of the car and tried to push her out. Sahin told her to get his wallet out of the trunk. TP got out; Sahin threw her pocketbook out of the car and sped off. By the time she spotted a man on the water, it was daylight. The man in the boat called 911. TP

did not report the rape to the police when they came because she was scared and embarrassed.

Late in September 2007, NW was walking along the road in Elkton, Maryland. It was between 2:00 and 4:00 a.m. and she was engaged in prostitution, looking for business. A small black, two-door car pulled up and the driver, Sahin, told her to hurry into the car because the police were coming. NW, who believed there was an outstanding warrant for her arrest, got into the car. Sahin offered NW \$200 to go with him to his parents house on Route 896 in Delaware. They ended up on a dirt road in a wooded area where Sahin made a U-turn and stopped. NW demanded the money, but Sahin said he had no money. Sahin pulled a switchblade type knife from the driver's side door and threatened to kill her if she did not do what he wanted. Sahin held the blade to her throat and ordered her to perform oral sex. She did. Then Sahin put on a condom and told NW to take her pants off and get on top of him. She complied. Afterward, Sahin told her to go get paper towels. As soon as she got out and started to walk to the back of the car, Sahin drove off. NW did not know where she was, but knew she was by water on a gravel road with no lights. After walking for a couple of hours, NW got to a Dunkin' Donuts about 6:00 or 7:00 a.m.

At the end of September 2007, AR, who had been drinking, decided to walk from her brother's house in Glasgow, Delaware,

to her mother's house in Chesapeake City, Maryland, or at least to a location where she could call her mother's residence without incurring long distance fees, at 2 o'clock in the morning. As she was walking along Route 40, a little black, two-door car pulled up and the driver, Sahin, asked if she wanted a ride. AR hesitated, but then decided to accept a ride. Sahin told her that he had to stop at his house before taking her to Chesapeake City. Instead, Sahin drove down a dark road by the C & D Canal, turned around, and parked. AR tried to get out of the car, but Sahin grabbed her shirt. He pulled a knife out from the side of the driver's seat and demanded that she take her clothes off. Sahin also ordered her to perform oral sex. AR finally managed to free herself and she ran into the woods. She called 911, and the police eventually found her in the woods.

In October 2007, Delaware state police set up surveillance in the area of the canal banks. On October 15, police stopped a black Honda Prelude with Delaware tags in the area. Sahin was driving the car and a female prostitute, who Sahin said he had met in Maryland that evening, was in the front passenger seat. Sahin did not have a valid driver's license and police took him into custody. Sahin subsequently made several inculpatory statements to police.

**I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING SAHIN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL RAISED IN HIS MOTION FOR POSTCONVICTION RELIEF.**

**Question Presented**

Did the trial court abuse its discretion in denying Sahin's claim of ineffective assistance of counsel raised in his motion for postconviction relief?

**Standard and Scope of Review**

The Superior Court's denial of postconviction relief based on claims of ineffective assistance of counsel is reviewed for abuse of discretion.<sup>6</sup> Nevertheless, this Court reviews the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law are not erroneous.<sup>7</sup>

**Merits<sup>8</sup>**

On appeal from the denial of his motion for postconviction relief, Sahin asserts the same claim of ineffective assistance of trial counsel he raised below, but on appeal has parsed them into two separate claims: (1) counsel's comments to the trier of fact prejudiced Sahin and undermined his choice to have a

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<sup>6</sup> *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

<sup>7</sup> *Id.*; *Outten v. State*, 720 A.2d 547, 551 (Del. 1998); *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

<sup>8</sup> This argument addresses all arguments presented in the opening brief.

trial; and (2) trial counsel's statements created an objective appearance of bias against the defendant. A Superior Court Commissioner issued a report recommending dismissal of Sahin's claims. After *de novo* review, Superior Court adopted the Commissioner's Report and Recommendation and denied relief. Superior Court was correct, and Sahin's claims are equally unavailing here.

Under well-settled Delaware law, the trial court must first determine whether Sahin met the procedural requirements of Superior Court Criminal Rule 61 before considering the merits of his postconviction claims for relief.<sup>9</sup> The Superior Court Commissioner found Sahin's motion to be timely under Criminal Rule 61(i)(1), as it was filed within a year after this Court's issuance of a mandate after direct appeal. Thus, Sahin's claims of ineffective assistance of counsel, not otherwise procedurally barred, were considered and rejected on the merits. Superior Court was manifestly correct in denying Sahin's claims of ineffective assistance of counsel.

