

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

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
)	
v.)	ID. NO. 9506017339
)	
)	
LAWRENCE JOHNSON,)	
)	
Defendant.)	

OPINION AND ORDER

ON THE DEFENDANT'S
MOTION FOR POSTCONVICTION RELIEF

Submitted: August 23, 2006
Decided: November 21, 2006
Amended: November 22, 2006
(Pages 1, 3, 6, 7, 11, 12 & 17)

Mark W. Bunitsky, Esquire and Thomas E. Brown, Esquire,
Deputy Attorneys General, Department of Justice, 820
North French Street, Carvel State Office Building,
Wilmington, DE 19801, Attorneys for the Plaintiff

Kathleen M. Jennings, OBERLY JENNINGS & RHODUNDA, P.A.,
800 Delaware Avenue, Suite 901, P.O. Box 2054,
Wilmington, DE 19899-2054, Attorney for the Defendant

Toliver, Judge

Before the Court is the Defendant's Motion for Postconviction Relief. Upon consideration of the Defendant's motion and the State's opposition, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

Tom Smith, a business owner engaged in the buying and selling of firearms, was shot to death on June 25, 1995, during the robbery of the gun shop he operated from his home, Black Sheep Sports. On at least two occasions prior to the crime, three individuals later identified as Lawrence Johnson, Jermaine Barnett and Hector Barrow, were known to have been outside of and/or to have entered the gun shop.¹ On June 25, witnesses observed the men return to the establishment. It was at that time that Mr. Johnson was posted outside, presumably as a "lookout", while Messrs. Barrow and Barnett continued

¹ The first took place the day before Mr. Smith's demise, while the second visit occurred on June 25, a short time before they returned to rob the gun shop.

inside. After witnesses heard what was described as a sound resembling a car backfiring, Mr. Johnson allegedly left his "post" and went to the entrance of the establishment. Whether Mr. Johnson actually went inside is unknown, but it is clear that the three men were seen leaving the premises moments later and two of them, identified as Johnson and Barnett, were purportedly carrying a brown bag that appeared to be heavy. According to witnesses, the men started toward the Lancaster Court Apartments and ultimately entered Apt. 2C, where they had been staying since their arrival on June 23 from New York City, New York.² A celebration ensued during which the guns taken from the gun shop were displayed and at least one of the participants boasted of his role in killing Mr. Smith.

At some point later that same day, the police surrounded the building in which Apt. 2C was located and searched that apartment. It was during the course of

² The record reflects that the two encountered or passed at least two witnesses who were able to identify them and incredulously exchanged greetings with one of them as they struggled with the weight of the weapons taken.

that search that police officers discovered firearms and ammunition taken during the robbery along with other physical evidence linking the men to the crime, including brightly colored clothing similar to that allegedly worn by Mr. Johnson as he stood outside the gun shop. All three were arrested³ and charged with numerous crimes including multiple counts of Murder First Degree, burglary, robbery and numerous counts of the possession of firearms during the commission of those felonies. The charges against Mr. Johnson were ultimately severed from those against Mr. Barnett and Mr. Barrow. The State elected to seek the imposition of the death penalty against Mr. Barnett and Mr. Barrow, but declined to do so against Mr. Johnson.

Apt. 2C was leased in the name of Christine Edwards, the aunt of Dennis Thomas, a local resident. Mr. Thomas was present in the Lancaster Court apartment during the planning of the crime. He remained there until the three

³ Also present in Apt. 2C were a Mr. Andrew Austin and an unknown female. They managed to exit the apartment and the building without being apprehended. Mr. Barnett was arrested when attempting to leave the building while Messrs. Barrow and Johnson were arrested inside the apartment.

men returned and did not leave until he was escorted out by the police during the search of the premises. Mr. Thomas was detained, but not charged with any crimes associated with the instant events.⁴

The Johnson trial began on November 18, 2006. On December 12, 1996, a jury found Mr. Johnson guilty as to both felony murder charges and not guilty as to the intentional murder charge. He was also found guilty on the remainder of the burglary, robbery and the weapons charges. On March 21, 1997, the Court sentenced Mr. Johnson to prison for two consecutive life terms on the murder charges and one hundred twenty-six years on the remaining offenses. On June 9, 1998, the Supreme Court affirmed the conviction and sentence on direct appeal. Shortly after he was arrested thru the affirmance of the aforementioned convictions, Mr. Johnson was represented by Edward C. Pankowski, Jr., Esquire and Todd E. Connor, Esquire.

