

OPINION

After a joint Superior Court trial, a jury found Michael Manley (“Manley”) and David Stevenson (“Stevenson”) guilty of First Degree Murder and related charges. At the penalty phase, the Superior Court followed the jury’s recommendations and sentenced both defendants to death.¹ Both of the defendants’ sentences were affirmed on direct appeal.² On November 2, 1998, the United States Supreme Court denied *certiorari*.³

On January 25, 1999, Manley filed a Motion for Postconviction Relief pursuant to Superior Court Rule 61, which this Court denied.⁴ On February 8, 1999, Stevenson filed a Motion for Postconviction Relief pursuant to Superior Court Rule 61, which this Court denied.⁵ On appeal, however, the Delaware Supreme Court vacated both defendants’ death sentences and ordered a new penalty hearing.⁶ The Delaware Supreme Court ordered that the new penalty hearing be held before a Superior Court Judge different from the judge who presided over the trial and first penalty hearing. This second judge was also to re-consider the defendants’ Motions for Postconviction

¹ *State v. Manley & Stevenson*, 1997 WL 27094 (Del. Super. Jan. 10, 1997).

² *Stevenson v. State*, 709 A.2d 619 (Del. 1998); *Manley v. State*, 709 A.2d 643 (Del. 1998).

³ *Manley v. Delaware*, 525 U.S. 893 (1998); *Stevenson v. Delaware*, 525 U.S. 967 (1998).

⁴ *State v. Manley*, 2000 WL 703812 (Del. Super. Apr. 27, 2000).

⁵ *State v. Stevenson*, 1999 WL 1568333 (Del. Super. Dec. 21, 1999).

⁶ *Stevenson & Manley v. State*, 782 A.2d 249 (Del. 2001).

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

Relief and any amendments thereto.

On September 7, 2001, Manley filed an Amended Motion for Postconviction Relief before the new Superior Court Judge. On March 26, 2003, Manley also filed a Motion to Preclude a New Penalty Hearing. On October 2, 2003, this Court denied both defendants' Motions for Postconviction Relief and Manley's Motion to Preclude a New Penalty Hearing.⁷ The Delaware Supreme Court affirmed these rulings on October 18, 2004.⁸

On December 6, 2005, after a new penalty hearing was held, the jury recommended death for both defendants. On February 3, 2006, this Court sentenced both defendants to death. On January 3, 2007, the Delaware Supreme Court affirmed both defendants' death sentences.⁹ On May 29, 2008, the United States Supreme Court denied *certiorari*.¹⁰

This is Manley's second Motion for Postconviction Relief, originally filed on January 25, 2008.

FACTS

The following facts are set forth by the Delaware Supreme Court in its 2007 opinion:

⁷ *State v. Manley & Stevenson*, 2003 WL 23511875 (Del. Super. Oct. 2, 2003).

⁸ *Manley v. State*, 846 A.2d 238 (Del. 2004); *Stevenson v. State*, 846 A.2d 239 (Del. 2004).

⁹ *Manley & Stevenson v. State*, 918 A.2d 321 (Del. 2007).

¹⁰ *Stevenson v. Delaware*, 550 U.S. 971 (2007); *Manley v. Delaware*, 550 U.S. 971 (2007).

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

In 1994, Stevenson was employed by Macy's Department Store in the Christiana Mall. While employed at Macy's, Stevenson used customers' credit card information to issue false gift certificates. Macy's security department employees, Parminder Chona ("Chona") and Kristopher Heath ("Heath"), investigated the matter. Stevenson was subsequently charged with theft and the matter was scheduled for trial in the Superior Court.

On the evening prior to Stevenson's scheduled court date, a black male wearing a long puffy black jacket knocked on the door to Heath's residence. His fiancée, Deborah Dorsey, answered. Dorsey informed the male that Heath was not home and the individual departed. Dorsey called Heath to tell him about the incident and that she was frightened. She also noted that the individual was not Stevenson, as she would have recognized him from her employment at Macy's.

On the morning of November 13, 1995, Heath was murdered in the parking lot of his residence at the Cavalier Country Club Apartments. Heath was shot in the back five times with a nine-millimeter handgun. The murder occurred on the same morning that Heath was to testify against Stevenson at his criminal trial. Upon hearing the gunfire, several residents at the apartment complex called police.