#### Ineffective Assistance of Counsel - Strickland Analysis

In order to establish that he received constitutionally ineffective assistance of counsel, Sahin was required to

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<sup>9</sup> See *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002); *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996); *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255 (1989)).



demonstrate that: 1) defense counsel's representation fell below an objective standard of reasonableness; and 2) there exists a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the trial would have been different.<sup>10</sup> Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>11</sup> Sahin has the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>12</sup> Sahin has not met his burden.

The Superior Court determined, and the State concedes, that counsel's performance was deficient. However, "[a]n 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."<sup>13</sup> The first consideration in the "prejudice" analysis "requires more than a showing of

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<sup>10</sup> See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Zebroski v. State*, 822 A.2d at 1043; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

<sup>11</sup> See *Zebroski*, 822 A.2d at 1043; *Gattis v. State*, 697 A.2d 1174, 1178-79 (Del. 1997); *Younger*, 580 A.2d at 556.

<sup>12</sup> *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*, 466 A.2d at 687) (internal quotations omitted).

<sup>13</sup> *Strickland*, 466 U.S. at 691.

theoretical possibility that the outcome was affected."<sup>14</sup> The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.<sup>15</sup> In turn, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."<sup>16</sup> "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"<sup>17</sup> True prejudice requires a "substantial," not just "conceivable," likelihood of a different result.<sup>18</sup> Therefore, the defendant must specifically allege prejudice (and substantiate the allegation).<sup>19</sup>

Sahin contends, however, that a specific demonstration of prejudice is not required here because counsel's conduct created

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<sup>14</sup> *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

<sup>15</sup> *Strickland*, 466 U.S. at 694; *Reese v. Fulcomer*, 946 F.2d 247, 256-57 (3d Cir. 1991).

<sup>16</sup> *Strickland*, 466 U.S. at 693. See *id.* at 696 (court "must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors").

<sup>17</sup> *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 693).

<sup>18</sup> *Richter*, 131 S. Ct. at 791.

<sup>19</sup> *Dawson*, 673 A.2d at 1196.

a presumption of prejudice.<sup>20</sup> Sahin argues that his trial counsel's performance was so deficient that no meaningful adversarial testing took place. This Court considered Sahin's argument for presumed prejudice on direct appeal and rejected it outright:

Sahin argues that this case falls within the *Cronic* exceptions to the *Strickland* prejudice test. We have concluded that none of the three circumstances listed in *Cronic* is directly applicable to the facts of Sahin's case.<sup>21</sup>

Sahin now asks this Court to reconsider its prior ruling and presume prejudice. However, in order to establish a presumption of prejudice under *Cronic*, Sahin must demonstrate that one of the following three types of situations arose in his case: (1) he was denied the presence of counsel at a critical stage of his criminal proceedings; (2) his counsel entirely failed to subject the prosecution's case to meaningful adversarial testing; or (3) his counsel was called upon to render assistance under circumstances where competent counsel very likely could not.<sup>22</sup> Sahin alleges that counsel's comments deprived him of a meaningful, adversarial testing of his case. As the United

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<sup>20</sup> Op. Brf. at 20 (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984) and *Cooke v. State*, 977 A.2d 803, 850 (Del. 2009)).

<sup>21</sup> *Sahin*, 7 A.3d at 452.

<sup>22</sup> *Bell v. Cone*, 535 U.S. 685, 697 (2002) (failures "of the same ilk as other specific attorney errors" are subject to "*Strickland's* performance and prejudice components").

States Supreme Court has noted, "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete."<sup>23</sup> In *Cooke v. State*, this Court noted such a complete breakdown in the adversarial system under *Cronic* when counsel failed to assist Cooke with his trial objective when they conceded his guilt in pursuit of a guilty but mentally ill verdict.<sup>24</sup>

Here, defense counsel's performance could hardly be described as a complete failure or breakdown in the adversarial system. Sahin points to counsel's comments regarding Sahin's rejection of a plea to demonstrate his complete failure to test the State's case. However, that argument isolates and takes out of context one comment, made two days prior to the start of trial, and ignores all of defense counsel's efforts throughout the trial. Counsel's comment, albeit inappropriate, was about the "risk" of trial in the face of "egregious" penalties.<sup>25</sup> Certainly, even an innocent person would reasonably consider risks in the face of egregious penalties. Defense counsel's comments were tied to the harsh penalties relative to the State's offer, not to Sahin's actual guilt or innocence.

