



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TROY DIXON,)	
)	
Defendant-Below,)	
Appellant,)	
)	
v.)	No. 319, 2020
)	
STATE OF DELAWARE,)	
)	
Plaintiff-Below,)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE’S ANSWERING BRIEF

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Dated: March 10, 2021

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NATURE AND STAGE OF THE PROCEEDINGS

Following his November 8, 2012 arrest, a New Castle County grand jury returned an indictment charging Troy Dixon (“Dixon”) with Assault First Degree, Possession of a Firearm During the Commission of a Felony (“PFDCF”), Disregarding a Police Officer’s Signal, Resisting Arrest, and Possession of a Firearm by a Person Prohibited (“PFBPP”). (A1 at D.I. 1, 3). On September 24, 2013, the Superior Court granted Dixon’s motion to sever the PFBPP charge. (A1, A2, at D.I. 23).

On October 1, 2013, at the conclusion of a 6-day trial on all but the severed PFBPP charge, the jury found Dixon guilty of the lesser-included offense of Assault Second Degree, PFDCF, and Resisting Arrest. (A4 at D.I. 18). On November 8, 2013, the Superior Court sentenced Dixon to a total of 21 years at Level V incarceration, suspended after 18 years for decreasing levels of supervision.¹ On October 1, 2014, this Court affirmed the judgment.²

On December 2, 2014, Dixon filed a *pro se* motion for postconviction relief. (A7 at D.I. 38). The Superior Court appointed Dixon counsel, and appointed counsel filed an amended motion for postconviction relief on September 25, 2015. (A7 at D.I. 40; A8 at D.I. 45). After receiving an affidavit from trial counsel, a response

¹ *Dixon v. State*, 2014 WL 4952360, at *1 (Del. Oct. 1, 2014).

² *Id.* at *2.

from the State, and Dixon's reply, the Superior Court denied Dixon's motion for postconviction relief on October 12, 2016.³ (A9 at D.I. 47-49; A10 at D.I. 54). This Court affirmed on appeal.⁴

On October 15, 2018, Dixon filed his second motion for postconviction relief as well as motions for appointment of counsel and witness statements. (A11 at D.I. 64, 65). On November 21, 2018, Dixon filed an amended second motion for postconviction relief, and motions to compel, for witness statements and for counsel. (A12 at D.I. 69-72).

On January 10, 2019, the Superior Court sent a letter to the State enclosing copies of all of Dixon's motions. (A12 at D.I. 73). The court directed the State to take no action on the motions except to respond to Count One of Dixon's amended motion for postconviction relief which stated:

Newly Discovered Evidence Supporting Facts: Evidence Emerged that Expert, Who Was Not Properly Certified in the Relevant Area of Firearms Identification as of Trial, Was Charged, Arrested and Plead Guilty to Falsifying Work Records. (*Id.*)

On January 30, 2019, Dixon filed a memorandum of law in support of his postconviction motion. (A12 at D.I. 74). On March 12, 2019, the State filed its answer to Count One of Dixon's motion. (A12 at D.I. 76).

³ *State v. Dixon*, 2016 WL 5929251 (Del. Super. Ct. Oct. 11, 2016).

⁴ *Dixon v. State*, 2017 WL 2492565 (Del. June 8, 2017).

On March 19, 2019, new counsel for Dixon wrote to the Superior Court asking that the court delay deciding Dixon's postconviction motion until counsel had the opportunity to file an amended postconviction motion. (A13 at D.I. 77). The court granted new counsel's request and Dixon's counsel filed a supplemental memorandum in support of Dixon's motion for postconviction relief on May 1, 2019. (A13 at D.I. 81).

On June 6, 2019, the Superior Court denied Dixon's motion for postconviction relief and denied the remaining motions as moot. (A14 at D.I. 83). Dixon filed an untimely appeal that this Court dismissed. (A14 at D.I. 84). On May 28, 2020, Dixon filed a third motion for postconviction relief alleging ineffective assistance of counsel for failing to notify Dixon of the court's June 6, 2019 decision in a timely manner to allow him to file an appeal.⁵ (A14 at D.I. 85). On September 4, 2020, the Superior Court granted Dixon's third motion for postconviction relief in part and denied it in part, finding that Dixon was not made aware of the Court's decision in a timely matter to appeal.⁶ As part of its September 4, 2020 Order, in the interest of justice, to permit Dixon the opportunity to appeal, the Superior Court vacated the June 6, 2019 Order denying postconviction relief and the related motions and then reissued its denial of Dixon's second postconviction motion and again found the

⁵ *State v. Dixon*, 2020 WL 5289927, at *2 (Sept. 4, 2020).

