IN THE SUPREME COURT OF THE STATE OF DELAWARE

TZE	POONG	LIU,)			
)			
		Defendant-Below,)			
		Appellant)			
)			
	$\mathbf{v}_{\scriptscriptstyle (\bullet)}$)	No.	204,	2012
)			
STAT	CE OF I	DELAWARE,)			
)			
		Plaintiff-Below,)			
		Appellee)			

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

STATE'S ANSWERING BRIEF

Timothy J. Donovan, Jr.
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
ID # 2063

DATE: August 29, 2012

TABLE OF CONTENTS

· · · · · · · · · · · · · · · · · · ·	PAGE
TABLE OF CITATIONS	ii
NATURE AND STAGE OF THE PROCEEDINGS	1
SUMMARY OF THE ARGUMENT	2
STATEMENT OF FACTS	3
ARGUMENT	
I. SUPERIOR COURT APPROPRIATELY EXERCISED ITS DISCRETION IN ADDRESSING THE CLAIMS LIU RAISED IN HIS SECOND MOTION FOR POSTCONVICTION RELIEF	4
CONCLUSION	13

TABLE OF CITATIONS

CASES	PAGE
Chao v. State, 604 A.2d 1351 (Del. 1992)	5
Chao v. State, 931 A.2d 1000 (Del. 2007)	6
Coleman v. Thompson, 501 U.S. 722 (1991)	10
Liu v. State, 628 A.2d 1376 (Del. 1993)	3, 5
Liu v. State, Del. Supr., No. 98, 1995, Holland, J. (Apr. 24, 1995) (Order)	5
Martinez v. Ryan, 132 S. Ct. 1309 (2012)	10
Middlebrook v. State, 815 A.2d 739 (Del. 2003)	10
Panuski v. State, 4 A.3d 416 (Del. 2012)	4
Somerville v. State, 703 A.2d 629 (Del. 1997)	11
State v. Liu, 1995 WL 413449 (Del. Super. Ct. Feb. 17, 1995)	5
State v. Liu, 2012 WL 2192939 (Del. Super. Ct. Feb. 29, 2012)	7, 11
Strickland v. Washington, 466 U.S. 668 (1984) 2,	8, 11
Wainwright v. State, 504 A.2d 1096 (Del. 1986)	9
Williams v. State, 818 A.2d 906 (Del. 2002)	6, 7
RULES	
Supr. Ct. R. 8	2, 9
Super. Ct. Crim. R. 61 p	assim
Super. Ct. Crim. R. 61(i)	7
Super. Ct. Crim. R. 61(i)(l)	7
Super Ct Crim P 61/i)//	7

NATURE AND SCOPE OF THE PROCEEDINGS

Tze Poong Liu has appealed Superior Court's denial of his second motion for postconviction relief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

DENIED. Superior Court properly exercised its 1. discretion in the manner in which it dealt with the claims raised in Liu's second, untimely motion for postconviction relief. The court granted relief, in part, by reducing Liu's three felony murder convictions to manslaughter. The court then considered and rejected the remaining claims. On appeal, Liu raises only one issue, that prior counsel was ineffective in advising him to voluntarily dismiss his appeal of Superior Court's denial of his first motion for postconviction relief in order to file a motion for a new trial in Superior Court. Applying the Strickland standard, Superior Court correctly ruled that counsel's strategy was not deficient; counsel, however, was later deficient in not following through and filing the new trial motion. In any event, no prejudice is shown. Furthermore, the relief that defendant now asks the Court to provide was not requested in Superior Court. Supr. Ct. R. 8.

¹ Strickland v. Washington, 466 U.S. 668 (1984).

STATEMENT OF FACTS

In the early morning hours of March 9, 1988, William Chen's wife, daughter, and mother were killed in a house fire in Claymont. The subsequent investigation determined that the fire had been deliberately set and that the culprits were Vicky Chao and Tze Poong Liu, both residents of New York. Chao was angry that William Chen, which whom she had been romantically involved, had married another woman. See Liu v. State, 628 A.2d 1376, 1377-79 (Del. 1993).

I. SUPERIOR COURT APPROPRIATELY EXERCISED ITS DISCRETION IN ADDRESSING THE CLAIMS LIU RAISED IN HIS SECOND MOTION FOR POSTCONVICTION RELIEF.

QUESTION PRESENTED

Whether the Superior Court judge properly exercised his discretion in applying the procedural rules of Rule 61 to the claims raised by Liuin his second, untimely motion for postconviction relief.

STANDARD AND SCOPE OF REVIEW

The Court reviews Superior Court's denial of postconviction relief for abuse of discretion; questions of law are reviewed de novo. Panuski v. State, 4 A.3d 416, 419 (Del. 2012).