One resident, Lance Thompson, informed the police that he observed a black male run to and enter a mid-sized blue vehicle with faded and peeling paint. Thompson saw the license plate number and gave it to police. At this time, Patrolman Daniel Meadows of the New Castle County Police broadcasted the license plate number and vehicle

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

description over the police radio. It was soon discovered that the license plate was registered to Stevenson and his mother at 206 West 20th Street in Wilmington, Delaware.

Wilmington Police arrived in two squad cars at 206 W. 20th Street. The officers saw a car fitting the description given by Meadows arrive at the same time with two black men inside. The passengers started to exit the vehicle but reentered after observing the approaching officers. The suspects drove away with patrol cars in pursuit. After a short chase, the suspects fled on foot and were taken into custody.

The occupants of the vehicle were Manley and Stevenson. Manley matched the description of the shooter given by eyewitnesses. After Stevenson was apprehended and brought to police headquarters, police searched the patrol car used to transport him. On the floor was a slip of paper with the name, address and phone number of Chona, the other Macy's employee who investigated Stevenson for the theft along with Heath.

MANLEY'S CONTENTIONS

Manley has filed a motion, amended motion, and a second amended motion. In his motion as amended, Manley raises the following grounds for relief:

_____ *Ground One:* as a result of trial counsel's ineffectiveness and prosecutorial misconduct in the 1996 trial, readily available evidence demonstrating the defendant's innocence was not presented to the jury, which violated the defendant's constitutional rights; the prosecution's forensic expert, William Kinard, presented incomplete and unreliable evidence that counsel failed to properly dispute; counsel

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

failed to develop and present evidence that challenged the prosecution's witnesses Susan Butler, Phillip Hudson, and Debra Dorsey, all of whom connected the defendant to the murder; counsel failed to develop and present available evidence to dispute the prosecution's contention that the defendant's reserve status made him more likely to have committed the murder; counsel failed to develop and present available evidence to dispute the prosecution's theory that the defendant was the shooter; counsel failed to hire an identification expert who could have disputed the prosecution's witnesses whom identified the defendant as the shooter; counsel failed to challenge the admission of Melissa Megalong's irrelevant and speculative testimony, which was that on the night before the murder, Ms. Megalong heard a knock at the door and two male voices; counsel failed to elicit testimony that the defendant was not present during a conversation between Kevin Powlette and Stevenson concerning Stevenson wanting to purchase a gun; and the defendant was prejudiced by counsel's errors because had the aforementioned evidence been presented, there is a reasonable probability that the verdict would have been different.

_____ *Ground Two*: counsel was ineffective in the 2005 penalty phase for failing to investigate, develop, and present available evidence disputing aggravation in violation of the defendant's constitutional rights; counsel failed to properly dispute the incomplete and unreliable prior testimony of forensic expert William Kinard; counsel elicited harmful and false testimony regarding the camouflage jacket and failed to develop and present available evidence to dispute the contention that the jacket belonged to the defendant; counsel failed to develop and present available evidence to dispute the prosecution's contention that the defendant's reserve status

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

made him more likely to have committed the murder; counsel failed to challenge the harmful and materially misleading prior testimony of Phillip Hudson, whom identified the defendant; counsel failed to develop and present evidence that challenged the prosecutions witnesses Susan Butler, Phillip Hudson, and Debra Dorsey, all of whom connected the defendant to the murder; counsel failed to develop and present available evidence to dispute the prosecution's theory that the defendant was the shooter; counsel failed to hire an identification expert who could have disputed the prosecution's witnesses whom identified the defendant as the shooter; and the aforementioned errors, individually and cumulatively, provide a compelling basis for doubting the reliability of the sentencing verdict.

Ground Three: the prosecution failed to disclose exculpatory impeachment evidence in its possession during both the 1996 trial and 2005 penalty phase, which violated the defendant's constitutional rights; and counsel was ineffective during both the 1996 trial and 2005 penalty phase for failing to request material impeachment evidence after prosecution witnesses testified on direct examination.

