IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID. No. 1204002559
	)	
	)	
KEVIN L. WILLIAMS,	)	
	)	
Defendant.	)	

Date submitted: August 18, 2017
Date decided: October 30, 2017

COMMISSIONER'S REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

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MANNING, Commissioner

This 30th day of October 2017, upon consideration of defendant Kevin L. Williams's amended motion for postconviction relief (hereinafter "Motion"), I find and recommend the following:

Procedural History

On November 19, 2012, Williams was indicted by a Grand Jury on 19 counts of Unlawful Sexual Contact First Degree ("USC") and one count of Continuous Sexual Abuse of a Child. Each of the 19 counts of USC was worded identically and used the same date range: August 1, 2002 to June 30, 2003. The alleged victim for all counts was the same child, Jean Smith.[1]

Williams was re-indicted on March 4, 2013. The re-indictment also used the identical language for each count, but changed two of the counts of USC to denote a new victim, Ava Smith. Additionally, the date range for all of the counts, except that of Continuous Sexual Abuse of a Child, was changed to cover varying periods of time ranging from August 1, 2002 to June 30, 2008.

On May 31, 2013, the State filed a motion to amend the re-indictment. The motion sought to amend the dates of count 18 from August 1, 2007 to June 30, 2008, to that of May 1, 2006 to September 30, 2006, and to amend the dates of count 19

[1] A pseudonym has been used to protect the privacy of the mother and victims in this case.

from August 1, 2007 to June 30, 2008, to that of September 1, 2009 to June 30, 2010. The Motion was granted on June 3, 2013, without objection by trial counsel.

Immediately prior to the start of trial, the State entered a *nolle prosequi* on all but six counts of the indictment. The State proceeded to trial on five counts of USC, three pertaining to Jean Smith and two pertaining to Ava Smith. The one count of Continuous Sexual Abuse of a Child pertaining solely to Jean Smith remained. Trial was held before a jury June 11-14, 2013. Williams was convicted of all counts and sentenced on September 20, 2013. At the time of sentencing, the State entered a second *nolle prosequi* on two of the counts of USC that pertained to Jean Smith. Trial counsel and the State stipulated that those crimes had occurred before the statute, as indicted, was enacted. Ultimately, Williams was sentenced to 23 years of unsuspended Level V time followed by probation. Williams's conviction was subsequently affirmed on direct appeal by the Delaware Supreme Court on August 21, 2014.[2]

Williams filed a timely *pro se* motion for postconviction relief on January 12, 2015. On February 2, 2015, a request was sent by the Court to the Office of Conflicts Counsel to appoint counsel to represent Williams on his pending motion. On November 3, 2015, counsel was appointed to represent Williams and a briefing

[2] *See Williams v. State*, 100 A.3d 1022 (Table), 2014 WL 4179121 (Del. August 21, 2014).

scheduled was issued by the Court ten days later. After a number of extensions, appointed counsel filed the Motion now before the Court.

In his Motion, Williams raises two grounds for relief:

> Ground one: Trial Counsel was ineffective in failing to file a bill of particulars in Mr. Williams's case which resulted in a violation of Mr. Williams's sixth amendment rights and due process rights.
>
> Ground two: Trial Counsel was ineffective in failing to object to the motion to amend the indictment in violation of Mr. Williams's sixth amendment and due process rights.

Trial counsel filed his Affidavit responding to Williams's claims on June 6, 2016. The State filed its Response on June 28, 2016. Williams filed his Reply on July 29, 2016. On March 22, 2017, at the request of the Court, trial counsel filed a Supplemental Affidavit addressing the second claim raised by Williams more thoroughly. Due to the nature of the allegations presented in William's Motion and the trial record, an evidentiary hearing as to Williams's claims was held on May 31, 2017. At the hearing, Williams's trial counsel was the sole witness. Upon conclusion of the hearing, both parties submitted supplemental briefing at the Court's request.

Relevant Facts

On November 10, 2011, Michelle Smith brought her two daughters, Jean and Ava Smith to the Delaware State Police and reported that Kevin Williams had sexually assaulted them over a number of years throughout their childhood. Both

girls gave an initial statement to police that was documented in police reports later provided to trial counsel. After their initial statement to police, both girls were interviewed at the Child Advocacy Center ("CAC") on December 12, 2011. Copies of the CAC interviews were sent to trial counsel on June 6, 2013, and stamped as "received" by his office on June 10, 2013.[3] Trial counsel testified, and his contemporaneous notes confirm, that he reviewed the CAC interviews the night before the trial began.[4] Trial counsel also received 23 pages of redacted Division of Family Services records at the same time. Aside from the allegations made by the two girls, no other evidence substantiating the crimes was produced in discovery or presented at trial. Williams testified in his defense at trial and denied any type of inappropriate sexual contact with either victim at any time.