⁶ *Id.*

remaining motions moot.⁷ The September 4, 2020 Order effectively permitted Dixon 30 days to perfect an appeal of the Superior Court's denial of his second amended motion for postconviction relief. Dixon has appealed and filed an opening brief. This is the State's answering brief.

⁷ *Id.* at *4.

SUMMARY OF THE ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in denying Dixon's second motion for postconviction relief. The Superior Court correctly found Rone's misconduct does not overcome either procedural bar of Rule 61(d) nor does it warrant a new trial. Dixon has failed to "plead with particularity" that the evidence of the State Firearms Expert's arrest and guilty plea to falsifying business records creates a strong inference of Dixon's actual factual innocence of the crimes for which he was convicted.

STATEMENT OF FACTS

On the evening of November 4, 2012, Maurice Harrigan, while at the Rebel nightclub, became embroiled in a heated discussion with a longtime associate, Kevin Bell, and Troy Dixon, but Harrigan believed they had resolved their differences that night. (A173-75, 23). Later that evening, at the Thunderguards clubhouse, Bell was fatally shot. (A173-74, B19-20).

On the morning of November 8, 2012, Darren Brown drove Harrigan to Bell's funeral. (A50-51, 173). Harrigan and Dixon saw each other at the funeral; Dixon "looked mad" and was "grittin"⁸ on" Harrigan, signifying continued tensions. (A206-07, B12-13). Brown drove Harrigan from the funeral; Harrigan sat in the passenger seat, and Aaron Summers sat in the back. (A49-50). While stopped at a light at Governor Printz Boulevard and Vandever Avenue, Brown noticed a black Crown Victoria pull up behind his car. (A53-54). The front passenger in the Crown Victoria "st[ood] over the top of the door and fired five or six shots over the door towards Brown's car. (A52-58). One bullet hit Summers in the back of the neck. (A57). Police found five nine-millimeter shell casings at the scene of the shooting and retrieved one spent projectile from the hospital. (A97-98, B29-30, 39). Brown's

⁸ Testimony from the trial indicated that "grittin" meant that Dixon was "star[ing] at [Harrigan] like he had a problem with him." (B12-13).

car was struck six times, and police recovered two spent projectiles from the car. (B35-36).

After the shooting, police searched for the black Crown Victoria. (A19). Officers had previously run a license plate on a suspicious Crown Victoria and included that license plate number in the broadcast. (B17-18). Police spotted a black Crown Victoria driving near the Browntown address at which the suspicious vehicle was registered. (A114-120). When the driver of the Crown Victoria saw the police, he abruptly stopped the car, quickly reversed, and accelerated away. (A117). The officer saw two occupants in the car and noticed that the driver, Zaire Cephas, looked startled. (A117-18, 128). Police pursued Cephas, who sped and drove the Crown Victoria erratically to evade police. (A20-21, 44, 125). Cephas did not stop in response to police lights and sirens. (A118-19). The Crown Victoria struck the rear of a van at Maryland Avenue and West 2nd Street, but Cephas continued driving westbound on West 2nd Street to the I-95 onramp. (A121-22).

On I-95, the Crown Victoria slowed down and the passenger, Dixon, jumped out of the front passenger seat, fell onto the ground, then ran underneath I-95 while clutching his midsection with his right hand. (A22-24). Dixon threw something with his right hand. (A22, 27). After a foot chase, police captured Dixon. (A23). Police returned to the site where Dixon had thrown something and found a Ruger

9-millimeter P95 semiautomatic pistol. (A32-34). The gun had a shell casing stuck, or “stovepiped,” in it. (B20).

After Dixon jumped out of the Crown Victoria, Cephas accelerated and sped down I-95, where a front tire ruptured. (A123-24). The Crown Victoria veered to the shoulder, and Cephas jumped out while the car was still moving down I-95. (A125-26). Police pursued Cephas into the marsh and, after a struggle, took him into custody. (A127-30). The temporary tag affixed to the Crown Victoria was different than the tag broadcast to police that morning. (A139-40).

After the shooting, police showed Brown two photographic lineups and asked him to identify the shooter. (A59-60). Brown said Dixon’s complexion and beard were similar to that of the shooter. (A60-61, 63, 110-14). Police also showed Harrigan photographic lineups. (B3-4). Harrigan identified Dixon as the man with whom he had argued at the Rebel nightclub. (B4-5).