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<sup>23</sup> *Bell*, 535 U.S. at 696-97.

<sup>24</sup> *Cooke v. State*, 977 A.2d at 849-50.

<sup>25</sup> Tr. 5/19/09 at p.19-21.

Two days after that exchange, trial counsel proceeded to put the State to its proof, as Sahin wished. He actively participated in Sahin's defense by meeting with Sahin extensively pretrial, by cross-examining and challenging the credibility of the State's witnesses, by calling a witness to establish the lack of fingerprint evidence, by questioning Sahin on direct examination and by moving to dismiss at least one count of the indictment on sufficiency grounds. Sahin's trial was a contested, adversarial proceeding. Consequently, Sahin's ineffective assistance of counsel claims are appropriately analyzed under the well-established two-part test announced in *Strickland*, as previously decided by this Court on direct appeal.

Sahin does not allege any specific prejudice as required by *Strickland*. This is likely because none exists, as the case against Sahin was overwhelming. The testimony of the women was remarkably consistent regarding Sahin's *modus operandi*. The rapes occurred late at night after Sahin picked up the women as they walked along the road. The women described Sahin as having an accent and/or appearing to be ethnic (Turkish, Iranian, or Hispanic, etc.). The women all testified that they were taken to the same location (the canal banks); most after being told that they would be taken to Sahin's home (or his parents' home). After the rapes, Sahin frequently asked the women to retrieve

something from his trunk before he stranded them by the canal banks. One victim (LS) testified that the man who raped her at the canal banks took her back to the place where he had picked her up. Sahin admitted during his interview with police that he took one of the girls back to where he found her after he had sex with her at knifepoint. State's Ex. 47. Sahin always displayed a knife, which he held in his left hand. Sahin agreed on cross-examination that he threatened women with a knife and demanded that they perform sexual acts. His only defense on the stand was that the women who had testified were not the correct victims. Sahin claimed he had never seen any of the women before, despite their description of his car, face, accent, actions, and the presence of his DNA on two of their bodies. In light of the overwhelming evidence of his guilt, Sahin cannot demonstrate that any of the actions or inactions of his trial counsel affected the outcome of the trial. As a result, Sahin's ineffective assistance of counsel claim must fail.

#### Fundamental Fairness Analysis

Next, Sahin argues that he was denied his fundamental right to a fair trial because counsel's error created an "appearance of bias" against him.<sup>26</sup> While the "appearance of bias" standard is typically used in the context of recusals, this Court, on

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<sup>26</sup> Op. Brf. at 26.

direct appeal, stated that in postconviction, a fundamental fairness analysis should be undertaken to focus on whether or not counsel's error created an appearance of bias surrounding the judge's ability to assess Sahin's credibility.<sup>27</sup> An appearance of bias exists when "an objective observer viewing the circumstances would conclude that a fair or impartial hearing is unlikely."<sup>28</sup>

While judges sitting as the trier of fact are presumed to disregard prejudicial evidence improperly before them, such review mechanisms exist to protect defendants in cases where the fact finder hears inadmissible evidence that is so prejudicial it creates "an unacceptable 'appearance of impropriety' that could test reasonable lay persons' trust in the judicial system."<sup>29</sup> "But, although the 'appearance of impropriety' standard is a potent tool, it does not invalidate judicial conduct in every instance."<sup>30</sup> In this instance, the Superior Court properly determined there was no objective appearance of

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<sup>27</sup> *Sahin*, 7 A.3d at 453.

<sup>28</sup> *Fritzing v. State*, 10 A.3d 603, 611 (Del. 2010) (objective standard as applied by this Court when reviewing the denial of a motion for recusal of the trial judge).

<sup>29</sup> *Jackson v. State*, 21 A.3d 27, 38 (Del. 2011).

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

prejudice and therefore no violation of Sahin's right to a fair trial.