MERITS

Procedural Background

In April 1988, Tze Poong Liu and codefendant Vicky

Chao were indicted for three counts of intentional murder,

three counts of first degree felony murder, and one count

each of attempted murder, burglary, arson and conspiracy.

Superior Court Docket Item ("D.I.") 1.2 The two defendant's

cases were later severed for separate trials. D.I. 45.

Chao was tried first, in 1989, and convicted as charged.3

 $^{^{2}}$ The docket is at A1-A45.

Liu was tried in 1991 and likewise convicted as charged.

Liu's convictions, with the exception of three conspiracy convictions, which were merged into one, were affirmed on appeal. Liu v. State, 628 A.2d 1376 (Del. 1993). In

November 1994, Liu filed a timely, pro se motion for postconviction relief. D.I. 193. The motion was denied.

State v. Liu, 1995 WL 413449 (Del. Super. Ct. Feb. 17, 1995). Liu appealed.

In the meantime, Vicky Chao moved in Superior Court for a new trial on the grounds that State's witness William Chen had perjured himself at her trial. The motion was granted and Chao was tried a second time. She was acquitted of the three intentional murder charges and convicted of the rest.

Chao's success in winning a new trial prompted Liu's trial attorney, Joseph A. Gabay, Esq., again to take up his former client's cause. Gabay first moved this Court to remand the case to Superior Court to allow him to file a motion for a new trial, as Chao had done. The motion was denied. Liu v. State, Del. Supr., No. 98, 1995, Holland, J. (Apr. 24, 1995) (Order) (Ex. A). Gabay then filed a notice of voluntary dismissal.

³ Chao v. State, 604 A.2d 1351 (Del. 1992) (affirming convictions).

Back in Superior Court, Liu filed a pro se motion for a new trial in November 1995. D.I. 211. Superior Court refused to consider Liu's pro se filing because he was represented by counsel. Gabay, however, never filed a new trial motion.

In 2002, this Court decided Williams v. State, 818

A.2d 906 (Del. 2002), which reconsidered its prior holdings on the felony murder statute, including Chao v. State, supra. Subsequently, Chao successfully challenged her felony murder convictions on the basis of Williams. Chao v. State, 931 A.2d 1000 (Del. 2007).

Motion for Postconviction Relief

Following Chao's success, Liu filed a pro se motion for postconviction relief in August 2007. D.I. 235.

Counsel was appointed to represent him (D.I. 237-38), and in January 2008, appointed counsel filed a new motion for postconviction relief (D.I. 239) followed by an amended motion in July. D.I. 240-41. In his amended motion, he raised four claims:

- 1. Williams and Chao dictate that Liu's felony murder convictions be vacated;
- Six claims of ineffective assistance of trial counsel, Joseph Gabay;

- 3. Prosecutorial misconduct at trial by calling "surprise" witnesses;
- 4. Unfair prejudice at trial caused by William Chen's perjured testimony.

Superior Court's Ruling

Superior Court granted, in part, Liu's first claim based on Williams v. State. State v. Liu, 2012 WL 2192939 (Del. Super. Ct. Feb. 29, 2012). Although Liu's claim was time barred, the court nonetheless ruled (and the State conceded) that the interests of justice dictated that Liu be granted the same relief as codefendant Chao and reduced his three felony murder convictions to manslaughter. Id. at *4.

Superior Court then carefully considered whether the procedural bars of Rule 61(i) applied to Liu's remaining claims. The court found his "surprise witness" claim both time-barred under Rule 61(i)(l) and barred as previously adjudicated under Rule 61(i)(4). Neither the interest of justice nor manifest injustice exceptions to these bars required addressing the claim on its merits. *Id.* at *7.

The court rejected Liu's claim of perjured testimony by William Chen as lacking a foundation in fact. Chao and Liu were tried separately, Chao first. It was at Chao's

⁴ Because *Williams* was decided in April 2003 (as amended), Liu had until April 2004 to claim retroactive applicability to his case. Liu's motion was not filed until August 2007.

trial that Chen perjured himself. It was at Liu's trial that the perjured testimony came to light, and Liu's jury was aware of it. Furthermore, the perjured testimony went to Chao's motive for murder, not Liu's. *Id.* at *7-*8.

The court then went on to consider Liu's ineffectiveness claims. The court first addressed Liu's primary claim that Gabay had been ineffective in first recommending that Liu dismiss his first Rule 61 appeal in order to file a new trial motion and then failing to follow through in filing the motion. Applying the familiar Strickland⁵ standard, the court found that although counsel's recommendation that Liu dismiss the appeal was not, in itself, ineffective lawyering, counsel's failure to follow through and file the new trial motion was deficient performance and met the first prong of the Strickland test. Liu, however, could not meet the prejudice prong of Strickland. As explained above, Chen's perjury at Chao's first trial did not carry over to Liu's trial. The court then went on to consider Liu's claims that Gabay had been ineffective at trial, rejecting each as without merit or procedurally barred. Id. at *8-*13.