Evidence Prior to Trial

The entirety of the evidence provided by the State to trial counsel prior to trial consisted of the Affidavit of Probable Cause ("APC") from Williams's arrest, the redacted police reports, redacted DFS records, and the recorded CAC interviews. The names within the reports were redacted, however trial counsel testified that he was able to determine who had said what with the assistance of Williams.[5]

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[3] Evidentiary Hearing Exhibits at B118.

[4] Evidentiary Hearing T. at 67.

[5] Evidentiary Hearing T. at 25.

Jean reported that when she was in the third grade at her Aunt's house on fourth street, she fell asleep on Williams's stomach/chest, as she often did as a child. This time however, she awoke to feel him rubbing his private part (penis) up against her private part (vagina). Williams's had pulled his pants part-way down and pulled her underwear off to the side.[6] Jean reported that Williams would, on a regular basis, enter her room and kiss her neck and rub his private part on her private part. During the CAC interview, she stated "that happened all the time."[7] Jean disclosed that Williams would touch her chest and buttocks with his hand as well as ejaculate on her stomach.[8] Jean added that this happened "all the time."[9] Finally, Jean disclosed that on one occasion Williams grabbed her hand and forced her to touch his penis as they both stood in the kitchen of her home. Jean stated that this caused her to then "throw-up."[10]

As to Ava, the APC indicates that she "disclosed that Williams would touch her buttock[s] on top of clothing while hugging her [and] that Williams grabbed her

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[6] Evidentiary Hearing Exhibits at B178.

[7] *Id.* at B179.

[8] *Id.* at B185.

[9] *Id.* at B186.

[10] *Id.* at B187.

hand and placed it on his private part (penis)." The redacted police reports indicate that Ava reported that Williams pulled his pants down and attempted to sexually assault her in a public park after a shopping trip—during trial this was known as the "Monkey Hill" incident due to where it occurred.[11] The police reports indicate that Ava reported that the incidents with Williams began when she was in the seventh grade. In the CAC interview, Ava advised that prior to the first time, Williams had reprimanded her for being down the street with a number of young girls and that he "had something for her."[12] Ava reported that later that same night, Williams entered her room, got on top of her and tried to kiss her neck, however, Michelle Williams entered the room before anything further could happen. Ava also disclosed during the CAC interview a time when she was in the shower when Williams took her hand and had her touch his erect penis as he stood outside the shower.[13]

Legal Standard

To prevail on an ineffective assistance of counsel claim, a 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

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[11] *Id.* at B036.

[12] *Id.* at B143.

[13] *Id.* at B161.

performance prejudiced the defense.[14] 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 the defendant to show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the outcome of the proceedings would have been different.[15]

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.[16] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[17] An error by trial counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.[18]

In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from his or her perspective at the time

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

[15] *Id.*

[16] *Id.* at 697.

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

[18] *Strickland*, 466 U.S. at 691.

decisions were being made.[19] A fair assessment of attorney performance requires that every effort is made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided. [20]

Most germane to this case, the law requires that there is a "reasonable probability" that the outcome of the case would have been different but for trial counsel's deficient performance. The use of the word "probably" is important, because under *Strickland*, the "probability" of a different outcome does not mean a mere "possibility"—it is a higher standard. In *Neal v. State*, the Delaware Supreme Court expounded on the *Strickland* burden of proof analysis under the prejudice prong, it held:

> A reasonable probability of a different result requires a probability sufficient to undermine confidence in the outcome. Although this standard is not mathematically precise and does not necessarily require a showing of more likely than not, *Strickland* requires more than a showing merely that the conduct could have or might have or it is possible that it would have led to a different result. The likelihood of a different result must be substantial, not just conceivable.[21]

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[19] *Strickland*, 466 U.S. at 691

[20] *Id.*

[21] *Neal v. State*, 80 A.3d 935, 942 (Del. 2013) (internal quotations and citations omitted).

Analysis

The procedural requirements of Superior Court Criminal Rule 61 must be addressed before considering the merits of any argument.[22] Williams's Motion was timely filed, is not repetitive, and neither issue was previously raised or adjudicated. Therefore, Williams's Motion is not procedurally barred under Rule 61 and should be considered on the merits.

Ground One

Williams argues that trial counsel was ineffective because he failed to file a bill of particulars which resulted in a violation of his sixth amendment rights and due process rights. Williams argues that without a bill of particulars, trial counsel was unprepared for trial because he did not know what factual allegations corresponded to what counts in the indictment and also failed to object when one of the victims testified to uncharged misconduct. Williams relies on the holdings in two Delaware Supreme Court cases—both decided after the trial in this case—to support his arguments: *Dobson v. State*[23] and *Luttrell v. State*,[24].