The focus of the inquiry, as directed by this Court, is on the appearance of the trial judge's ability to assess credibility fairly. The specific comments by counsel relating to Sahin's credibility were in reference to the use of an interpreter and implied more of an avoidance or delay tactic by Sahin rather than an outright lie. Trial counsel never impugned the credibility of his client's statements or testimony. The only person responsible for tarnishing Sahin's credibility at trial was Sahin himself. Although counsel's comments may not have been appropriate, they did not create a stigma of bias sufficient to prevent the judge from fairly presiding over the case.<sup>31</sup>

The first comment regarding the interpreter issue came before Sahin elected a bench trial. Counsel stated he did not believe Sahin needed an interpreter.<sup>32</sup> The statement was not directed at Sahin's credibility, but was merely an answer to the question of whether an interpreter would be necessary. Shortly

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<sup>31</sup> See *In re Shusterman*, 2010 WL 3096164 (3d Cir. 2010) (judge called defendant "one of the most specially-talented liars that [he'd] ever met" during a motion to withdraw his plea, yet the judge was not disqualified from presiding over subsequent motions because the comment did not demonstrate sufficient bias to establish he could not fairly decide other claims).

<sup>32</sup> Tr. 5/19/09, p. 8.



thereafter, Sahin was asked questions by the judge which he clearly understood and answered, but Sahin later hesitated and requested an interpreter.<sup>33</sup> The trial judge asked Sahin some additional questions, which he answered, but the court ultimately agreed to go over them again with an interpreter.<sup>34</sup>

Thereafter, counsel explained that because of the severe penalties (not Sahin's guilt, necessarily) he thought Sahin should consider resolving the case.<sup>35</sup> Counsel went on to say:

I also told him, however, that it was his choice, and that **I would support him either way...**

\* \* \*

**I will support him in this, and I will defend him to the best of my ability...**<sup>36</sup>

(emphasis added). The judge, acknowledging Sahin's right to a fair trial, stated:

...but I will tell you, Mr. Sahin, that **I am sworn to uphold the law and to be fair and impartial, and I will listen to all the evidence and I will be fair, and I want you to know that.** So, I understand where we are, and I understand that you have exercised your Constitutional right to a trial and to put the State

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<sup>33</sup> Tr. 5/19/09, p. 10-12.

<sup>34</sup> Tr. 5/19/09, p. 12-17 (note the defendant's answers to the judge's questions and compliance with her requests without the use of an interpreter).

<sup>35</sup> Tr. 5/19/09, p. 19-21.

<sup>36</sup> Tr. 5/19/09, p. 20-21.

to their proof, and that is your Constitutional right, and we will move forward with the trial...<sup>37</sup>

(emphasis added). Later, after an interpreter was secured, there was a discussion regarding whether or not the interpreter needed to translate the recordings. The following occurred:

**Trial Judge:** Based on what I know about the case from conferences and openings, he gave multiple police interviews, is that correct?

**Prosecutor:** Yes

**Trial Judge:** He did so without requesting or referring to the aid of an interpreter, is that correct?

**Prosecutor:** Correct

**Trial Judge:** There are hours of interrogation, correct?

**Prosecutor:** The first two are about 45 minutes each and the third is about 18 minutes.

**Trial Judge:** Ok. The trip he took to the alleged scene of the crime with the police, was an interpreter present for his tour?

**Prosecutor:** No.

**Trial Judge:** He has spoken to [defense counsel], I know, on many, many occasions without the assistance of an interpreter, is that correct?

**Defense counsel:** Correct.<sup>38</sup>

Clearly, the court, based on its own observations, had determined that Sahin could speak and understand English and

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<sup>37</sup> *Id.*

<sup>38</sup> Tr. 5/21/09 at p. 120-121.

that the use of the interpreter was protracting the trial unnecessarily.<sup>39</sup> It was only *after* the trial judge made her opinion clear, that counsel began expressing some frustration about his client's insistence that he needed an interpreter. Counsel, specifically stated, however:

...I'm not saying he's a - malingerer, but I know I'm confident he understands what is going on.<sup>40</sup>

The judge then summarized her findings as follows:

**It appears to me, based on everything I have observed in the courtroom, including his ability to understand me when I told him to sit down and his ability to understand me during my colloquy about whether or not he wanted a bench trial, it appears to me that he understands English just fine.** I think the interpreter is in the courtroom largely for the benefit of his father, and I do not intend to have the interpreter sit there and interpret the police questioning and his answers on those tapes in light of this, because (A), he knows what he said. He said it, and he spoke English, never asked for an interpreter and seemed to be just fine and (B), I - we can't do that in the courtroom. It's going to take forever.