Dixon admitted to the police that he possessed the P95 Ruger 9-millimeter. (B45).⁹ The gun’s magazine – where the bullets are loaded before firing – could hold 15, possibly 16 bullet cartridges.¹⁰ (B35). Investigators recovered five casings

⁹ Dixon’s statement was admitted as an exhibit although it was not enumerated by the Prothonotary. (B40-42).

¹⁰ Detective Law explained that one experienced with the P-95 firearm could manipulate the weapon to add an additional, 16th, cartridge to the chamber before firing. (B35).

from the scene, one casing lodged in the firearm, and nine unfired cartridges in the magazine indicating Dixon's recovered firearm was fully loaded prior to the shooting earlier that day. (B21-31). Firearm expert, Carl Rone, determined that six cartridge cases, which included the one stuck in the firearm, and at least one of the spent project projectiles (A365) were fired from the 9-milimeter pistol Dixon threw when fleeing police. (A278-79).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DIXON’S SECOND MOTION FOR POSTCONVICTION RELIEF.

Question Presented

Whether the Superior Court abused its discretion in denying Dixon’s motion for postconviction relief.

Standard and Scope of Review

This Court reviews the Superior Court’s decision to deny a motion for postconviction relief for abuse of discretion.¹¹ “An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice.”¹² This Court reviews questions of law and claims of constitutional violations *de novo*.¹³

Merits of the Argument

Dixon argues that “[o]nly one piece of evidence linked [him] to the crime: the testimony of Carl Rone, the state ballistics expert, [who] opined that the gun found on Dixon was the gun used in the shooting,” and thus, it was Rone’s testimony that took the case from one that that “most likely could not withstand a judgment of acquittal to one that led to Dixon’s conviction.” (Amend. Op. Brf. at 13). Dixon

¹¹ *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

¹² *Harper v. State*, 970 A.2d 199, 201 (Del. 2009).

¹³ *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010) (citations omitted).

minimizes and misstates the evidence presented at trial and his argument is otherwise unavailing.

A. Procedural Bars to Relief

Before considering a motion for postconviction relief, the Court must first determine whether the defendant has satisfied the procedural requirements of Superior Court Criminal Rule 61.¹⁴ Rule 61(i)(1) prohibits the Court from considering a motion for postconviction relief unless it is filed within the applicable time limitation.¹⁵ Rule 61(i)(2) prohibits the filing of repetitive motions for postconviction relief, unless under 61(d)(2)(i), the movant “pleads with particularity that new evidence exists that creates a strong inference” of actual innocence; or, under 61(d)(2)(ii), “that a new rule of constitutional law, made retroactive to cases on collateral review” apply to movant’s case.¹⁶ Rule 61(i)(3) provides that “any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows (A) cause for relief from the procedural default and (B) prejudice

¹⁴ Because Dixon filed his motion for postconviction relief in November 2018, it is controlled by the version of Superior Court Criminal Rule 61 which was in effect at that time.

¹⁵ Del. Super. Ct. Crim. R. 61(i)(1).

¹⁶ Del. Super. Ct. Crim. R. 61(i)(2).

from the violation of movant's rights.¹⁷ Rule 61(i)(4) provides that any claim that has been formerly adjudicated is thereafter barred.¹⁸ Rule 61(i)(5) provides that any claim barred by Rule 61(i)(1)-(4) may nonetheless be considered if the claim is jurisdictional or otherwise satisfies the pleading requirements of (d)(2)(i) or (d)(2)(ii).¹⁹

Dixon filed this, his second motion for postconviction relief, on November 18, 2018, raising five claims.²⁰ Because Dixon's conviction was final on the date the Delaware Supreme Court issued its mandate on October 21, 2014,²¹ it is untimely. It is also repetitive.²² On appeal, Dixon raises only one of the five claims he presented to the Superior Court – newly discovered evidence regarding the credibility of the State's ballistic expert, Carl Rone.²³ Dixon's remaining five claims are waived based on his failure to brief or argue them in his opening brief on appeal.²⁴

¹⁷ Del. Super. Ct. Crim. R. 61(i)(3).

¹⁸ Del. Super. Ct. Crim. R. 61(i)(4).

¹⁹ Del. Super. Ct. Crim. R. 61(i)(5).

²⁰ *Dixon*, 2020 WL 5289927, at *2.

²¹ *See* Del. Super. Ct. Crim. R. 61(e)(2) and (i)(1).

²² *See* Del. Super. Ct. Crim. R. 61 (i)(2).

²³ *Dixon*, 2020 WL 5289927, at *3.

