

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

STATE OF DELAWARE

v.

TZE POONG LIU

Defendant

)
) **CRIMINAL ACTION NUMBER**
)
) IN-88-03-1013-R2 IN-88-03-1017-R2
) IN-88-03-1019-R2 -IN-88-03-1020-R2
) IN-88-04-0837-R2 – IN-88-04-0841-R2
)
) ID No. 88001915DI

Submitted: December 2, 1011

Decided: February 29, 2012

MEMORANDUM OPINION

*Upon Motion of Defendant for Post-Conviction Relief - **DENIED***

Appearances:

Paul R. Wallace, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State of Delaware

James J. Haley, Jr., Esquire, of Ferrara & Haley, Wilmington, Delaware, Attorney for
the Defendant Tze Poong Liu

HERLIHY, Judge

Tze Poong Liu has filed his second motion for post-conviction relief. The motion consists of four claims: (1) his three felony murder convictions cannot stand; (2) prosecutorial misconduct; (3) use of alleged perjured testimony; and (4) ineffective assistance of counsel. Based on *Williams v. State*¹ and *Chao v. State*,² as the State concedes, his felony murder convictions will be vacated. Those convictions will be reduced to manslaughter and Liu will be re-sentenced accordingly.

The Court holds that his remaining three claims are procedurally barred and with no applicable means of relief from those bars, or that these claims lack substantive merit. He has also moved for a new trial. His motions are DENIED.

Procedural History³

This case has an unusual procedural history which is necessary to review. Liu was (and is) a co-defendant with Vicky Chao. The history of their cases is inextricably intertwined and important to understand in order to frame the issues now presented. They were both charged with the intentional murder of three members of the William Chen family (his wife and two children), of felony murder of that family because they died as a result of a deliberately set fire, conspiracy to murder and attempted murder of William Chen. Their trials were severed.

¹ 818 A.2d 906 (Del. 2002).

² 931 A.2d 1000 (Del. 2007).

³ This judge did not preside over Liu's trial or those of his co-defendant Vicky Chao. Nor did he rule on Liu's first motion for post-conviction relief. That judge has retired from this Court.

Chao was tried first. She was convicted, of among other charges, three counts of intentional murder and three counts of felony murder. Her convictions were upheld on direct appeal.⁴ The State's primary witness, Chen, testified in her trial. Only at Liu's subsequent trial, did it become known that Chen had perjured himself in significant ways regarding his ongoing relationship with Chao, even while he was married (his wife was one of the murder victims).

In Liu's trial, Chen provided far more detail, much of it substantive, about his relationship with Chao. Liu was, nevertheless, convicted of three counts of intentional murder and three Counts of felony murder. Those convictions were upheld on direct appeal.⁵ The Supreme Court, however, reversed his three convictions for conspiracy to commit murder and collapsed them into just one such conviction and remanded the case for appropriate re-sentencing. The mandate was issued September 3, 1993. Liu was resentenced on the one conspiracy count on October 22, 1993.

On November 23, 1994, Liu moved, *pro se*, for post-conviction relief. It was denied on February 17, 1995.⁶ In 1994, Chao moved for a new trial, her primary claim being that Chen had lied in her trial about the extent of his relationship with her. It is the extent to which he testified about it and its depth in Liu's trial which, she

⁴ *Chao v. State*, 604 A.2d 1351 (Del. 1992).

⁵ *Liu v. State*, 628 A.2d 1376 (Del. 1993).

⁶ *State v. Liu*, 1995 WL 413449 (Del. Super. Feb. 17, 1995).

claimed, warranted a new trial. The trial judge concurred. He made these observations in his opinion granting her new trial motion:

In the present case, however, the new evidence clearly demonstrates that one of the State's primary witnesses committed perjury at defendant's trial. Moreover, the State concedes in its reply brief that the witness perjured himself.

• • • •

After reviewing the record, the Court is satisfied that the State's primary witness, Mr. Chen, committed perjury at defendant's trial. Defendant claims that Mr. Chen falsely testified about the frequency of visits and the length of his stay at apartment 2C in New York in the fall of 1987. She points out that while he testified at her trial that he only went to New York on occasion, he testified at Liu's trial that he lived in apartment 2C for as much as two months at a time. Defendant also argues that Mr. Chen himself admitted to lying under oath. The State contends that a fair reading of Mr. Chen's testimony regarding apartment 2C does not establish that perjury occurred as to length of stay. Moreover, the State argues that Mr. Chen admitted to committing perjury only as to the nature and extent of his relationship with defendant and nothing else.