Ground Four: counsel was ineffective during the 2005 penalty phase for failing to investigate, develop, and present readily available evidence regarding the defendant's background and history; the substance of the testimony that counsel elicited involved little more than general descriptions of the defendant's devotion to his family, the absence of his father, his academic accomplishments, his employment and desire to work, and his kindness to others; counsel presented no expert witnesses; during closing arguments, counsel failed to direct the jury's focus towards mitigation considerations; and had these errors not occurred, there is a reasonable probability

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

that the capital sentencer would have returned a life verdict.

Ground Five: as a result of counsel's ineffectiveness and prosecutorial misconduct during the 2005 penalty phase, prior testimony and other hearsay statements were admitted in violation of the defendant's constitutional rights; the prosecution admitted the prior testimony of at least eight witnesses, all of whom were claimed to be unavailable; counsel was deficient for failing to inquire into the unavailability of the witnesses; the prosecution presented materially misleading and/or false information in proffers to the Court regarding witness unavailability; the prosecution failed to meet its burden for admission under Rule 804 of the Delaware Rules of Evidence; and counsel was ineffective for failing to litigate these issues.

Ground Six: the defendant's 2005 penalty phase was improperly joined with Stevenson in violation of the defendant's constitutional rights.

Ground Seven: the defendant's constitutional rights were violated in the 2005 penalty phase because the Court's instructions skewed and limited the jury's consideration of mitigation and therefore, the defendant is entitled to a new sentencing hearing; the Court failed to articulate the mitigation defense that the defense pursued; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Eight: the defendant is entitled to relief from his 1996 conviction and 2005 sentencing because the Court and counsel failed to conduct *voir dire* to determine the racial attitudes of the jurors in this capital case in violation of the defendant's constitutional rights; and counsel was ineffective for failing to properly raise and litigate these claims.

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

Ground Nine: the defendant is entitled to relief from his 1996 conviction and his 2005 sentencing because in the 2005 penalty phase, the prosecution used peremptory strikes against women and minorities during jury selection in violation of the defendant's constitutional rights; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Ten: the defendant is entitled to relief from his 1996 conviction because the prosecution deliberately exercised a peremptory strike against a minority juror, Phyllis J. Stewart, during jury selection in violation of the defendant's constitutional rights; the defendant has met his burden under *Batson*; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Eleven: as a result of court error and ineffective assistance of counsel during jury selection for the 2005 penalty phase, the defendant was denied his constitutional rights; that two biased jurors were empaneled; Steven Roberts was a biased juror and should have been excused because he indicated that he had a bias of favoring the credibility of a police officer over other witnesses; Joyce Lennon was a biased juror and should have been excused; the Court improperly excluded prospective jurors who expressed a concern about the death penalty even though the prospective jurors did not state that they could not follow the law; the Court improperly excused prospective jurors who gave negative responses regarding whether they could recommend the death penalty; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twelve: the defendant was denied his right to a fair and impartial jury during the 1996 trial in violation of his constitutional rights; counsel was ineffective

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

when counsel allowed jurors to see the defendant in prison clothing, which prejudiced the defendant; the Court and counsel failed to exclude three jurors who demonstrated bias: Rebecca Keesler, Terrence Pendergast, and Patricia Romanoski; sitting jurors were exposed to outside influences including a “circus-like” atmosphere in the courtroom, police officers sitting around the victim’s family, and other jurors dozing off during proceedings; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Thirteen: the admission of victim impact testimony during the defendant’s 2005 penalty phase violated the defendant’s constitutional rights; the prosecution presented inflammatory, emotional, and cumulative evidence and argument about the decedent’s personal characteristics, his relationship with family members, and the effect of the decedent’s death and the shooting itself on the family; and counsel was ineffective for failing to object to the improper victim testimony, to request a limiting instruction, and for failing to raise these issues in the prior proceedings.