²⁴ *See Fatir v. State*, 2012 WL 1237782 (Del. 2012) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)); Supr. Ct. R. 14 (b)(iv)(vi).

Dixon attempts to avoid the bar to his repetitive filing by claiming that he has “ple[d] with particularity that new evidence exists that creates a strong inference” of his actual innocence. (Amend. Op. Brf. at 14 fn.1). But, as the Superior Court determined, Dixon fails to “plead with particularity” that the evidence of the State Firearms Expert’s arrest and guilty plea to falsifying business records creates a strong inference of Dixon’s actual factual innocence²⁵ of his convictions for Assault Second Degree, Possession of a Firearm During the Commission of a Felony and Resisting Arrest.

B. Dixon’s case is dissimilar from *Fowler v. State*

Rone was indicted in 2018 for criminal acts that occurred over a period of time in 2016 - 17.²⁶ The indictment alleged Rone falsified payroll records and was paid for time when he was not working. No allegation asserted Rone mishandled evidence or falsified documents related to his examination of evidence, or the reports he produced and to which he later testified.²⁷ He pled guilty to Theft by False

²⁵ *Id.* at *4.

²⁶ *See State v. Romeo*, 2019 WL 918578, at * 28 (Del. Super. Ct. Feb. 21, 2019) (citing *Former DSP Civilian Employee Arrested*, Delaware State Police Newsroom (May 8, 2018) <https://dsp.delaware.gov/2018/05/08/former-dsp-civilian-employee-arrested>).

²⁷ *See State v. Damiani-Melendez*, 2020 WL 3474144, at *2 (Del. Super. Ct. June 23, 2020).

Pretense and Falsifying Business Records in 2018.²⁸

“Since the discovery of Rone's misconduct, various convicted defendants have sought postconviction relief on the basis of the misconduct and the credibility issues Rone's misconduct potentially created.”²⁹ Here, Dixon relies on one such case, *Fowler v. State*.³⁰ In *Fowler*, the defendant was charged with offenses stemming from two separate shootings that were tried together at one trial. The State's theory was that the defendant was the shooter who used the same gun in both incidents.³¹ The State presented the testimony of four fact witnesses and the opinion testimony of Carl Rone. A Superior Court jury convicted Fowler, and his convictions were affirmed on direct appeal.³²

²⁸ *Sierra v. State*, 242 A.3d 563, 569 (Del. 2020).

²⁹ *Id.* at *3 (citing *See Fowler v. State*, 194 A.3d 16 (Del. 2018); *Phillips v. State*, 2019 WL 1110900, at *6 (Del. Mar. 11, 2010); *State v. Romeo*, 2019 WL 918578 (Del. Super. Ct, Feb. 21, 2019) (holding that evidence of Rone's credibility issues did not demonstrate an important change in the factual circumstances sufficient to warrant relitigation under Rule 61(i)(4)); *State v. Pierce*, 2019 WL 4771787 (Del. Super. Ct., Oct. 1, 2019) (denying defendant's motion because Rone's relevant participation in defendant's case occurred in 2009, while his misconduct occurred from 2016-2017); *State v. George*, 2018 WL 4482504 (Del. Super. Ct., Sept. 17, 2018) (“Defendant has presented no evidence tending to show that the [2009] trial testimony given by Mr. Rone was in any way false or misleading.”)).

³⁰ 194 A.3d 16 (Del. 2018).

³¹ *Sierra*, 242 A.3d at 570 (citing *Fowler*, 194 A.3d at 17).

³² *Id.*

During Superior Court postconviction proceedings, it emerged that the State had failed to provide Fowler with *Jencks* statements of the four key witnesses.³³ The Superior Court determined that the *Jencks* violations were harmless in an analysis that “heavily relied on ‘the fact that ballistic evidence linked the same weapon to both incidents [that] makes the evidence of [the defendant's] guilt in each separate incident mutually reinforcing.’”³⁴ Thus, “Rone's testimony was vital to both the State's trial case and the Superior Court's opinion because if one accepted the expert's testimony that the same weapon was present at each incident, it gave the jury and the Superior Court a basis other than eyewitness testimony to conclude that [the defendant] was the shooter.”³⁵

The news of Rone's financial misconduct emerged during Fowler's appeal of the Superior Court's denial of his postconviction motion to this Court. Answering Fowler's claims on appeal, the State argued that Rone's testimony was not important to its case because multiple eyewitnesses had testified that Fowler was the shooter at both shootings. However, the witnesses the State relied on to overcome Rone's now compromised testimony were the same four witnesses whose statements were

³³ *Id.*

³⁴ *Fowler*, 194 A.3d at 22 (quoting *State v. Fowler*, 2017 WL 4381384, at *6 (Del. Super. Sep. 29, 2017)).