It is a disingenuous argument to claim that defendant has not satisfied her burden because her specific allegation does not technically establish that Mr. Chen committed perjury on one issue when it is clear perjury was committed on another issue. To the contrary, the record clearly shows that a material State witness perjured himself on a highly relevant issue in the case, motive.

• • • •

The lynchpin of the State's case, however, was the theory that after Mr. Chen's marriage, defendant became a woman scorned, obsessed with the idea of having Mr. Chen and that if she could not have him then no woman would. This "fatal attraction" theory was the framework in which the facts and evidence were presented to the jury in its opening and closing arguments.⁷

⁷ *State v. Chao*, 1995 WL 412364, at *2-4 (Del. Super. Feb. 17, 1995).

It is noteworthy that the opinions denying Liu's motion for post-conviction relief and granting Chao's motion for a new trial were issued on the same day. The divergence in these two cases, thereafter, continued and widened. Chao was re-tried, and convicted of three counts of felony murder but acquitted of the three counts of intentional murder.

Without detailing all of Chao's subsequent procedural history, the Supreme Court later reversed her three felony murder convictions.⁸ In short, it reversed itself from its 1992 opinion on felony murder in her direct appeal.

Liu initially appealed the 1995 denial of his second motion for post-conviction relief. It is what happened in that process which forms one of the grounds for ineffective assistance of counsel in the instant motion. The appeal was withdrawn. It was withdrawn because counsel, who had represented him at trial and on direct appeal, also represented him in the new appeal, convinced him to withdraw the appeal, indicating he would file a motion for a new trial.

The appeal was "voluntarily" dismissed in July 1995. Counsel, however, did not file a motion for a new trial as promised but Liu himself did on November 22, 1995. The Court forwarded that motion to counsel, but still no motion was filed. In February 1996, Liu, again acting on his own, moved to have counsel dismissed and new counsel appointed. In May 1996, the Court denied that request noting that counsel was waiting for preparation of the trial transcript and had also been tied up in a series

⁸ *Chao v. State*, 931 A.2d 1000.

of trials further delaying preparation of the motion. There were further exchanges over several years between the Court and counsel and between Liu and the Court, but still, no new trial motion was ever filed.

The docket shows that six years elapsed from the time Liu was sending letters to the original judge to the date he filed, *pro se*, the current motion for post-conviction relief. He complained his letters were forwarded to his counsel and that still nothing was happening. This judge has no explanation for that gap. The present motion was filed August 2, 2007. The Court promptly appointed new counsel for him but there was a conflict with that counsel and a second attorney was appointed. That new counsel filed a restated motion for post-conviction relief on January 9, 2008.

Following an office conference, a schedule was established for an exchange of briefing. New counsel missed his deadlines and after much prodding, a new schedule was established which included the filing of an amended motion. This time, the amended motion was filed timely. In place of a hearing, Liu was to submit an affidavit, as the issues seemed to be resolvable without the need for a hearing. Liu timely submitted his affidavit which the Court forwarded to prior counsel for a response. That, in turn, was done timely and then forwarded to current counsel for Liu's input. That came through Liu's reply to the State's answer to the amended motion and an affidavit from Liu.

Factual Background

The factual background of the murders is also needed to put all of this in context. It is found in the opinion denying Liu's first motion for post-conviction relief:

William Chen's (Chen) wife, daughter and mother were killed in a fire that was deliberately set at his Claymont home located on Compass Drive in the early morning hours of March 9, 1988. Chen testified that he went down to the first floor because he had been awakened by smoke and noise and saw the figure of a female intruder in the living room. At first, he assumed the figure was that of his mother but later stated that it was Chao. Chen opened the front door to let the smoke out and was forced out of the house as flames flashed through his home. Gasoline had been poured strategically around the house to block every major exit from the home. A witness, Steven Green, had given a taped statement to an investigating deputy attorney general purportedly stating that he had seen someone around Chen's house before the fire started.

The ensuing investigation revealed that Chen had been involved in a turbulent adulterous relationship with a woman from New York City named Vicky Chao. There was a love triangle involving defendant, Chao and Chen. Chen then testified that Chao had come to his Claymont home nine days before the fire, argued with his wife and mother and threatened to cause "big trouble."