⁴ Mr. Thomas did admit to receiving two of the firearms stolen by the three when they returned from their last trip to the gun shop. The record is equivocal as to why he was so favored by them although there is no indication that he was directly involved in the commission of the offenses in question.

On April 12, 2000, Joseph A. Hurley, Esquire filed the initial postconviction relief motion pursuant to Superior Court Criminal Rule 61 on behalf of Mr. Johnson. Mr. Hurley was subsequently permitted to withdrawal from the matter on August 10, 2000, and Carolyn P. Ayres, Esquire entered her appearance on behalf of Mr. Johnson on October 2, 2000. Ms. Ayers was directed by the Court to renew, and refile, if necessary, Mr. Johnson's motion, which she did on July 19, 2001. However, Ms. Ayres moved to withdraw from the matter in the latter part of 2002.⁵

That status remained unchanged until August 26, 2003, when Kathleen M. Jennings, Esquire entered her appearance on behalf of Mr. Johnson and filed yet another Rule 61 petition. The gist of her claim is that the advocacy presented by trial counsel on Mr. Johnson's behalf was so deficient it abridged his right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. Ms. Jennings requested an evidentiary hearing regarding

⁵ On March 27, 2002, the Court denied the motion filed by Ms. Ayres until another attorney entered his or her appearance for Ms. Ayres. However, Ms. Ayres was suspended from the practice of law for three years on July 8, 2002. Mr. Johnson's quest for relief was left in legal limbo as a result.

Mr. Johnson's claims which the Court held on December 20, 2005. Counsel stipulated to a briefing schedule following that hearing which has now been completed.

Mr. Johnson's claim that he is entitled to the relief sought is threefold.

First, he argues that counsel should have, but failed to impeach the credibility of Mr. Thomas by putting before the jury the contention that he too could have faced charges in connection with the murder of Mr. Smith. The failure to do so was, under the circumstances, unreasonable as well as prejudicial since he was a key prosecution witness who provided critical testimony against Mr. Johnson leading to his conviction. Second, Mr. Johnson contends that trial counsel should have objected to the instruction given to the jury on accomplice liability which was incorrect as a matter of law. That nonfeasance rendered counsel's advocacy ineffective, or at the very least, substantially contributed to the findings of guilt against Mr. Johnson. Lastly, Mr. Johnson contends that counsel should have, but did not, object to references to him as a "lookout."

He contends that those references unfairly painted him as a participant in the crimes in question without any foundation in the record.

The State argues that the decision not to impeach the credibility of Mr. Thomas was a reasonable strategy given the fact that Mr. Johnson was acquitted of intentionally participating in Mr. Smith's murder. The State further contends that the instruction regarding accomplice liability was consistent with the Court's pattern instruction in that regard and was otherwise legally sound. Consequently, there was no basis for any objection to that given. The State's final retort is that defense counsel's failure to object to the use of "lookout" as a reference to Mr. Johnson was reasonable in light of the testimony regarding his actions immediately prior to, during and immediately following the death of Mr. Smith. It contends that the reference held exculpatory value for Mr. Johnson since the testimony accompanying its usage resulted in the inference that he did not go inside the gun shop, if at all, until after the shot that killed Mr. Smith had been fired.

DISCUSSION

The Court has consistently held that a predicate to addressing the merits of a Rule 61 motion is an examination to determine whether there are any existing bars based upon procedural grounds as set forth in Rule 61(i)(1)-(4). Those bars may only be lifted if there is a mechanism to do so in the pertinent subsection of Rule 61.⁶ If there is no relief there, the "catchall" provision of Rule 61(i)(5) may provide relief from procedural bars contained in 61(i)(1)-(3).

Rule 61(i)(5) provides that the aforementioned bars may be raised where the defendant establishes a colorable claim that there has been a "miscarriage of justice." A colorable claim of "miscarriage of justice" occurs when

⁶ A motion for postconviction relief filed prior to July 1, 2005, may be filed no more than three years after the judgment of conviction is final, or if it asserts a retroactively applicable right that is newly recognized after the judgment is final, no more than three years after the right is first recognized by the Supreme Court of Delaware or by the United State Supreme Court. Super. Ct. Crim. R. 61(i)(1). Grounds not presented in prior postconviction proceedings or formerly adjudicated claims are barred unless consideration of the claim is warranted in the interest of justice. Super. Ct. Crim. R. 61(i)(2) & (4). Likewise, any ground for relief not asserted in the proceedings leading to the judgement of conviction are barred unless the movant shows cause for relief and prejudice. Super. Ct. Crim. R. 61(i)(3).

there is a "constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."⁷ This exception to the procedural bars is very narrow and is only applicable in very limited circumstances.⁸ The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."⁹ In this case, it is evident that the procedural bars will not prevent consideration of the merits of Mr. Johnson's claim.