³⁵ *Id.*

not provided to Fowler in violation of *Jencks*.³⁶ This Court stepped outside these competing arguments and determined that the burden was on the State to prove that both the *Jencks* violations and the Rone issue were harmless beyond a reasonable doubt, and that the State failed to meet that burden.³⁷ The Court found:

[N]o Rule 61 hearing will ever fully dispel the uncomfortable reality that Fowler had a trial where his defense counsel was denied timely access to four *Jencks* statements and where the ballistics evidence against him was presented by someone the state has now indicted for falsifying work records. Based upon the unusual confluence of events presented here and the standard of review we are required to apply, justice demands that we reverse the Superior Court's denial of Fowler's motion for post-conviction relief, vacate his convictions and remand for a new trial.³⁸

As this Court has stated, *Fowler* should be viewed in the context of the “unusual confluence of events” present in that case.³⁹ In *Fowler*, all of the key testimony used to convict the Defendant was called into serious doubt for different reasons.⁴⁰ But here, there was much more evidence beyond ballistics for the jury to consider and key witness statements were not entangled with *Jencks* issues.⁴¹ The Superior Court correctly distinguished the unusual circumstances in *Fowler* from the facts of this

³⁶ *Id.* at 570-71 (citing *Fowler*, 194 A.3d at 23-24).

³⁷ *Id.* at 571 (citing *Fowler*, 194 A.3d at 23)

³⁸ *Id.* at 27.

³⁹ *See Sierra*, 242 A.3d at 571 (citing *Fowler*, 194 A.3d at 27).

⁴⁰ *See Dixon*, 2020 WL 5289927, at *4.

⁴¹ *See Sierra*, 242 A.3d at 570.

case. Moreover, as argued more thoroughly below, since *Fowler*, it has been noted that Rone's misconduct is sufficiently dissimilar from his ballistics testimony to not be an issue and Dixon has provided nothing showing that Rone's trial testimony regarding ballistics was inaccurate or unreliable.

On direct appeal, this Court found that although neither witness positively identified Dixon as the shooter, Brown was able to identify the shooter as having a complexion and facial hair similar to Dixon's.⁴² Harrigan identified Dixon as the individual with whom he argued at the Rebel nightclub, and the Superior Court did not abuse its discretion in determining that Harrigan's testimony was relevant to the State's motive theory.⁴³

Around 10:30 – 11:00 a.m. on the day of the shooting, Harrigan saw Dixon at Bell's funeral and Dixon appeared mad, so Harrigan just left him alone. (A209). Harrigan then left with Brown and Summers. Very soon thereafter, when they were at a light, Brown saw a black Crown Victoria pull up behind them and the front seat passenger open his door, lean out and shoot at his vehicle, hitting Summers. The police sent out a dispatch for a black Crown Victoria involved in the shooting and the police added a potential tag number. Officer Martinez situated himself at the address associated with the suspicious tag and waited. Cephas and Dixon appeared

⁴² *Dixon v. State*, 2014 WL 4952360, at *1 (Del. Oct. 1, 2014).

⁴³ *Id.*

at the address, in a black Crown Victoria bearing temporary tags. They saw Officer Martinez and immediately retreated, leading several police vehicles on a high-speed chase through the City of Wilmington and onto I-95. Dixon bailed out of the front passenger seat of the vehicle on the southbound onramp and police quickly captured him after he discarded a Ruger 9mm firearm that he soon admitted was his gun. Detective Henry Law testified that six 9mm casings were found at the scene and in the gun and explained that these casings, combined with the nine projectiles he found in the gun's magazine yielded a total of 15 cartridges - the maximum capacity for that gun's magazine. While Rone did match most of the ballistics to that firearm to a reasonable degree of scientific certainty (A278-79),⁴⁴ that evidence was simply corroborated what was established through eyewitness testimony at trial. As the Superior Court determined “[a]ny credibility issues on Rone’s part would have “no effect [on] the reliability of these key pieces of evidence.”⁴⁵

To the extent that Dixon argues that the evidence against him was weak because the Superior Court granted a motion for judgement of acquittal on the charges of Assault First Degree and PFDCF against his co-defendant Zaire Cephas (Amend. Op. Brf. at 18), such argument is unavailing. The Superior Court found:

⁴⁴ Contrary to Dixon’s statements, Rone’s did not couch in terms of “absolute” conclusions. (See Amend. Op. Brf. at 10).