During Chao's interview by the authorities, she implicated **Liu**. She claimed **Liu** wanted to kill Chen and forced her to drive down with him from New York City to Delaware in his yellow taxicab early that morning. During the trip to Delaware, **Liu** stopped to fill a plastic jug with gasoline. At approximately 4:30 a.m. on the day of the fire, a neighbor of Chen witnessed a yellow cab with two occupants driving very slowly on a street adjacent to Compass Drive. The car went slowly down to the end of the street which was a cul-de-sac and turned off its lights. The neighbor testified that the occupants appeared to be looking for a particular house. The cab went back up that street, turned onto Compass Drive and drove up to the victims' house. When they arrived at Chen's home, Chao waited in the cab while **Liu** exited the car. Chao stated that when **Liu** returned to the car, his hand was bleeding and he said that he had set fire to the house.

A forensic chemist found traces of gasoline in **Liu's** taxicab and on his pants and shoes seized from his New York apartment on March 10, 1988. In addition, a toll collector working at the Delaware Memorial

Bridge on the morning of March 9, 1988 saw defendant in a taxi cab with a passenger crossing from Delaware to New Jersey. Despite defendant's statement to the authorities that he had never been to Delaware, defendant had driven Chao to Delaware nine days before the murder.

Liu and Chao were both arrested in March of 1988 and indicted on six counts of First Degree Murder and related charges of Attempted Murder, Arson, Burglary, and Conspiracy. The trials were severed and the State decided to prosecute Chao first. Her trial began on July 11, 1989 and a jury returned a verdict of guilty on all charges on August 2, 1989. Chao's convictions were affirmed on appeal. **Liu's** trial began on March 11, 1991 and he was convicted on all charges on June 1, 1991. On appeal, the Supreme Court reversed the multiple convictions of conspiracy but affirmed the remaining convictions.⁹

Liu's Claims/State's Response

As noted in the beginning of this Court's opinion, one of Liu's claims is that his felony murder convictions should be vacated. The State agrees and says he should be re-sentenced, instead, on three counts of manslaughter. In an opinion on this same issue, Chao's similar felony murder convictions were reduced to manslaughter, and she was re-sentenced accordingly.¹⁰ For the identical reasons outlined in that opinion, Liu's three felony murder convictions will be vacated and convictions for the three counts of manslaughter will be entered. He will be re-sentenced accordingly.¹¹

Next, Liu argues that there was prosecutorial misconduct, namely "surprise" witnesses – fellow inmates and a correctional officer testifying about his English

⁹ *State v. Liu*, 1995 WL 413449, at *1-2 (**emphasis added**).

¹⁰ *State v. Chao*, ID No. 88001884 (Del. Super. June 19, 2008).

¹¹ To the extent this issue has been litigated previously and would be barred by Superior Court Criminal Rule 61(i)(4), the Court is granting relief based on the "interest of justice" means of relief from that bar.

language difficulty. His next ground for relief raises the issue of Chen and his “perjured” testimony claiming he lied not only at Chao’s trial but also in his.

His fourth ground for relief is a series of itemized claims falling under the general claim of ineffective assistance of counsel. Rather than list them here, each will be discussed separately later in this opinion. Since Chen’s perjury at Chao’s trial warranted a new trial, he seeks a new trial for himself for the same reason.

The State’s response to the claims, other than the felony murder claim, is that they are procedurally barred. Further, it contends, there are no means of relief from these bars.

Discussion

Before undertaking a review of the claims Liu presents, the Court is required to determine if there are any procedural impediments to doing so.¹² To appreciate whether there are applicable bars, it is instructive to see what Liu raised in his direct appeal and in his earlier motion for post-conviction relief. On direct appeal Liu sought review of the trial judge’s denial of his motion to suppress arguing (1) his language/cultural barriers rendered his *Miranda*¹³ waiver invalid; (2) the trial judge’s failure to suppress evidence seized from his apartment, a search resulting from a consent similarly challenged; and (3) failure to suppress evidence seized from his

¹² *Richardson v. State*, 3 A.3d 233, 237 (Del. 2010).

