

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)	ID No. 1312005545A
)	In and for Kent County
v.)	
)	RK13-12-0387-01 through
RAMON R. RUFFIN,)	RK13-12-0389-01
)	RK13-12-0391-01 through
Defendant.)	RK13-12-0394-01
)	RK14-02-0068-01
)	RK14-02-0069-01

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Jason C. Cohee, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Brian T. N. Jordan, Esquire, Wilmington, Delaware for Defendant.

FREUD, Commissioner
May 9, 2018

The defendant, Ramon R. Ruffin, (“Ruffin”) was found guilty following a jury trial on October 29, 2014 of one count of Attempted Robbery in the First Degree, 11 *Del. C.*§ 531; one count of Assault in the Second Degree as a lesser included count of Assault in the First Degree, 11 *Del. C.*§ 612; three counts of Possession of a Firearm During the Commission of a Felony, 11 *Del. C.*§ 1447A; one count of

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Aggravated Menacing, 11 *Del. C.* § 602; one count of Receiving a Stolen Firearm, 11 *Del. C.* § 1450; one count of Disregarding a Police Officer's Signal, 21 *Del. C.* § 4103; and one count of Resisting Arrest, 11 *Del. C.* § 1257. Two counts of Possession of a Firearm or Firearm Ammunition by a Person Prohibited were severed prior to trial. Following the conviction the State moved to declare Ruffin an habitual offender pursuant to 11 *Del. C.* § 4124(b) mandatory life in prison. However following a discussion with the Court and Defense Counsel prior to sentencing both the State and Defense agreed that the Court should sentence Ruffin as an habitual offender under section 4214(a). Consequently the Court proceeded to sentence Ruffin to the minimum mandatory time of 113 years incarceration pursuant to 11 *Del. C.* § 4214(a).¹

Ruffin, through counsel, appealed his conviction to the Delaware Supreme Court. The issues on appeal were noted by the Court as follows:

(1) the trial court erred in admitting the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) trace report into evidence because it was inadmissible hearsay; (2) he was denied a fair trial due to improper, suggestive eyewitness identification; (3) the trial court erred in denying his request for a Lolly^{FN2} instruction regarding the State's failure to test allegedly exculpatory evidence; and (4) he was prejudiced by cumulative error.²

^{FN2} *Lolly v. State*, 611 A.2d 956 (Del. 1992).

¹ *State v. Ruffin*, Del. Super., ID No. 1312005545A (Jan. 15, 2015), tr. at 3 - 14.

² *Ruffin v. State*, 131 A.3d 295, 297 (Del.).

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The Supreme Court on December 3, 2015, affirmed Ruffin's conviction and sentence stating "We have concluded that all of Ruffin's claims are without merit. Therefore, the judgment of the Superior Court must be affirmed."³

On July 15, 2016, Ruffin filed a *pro se* motion for postconviction relief in which he raised multiple grounds for relief including ineffective assistance of counsel. On July 27, 2016 Ruffin filed a Motion for Appointment of Counsel which the Court granted. Next Appointed Counsel on July 30, 2017 filed a letter to the Court stating that he was satisfied that Ruffin had "addressed all issues and I will not be adding any additional arguments to the ones he made." Following the filing of the affidavit of prior counsel and the State's response to the motion for postconviction relief, Appointed Counsel filed a response on January 12, 2018 in which he moved to withdraw claims 1, 2, 4 and 5 because after review of Trial Counsel's affidavit he concluded there was no ineffective assistance of counsel concerning those claims. Appointed Counsel continued to argue Trial Counsel was ineffective as outlined in claim 3. Ruffin filed a *pro se* reply on January 18, 2018 in which he addressed his argument concerning the witness identification.

FACTS

Following are the facts as set forth by the Delaware Supreme Court:

Robert Alan Cocozzoli is the owner of two McDonald's restaurant franchises in Dover, Delaware. On Monday afternoon, December 9, 2013, Cocozzoli was at his McDonald's restaurant located on the northbound side of

³ *Ruffin*, 131 A.3d at 297.

U.S. Route 13. Cocozzoli was taking items outside to his Nissan Murano SUV parked on the south side of the restaurant.