⁴⁵ See *Dixon*, 2020 WL 5289927, at *4.

Well, I think the bottom line is, in my view, the evidence against Mr. Zaire Cephas just isn't strong enough, looking at it in the light most favorable to the non-moving party; i.e., the State. []

But what we have is the defendant led the police on a chase, let Dixon out;

There was firearm tied to Dixon;

Uncertainty what the time period is, anywhere from 30 minutes to two-and-a-half or three hours, or so.

The altercation at the Rebel is not particularly motive-generating, I don't think.

Under all the circumstances, I think that Defendant Cephas' motion for judgment of acquittal as to Count 1 and Count II should be granted. (B49-50).

With Dixon, however, the Superior Court found that

“he was a front seat passenger, he was identified in a photo lineup; but most significantly, through the testimony of Carl Rone, the gun was located where he fled. Flight can be indicative of consciousness of guilt. The gun linked to him was found to be the gun that wounded Aaron Summers. So looking at the evidence in a light most favorable to the State, the standard hasn't been met with respect to the Defendant Dixon for those reasons and any other reasons that might have been advanced.” (B46).

C. The Court has found that Rone's Subsequent Criminal Conduct does not Relate to his Toolmark Work

Dixon argues that since the conclusion of Dixon's trial, “Carl Rone's credibility and integrity have been destroyed.” (Amend. Op. Br. At 19). But, Rone's criminal conduct did not impinge on his work as a toolmark examiner. Dixon's

claim falls far short of “ple[ading] with particularity that new evidence exists that creates a strong inference” that he is actual innocent,⁴⁶ as Rule 61 requires.

Subsequent to *Fowler*, in October 2018, the Delaware Superior Court, in *State v. Pierce*,⁴⁷ concluded that Rone’s expert testimony regarding ballistics was sufficiently dissimilar and attenuated from his falsification of his payroll records to not be an issue, finding:

The Court's limited finding for purposes of this hearing regarding Mr. Rone’s falsification of business records creates a significant issue that the Court has carefully weighed. Mr. Pierce is correct in that payroll records, chain of custody records, and testing records are all “business records.” In the Court's overall evaluation, however, the Court does not find the same motivation to be present when submitting records seeking extra pay that was not earned, compared to submitting allegedly false evidence logs and testing documentation when handling evidence. There is significant dissimilarity between these two types of business records. Likewise, the two types of duties at issue regarding Mr. Rone’s payroll submissions versus his expert testing and evidence processes have significant differences. As a final matter in the Court's evaluation, Mr. Rone’s false verifications in his payroll records occurred in 2016 and 2017. In contrast, Mr. Rone’s relevant participation as a link in the chain of custody for the subject casing was in 2009.⁴⁸

⁴⁶ See Rule 61(d)(2)(i).

⁴⁷ 2018 WL 4771787 (Del. Super. Ct. Oct. 1, 2018).

⁴⁸ *Id.* at *4.

Since that time, there have been other similar rulings.⁴⁹ For example, in *Phillips v. State*,⁵⁰ Jeffrey Phillips argued that the criminal charges against Rone tainted his 2014 trial.⁵¹ The Superior Court found that Phillips' conviction did not turn on Rone's testimony, there was no evidence of Rone's misconduct in 2014 and Phillips had not discredited other testimony and therefore he had not met his burden to justify relief.⁵² On appeal, Phillips argued that he should have been given an evidentiary hearing to determine whether Rone's conduct went back to the time of his trial.⁵³ Phillips argued that Rone's testimony was crucial to his conviction because it linked one of the guns to him, and it identified the shell casings near the scene of the crime, which was critical because no bullets were found.⁵⁴ Phillips asserted that challenging his credibility could have affected the verdict and that

⁴⁹ *State v. George*, 2018 WL 4482504, at *3 (Del. Super. Ct. Sept. 17, 2018) (Defendant has failed to show how it prejudiced him or creates a strong inference of actual innocence because it occurred subsequent to the trial and there is no evidence to indicate that Mr. Rone's testimony was unreliable or invalid), dismissing reconsideration, 2019 WL 338669 (Del. Super. Ct. Jan. 4, 2019); (*State v. Bezares*, 2020 WL 3474145, at *3 (Del. Super. Ct. June 25, 2020) (Rone's falsification of payroll records in 2016 and 2017 is sufficiently attenuated from his expert firearms work by both subject matter and time) (internal citations omitted)).