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[22] *See Younger*, 580 A.2d at 554.

[23] 80 A.3d 959 (Del. October 31, 2013).

[24] 97 A.3d 70 (Del. July 28, 2014).

In *Dobson*, the defendant was indicted on six identically worded counts of Rape in the Second Degree, each covering the same one-year period. At trial, the victim testified without objection to eight separate incidents in which Dobson was the molester. Dobson was convicted of all six counts. The Court held that "[b]y failing to request a bill of particulars or otherwise becoming informed through discovery, defense counsel proceeded to trial with inadequate knowledge of the case to be tried." Central to the holding in *Dobson* is the fact that defense counsel failed to object when the State presented testimony from the victim that alleged two additional uncharged incidents of rape. As the Court in *Dobson* noted, these additional crimes were presented to the jury without any type of limiting instruction or explanation as to how the jury should, or should not, consider them. Defense counsel's failure caused prejudiced, requiring reversal.

Relying on *Dobson*, Williams argues that "just as in this case, at trial, the victim testified to incidents of which trial counsel was unaware."[25] Williams cites to the "powder incident" and the "Taron Hackett incident" as having never been "mentioned in any of the discovery provided to trial counsel."[26] Although it is true that the State never disclosed the name Taron Hackett as part of discovery, the sexual

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[25] Williams's Motion at 17 and Supplemental Brief at 5.

[26] *Id.*

assault that occurred after Taron left the house, when Williams entered Jean 's room, is consistent with what she had previously described to police and during the CAC interview. The trial testimony regarding Taron Hackett is only relevant in that it provided Jean a temporal reference point for when one of the incidents with Williams occurred.[27]

What distinguishes *Dobson* from the facts, in this case, is that although Jean added additional details when she testified that had not been disclosed in discovery—*i.e.* the mention of her new boyfriend Taron Hackett— unlike *Dobson*, the additional details did not allege any new or uncharged crimes. In the police interview and during the CAC interview that was provided to trial counsel, Jean stated that Williams would enter her room, kiss her neck and rub his private parts on hers and that it "happened all the time."[28] These are the same acts she testified to at trial but qualified it by adding that it occurred after Taron Hackett had left her house one day after meeting Williams for the first time.

The "powder incident" was also similarly disclosed as part of Jean 's CAC interview. The "powder incident," is the same as the "basketball incident," and was explained by the State to constitute the second count of the indictment during closing

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[27] Motion Appendix at A086-A088.

[28] *Id.* at A257.

arguments.[29] During her CAC interview, Jean disclosed that after the first incident, Williams's would touch her and rub his "private parts" against her "on the regular" and that it got "like, out of control" until she was around 15 years old.[30] Just as with the Taron Hackett incident, the recitation of this incident by Jean did not allege anything new or undisclosed; rather, it simply provided a temporal reference point for her during her testimony.

Underpinning the Supreme Court's reversal in *Dobson* is the finding that defense counsel had not become "informed through discovery, [and] [] proceeded to trial with an inadequate knowledge of the case to be tried."[31] I do not believe that to be the case here. As is evidenced by trial counsel's testimony during the evidentiary hearing, by the time trial began, he was aware of the five incidents he needed to defend against.[32]

In *Lutrell*, the defendant was indicted on multiple identical counts of rape and other sex crimes. Prior to trial, Lutrell filed a motion for a bill of particulars arguing that the State's indictment did not contain sufficient facts to differentiate each count from others of the same type. The Superior Court denied the motion, ruling that the

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[29] *Id.* at A164.

[30] Evidentiary Hearing Exhibits at B180 – B181.

[31] *Dobson*, 80 A.3d at *2.

[32] Evidentiary Hearing T. at 59.

defendant was apprised of what the charges were based on the probable cause affidavit and that if the State started to prove something different at trial an objection could be made at that time. Compounding the problem in *Luttrell* was the fact that neither the court nor the State ever explained to the jury which factual allegations aligned with which counts in the indictment. The Supreme Court held it was an abuse of discretion for the Superior Court to have denied the motion for a bill of particulars and reversed the conviction.

Three things distinguish *Luttrell* form this case. First, trial counsel was provided more information than what was contained in the APC. Prior to trial, the State provided redacted police reports which summarized the police interviews and the CAC interview. Additionally, the State provided the actual CAC interviews prior to trial. The CAC interviews formed the basis for all of the charges in the case. Thus, trial counsel was fully apprised of the scope of the evidence against Williams prior to the start of trial. It is apparent from the record that the specific dates on which the underlying acts were alleged to have occurred were not known to either side with any real degree of precision.