¹³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

taxicab. On direct appeal, Liu also challenged the accuracy of the interpretation of the proceedings and contested he could not be convicted of felony murder and also of intentional murder. He also contested the jury instruction that he could be convicted as an accomplice or principal and that the jury needs not be unanimous of which the two he was as long as it was unanimous about his guilt. Finally, Liu initially argued that the trial judge erred when it gave a voluntariness instruction regarding his confession.¹⁴ All of these claims were rejected.¹⁵

Liu filed his first motion for post-conviction relief on November 23, 1994. He was proceeding *pro se*. Counsel was not appointed to represent him. His motion proffered these grounds for relief: (1) the search of his New York apartment was illegal; (2) denial of indictment, preliminary hearing, change of venue, of speedy trial; (3) that he was held on unreasonable bail; (4) evidence admitted contrary to rules of evidence, (5) insufficient evidence to support intentional murder; (6) sandbagging the defense in rebuttal; (7) withholding of *Brady*¹⁶ material; (8) deprivation of right of confrontation; and (9) ineffective assistance of counsel.

¹⁴ At oral argument on appeal, Liu conceded this argument had no merit. Nevertheless, the Supreme Court discussed it.

¹⁵ As noted earlier, one other issue he appealed was the three conspiracy convictions.

¹⁶ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

This Court considered all of those claims and rejected them either on substantive grounds or that they were procedurally barred.¹⁷ The claim against counsel was that he was inadequately prepared and that he had not filed certain pre-trial motions, namely dismissal for lack of speedy trial. The Court's rejection of his separate claim of denial of his right a speedy trial resolved, in effect, that part of his claim against counsel. Liu argued that counsel did not argue issues that would have led to an acquittal or reduction in his sentences. Liu also criticized counsel for not introducing the statement of Steven Green.¹⁸ Liu claimed that Green had told the police he had seen Chen outside his house before the fire started. That, of course, would conflict with Chen's testimony that he saw a female figure inside his house just before the fire started. The Court in deciding Liu's first motion for post-conviction relief approached Green's statement from two perspectives. One, whether there had been a *Brady*¹⁹ violation, and two, whether Liu's counsel had been ineffective in not introducing it or presumably not having him testify. The Court found neither of Liu's claims about Green had merit. It reached that conclusion because Chao had raised the same *Brady* issue about Green in her motion for a new trial.

When she did, the Court had the State produce Green's statement for an *in camera* inspection. That inspection revealed Green had seen Chen outside after the fire

¹⁷ *State v. Liu*, 1995 WL 413449.

¹⁸ Green's statement was an issue in Chao's trial also.

¹⁹ *Brady v. Maryland*, 373 U.S. 83.

as Chen was banging on the door. The Court found no *Brady* violation in the *Chao* case and restated that reasoning in rejecting Liu's *Brady* claim about Green and his claim of ineffective assistance of counsel.²⁰

Liu appealed that decision. While on appeal, Liu's trial counsel became involved to some extent or became attorney of record. The following correspondence occurred:

Dear Mr. Liu:

As you know the Delaware Supreme Court has denied my Motion to Remand your case to seek a new trial. I have filed a Motion to Withdraw as your counsel on appeal, and a Motion to Extend the deadline to file an opening brief. I shall let you know what the court decides.

It would be my recommendation to you that you voluntarily dismiss your current appeal and permit me to pursue the new trial motion in Superior Court. I believe there is virtually no possibility that you will win the appeal, but a chance does exist that a Motion for New Trial will be granted.

If you do not want to voluntarily dismiss the appeal I shall have to wait until the conclusion of the appeal before filing the motion in Superior Court.

Please let me know how you intend to proceed.

Very truly yours,

[Trial Counsel]²¹

Counsel subsequently sent this letter to the Supreme Court:

²⁰ *State v. Liu*, 1995 WL 413449, at *11-12.

²¹ Liu's *Pro Se* Motion for Post-conviction Relief, Aug. 2, 2007.

Dear Madam Clerk:

I am filing this letter as a response to your letter of June 20, 1995 in connection with the above-captioned matter. Simultaneous with this letter I am also filing a Notice of Voluntary Dismissal.

In response to the specific inquiries raised in your letter I note the following:

- a) When I filed the Motion to Withdraw as counsel copies were mailed to Mr. Liu. When I met with Mr. Liu he indicated that he had received them. We reviewed the contents of the motion at that meeting.
- b) He was advised that he could file a written response. During the course of the discussions he advised me that he would not oppose the motion but would prefer that I stay in the case. We discussed that I would have to review Judge Gebelein's opinion and determine whether that would be possible. Subsequent to that meeting Mr. Liu attempted to file a voluntary motion for dismissal which was forwarded to my office. I have now discussed the various options with Mr. Liu and he has requested that I dismiss the appeal and file a Motion [sic] for New Trial in Superior Court; and
- c) As a result there is no response from Mr. Liu to be filed with the Court.²²

Counsel sent a copy of that letter to Liu:

Dear Mr. Liu:

Enclosed please find a copy of my letter to the Court and Notice of Voluntary Dismissal which was filed on July 26, 1995. Once the mandate is received and jurisdiction returns to Superior Court I shall file the Motion for a New Trial.