Ground Fourteen: the prosecution’s continuous misconduct throughout the 1996 trial violated the defendant’s constitutional rights; the prosecutor used prejudicial, inflammatory, and misleading remarks during opening and closing; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Fifteen: the prosecution’s continuous misconduct throughout the 2005 penalty phase violated the defendant’s constitutional rights; the prosecutor used improper and inflammatory opening and closing remarks; the prosecution repeatedly mischaracterized and mislead the jury as to the evidence presented, particularly the

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

camouflage jacket, Susan Brown's testimony, the Macy's theft and related gang/drug activity, and Debra Dorsey-Crowell's testimony; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Sixteen: the defendant's constitutional rights were violated when counsel failed to move for Justice Ridgely's recusal from the defendant's panel on direct appeal; Justice Ridgely's recusal was required because he submitted factual averments in response to the Delaware Supreme Court's inquiry regarding Judge Barron's recusal; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Seventeen: the defendant's constitutional rights were violated in the 2005 penalty phase when counsel failed to raise and litigate the denial of the defendant's right to a fair and impartial sentencing tribunal; and a new sentencing tribunal was required because the Court considered and disposed of the defendant's prior motion for post-conviction relief.

Ground Eighteen: counsel failed to effectively raise and litigate the defendant's right to a new trial in 1996 after there was the appearance of impropriety with the assignment of Judge Barron.

Ground Nineteen: the defendant is entitled to relief because of the cumulative prejudicial effect of the overall errors in this case.

Ground Twenty: the Court's accomplice liability instruction in the 1996 trial and 2005 penalty phase violated the defendant's constitutional rights; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twenty-One: as a result of ineffective counsel during the 1996 trial,

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

the jury was permitted to view the defendant in prison clothing in violation of the defendant's constitutional rights; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twenty-Two: the defendant's constitutional rights were violated in the 1996 trial when the Court improperly instructed the jury regarding the application of evidence of Stevenson's bad acts against the defendant; the defendant's constitutional rights were violated in the 2005 penalty phase when the Court failed to provide a limiting instruction regarding the use of Stevenson's bad acts against the defendant; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twenty-Three: the Court's reasonable doubt instruction in the 2005 penalty phase violated the defendant's constitutional rights; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twenty-Four: the defendant's constitutional rights were violated in the 1996 trial when the prosecution admitted hearsay statements of Stevenson against the defendant; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twenty-Five: the defendant's constitutional rights were violated in the 1996 trial by joining the defendant's guilt phase with Stevenson; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twenty-Six: trial counsel's failure to request a change of venue or venire during the 1996 trial prejudiced the defendant in violation of the defendant's constitutional rights.

Ground Twenty-Seven: Delaware's capital sentencing statute violated the

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

defendant's constitutional rights; and counsel was ineffective for failing to properly raise and litigate these claims.

Ground Twenty-Eight: the death penalty is unconstitutional, facially and as applied, because the Delaware statutory scheme fails to genuinely narrow the class of persons eligible for the death penalty in violation of the defendant's constitutional rights; and counsel was ineffective for failing to properly raise and litigate these claims.

DISCUSSION

Under Delaware law, before this Court addresses the merits of Manley's claims for postconviction relief pursuant to Superior Court Criminal Rule 61, it will apply the procedural requirements of Rule 61(i).¹¹ This will be Manley's second postconviction motion decided by this Court.¹² This second postconviction motion stems from Manley's second penalty hearing, the decision of which became final on May 29, 2007 after the United States Supreme Court denied *certiorari*. Manley filed the motion on January 25, 2008. Thus, the bar of Rule 61(i)(1) does not apply to this motion because it was timely filed.

The bar of Rule 61(i)(2) prevents consideration of any claim not asserted in a prior postconviction motion. The Court may consider such claim if it is warranted in

¹¹ See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹² Technically, this is Manley's third postconviction motion, however, this Court reconsidered Manley's postconviction motion that was filed after his 1996 trial as a result of the Delaware Supreme Court's remand. *State v. Manley & Stevenson*, 2003 WL 23511875 (Del. Super. Oct. 2, 2003).

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

the “interest of justice.”

The bar of Rule 61(i)(3) prevents consideration of any claim not asserted in the proceedings leading to the judgment of conviction. A movant avoids this bar by demonstrating (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant’s rights.

The bar of Rule 61(i)(4) prevents consideration of any claim that was formally adjudicated in the proceedings leading to the judgment of conviction or in an appeal. The Court may reconsider such claim if it is warranted in the “interest of justice.”

