

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

STATE OF DELAWARE,)	
)	
)	ID No. 0611011396
v.)	
)	
KEINO CHRICHLOW,)	
Defendant.)	

ORDER

Upon Defendant's Motion for Postconviction Relief - DENIED

1. On June 1, 2007, a jury convicted Keino Chrichlow of nineteen armed robberies and related charges stemming from an orchestrated bank robbery. Chrichlow's co-defendant, Andre Bridgers, held many customers at gunpoint while a third man, Craig Hunter, cleaned-out several tellers' cash drawers. Chrichlow, waiting outside in a car stolen for the occasion, was the getaway driver. Hunter pleaded guilty and testified against Bridgers and Chrichlow. As discussed in prior decisions and below, the crime could have been dreamed-up in Hollywood.

2. Post-trial, the court reduced many of the robbery convictions, those involving customers, to aggravated menacing. Even so, on November 30, 2007 as to Bridgers, and January 17, 2008 as to Chrichlow, Defendants received lengthy sentences, involving many mandatory years in prison.

3. The State filed a direct appeal on November 19, 2007, challenging the court's having reduced the robberies involving customers. Due to the post-trial order's wording, the State had to file its appeal before Defendants were sentenced. Although it makes no meaningful difference here, it would have been better practice if the order had not become final until both Defendants had been sentenced, thus triggering simultaneous rather than serial appeals.

4. Significantly, as to the pending motion, on December 28, 2007, Bridgers filed a timely cross-appeal. Chrichlow, through counsel, opposed the State's appeal, but no appeal of Chrichlow's convictions was filed. After full briefing and two oral arguments, the Supreme Court, *en banc*, rejected the State's appeal and affirmed Defendants' convictions.¹ Chrichlow filed an appeal *pro se*, but by then it was too late and he was rebuffed by the Supreme Court in July 2009.

5. Next, on January 26, 2010 as to Chrichlow, and March 1, 2010 as to Bridgers, Defendants filed timely, *pro se*, motions for post-conviction relief under Superior Court Criminal Rule 61. With permission, Chrichlow amended his motion on March 2, 2010. The Prothonotary properly referred the motions under Rule 61(d)(1) for preliminary consideration.

¹ *State v. Bridgers*, 988 A.2d 939 (Del. Super. 2007), *aff'd* 970 A.2d 257 (Del. 2009) (TABLE).

6. Consistent with *Horne v. State*,² the court called for affidavits from Chrichlow's trial and appellate lawyers. After the affidavits were submitted, Chrichlow and the State filed replies. The State filed on April 29, 2011. Chrichlow requested and received extensions for his final reply.

7. Meanwhile, on June 25, 2010,³ the court summarily dismissed Bridgers's motion and it is no concern now.

8. Because Chrichlow was convicted as an accomplice and he did not file a cross-appeal, his claims are more complicated and challenging. As mentioned, Chrichlow was the getaway driver. He never entered the bank. Trial counsel did not request and the court did not give the detailed jury instruction on accomplice liability under 11 *Del. C.* § 274 and *Allen v. State*.⁴ Therefore, Chrichlow had at least one issue potentially meriting direct appeal.

9. There are two ways for the court to act where a criminal defendant like Chrichlow blamelessly misses out on a direct appeal. Usually, the court simply re-sentences, thus triggering a new appeal period. Alternatively, as *Middlebrook v.*

² 887 A.2d 973 (Del. 2005).

³ *State v. Bridgers*, 2010 WL 2977940 (Del. Super. June 25, 2010) (Silverman, J.).

⁴ 970 A.2d 203 (Del. 2009).

State suggests, the court can address the issues through Superior Court Criminal Rule 61.⁵ That also will send up the potential appellate issues.

10. In this unusual case, the alternative approach is best because the potential appellate issues were considered by Chrichlow's lawyers. Trial counsel did not want a § 274 instruction and appellate counsel saw no reason to pursue it. Thus, the effectiveness of their assistance to Chrichlow is bound-up in the issues themselves. If the court simply re-sentences Chrichlow and his appeal were to fail, as it likely would because a § 274 instruction was not requested, that will inevitably trigger another post-conviction relief proceeding questioning counsel's decision not to ask for the instruction. By considering the issues and the lawyers' effectiveness together now, the courts can resolve everything one way or another, once and for all.

11. The State argues that the pending motion is untimely as it was filed more than one year after the convictions became final.⁶ The State's argument is too sharp. Chrichlow missed the deadline because he was trying to get the Supreme Court to hear him, *pro se*, on direct appeal. Chrichlow has shown cause and prejudice for his default.⁷ Moreover, the interest of justice dictates that the courts

⁵ *Middlebrook v. State*, 815 A.2d 739, 743 (Del. 2003) (citing *Dixon v. State*, 581 A.2d 1115, 1117 (Del. 1990)).