Very truly yours,

[Trial Counsel]²³

²² *Id.*

The Supreme Court dismissed the appeal as requested in late July, 1995. Counsel, however, did not file a motion for a new trial. Liu, on the other hand, filed one on his own on November 22, 1995. The trial judge forwarded it to counsel.²⁴ Liu made critical comments about counsel in a letter to the Court and then in April 1996 moved for new counsel.²⁵ That was denied. Over a period of several years, thereafter, there continued to be correspondence between Liu, the Court and counsel. From 2001 to 2007 nothing happened until the current motion was filed.

The Court has reviewed the history to better analyze and focus on whether any procedural bars apply and, if so, whether there are means of relief of from any of these bars.

Several claims are procedurally barred. They are that the State produced so called “surprise” witnesses – fellow inmates and a corrections officer. This issue was knowable at the time of Liu’s direct appeal and knowable when he filed his first motion for post-conviction relief. His conviction became final in 1993 and this claim, now made in his second motion in 2007 is time barred.²⁶

There is another reason the time bar applies. In April 1997, Liu filed for post-conviction relief. It was rejected, by another judge, for non-compliance because he had

²³ *Id.*

²⁴ Docket No. 212.

²⁵ Docket No. 214.

²⁶ Super. Ct. Crim. R. 61(i)(1).

not used the Court's form for such motions.²⁷ Along with the rejection notice, the Prothonotary sent him the proper form to use. He did not re-file his motion using the correct form. His current motion, originally filed *pro se*, was also rejected because he failed to use the correct form. But only several weeks later did Liu file the motion using the correct form. He was at that time still representing himself.

In his 1997 "motion" Liu raised the same issue of the "surprise" prisoner witnesses and the correctional officer witness. These witnesses testified at his suppression hearing. At the time of his trial, Rule 61(i)(1) had a three year window for post-conviction motions to be filed once the conviction was final. His 1997 "motion" was filed just over three years from his conviction becoming final on direct appeal.²⁸

There is a means of relief from this procedural time bar. Rule 61(i)(5) provides:

The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction 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.

The Court sees nothing in this claim which rises to that level and which would operate to provide relief from the time bar in Rule 61(i)(1).

²⁷ Docket No. 219.

²⁸ The Court is not using or considering what Liu filed in 1997 as an actual prior motion for any purposes under the procedural bars of Rule 61(i). It contains details not found in the current motion which are nevertheless helpful to the resolution of Liu's current motion.

Liu's claim about the "surprise" inmate witnesses and the correctional officer witness is also barred as previously adjudicated.²⁹ As his 1997 "motion" sets out, these witnesses testified at the pre-trial suppression hearing concerning his statement and his consent to search his apartment. Their testimony concerned his ability to understand English and cultural issues in waiving *Miranda* rights and consenting to the apartment search. All of the questions regarding any language barrier or cultural issues were thoroughly reviewed first by this Court after the suppression hearing then by the Supreme Court in its decision affirming his convictions.³⁰ As the issue was thoroughly considered and adjudicated, this Court sees no interest of justice warranting reconsideration. Further, though stated somewhat differently, this claim is a re-packaging of an adjudicated claim. This Court does not consider such "re-packaged" claims.³¹

In sum, Liu's claim of prosecutorial misconduct because of co-called surprise witnesses, etc., is barred.

Of greater note, however, is his claim about Chen's testimony. There is no doubt Chen lied at Chao's first trial minimizing his relationship with Chao and that those lies and the State's reliance upon them (not knowing then they were lies) to show her revenge motive were the reasons Chao was given a new trial. The trouble with

²⁹ Super. Ct. Crim. R. 61(i)(4).

³⁰ *Liu v. State*, 628 A.2d at 1379-1382.

³¹ *Flamer v. State*, 585 A.2d 736, 748-50 (Del. 1990).

Liu's claim about Chen is that it was during *his* trial that Chen's perjury at Chao's trial came out. In other words, the jury in Liu's trial knew all of this, yet still convicted him.