As stated above, a postconviction relief motion filed prior to July 1, 2005, is to receive consideration if filed within three years of the final conviction, or if asserting a retroactively applicable right, within three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.¹⁰ Mr. Hurley filed the initial postconviction motion on Mr.

⁷ Super. Ct. Crim. R. 61(i)(5).

⁸ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

⁹ *Id.*

¹⁰ Super. Ct. Crim. R. 61(i)(1).

Johnson's behalf on April 12, 2000, well within the requisite three year period for filing under Rule 61(i)(1). Attorneys Ayres and Jennings filed their memoranda on behalf of Mr. Johnson in support of the effort Mr. Hurley began in 2001.

It is apparent that the three attorneys representing Mr. Johnson at different times during the postconviction phase have diligently sought to preserve the means to challenge his conviction under Rule 61. Even though their individual withdrawal or entry into the case may have resulted in some delay, it is apparent to the Court that they acted in support of the effort initiated by Mr. Hurley and are inextricably intertwined as a result. Given this finding and the nature of the constitutional right Mr. Johnson seeks to invoke, the Court must conclude that the motion filed by Ms. Jennings will relate back to the date of the initial filing and therefore escape the bar of Rule 61(i)(1).

The Court must also conclude that consideration of Mr. Johnson's claim of ineffective assistance of counsel, by its very nature, is not procedurally barred by any

section of Rule 61.¹¹ However, even when the Court reaches the merits of his claim, the relief sought is beyond Mr. Johnson's reach. The prevailing standard for establishing a Sixth Amendment ineffective assistance of counsel claim is set forth in *Strickland v. Washington*.¹² In that case, the United States Supreme Court declared that to establish such a claim a movant must prove that counsel's representation fell below an objective standard of reasonableness and that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.¹³ Notwithstanding counsels' efforts in this regard, Mr. Johnson failed to meet the burdens posed by *Strickland*.

¹¹ See *Mason v. State*, 725 A.2d 442 (Del. 1999); and *State v. McRae*, 2002 Del. LEXIS 495, at *5. When a movant alleges a colorable claim of ineffective assistance of counsel which is potentially procedurally barred under Rule 61(i)(1), (2) or (3), it appears that Rule 61(i)(5) would also cause the bar or bars to be raised because such a claim, by definition, is likely to constitute a "constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceeding." Super. Ct. Crim. R. 61(i)(5).

¹² 466 U.S. 668.

¹³ *Strickland v. Washington*, 466 U.S. 668, 694 (1984); See also *Winn v. State*, 705 A.2d 245 (Del. 1998).

First, Delaware law in this regard requires that Mr. Johnson make concrete allegations of actual prejudice and substantiate them.¹⁴ Second, there is a strong presumption that counsel's trial strategy fell within the wide range of reasonable professional assistance.¹⁵ The majority of the argument related to counsel's performance now raised by Mr. Johnson involves strategic choices made by defense counsel.

The presumption of reasonable professional assistance is particularly difficult to overcome considering that Mr. Johnson was acquitted of intentional murder, the most serious of the charges lodged against him. Notwithstanding his obvious disagreement with trial strategies pursued by counsel, Mr. Johnson also failed to provide evidence or otherwise establish what the standard was or that counsel's conduct fell below that expected

¹⁴ *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996); *Jordan v. State* 1994 WL 466142 (Del.); *State v. Brittingham*, 1994 WL 750341 (Del. Super.).

¹⁵ See *Stone v. State*, 690 A.2d 924, 925 (Del. 1996) (quoting *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990) ("Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable." (internal citation omitted))).

under the circumstances. Without more, Mr. Johnson cannot meet the first prong of *Strickland*.

Given this conclusion, consideration of the second prong of *Strickland* is not necessary. However, were the Court to do so, Mr. Johnson does not cite particular instances of actual prejudice which undermined the proceedings and materially impacted the result. Indeed, in light of the evidence put before the jury, it is readily apparent that the outcome would have been the same even if counsel had acted as Mr. Johnson now suggests.