Lastly, the procedural bars of Rule 61(i)(1), (2), and (3) are inapplicable to a jurisdictional claim 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.”¹³

Grounds Twenty, Twenty-Two, Twenty-Four, and Twenty-Five, raise issues concerning the accomplice liability instruction that was given to the jury in the 2005 penalty hearing, the bad acts instruction that was given to the jury in the 1996 trial, the admission of several hearsay statements in the 1996 trial, and the improper joinder with the co-defendant in the 1996 trial. These issues were fully litigated in the trial court proceedings, direct appeals, and/or the defendant’s first Motion for Postconviction Relief. Therefore, I find that these issues are barred by Rule 61(i)(4). I also find that reconsideration of these issues is not warranted in the interest of

¹³ Superior Court Criminal Rule 61(i)(5).

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

justice. Additionally, *Grounds One, Three, Eight, Ten, Twelve, Fourteen, Eighteen, Twenty* through *Twenty-Two*, and *Twenty-Four* through *Twenty-Six* raise issues that concern the defendant's 1996 trial.¹⁴ To the extent that the instant postconviction motion raises issues from the 1996 trial that were not included in the defendant's first postconviction motion, I find that those issues are barred by Rule 61(i)(2). I also find that reconsideration of those issues is not warranted in the interest of justice.

Grounds Two through *Nine, Eleven, Thirteen, Fifteen* through *Seventeen, Twenty-Two, Twenty-Three, Twenty-Seven, and Twenty-Eight* raise issues concerning counsel's failure to present/develop evidence disputing aggravation, counsel's failure to request exculpatory impeachment evidence, counsel's failure to develop mitigation evidence, the admission of hearsay statements, the improper joinder with the co-defendant in the second penalty phase, errors with jury instructions, questioning during *voir dire*, errors with jury selection, the admission of victim impact testimony, prosecutorial misconduct, counsel's failure to move for the recusal of Justice Ridgley, the impartiality of this Court, Delaware's capital sentencing statute, the constitutionality of the death penalty, and ineffective assistance of counsel. I find that the issues raised by these grounds are barred by Rule 61(i)(3) because apart from the claims of ineffective assistance of counsel, these issues could have been raised in the trial court proceedings or in the defendant's direct appeal. Therefore, I find that the only cause of relief from the procedural bar of Rule 61(i)(3) is the alleged ineffective

¹⁴ Some of these grounds also raise issues concerning Manley's 2005 penalty hearing, which will be addressed below.

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

assistance of counsel.

Ineffective Assistance of Counsel

The defendant's ineffective assistance of counsel claims are not subject to the procedural bar default rule, in part, because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal.¹⁵ For this reason, many defendants 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."¹⁶ According to the United States Supreme Court:

[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.' Ineffective assistance of counsel, then, is cause for a procedural default.¹⁷

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

¹⁵ *Wing v. State*, 690 A.2d 921, 923 (Del. 1996).

¹⁶ *State v. Gattis*, 1995 WL 790961, at *3 (Del. Super. Dec. 28, 1995).

¹⁷ *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (internal citations omitted).

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

must engage in the two part analysis enunciated in *Strickland v. Washington*¹⁸ and adopted by the Delaware Supreme Court in *Albury v. State*.¹⁹

The *Strickland* test requires that the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.²⁰ 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.²¹ In setting forth a claim of ineffective assistance of counsel, a defendant must make and substitute concrete allegations of actual prejudice or risk summary dismissal.

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established. 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."²² In other words, if the court finds 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. Furthermore, the defendant must rebut a "strong presumption" that trial

¹⁸ 466 U.S. 668 (1984).

¹⁹ 551 A.2d 53, 58 (Del. 1988).

²⁰ *Albury*, 551 A.2d at 58 (citing *Strickland*, 466 U.S. at 688).

²¹ *Id.* (citing *Strickland*, 466 U.S. at 694).

²² *Strickland*, 466 U.S. at 697.

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

counsel's representation fell within the "wide range of reasonable professional assistance," and this court will eliminate from its consideration the "distorting effects of hindsight" when viewing that representation.²³

Grounds Two and Four, evidence disputing aggravation and mitigation evidence: the defendant contends that counsel could have developed and presented evidence to challenge prosecution witnesses who connected the defendant to the murder; counsel could have hired an identification expert to dispute witnesses whom identified the defendant as the shooter; counsel could have elicited more testimony from witnesses regarding the defendant's devotion to his family, the absence of his father, and other mitigation factors; and counsel did not present expert witnesses on the subject of mitigation.