Liu does not share the same basis for a new trial as Chao did. The state did not rely on Chen's perjury to show Liu's motive for participating in the murders as it had in Chao's original trial. His jury was aware of Chen's perjury. There was much independent evidence, both in quality and quantity, tying him to the conspiracy and the actual participation in the murder. To the extent that "fairness of justice" would warrant granting a new trial, this Court sees no need. There is no new evidence showing a need to do so.

The discussion of the role of Chen's perjury during the Chao trial which led to her getting a new trial overlaps with and leads necessarily to a discussion of Liu's claim of ineffective assistance of counsel.

The reason is obvious. On the same day the original judge denied his first motion for post-conviction relief, it granted Chao's motion for a new trial.³² On advice of counsel, Liu voluntarily dismissed his appeal of the denial of his first motion for post-conviction relief. It was done, as the record shows, because counsel (1) did not believe there was any merit to the appeal, but (2) more importantly, to let him file a

³² *State v. Chao*, 1995 WL 412364.

motion for new trial. That was certainly Liu's understanding why his appeal was dismissed.

That motion was never filed. Its contents or grounds, therefore, are unknowable. It would be a fair and obvious assumption that it would have included, at least, the same ground as Chao's motion: Chen's perjury.

There are other claims of ineffective assistance of counsel in addition to the failure to file the motion for new trial, but before discussing them, the grounds he needs to show for such a claim need to be set out.³³ To establish a claim of ineffective assistance of counsel Liu must demonstrate (1) counsel's performance fell below an objective standard of reasonableness and (2) such deficient performance caused the defendant actual prejudice.³⁴ To meet the prejudice prong, Liu has to show that but for counsel's errors, the result of the proceeding would have been different.³⁵ He also has to make specific and concrete claims of actual prejudice and substantiate them.³⁶

Liu's list of claims of ineffective assistance does not contain an explicit ground that counsel failed to file a motion for a new trial based on Chen's perjury. It is,

³³ The Court notes that there is no explicit claim of ineffectiveness for this failure, but a fair reading of his original *pro se* motion and other claims makes it apparent this is a claim.

³⁴ *Scott v. State*, 7 A.3d 471, 475 (Del. 2010).

³⁵ *Guy v. State*, 999 A.2d 863, 870 (Del. 2010).

³⁶ *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

however, clearly subsumed in several of the grounds but also, of course, in his general claim about Chen's testimony. His specific claims are:

1. [Trial counsel's] reliance on his "conflict counsel" contract with the Court made him anxious to avoid disturbing the Court and the State of Delaware so he refrained from advocating Liu's interests aggressively.
2. [Trial counsel] allowed an (sic) FBI agent to sit on the jury.
3. [Trial counsel] lied to Liu and advised him that the State would release him.
4. [Trial counsel] failed to subpoena eyewitness who had seen William Chen and Vicky Chao outside the house on the night of the fire.
5. [Trial counsel] persuaded Liu to dismiss his appeal of this Court's February 17, 1995 decision denying his prior Rule 61 petition.
6. Mr. Liu refrained from testifying at trial on [trial counsel's] advice.³⁷

Liu's first claim lacks the requisite specificity and is no more than innuendo, and is not concrete. If the first claim bares *any* relationship to trial counsel's failure to move for a new trial after the appeal was voluntarily dismissed, Liu has a claim. Claim number five above about that appeal dismissal is related, too, of course. The Court views the appeal dismissal and the unfiled motion for a new trial to be the most serious issue raised. Before proceeding with the analysis of it, pertinent portions of trial counsel's affidavit responding to Liu's claims need to be set out:

7. Mr. Liu then filed a pro se motion under Superior Court Rule 61 which was denied;

³⁷ Def.'s Am. Mot. for Post-Conviction Relief, ¶ 8.

8. An appeal was filed with the Delaware Supreme Court;
9. Counsel met with Mr. Liu to discuss the appeal versus filing a Motion for a New Trial;
10. Counsel may have written to Mr. Liu but no longer has the file on this matter to assist in refreshing his recollection;
11. Following those discussions Mr. Liu agreed to have the matter in the Delaware Supreme Court dismissed for the purposes of pursuing the new trial application;
12. It is my recollection that Petitioner and counsel agreed on some points to be raised in the application but not in total;
13. Counsel recalls it taking some time to prepare a draft given his schedule and the length of the transcript;
14. Counsel recalls sending a draft of the motion to Mr. Liu but does not have a copy to provide the court or the parties;
15. At some point given the allegations made by Mr. Liu counsel did not proceed further on the motion. Counsel cannot identify a time period when that occurred;
16. Counsel at all times believed in the validity of Mr. Liu's new claims for a new trial as being justified in the interest of justice – i.e. Mr. Chen admitted lies during testimony and subsequent decisions in the Chao case;
17. Counsel believes that sometime in 1998 he was under the belief that Mr. Liu would be appointed new counsel;
18. My review of the docket shows that new counsel was not appointed until 2007.³⁸

The letters between Liu and trial counsel³⁹ make it clear Liu agreed to counsel's advice not to pursue the appeal on the condition or promise that counsel would file such

³⁸ Trial Counsel's Aff., Docket No. 254.

a motion. He never did. His affidavit makes it clear that it would have been based, if filed, on Chen's perjury at Chao's trial.