⁶ Super. Ct. Crim. R. 61(i)(1).

⁷ Super. Ct. Crim. R. 61(i)(3).

consider the claims presented here.⁸ A § 274 instruction would not have helped Chrichlow in the end, but he is entitled to have the courts confirm that is so. At least, his appellate counsel should have filed a notice of appeal and a Supreme Court Rule 26(c) brief. Then, Chrichlow could and would have made his claims, and the Supreme Court would have considered them. The court emphasizes that this approach is called for because Chrichlow always insisted on being heard and he did not rest.

12. The facts were presented in some detail in the post-trial decision and they are summarized above. The State's case was very strong. Among other things, when Defendants were arrested shortly after the robberies, the police found the money, weapons and disguises in the car to which Chrichlow and the others had transferred after abandoning the stolen getaway car. Assuming, as Chrichlow emphasizes, that trial counsel failed to highlight several inconsistencies between the victims' testimony and their statements to the police, those inconsistencies were trivial and easily explainable as products of excitement, or otherwise. As a whole, the evidence was crystal clear.

13. As the motion largely turns on § 274 and *Allen*, it bears mention that Chrichlow was also charged with armed robbery in Maryland. That fact was

⁸ Super. Ct. Crim. R. 61(i)(4).

potentially relevant to any claim that Chrichlow did not know he was getting involved in an armed robbery in Delaware. Chrichlow's trial counsel was concerned, rightly so, about not opening a door to that. The risk of unfair and devastating prejudice was enormous.

14. Otherwise, the State offered little evidence bearing directly on whether Bridgers or Hunter revealed to Chrichlow that they would display a deadly weapon during the bank robbery. Hunter told the jury once, without elaboration, that the weapons were in Chrichlow's sight. Indirectly, however, it defies common sense that Chrichlow thought Bridgers and Hunter were going to rob a crowded bank without a threat of armed violence. Again, the bank was full of customers and tellers, all of whom had to be held at bay by one man while the other inside-man took the money.

15. Trial counsel's affidavit offers reasoning about the § 274 issue. First, he explains that he did not want to raise the issue and risk the State's responding by trying to put the pending Maryland armed robbery into evidence to show Chrichlow's probable expectations about the Delaware robberies. Second, he explains that he was aware of § 274, but he was pursuing a not guilty verdict by emphasizing the instruction that Chrichlow's mere presence at the scene of the bank robbery was not enough to convict him as an accomplice.

16. Trial counsel's approach to the evidence on Chrichlow's state of mind was astute. The State did not focus much on Chrichlow, compared to Bridgers and Hunter. So, Chrichlow's counsel left well-enough alone. Had he drawn attention to the issue at trial, the State could easily have refocused on Chrichlow by asking Hunter more specific questions about Chrichlow's knowledge and, in the process, that would have drawn the jury's attention to Chrichlow. That is true, even without the State's bringing up the Maryland case.

17. Chrichlow argues, as discussed above, that the evidence as to his intent was sketchy. Thus, he contends instructing the jury to consider his specific intent would likely have prompted conviction for robbery second-degree. The arguments about the instruction on intent is different from the evidentiary argument. Consistent with this court's practice, trial counsel could have asked for § 274 instruction after the evidence had closed and it was too late for the State to react. The argument for the instruction is important because Chrichlow's prison sentence would likely have been much less if he had not been convicted of any crime carrying a mandatory sentence. He makes the same argument about menacing as a lesser-included offense of aggravated menacing.

18. Trial counsel's approach to the lesser-included instruction presents a judgment call. The record shows Chrichlow's trial counsel was generally invested

on Chrichlow's behalf. He filed pretrial motions and worked for a plea. (The plea bears passing mention as Chrichlow is now arguing for conviction on lessers, but he was not interested in a plea unless both co-defendants also plead.) Counsel was actively engaged during the trial and his overall defense strategy was reasonable.

19. As mentioned, trial counsel was advancing the defense that Chrichlow was merely present at the scene, not a participant. Had it worked, Chrichlow would have been acquitted. Counsel observes in his affidavit that by asking for an instruction on lessers he would have had to argue in the alternative, which seldom works and would have undermined the entire defense.