⁵⁰ 2020 WL 1487787, at * 5 (Del. Mar. 25, 2020).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Rone's fraudulent conduct was a specific act of “untruthfulness” that may be explored under evidentiary rules.⁵⁵

This Court found that Phillips failed to demonstrate that the Superior Court abused its discretion because Rone’s charges included providing false timesheets, that is, misconduct, during 2016 and 2017, and Phillips' trial was held in 2014. Even assuming there was cause for relief, this Court found that the Superior Court did not abuse its discretion by finding that Phillips did not show actual prejudice. The Court was unpersuaded by Phillips arguments that his case “turn[ed] on Rone’s testimony”³² because, as the Superior Court found, there were multiple witnesses who testified about identification, it was not a close case and Phillips did not discredit the remaining trial evidence. The Court found however that even if Rone’s testimony was critical, Phillips had failed to show that the later fraud—lying about time sheets for undeserved payment—bears any relation to the subject of his testimony.⁵⁶ The same holds true here.

The Superior Court found that at the time of Dixon's trial there was no evidence of Rone's misconduct that would have led defense counsel to cross-examine Rone differently. And there remains no evidence of misconduct committed by Rone in or before 2013. Nor is there any evidence that Rone did not do the work

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Pierce*, 2018 WL 4771787, at *4).

he testified about at Dixon's trial.⁵⁷ Dixon's argument that because there is new evidence of Rone's misconduct, he should be given a new trial or at a minimum an evidentiary hearing to determine what impact the newly discovered evidence would have had on the verdict is unavailing. Dixon's trial took place in 2013 and Dixon has not offered evidence that the evidence Rone provided at his trial was inaccurate. Rone's convictions for acts subsequent to Dixon's trial would likely be inadmissible. Rone's financial misconduct occurred years after Dixon fired a gun at Brown's car hitting Summers, and years after Dixon was convicted following a jury trial. Rone's after-the-fact credibility concerns do not create a strong inference that Dixon is actually factually innocent of the crimes charged. Moreover, Rone's misconduct evidence is merely impeachment evidence, and evidence that tends only to impeach testimony at trial is insufficient to establish actual innocence.⁵⁸

This Court has rejected *ad hoc* attacks on the credibility of witnesses when there is no evidence that the witness' credibility directly impacted the case.⁵⁹

⁵⁷*Dixon*, 2020 WL 5289927, at *4.

⁵⁸ See *Mason v. State*, 2020 WL 7392348, at *1 n.2 (Del. Dec. 16, 2020) (citing *Emmett Taylor*, 2018 WL 655627, at *1 (Del. Jan. 31, 2018); See also *State v. Brathwaite*, 2017 WL 5054263, at *2 (Del. Super. Ct. Oct. 23, 2017), *aff'd*, 2018 WL 2437233.

⁵⁹ See *Ira Brown v. State*, 108 A.3d 1201, 1206 n.30 (Del. 2015) (holding that the evidence of employee misconduct at the OCME was "impeachment evidence that came to light after Brown pled guilty and was sentenced [and] did not go to his actual innocence or affect the voluntariness of his plea"). See also *Anzara Brown v. State*, 117 A.3d 568, 581 (Del. 2015) (defendant not entitled to a new trial where he could

Likewise, the Supreme Court has rejected the same type of argument requesting an evidentiary hearing in cases where the trial and witness' testimony predated the alleged misconduct.⁶⁰

D. Dixon's claim that Rone's Testimony was False or Misleading is Procedurally Barred.

As part of his "new evidence" claim, Dixon attempts to raise a claim that Rone presented false and misleading testimony by bootstrapping a claim that Rone's subjective methodology has been the subject of increasing scrutiny, and that based upon a National Academy of Science Report, he should not be allowed to express an opinion with "certainty." (Amend. Op. Brf. at 24-25). Because this claim was not previously raised, it is procedurally barred under Rule 61(i)(3). Dixon fails to acknowledge that the claim is barred and therefore he does not set forth cause or prejudice and the claim remains procedurally defaulted and should not be considered. In any case, the claim is factually inaccurate and meritless.

not demonstrate that misconduct at the OCME affected his case); *Bunting v. State*, 2015 WL 2147188, at *3 (Del. May 5, 2015) (rejecting defendant's argument that he was entitled to relief based on misconduct at the OCME when he failed to allege or offer any proof that the misconduct compromised the integrity of his trial proceedings).

⁶⁰ *Cannon v. State*, 127 A.3d 1164, 1168 (Del. 2015).