⁵ Strickland v. Washington, 466 U.S. 668 (1984).

Appeal

On appeal, Liu raises only one claim of error:

Superior Court was wrong in deciding that Gabay was not ineffective in convincing Liu to withdraw the appeal of his first Rule 61 motion. He asks this Court to reverse that finding and remand the case to Superior Court "with instructions that the Superior Court reissue its 1995 denial of Liu's motion for postconviction relief, and allowing an appeal from same to proceed." Op. Brf. at 13.

Liu's requested relief should be rejected. In the first instance, Liu never requested this relief in Superior Court. Therefore, Liu may not do so now for the first time on appeal absent a showing of plain error. Supr. Ct. R. 8. To be "plain," any error must be "apparent on the face of the record." Wainwright v. State, 504 A.2d 1096, 1100 (Del. 1986). It is hardly apparent on the face of this record that Liu is entitled to an appeal of his first Rule 61 motion, or that he was even requesting one in Superior Court. Neither in Superior Court nor now on appeal has Liu identified what issue or issues raised in his first Rule 61 motion he expects to succeed on appeal or in what manner the judge abused his discretion or erred at law in denying his 1995 motion. Therefore, it was not plain error for the

judge not to re-issue the court's 1995 denial of Liu's first Rule 61 motion.

Even if the Court were to consider the issue under the plain error standard of review, Liu fares no better. Liu rests his entire argument on Middlebrook v. State, 815 A.2d 739 (Del. 2003). There, the Court held that when an attorney fails to file notice of appeal within 30 days of sentencing, resentencing the defendant to start the appeal clock anew provides a complete remedy for counsel's dereliction. Middlebrook, however, concerned counsel's failure to file a direct appeal from his client's conviction when he had been told by the client to do so. Liu's case involves neither a direct appeal⁶ nor counsel's failure to perform a duty. Rather, Gabay consulted with Liu, explained his strategy and received Liu's consent before filing notice of voluntary dismissal, and Liu does not dispute this on appeal.

Nor, beyond relying on *Middlebrook*, does Liu dispute Superior Court's finding that Gabay was not ineffective in advising Liu to withdraw his Rule 61 appeal, as Liu now seems to think. Superior Court, on the contrary, expressly

⁶ Traditionally, a defendant's right to counsel extends only through direct appeal. See Coleman v. Thompson, 501 U.S. 722 (1991). But cf. Martinez v. Ryan, 132 S. Ct. 1309 (2012).

found that "there was no objective standard violated when counsel recommended voluntary dismissal of the Rule 61 appeal." State v. Liu, 2012 WL 2192939 at *9. Gabay's performance became deficient only when he later failed to follow through and file a new trial motion. "The failure to move for a new trial was an utter breakdown in counsel's duties to Liu." Id.

In evaluating an attorney's performance, a reviewing court should "eliminate the disturbing effects of hindsight," reconstruct the circumstances of counsel's challenged conduct, "and evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Gabay's advice to Liu, made after codefendant Chao had won a new trial based on Chen's perjured testimony, was a strategic decision, whose presumption of soundness Liu has not even tried to overcome. Superior Court's ruling should be affirmed.

In the present appeal, Liu has not challenged any of the other rulings of Superior Court in denying postconviction relief. These issues should be considered waived and abandoned. Somerville v. State, 703 A.2d 629, 631 (Del. 1997).

⁷ Strickland at 689.

In sum, Superior Court properly exercised its discretion in denying Liu's motion for postconviction relief. That ruling should be affirmed.

CONCLUSION

The judgment of the Superior Court should be affirmed.

/s/ Timothy J. Donovan, Jr.
Timothy J. Donovan, Jr.
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
ID # 2063

DATE: August 29, 2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TZE POONG-LIU,	§	
K =	§	
Defendant Below-	\$ 1	No. 98, 1995
Appellant,	~ §	
and the second second	a 🤏 8 🖇 🦠 🕕	
v.	§	¥ .
	Ş	6
STATE OF DELAWARE,	§	
	§	
Plaintiff Below-	§ .	
Appellee.	§.	

ORDER

This 24thday of April, 1995, the Court has considered the appellant's motion to remand this matter to the Superior Court and the State's response thereto, and has determined that good cause does not exist to grant the motion to remand.

NOW, THEREFORE, IT IS ORDERED that the appellant's motion to remand be, and the same hereby is,

DENIED.

BY THE COURT:

Justice

Ex. A

CERTIFICATE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on August 29, 2012, he caused the attached document to be delivered via Lexis-Nexis and served to:

James J. Haley, Jr., Esq. FERRARA & HALEY 1716 Wawaset Street Wilmington, DE 19806-2131

/s/Timothy J. Donovan, Jr.
Timothy J. Donovan, Jr.
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
ID #2063

DATE: August 22, 2012