20. Even in hindsight, trial counsel's tactical decision to forgo an attempt for lessers was consistent with his strategy: seek acquittal. Moreover, it is not reasonable to believe that even if it were substandard, which it was not, counsel's tactic was prejudicial to Chrichlow. Arguing in the alternative usually appears insincere. And, as presented, the State's evidence was impressive. The crimes were elaborate and highly planned. The robbers drove from Maryland to case the bank the day before the robbery. During the robbery, Chrichlow was in a stolen car at the bank. As part of the getaway, he switched to his own car. That corroborates Hunter, the third robber's, testimony to the effect that it was all a joint venture. As also presented, the notion that Chrichlow knew he was involved in a daylight bank

robbery, yet he thought no weapons would be displayed, defies common sense to the point of being fanciful. Accordingly, Chrichlow's § 274 argument fails to meet either of *Strickland v. Washington*'s prongs.⁹

21. Chrichlow's other arguments are not close. He makes the same § 274 argument about his convictions for aggravated menacing. Again, the difference between aggravated menacing and menacing is the display of a deadly weapon,¹⁰ just like the difference between first and second degree robbery. So, Chrichlow's § 274 argument about the aggravated menacing has the same infirmities as his § 274 argument about the armed robbery convictions.

22. Chrichlow's final claim against trial counsel is that the convictions for robbery in the first degree and possession of a firearm during commission of a felony violate the double jeopardy prohibition. Chrichlow relies on the dissent in *LeCompte v. State*.¹¹ Possession of a firearm during commission of a felony, however, punishes actual possession of a firearm during a crime. That discourages gunplay by criminals and those who resist them. Robbery in the first degree punishes terrorizing people by making them believe they are facing death, whether they truly

⁹ 466 U.S. 668, 687 (1984) (“[T]he defendant must show that counsel's performance was deficient . . . [and] . . . the deficient performance prejudiced the defense.”).

¹⁰ *Poteat v. State*, 840 A.2d 599, 606 (Del. 2003).

¹¹ 516 A.2d 898 (Del. 1986) (Walsh, J., dissenting).

are or not. The crimes are different. A defendant can commit robbery first degree while unarmed. A defendant can commit possession of a firearm during commission of a felony without committing robbery. If, however, a robber decides to actually possess, not merely to pretend to possess, a firearm during a robbery, the robber can be found guilty of the separate offenses that flow from his decisions.¹² Similarly, each robbery is a separate felony, so the robber can be found guilty of a firearm charge for each robbery.¹³

23. It is not clear what issues Chrichlow wanted to raise on appeal. Perhaps, as the State argues, some of those issues were not appropriate for direct appeal. Nevertheless, it appears that Chrichlow wanted an appeal and even if counsel rightly discounted its prospects, counsel should have perfected one. Thus, it can be said that appellate counsel was ineffective. It appears that counsel's negative assessment of Chrichlow's appellate issues is correct, but Chrichlow should at least have a chance to present them.

¹² See *Robertson v. State*, 630 A.2d 1084, 1093 (Del. 1993) ("Separate convictions for a deadly weapon offense, for each felony the defendant committed while in possession of a deadly weapon, is consistent with the deterrence goal of the statute and that such multiple weapon convictions were supported by the statute's plain language.").

¹³ See, e.g., *Yelardy v. State*, 945 A.2d 595 (Del. 2008) (Upholding Yelardy's conviction on multiple counts of Robbery in the First Degree and Possession of a Firearm During the Commission of a Felony.).

24. Finally, the court observes that in his reply to appellate counsel's affidavit, Chrichlow, for the first time, offers an elaborate argument to the effect that he was convicted for crimes of which he was not accused. He heavily cites the docket. The argument is out-of-order in two ways. First, that sort of claim should have been raised up-front, not in a final reply, so that it could have been addressed by counsel and the State. More importantly, it appears that Chrichlow is relying on an outdated docket. As the record shows, and as mentioned at the outset above, Chrichlow was convicted on the nineteen, surviving counts and related counts from the amended indictment. The criminal action numbers on the sentence order jibe with the amended indictment and the verdict.

25. Because of the mandatory terms, Chrichlow has received a very long prison sentence for crimes committed at a single bank on a single occasion, where no one was physically injured and Chrichlow stayed outside. That invites close scrutiny. Even so, there is no reasonable basis to believe that the verdict was unjustified, nor that another trial would turn out better for him. Chrichlow insisted on going to trial, apparently for his own reasons. Anyway, this is the result and as serious as it is, it does not appear the outcome is attributable to counsel's shortcomings. The court sees no principled basis for postconviction relief.

26. Considering what the court heard at trial along with the motions, it does not appear that appointment of a third lawyer for Chrichlow and an evidentiary hearing are desirable.

For the foregoing reasons, Defendant's amended motion for postconviction relief is **DENIED**. The Prothonotary **SHALL** cause Defendant to be notified.

IT IS SO ORDERED.

Date: December 28, 2011

/s/ Fred S. Silverman
Judge

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