As Cocozzoli was putting items into his car, a person approached from the rear asking for a cigarette. When Cocozzoli turned around, he heard, 'Give me your wallet.' at that point, he saw Ramon Ruffin pointing a gun at him.^{FN3} The gun Ruffin was holding looked to Cocozzoli like a .45 caliber weapon.^{FN4} After Ruffin's demand for Cocozzoli's wallet, Cocozzoli grabbed Ruffin's hand containing the gun and a struggle between the two men ensued in the parking lot. Ruffin struck Cocozzoli in the head several times with the gun.

While Cocozzoli was struggling with Ruffin, a Pepsi van operated by Robert Yaniak, Jr. pulled into the McDonald's parking lot. Yaniak saw Ruffin beating Cocozzoli in the face repeatedly with a gun. When Yaniak blew his van's horn, Ruffin was distracted from his attack on Cocozzoli and pointed the gun at Yaniak. Yaniak had stopped his van about twenty feet from the scene of the struggle. Yaniak saw Ruffin's face and thought Ruffin was going to shoot him.^{FN5}

Yaniak then saw Ruffin run to the driver's side of a white Pontiac minivan. According to both Cocozzoli and Yaniak, Ruffin got into the driver's side of the van. The white Pontiac minivan backed out of a parking space in front of Yaniak, who wrote down the vehicle's Delaware license plate number.

After Ruffin fled northbound on U.S. Route 13 in the minivan, Yaniak exited his vehicle. Cocozzoli told Yaniak

to call 911. In his 911 call, Yaniak described Ruffin's getaway vehicle and gave the Delaware license plate number. Paramedics arrived at the McDonald's, and transported Cocozzoli to Kent General Hospital in Dover. Cocozzoli had cuts on his face, ear, and cheek as a result of Ruffin's attack. Hospital X-rays revealed that Cocozzoli had cheek bone fractures.

A police radio broadcast notified patrolling officers to be on the lookout for a robbery suspect fleeing northbound on U.S. Route 13 in a white Pontiac minivan with Delaware license plate number 57722. The police broadcast described the robbery suspect as a black male with a handgun.

Dover Police Department Brian Sherwood was driving on Scarborough Road near U.S. Route 13 in north Dover, when he received the police radio broadcast of a robbery in progress. Corporal Sherwood drove his unmarked police car to U.S. Route 13 and headed southbound. Corporal Sherwood spotted the white Pontiac minivan as it passed him from the opposite direction proceeding northbound on U.S. route 13. Corporal Sherwood verified the license plate number and observed a black male with a red jacket driving. Corporal Sherwood made a U-turn at Kentwood Drive and then drove northbound on U.S. Route 13 in pursuit.

The white Pontiac minivan also made a U-turn and proceeded southbound on U.S. Route 13 until it turned right into the entranceway for a Holiday Inn and another McDonald's restaurant. At this point, Corporal Sherwood activated the lights and siren on his police vehicle. The white Pontiac minivan attempted to elude the police by

returning to U.S. Route 13 southbound, turning right into an old Wal-Mart store parking lot, driving on Crawford Carroll Road and then Scarborough Road before returning to U.S. Route 13.

During the circular police pursuit, Corporal Sherwood observed the white Pontiac minivan run three stop signs, sideswipe a Dodge Ram vehicle, and bump a red car several times in an effort to push that vehicle out of the way. Corporal Sherwood also observed a passenger inside the minivan. Other Dover police vehicles joined in the highway pursuit of the minivan. At Ruffin's trial, the jury observed three DVD's taken by Dover Police in-car dash cameras of the police chase.

After retracing its route past the old Wal-Mart store a second time, the white Pontiac minivan drove across Scarborough Road into the Del Tech campus. At this point, four Dover police officers (Brian Sherwood, Ian Thompson, Harvey Jaksch, and James Paul Piazza) were all in pursuit of the white Pontiac minivan. As the minivan attempted to exit from the Del Tech campus to turn left onto Denneys Road, the minivan slid over a curb and became lodged on a metal post.