The State contends that the defendant has failed to establish any prejudice as a result of counsel's failure to present such evidence.

After considering the parties' submissions concerning this motion and the post-evidentiary hearing memorandum filings, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test.

Ground Three, exculpatory impeachment evidence: the defendant contends that the State failed to disclose several pieces of exculpatory impeachment evidence and counsel was ineffective for failing to request such evidence after the State's witnesses testified on direct presumably in the 1996 trial. The defendant contends that the following pieces of evidence should have been disclosed: the audio and video tapes

²³ *Id.* at 689.

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

of witness interviews from what appears to be the police investigation that occurred before the 1996 trial; and the criminal record of Phillip Hudson, whose 1996 testimony was admitted in the 2005 penalty hearing. The defendant contends that at the time of the 2005 penalty hearing, Mr. Hudson was actually incarcerated in Arizona for felony theft offenses and therefore, Mr. Hudson's criminal record should have been disclosed so that it could be used for impeachment.

The State contends that the evidence relating to the 1996 trial is procedurally barred; and the defendant has failed to establish any prejudice as a result of the prosecution's failure to disclose and counsel's failure to request Mr. Hudson's criminal record because Mr. Hudson's testimony actually occurred in 1996. Thus, Mr. Hudson's testimony would not have been impeachable by a subsequent conviction.

The defendant appears to contend that this claim arises out of the 2005 penalty hearing, however, much of the evidence that the defendant contends should have been disclosed actually arises out of the 1996 trial, which the Court already found as procedurally barred. As to the evidence concerning the 2005 penalty hearing, after considering the parties' submissions, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test. Mr. Hudson's criminal conviction occurred subsequent to his 1996 testimony and therefore, I find that there was no prejudice to the defendant.

Ground Five, admission of hearsay statements: the defendant contends that counsel was ineffective in that counsel did not object to the State introducing witnesses' prior testimonies from the 1996 trial due to witness unavailability. The

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

defendant's contentions on this ground are without merit. This 2005 penalty hearing was conducted nearly nine years after the first penalty hearing. It is understandable that some of the witnesses who testified in the first penalty hearing would be unavailable and therefore, prior testimony would be used. I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Ground Six, improper joinder with the co-defendant: the defendant contends that the Court erred in failing to order and counsel was ineffective in failing to request severance of this joint penalty phase because Stevenson presented mitigation evidence that was not presented by the defendant, which invited the jury to compare the relative culpability of each defendant rather than evaluating each defendant individually.

The issue of severance has been addressed many times in the proceedings below and is only being addressed here because the defendant contends that he failed to raise the severance issue in his most recent direct appeal as a result of ineffective assistance of counsel. At the conclusion of the penalty hearing, the jury was instructed to consider the evidence for and against each defendant separately. After reviewing the parties' submissions, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Grounds Seven, Twenty-Two, and Twenty-Three, errors with jury instructions: the defendant contends that there were errors with the jury instructions as follows: that the Court's mitigation definition restricted the jury's consideration of mitigation

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

evidence by limiting the jury's focus to evidence that makes the defendant's conduct at the time of the crime less serious, thereby requiring a nexus between the mitigation evidence and the defendant's conduct at the time of the event; that the Court listed the aggravation factors for the jury but only generally referred to "mitigation"; that counsel failed to request a jury instruction on how to consider the bad acts evidence regarding Stevenson even though such an instruction was given in the 1996 trial; and that reasonable doubt was improperly defined. The defendant contends that the Court's definition of reasonable doubt was as follows, "beyond a reasonable doubt is proof that leaves you firmly convinced." The defendant contends that firmly convinced is a standard of proof by clear and convincing evidence and therefore, is a lesser standard than required by the Constitution. The defendant contends that these errors in the jury instructions prejudiced the defendant because the State's burden of proof was diminished.