The Association of Firearm and Toolmark Examiners (“AFTE”) is the leading international organization for firearms and toolmark examiners.⁶¹ The AFTE theory of toolmark comparison permits an examiner to conclude that two bullets or two cartridges are of common origin (i.e. fired from the same gun) when the microscopic surface contours of their toolmarks are in “sufficient agreement.”⁶² This theory acknowledges that there is a subjective component to the determination of “sufficient agreement,” which must necessarily be based on the examiner's training and experience.⁶³ Delaware courts have continued to recognize that the AFTE methodology is reliable. For example, in 2015, the Superior Court in *State v. Jeffrey Phillips*, cited the Third Circuit decision in *U.S. v. Otero* and that the AFTE theory is testable and has been tested.⁶⁴ Following the *Otero* Court's analysis, the Superior Court found that the AFTE theory satisfies the peer review and publication factor under *Daubert* and is generally accepted among professionals in the field of firearm and toolmark identification.⁶⁵

In *Phillips*, the Superior Court rejected a motion to exclude the testimony of the State's ballistics expert, Rone, and found Rone was qualified to testify as a firearms

⁶¹ *State v. Phillips*, 2015 WL 5168253, at *4 (Del. Super. Ct. Sept. 15, 2015).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (citing *U.S. v. Otero*, 849 F. Supp. 2d 425, 432 (D. N.J. 2012)).

⁶⁵ *Id.* at *5 & *7.

and toolmark identification expert and that the AFTE firearm and toolmark identification methodology was reliable under *Daubert*.⁶⁶ While noting that some courts have limited the scope of an examiner's testimony, the *Phillips* Court did not limit the scope of Rone's testimony.⁶⁷

Recently, in *State v. Gibbs*,⁶⁸ the Superior Court again found that "where the State's expert testimony is based on methodology previously held reliable under *Daubert*, the State has demonstrated by a preponderance of the evidence that the proposed expert testimony is reliable."⁶⁹ Citing *McNally v. State*⁷⁰ and *Phillips*, the Court noted that AFTE methodology is generally accepted among professional examiners as a reliable method of firearms and toolmark identification, and held that the State would have the opportunity to introduce evidence that suggests a nexus between both shootings, which the defense may challenge through cross-examination.⁷¹ In so ruling, the Court rejected the defense's argument that the expert's report delete any references to "match or identification," noting that the

⁶⁶ 2015 WL 5168253 (Del. Super. Sept. 2, 2015) (adopting reasoning of the District Court of New Jersey in *United States v. Otero*, 849 F. Supp. 2d 425, *aff'd*, 557 Fed. App'x 146 (3d Cir. 2014)).

⁶⁷ *Id.*

⁶⁸ 2019 WL 6709058 (Del. Super. Dec. 9, 2019).

⁶⁹ *Id.*

⁷⁰ 980 A.2d 364 (Del. 2009).

⁷¹ *Gibbs*, 2019 WL 6709058, at *3.

expert was not precluded from using those terms.⁷² However, the Court did limit the expert's ability to testify based on the parties' agreement that the expert should not testify as to being "100% certain as to his findings," noting that such a limitation was in line with the "current trend."⁷³ The limitations set forth in *Gibbs* do not apply retroactively and are not applicable to Rone's testimony in Dixon's trial because Rone testified to a reasonable degree of scientific certainty (A278-79). Rone did not testify regarding a "100 percent match," or "to the exclusion of all other guns," nor did he use the words "conclusively" or "absolutely." When the prosecutor asked if toolmark examination was like fingerprint analysis, Rone responded it was a "close similarity." (A265). Rone was subject to cross-examination on his testimony; Dixon's present attacks on the scientific basis of his testimony are meritless.

Dixon's argues that given the subjectivity of ballistic evidence coupled with the fact that "Rone committed fraud," it is doubtful Rone did a vigorous analysis or that he even conducted an analysis in his case. (Amend. Op. Brf. at 26). That argument is pure conjecture and lacks factual support. At Dixon's trial, Rone provided a report and pictures of the test fires and discussed them in detail on direct and cross-examination. (A255-99).

⁷² *Id.*

⁷³ *Id.* at *4.

The Superior Court did not abuse its discretion in denying Dixon's second motion for postconviction relief. Dixon has failed to overcome either procedural bar of Rule 61(d) and he does not warrant a new trial.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

/s/ Maria T. Knoll

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Dated: March 10, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TROY DIXON,)
)
Defendant-Below,)
Appellant,)
)
v.) No. 319, 2020
)
STATE OF DELAWARE,)
)
Plaintiff-Below,)
Appellee.)

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Dated: March 10, 2021

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