For example, the testimony proffered by Mr. Thomas is characterized by Mr. Johnson as "key" to the State's case because that testimony implicated Mr. Johnson as an aider and abettor of the crimes against Mr. Smith. Obviously the testimony aided the State. Notably, it is reasonable to assume that the same result would have attained even if the jury had been informed that Mr. Thomas could have been charged criminally based upon his involvement in the

events culminating in the death of Mr. Smith.¹⁶

That conclusion is reached because witnesses to the events identified Mr. Johnson as the "lookout" at Mr. Smith's establishment and also as one of the men who carried fruits of the crime away from the scene and to the building in which Apt. 2C was located. When police executed the search warrant for that dwelling, Mr. Johnson was found to be laying on or very near the firearms taken from the gun shop. He was also in close proximity to clothing of the color the "lookout" was alleged to have worn during his role in the crimes in question. Moreover, his fingerprints were found on the firearm used to kill Mr. Smith. With the overwhelming evidence regarding Mr. Johnson's involvement, it is difficult to fathom how a different outcome could have resulted had Mr. Thomas' credibility been challenged by counsel as Mr. Johnson suggests.¹⁷

¹⁶ As noted above however, the jury did hear testimony elicited by defense counsel that Mr. Thomas received at least two firearms from the defendants for whatever reason. It was readily apparent to the jury as a result, that he had engaged in some illegality on June 25.

¹⁷ Mr. Johnson appears to ignore the testimony by Mr. Thomas describing Mr. Barrow's statement that he shot "the bombacot" which obviously contributed to Mr. Johnson's acquittal on the intentional

The argument regarding counsel's failure to object to the use of "lookout" as a reference to Mr. Johnson fails for much the same reason. There was an abundance of eyewitness and physical evidence which verified his participation in the crime. Further, it is conceivable that referring to Mr. Johnson as the "lookout" actually held exculpatory value because it indicates that he did not directly participate in the killing of Mr. Smith, having been "posted" outside when the fatal shot was fired. Again, it was that role which presumably helped him allude a conviction on the intentional murder charge.

Lastly, to the extent that counsel did not object to the jury instruction regarding accomplice liability, there was no necessity to do so because there was no viable legal basis for such a challenge. Eleven *Del. C.* §§ 271 and 274 require the jury to undertake a two-part analysis when the State proceeds on a theory of accomplice liability. First, § 271 sets forth the standard that must be applied in order to establish guilt by virtue of accomplice liability. In part it states:

murder charge.

A person is guilty of an offense committed by another person when:

- (1) Acting with the state of mind that is sufficient for commission of the offense, the person causes an innocent or irresponsible person to engage in conduct constituting the offense; or
- (2) Intending to promote or facilitate the commission of the offense the person:
 - a. Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or
 - b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it¹⁸

Second, § 274 instructs that if a defendant is found liable for a criminal offense under a theory of accomplice liability, and if the offense is divided into degrees, then the jury must determine what degree of the offense the defendant committed. That subsection provides:

¹⁸ 11 Del. C. § 271.

When, pursuant to § 271 of this title, two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance.¹⁹

As the State noted, the instruction given directed the jury to comply with the requirements of §§ 271 and 274. In carrying out that mandate, the jury determined that Mr. Johnson acted intentionally with regard to the burglary and robbery charges and that the murder was a foreseeable consequence of those acts. The two-part inquiry was satisfied and nothing more was required under the circumstances. In addition, Mr. Johnson failed to establish that it was not appropriate to apply the pattern charge given the circumstances of this case or how the charge as given was fatally flawed as a matter of law. If there was no basis to object to the instruction, the failure to object does not run afoul of the Sixth

¹⁹ 11 Del. C. § 274.

Amendment.

Given that Mr. Johnson has not set forth with precision how counsel's conduct fell below that which is reasonable under the circumstances nor has he otherwise identified how a different outcome would have ensued, the representation provided was not constitutionally suspect. Effective assistance of counsel does not mean perfect representation or representation that brings about a result that is acceptable to the defendant. It is acting in a manner that is professionally reasonable under the circumstances given the evidence available and the applicable law.²⁰

²⁰ *Strickland*, 466 U.S. at 690.

CONCLUSION

In light of the foregoing discussion, the Court concludes that the representation provided by Edward C. Pankowski, Jr., Esquire and Todd E. Connor, Esquire, was not ineffective. Nor does it otherwise run afoul of the Sixth Amendment to the United States Constitution. As a result, Mr. Johnson's motion must be, and hereby is, **denied.**

IT IS SO ORDERED.

TOLIVER, JUDGE