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We are trying bits and pieces of trial over the next couple of weeks. I can't conceive how we're going to accomplish this, and I'm not sure it's necessary for him.<sup>41</sup>

(emphasis added). The worst of counsel's comments - counsel's opinion that his client would use his lack of fluency in English

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<sup>39</sup> Tr. 5/21/09, p. 123-4.

<sup>40</sup> Tr. 5/21/09 at p. 122.

<sup>41</sup> Tr. 5/21/09 at p. 123-24.

to "play dumb"<sup>42</sup> - came only after the trial judge had clearly formed her own opinion based on what occurred inside of the courtroom. It is well settled that "the alleged bias or prejudice of the judge 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"<sup>43</sup> None of counsel's comments regarding the interpreter revealed anything that had not already been made clear to the judge by Sahin himself during the course of the proceeding, and, therefore, cannot be considered so prejudicial as to undermine the public's faith in the justice system.

In *Maledo v. United States*, a District of Columbia Court of Appeals case, the court held that defense counsel calling the defendant a "malevolent little man" and accusing him of false statements in his motion to withdraw did not deprive him of effective counsel in his subsequent bench trial before the same judge.<sup>44</sup> The court specifically focused on the fact that

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<sup>42</sup> Tr. 5/21/09, p. 127.

<sup>43</sup> *Gattis v. State*, 955 A.2d 1276, 1282 (Del. 2008) (citing *Los v. Los*, 595 A.2d 381, 384 (Del. 1991) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)). See also *Beck v. Beck*, 766 A.2d 482, 485 (Del. 2001) ("Moreover, the alleged bias or prejudice must be based on information that the trial judge acquired from an 'extrajudicial source.'").

<sup>44</sup> 767 A.2d 267, 273 (D.C. 2001).

counsel's comments did not affect the defense strategy or the skill and vigor with which it was pursued. The court noted that had counsel discredited his client on the specific defense presented, it would have come to a different conclusion. In this case, counsel did not discredit Sahin's defense or his trial testimony. The only comment that could be construed as discrediting Sahin was in regards to his need for an interpreter.

In *Jackson*, a capital case, defense counsel told the presiding judge during his motion to withdraw (which was granted) that he believed the defendant "ought to die" for his crimes.<sup>45</sup> The same judge later sentenced Jackson to death.<sup>46</sup> This Court determined that based on all of the relevant circumstances, including the steps taken by the judge to demonstrate a lack of bias, there was not a sufficient appearance of impropriety to reverse.<sup>47</sup> Similarly, in this case, the judge took steps to demonstrate the lack of any bias against Sahin.

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<sup>45</sup> *Jackson*, 21 A.3d at 33-34.

<sup>46</sup> *Id.* at 31.

<sup>47</sup> *Id.* at 38.

An objective observer in this case would have heard the judge promise Sahin a fair trial.<sup>48</sup> An objective observer would have heard the trial judge communicating with Sahin without an interpreter. An objective observer would have heard the judge state her opinion that Sahin seemed to not require an interpreter, prior to counsel's most troubling comment. An objective observer would have seen the judge provide Sahin with an interpreter, despite the fact that it appeared he did not require one. An objective observer would have watched and listened to Sahin, on video, speaking to the police for literally hours without an interpreter. And finally, an objective observer would have heard Sahin testify, albeit with an interpreter, that he had forced women to have sex at knife point, but not the women who testified against him, despite the DNA evidence linking him to them. No objective observer, based on all of those circumstances, could reasonably believe that *counsel's* comments affected the trial judge's ability to assess Sahin's credibility. Sahin destroyed his own credibility with the court by his lack of candor about his ability to speak and understand English. Regardless, the judge ensured Sahin had an interpreter and pledged he would receive a fair trial.

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<sup>48</sup> The judge even interrupted and reminded the prosecutor during her closing argument that the rapes being referenced were "alleged rapes." Tr. 6/1/09 at 54.

Therefore, considering the totality of the circumstances, counsel's comments did not create a stigma of bias surrounding the judge's ability to assess credibility fairly, sufficient to undermine the public's faith in the criminal justice system. To the contrary, there was an air of fairness and accommodation to Sahin throughout the trial. Sahin should not be granted a windfall because he was unsuccessful at convincing everyone at trial that he no longer understood English. While counsel's comments were not appropriate, the trial court came to its own conclusions about Sahin's ability to understand English (and his credibility regarding the matter) prior to the negative comment by trial counsel. The Superior Court properly found that there was no evidence that Sahin's trial was unfair or unreliable.

**CONCLUSION**

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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