The backseat passenger of the white Pontiac minivan, later identified as Wilbur Doughty, jumped out and ran towards Denneys Road where he was apprehended by Dover Police. The driver of the minivan also fled by running east toward the Del Tech buildings where he was also taken into custody. Corporal Sherwood, who apprehended Ruffin, identified Ruffin at trial as the driver of the white Pontiac minivan. Similarly, Dover police officer Harvey Jaksch identified Ruffin at trial as the man who exited the driver's

side door of the minivan and who was chased down by Corporal Sherwood. After the apprehensions of Ruffin and Doughty, Corporal Sherwood and Officer Jaksch observed a semiautomatic pistol on the minivan floor behind the front driver's seat.

Dover Police Department Crime Scene Investigator ("CSI") Lawrence Simpkins went to the Del Tech campus on December 9, 2013, after being advised of an incident involving a robbery with a gun and a police pursuit. CSI Simpkins took several photographs of the white Pontiac minivan, and located a .45 caliber semiautomatic Hi-Point handgun behind the front driver's seat and in front of the rear passenger seat. The gun was loaded with one cartridge in the chamber and eight more shells in the magazine. The gun retrieved by CSI Simpkins after the police chase was admitted without objection at trial as State's Exhibit #11.

CSI Simpkins found blood on the gun. CSI Simpkins contacted the ATF for a trace report on the gun (the "ATF Report"). The ATF Report revealed that the gun was originally purchased on February 4, 2007 in Richmond, Virginia by Larry Alphonso Tucker. The ATF Report of the gun was admitted at trial as State's Exhibit #12. A subsequent National Crime Information Center ("NCIC") search of the gun by Dover Police Detective Matthew Knight revealed that the gun had been reported as stolen.

Ruffin elected not to testify at his jury trial and the defense presented no witnesses.⁴

⁴ *Ruffin*, 131 A.3d 295, 297-99.

^{FN3} Cocozzoli identified Ruffin at trial as the individual who approached him in the McDonald's restaurant parking lot on the afternoon of December 9, 2013.

^{FN4} Cocozzoli was shown a Hi-Point .45 caliber semiautomatic handgun that the State admitted at trial as State's Exhibit # 11. Cocozzoli confirmed that it looked like the gun Ruffin pointed at him.

^{FN5} Yaniak also identified Ruffin at trial as the individual he saw attacking Cocozzoli in the McDonald's parking lot and as the person who pointed a gun at Yaniak. Yaniak testified that Ruffin's gun was a black semiautomatic.

RUFFIN'S CONTENTIONS

Next, Ruffin filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Rule 61. In his motion, he raises the following grounds for relief:

Claim one: Trial Counsel was ineffective for failing to file a timely motion for a mistrial and/or request trial court to suppress the in-court identifications made by both witnesses, resulting in prejudice to Ruffin.

Claim two: Trial Counsel provided ineffective assistance by not consulting with and/or presenting the testimony of a subject matter expert in the field of eyewitness identification, thus, resulting in prejudice to Ruffin.

Claim three: Trial counsel provided ineffective assistance by not requesting a more appropriate and

detailed comprehensive eye witness identification instruction to the jury, thus, resulting in prejudice to Ruffin.

Claim four: Trial Counsel provided ineffective assistance by failing to conduct an investigation into Ruffin's background and made no effort to produce or present available mitigating information at the January 15, 2015 sentencing hearing, thus resulting in prejudice to Ruffin.

Claim five: Ramon requests a vacation of his convictions and moves this court for a new trial. Based on prosecutorial misconduct, the State's prosecutor, Mr. Robert David Favata, took deliberate and substantial steps to conceal several ethical violations committed against Ruffin during his October 2014 trial, resulting in prejudice to Ruffin. (See Memorandum of Law arguments).

DISCUSSION

Under Delaware law, the Court must first determine whether Ruffin has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.⁵ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction

⁵ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

becoming final.⁶ Ruffin's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Ruffin's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.⁷ The bars to relief are inapplicable to a jurisdictional challenge or "to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."⁸

Ruffin's first, second, third and fourth grounds for relief are premised on allegations of ineffective assistance of counsel. Ruffin's fifth ground for relief does not appear to be premised on ineffective assistance of counsel and as such he has failed to establish cause for not raising this claim sooner. However to some extent this claim is similar to his argument on direct appeal concerning the lack of DNA testing and "hearsay" and denied by the Delaware Supreme Court and as such it would be barred by Superior Court Criminal Rule 61(i)(4) as previously adjudicated. To the extent Ruffin is "cryptically" arguing his attorney was ineffective for not

⁶ Super. Ct. Crim. R. 61(i)(1).