There is no need for prolonged discussion of counsel's performance. First, there was no objective standard violated when counsel recommended voluntary dismissal of the Rule 61 appeal. Second, however, counsel clearly violated any reasonable objective standard by not doing what he promised to do as part of that dismissal when he failed to move for a new trial. Even if the appeal had not been dismissed and this Court's ruling on the first Rule 61 motion affirmed, counsel still had a duty to move for a new trial. The failure to move for a new trial was an utter breakdown in counsel's duties to Liu.

Counsel's default in not filing for a new trial is compounded by subsequent events. Liu moved to have new counsel appointed. Granted, the original judge denied that motion primarily because he believed counsel's long involvement and familiarity with the case were beneficial to Liu. But paragraph fifteen in counsel's affidavit is revealing. If original counsel believed Liu's allegations of counsel's inactions interfered enough at some point with his ability to continue to represent him, he had an independent duty to and should have asked for leave to withdraw.⁴⁰ By failing to do so, counsel breached his duty, again, to Liu.

³⁹ *See supra* pp. 11-13.

⁴⁰ In a letter counsel sent to the original judge on May 13, 1996, he said, "While I would prefer to stay on the case, I would have no objection to new counsel being appointed." Docket No. 217. It is that letter to which the original judge replied that he believed it was in Liu's best interest for counsel to remain in the case.

Liu has made his case of attorney error. But he cannot show the prejudice or degree of prejudice to complete his claim of ineffective assistance of counsel. That analysis involves two phases. The first is the appeal of the original judge's denial of the first Rule 61 motion. Counsel wrote Liu that he believed "there is virtually no possibility that you will win the appeal...."⁴¹ This Court's view is, after examining the record in this case, the decisions of the original judge, the Supreme Court's opinion affirming the convictions, the original judge's Rule 61 decision, and the law applied, that counsel's assessment was correct. No result was guaranteed on that appeal, but his assessment was objectively reasonable. Further, Liu cannot show that if counsel had pursued the appeal, it is likely the decision from the original judge would have been reversed.

The next phase, of course, is to determine if Liu would have received a new trial if counsel had done what he promised. As counsel states in paragraph sixteen, the motion would have been premised on Chen's perjury which was brought to light in Liu's trial. There is one unknown and several knowns about what would have come out at trial if re-tried. The unknown is that there may have been more about which Chen lied in Chao's trial concerning his relationship with Chao, but neither counsel nor Liu state what that might have been. Importantly, they cite nothing from Chao's second trial about Chen's testimony which was not brought in Liu's earlier trial. Clearly, Chen's testimony at Chao's second trial would be fodder, if at all, for this

⁴¹ See *supra* p. 11.

current motion. It is more than probable, therefore, that there was nothing additional to that which developed at his trial. The inability, through no fault of their own (current counsel or Liu), to cite to anything further about Chen's testimony at Chao's second trial also affirms there is no substantive basis to grant Liu a new trial.

What is known, of course, is that all of the other evidence implicating Liu which the jury heard at the first trial would be presented at the second trial. There is no need to repeat it. As the Supreme Court said in its affirmance of his convictions, Liu came to Delaware in his taxi cab and either went into the Chen residence to set the fire or had aided and abetted Chao in doing so.⁴² Obviously, if there had been a new trial, there is no way to predict its outcome with certainty. This Court finds that Liu has not met the prejudice test that, even if trial counsel had moved for a new trial, it is likely that one would have been granted.

In this regard, while trial counsel failed in his duties to Liu by not moving for a new trial, the Court disagrees with Liu's claim that the failure was due to his "conflict counsel" status and not wanting to disturb the Court – whatever that means. This claim, other than its relationship to the new trial motion lacks merit.