After reviewing the jury instructions and the contentions set forth by the defendant in the defendant's submissions, the State's responses thereto, and the submissions following the evidentiary hearing, I find that all of the defendant's contentions regarding the jury instructions are without merit. I find that the jury instructions were a correct recitation of the law and therefore, the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Ground Eight, questioning during voir dire: the defendant contends that counsel was ineffective for failing to inquire into racial biases of potential jurors. The Court held an evidentiary hearing and questioned jurors regarding this issue. Two

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

jurors could not be located at the time of the evidentiary hearing and ten jurors testified that race played no role in their deliberations. I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Grounds Nine and Eleven, errors with jury selection: the defendant contends that the State used a total of eight peremptory strikes against women, three of whom were African-American; that the first six of the State's peremptory strikes were against women; that of the nine African-Americans not excused for cause from the venire, the State used peremptory strikes to exclude five; that this pattern clearly demonstrated gender and race discrimination in violation of the Constitution; that counsel was ineffective for failing to object; that several jurors should have been excused due to potential biases against the defendant; and that jurors should not have been excused who expressed a concern about the death penalty.

After reviewing the parties' submissions, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test. During jury selection, the State offered race and gender neutral reasons for exercising its peremptory strikes. Had counsel objected, the Court likely would have allowed these jurors to be excused. Additionally, the record shows that the Court thoroughly inquired into whether to excuse a potential juror, which demonstrates that the Court properly exercised its judicial discretion.

Ground Thirteen, admission of victim impact testimony: the defendant contends that the admission of victim impact testimony was inflammatory, cumulative, and violated the defendant's constitutional rights; and counsel was ineffective for failing

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

to object to the admission of such testimony.

After reviewing the parties' submissions, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test. The victim impact testimony was properly admitted in the 2005 penalty hearing. Additionally, the jury was instructed on how such testimony should and should not be used.

Ground Fifteen, prosecutorial misconduct: the defendant contends that the State engaged in prosecutorial misconduct by using improper and inflammatory opening and closing remarks, and by mischaracterizing evidence; and that counsel was ineffective for failing to raise and litigate the issue of prosecutorial misconduct.

After reviewing the defendant's submissions, and the State's responses thereto, I find that the defendant's contentions on this claim are without merit. The remarks made during opening and closing were proper, as were the prosecution's characterizations of the particular pieces of evidence. I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test.

Ground Sixteen, the recusal of Justice Ridgely: the defendant contends that Justice Ridgely should have been excused from the defendant's panel on direct review of his 2005 death sentence because Justice Ridgely submitted factual averments in response to the Delaware Supreme Court's inquiry regarding Judge Barron's recusal. The defendant's contentions on this claim are without merit. I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test.

Ground Seventeen, the impartiality of this Court: the defendant contends that the judge who presided over the second penalty hearing should have recused himself

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

because this judge denied the defendant's first Motion for Postconviction Relief; and counsel was ineffective for failing to continue raising this issue. The fact that the same judge denied the defendant's first Motion for Postconviction Relief does not automatically render that judge biased in all subsequent proceedings. Therefore, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Grounds Twenty-Seven and Twenty-Eight, capital sentencing and the constitutionality of the death penalty: the defendant contends that Delaware's capital sentencing statute is unconstitutional because it allows the Court to find that aggravation outweighed mitigation by a preponderance of the evidence, which violates the defendant's Sixth Amendment right to a unanimous jury determination finding beyond a reasonable doubt of essential facts that increase a defendant's statutory punishment; and Delaware's statutory scheme regarding the death penalty is unconstitutionally vague and arbitrary. I find that the defendant's contentions on this issue have no merit.

Ground Nineteen, cumulative errors: the defendant contends that he is entitled to relief because of the cumulative prejudicial effect of the errors in the overall case. I find that the defendant's contentions on this issue have no merit. The defendant has failed to show actual prejudice under the second prong of the *Strickland* test.

I further find as to all grounds that there is no jurisdictional claim and no 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.

State v. Michael R. Manley
ID. No. 9511007022 (NCC)
May 29, 2014

CONCLUSION

For the foregoing reasons, the defendant's Motion for Postconviction Relief is *denied*.

IT IS SO ORDERED.

President Judge

oc: Prothonotary
cc: File