⁷ Super. Ct. Crim. R. 61(i)(3).

⁸ Super. Ct. Crim. R. 61(i)(5).

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raising prosecutorial misconduct earlier I will review the claim. Therefore Ruffin has alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. Ruffin's ineffective assistance of counsel claims are not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Ruffin, allege ineffective assistance of counsel in order to overcome the procedural default. "However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards."⁹ The United States Supreme Court has held that:

[i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that the responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance;' [i]neffective assistance of counsel then is cause for a procedural default.¹⁰

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant

⁹ *State v. Gattis*, 1995 WL 790961 (Del. Super.).

¹⁰ *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

must engage in the two part analysis enunciated in *Strickland v. Washington*¹¹ and adopted by the Delaware Supreme Court in *Albury v. State*.¹²

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.¹³ Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.¹⁴ In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.¹⁵

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.¹⁶ However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."¹⁷ In other words, if the Court finds

¹¹ 466 U.S. 668 (1984).

¹² 551 A.2d 53, 58 (Del. 1988).

¹³ *Strickland*, 466 U.S. at 687; see *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

¹⁴ *Id.*

¹⁵ See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

¹⁶ *Strickland*, 466 U.S. at 687.

¹⁷ *Id.* at 697.

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that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.¹⁸ Furthermore, Ruffin must rebut a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance," and this Court must eliminate from its consideration the "distorting effects of hindsight when viewing that representation."¹⁹

Turning to Ruffin's first ground for relief, he claims that his counsel was ineffective for failing to file a timely motion for mistrial. Counsel makes clear in his affidavit there was in fact a mistrial motion made albeit late but that the error was harmless because the motion was denied on its merits. I conclude that in light of the facts of this case and the charges that there was no prejudice to Ruffin. Furthermore, as the State points out in its response, this claim appears to be a restatement of Ruffin's argument on direct appeal and would then be barred by Superior Court Rule 61(i)(4). This ground for relief is meritless.

In his second ground for relief Ruffin argues that Trial Counsel should have hired an expert on eyewitness identification. Counsel stated he did not do so because the facts of the case were clear and straight forward and there was a plethora of evidence tying Ruffin to the crime. This claim is meritless and there was no prejudice to Ruffin.

Turning to Ruffin's third ground for relief in which he argues that his Trial

¹⁸ *State v. Gattis*, 1995 WL 790961 (Del. Super.).

¹⁹ *Strickland*, 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

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Counsel should have requested a more detailed jury instruction concerning eyewitness identification, his Trial Counsel stated that based upon the totality of the evidence that a more detailed jury instruction would not have made a difference. I have reviewed the entire file and the trial transcript and I conclude that based on the totality of the evidence that there saw no prejudice to Ruffin arising from the lack of a more detailed eyewitness jury instruction and that his Trial Counsel was not ineffective for failing to request one. This ground for relief is meritless.

In his fourth ground for relief, Ruffin alleges his counsel should have presented mitigating evidence at his sentencing. However this claim is belied by the record because both the State and Ruffin agreed that he was eligible to be sentenced as an habitual offender and he received the minimum mandatory sentence. This claim is clearly meritless.

Finally in his fifth ground for relief, Ruffin alleges various instances of prosecutorial misconduct several of which were to some degree raised in his direct appeal and denied. As such they are barred by Superior Court Criminal Rule 61(i)(4). Additionally, after a review of the record and Trial Counsel's affidavit it is clear to me that there was no prosecutorial misconduct and as such counsel was not ineffective for failing to address it earlier. This claim is meritless and procedurally barred.

CONCLUSION

After reviewing the record in this case, it is clear that Ruffin has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). A review of his counsel's affidavit clearly shows that counsel represented Ruffin in a competent fashion and

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was not ineffective. Additionally, Ruffin has failed to demonstrate any concrete prejudice. Consequently, I recommend that Ruffin's motion be denied as procedurally barred by Rule 61(i)(3) and (4) for failure to prove cause and prejudice and as previously adjudicated.

/s/ Andrea M. Freud
Commissioner

AMF/dsc
oc: Prothonotary