To this point, it is clear from trial counsel's testimony during the evidentiary hearing that had the State proceed to trial on all 19 counts he would not have been prepared for trial as he was not clear on what facts supported each of the 19 counts. However, it is also apparent after the evidentiary hearing that trial counsel had been

communicating with the State prior to trial and was aware that the State was going to drop all but five of the USC counts. Trial counsel testified that by the time trial started, he knew that he was defending against five specific incidents.[33] Trial counsel also testified that the time frames for each count of the indictment were less important to him than the underlying acts or locations as described by the victims. Trial counsel testified that, primarily, it was thru his discussions with the prosecutor that he was able to narrow down the five specific incidents the State was going to pursue at trial.[34]

Second, unlike *Luttrell*, the State did explain to the jury which acts corresponded to which count in the indictment. During closing arguments, the State outlined the facts and time period that constituted the first, second and third incidents of USC whereby Jean was the victim.[35] Likewise, the State then outlined the facts and time period for the two counts of USC whereby Ava was the victim.[36] I recognize that the State could have been more specific within the indictment itself, but the transcript makes clear that the State presented each incident to the jury in a

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[33] Evidentiary Hearing T. at 59.

[34] *Id.* at 59, 73, 80-83

[35] Motion Appendix at A164.

[36] *Id.*

chronological order that generally corresponded to the date range for each successive count of the indictment.

Finally, the Court in *Luttrell* also noted that the victim's testimony, in that case, had changed over time and was inconsistent with both his CAC interview and testimony given by other witnesses. In this case, however, although both victims added details during their testimony and there were some inconsistencies, their testimony did not fundamentally change, nor was it contradicted by other witnesses or evidence during the trial.

In light of these differences, *Dobson* and *Luttrell* are distinguishable and do not mandate a finding of ineffective assistance of counsel in my opinion.

Ground Two

Williams argues that trial counsel was ineffective because he allowed the State to amend the dates in the indictment without objection. Williams argues that the amendment "expanded the time period of the crimes alleged significantly and trial counsel had already been preparing for trial that had been pending for months."[37]

To be more specific, the amendment changed the dates in count 18 from that of August 1, 2007 to June 30, 2008, to that of May 1, 2006 to September 30, 2006. This count subsequently became the fourth count. In count 19, the dates were changed from that of August 1, 2007 to June 30, 2008, to that of September 1, 2009

[37] Motion at 21.

to June 30, 2010. This count subsequently became count number five. Finally, for both counts, the victim was changed from Jean to Ava.

During the evidentiary hearing, trial counsel admitted that he did not object to the State's motion to amend the indictment. However, trial counsel testified that he did not object because he did not see how the change in dates impacted his trial strategy. Trial counsel repeatedly testified that the dates in the indictment did not matter so much as the specific incidents. Trial counsel testified that if the change in dates had been an issue or impaired his defense in some way, he would have objected.[38]

Moreover, the amendment to count 18 actually appears to have worked in Williams's favor because it narrowed the time period in question from that of ten months to five months—albeit a year prior. In count 19, the amendment kept the same 10-month period, but changed it to the following year. These changes might have been significant if Williams was preparing to present an alibi defense at trial, but he was not. In fact, when speaking with trial counsel, Williams did not dispute some of the underlying factual situations, rather, he only denied that anything sexual had ever occurred.[39] Williams's Motion alleges that these changes prejudiced him

[38] Evidentiary Hearing T. at 104-105.

[39] *Id.* at 84-86

in a somewhat conclusory fashion that stands in contrast to trial counsel's testimony that the actual dates in the indictment had little bearing on his defense strategy.

Having reviewed the record in this case, I cannot find that trial counsel's failure to object to the amendment prejudiced Williams. As stated by trial counsel, he was preparing to go to trial to defend against specific allegations that Williams flatly denied, the approximate dates on which the acts occurred were far less important.

Conclusion

Even assuming trial counsel's failure to file a motion for a bill of particulars or object to the amendment to the indictment was objectively unreasonable, such failure did not prejudice Williams in the end. Had the State proceeded to trial on all 19 counts, I do not think that would have been the case. However, as the case was actually tried, I am not convinced that there is a reasonable probability that the outcome might have changed had trial counsel done anything differently. The reality of this case is that Williams denied all sexual allegations by the victims and trial counsel presented the best possible defense he could—fabrication by Ava and Jean, bias on the part of their mother, and Williams's denial. In the end, this case boiled down to a credibility battle for the jury to decide.

Ultimately, my review of the evidence leaves me convinced that the proceedings in this case were fundamentally fair and a reliable verdict was reached. Accordingly, Williams's Motion should be DENIED.

IT IS SO RECOMMENDED.

Bradley V. Manning,
Commissioner

oc: Prothonotary
cc: Counsel via email.