Another one of Liu's claims of counsel ineffectiveness is that he failed to strike a FBI agent from the jurors selected. Counsel, who chose not to examine his files or seek to examine them prior to filing his affidavit provided no information on this

⁴² *Liu v. State*, 628 A.2d at 1385.

claim.⁴³ The Court has spent considerable independent time examining each of the Prothonotary's boxes containing the record in this case. The search was an effort to find if there was any biographical information on the jurors selected. Such information is traditionally not kept in the Prothonotary's files (to preserve the confidentiality of the information) and is returned to Jury Services after the trial. All that could be found were the green and white computer sheets utilized in a long-ago discarded system which listed all jurors summoned. But those sheets never contained biographical information.

The Court also asked for help from Jury Services. In 1991 when this trial was held, this Court had an entirely different system than that employed now. Staff in Jury Services indicated that when the conversion was made years ago to the current system, efforts were made to preserve prior juror information. Staff has learned, however, that the preservation started with records in 1995 and forward. In sum, there is no biographical information available to verify or refute this claim.

The Court undertook this effort despite its belief that this claim is barred. First, it was a claim Liu clearly knew he had when he filed his first motion for post-conviction relief. And in his "second" motion, the one which was procedurally rejected and which he did not follow-up in proper form, Liu did not raise this claim. That "motion" was filed *pro se*. The claim is raised in the current motion but only in its iteration after counsel was appointed for him, specifically in the Amended Motion filed May 21, 2009.

⁴³ Trial Counsel Aff., ¶ 10, "Conclusion." Docket No. 264.

This particular ineffectiveness claim is time barred. It is being raised sixteen years after his conviction became final. The time bar has to have some purpose and some teeth, and to raise such a claim now, manifestly shows why. Concededly, Liu could not have raised this issue on direct appeal.⁴⁴ He did not raise it in 1994 in the prior motion. The Court views that as important because in 2009, Liu says he engaged trial counsel in a conversation about the presence of a FBI agent. Usually, such conversations are remembered better closer in time to the event. Further, Liu has provided no supporting information of any kind that such a person was a juror.

It is, of course, unknown and unknowable if this issue may somehow have been raised in the never-filed motion for a new trial. There also is no newly recognized constitutional right recognized in this claim which is one of the two means of relief from the time bar.⁴⁵ Nor has he shown how the claim, if true, amounts to a miscarriage of justice which would operate to overcome the time bar.⁴⁶

The Court also views this claim as repetitive and procedurally barred.⁴⁷ While it appears that current counsel did something to trigger Liu's memory since Liu had never mentioned it in 1994 or in 2007 (in his *pro se* motions), he knew of it and could have

⁴⁴ *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985).

⁴⁵ Super. Ct. Crim. R. 61(i)(1).

⁴⁶ Super. Ct. Crim. R. 61(i)(5).

⁴⁷ Super. Ct. Crim. R. 61(i)(2).

raised it. The Court sees no interest of justice warranting consideration of a colorable claim of miscarriage of justice enabling consideration of the claim.⁴⁸

Liu next complains that trial counsel “lied” to him about the State releasing him. It is unclear what this claim is and totally unclear what prejudice flowed from the “lie.” His 1997 “motion” speaks of being released (which is inexplicable to this judge considering the charges against him). The Court cannot find where any objective standard for counsel was breached and/or, if so, what prejudice existed.

Trial counsel, Liu alleges, failed to subpoena a witness who had supposedly seen Chen and Chao outside of Chen’s house on the night of the fire. No name is mentioned in the Amended Motion but in the 2007 *pro se* motion, Liu names Steven Green. The Court assumed that Green is the witness Liu wanted counsel to subpoena. This claim was previously adjudicated in 1995, albeit within slightly different packaging: (1) an alleged *Brady* violation and (2) ineffective assistance of counsel. The original trial judge dealt with those claims, and basically found Green had nothing exculpatory that would have helped Liu.⁴⁹ This claim of ineffective assistance lacks merit and is barred as formerly adjudicated.⁵⁰ No interest of justice warrants reconsideration.

⁴⁸ Super. Ct. Crim. R. 61(i)(5).

⁴⁹ *See supra* p. 11.

⁵⁰ Super. Ct. Crim. R. 61(i)(4).

Liu states he declined to testify upon trial counsel's advice. Counsel did not respond to this claim. The transcript of the colloquy between the Court and Liu about testifying or not shows:

The Court: My understanding from what [trial counsel] said at the office conference, that Mr. Liu is not going to testify at trial. Is that correct?

[Trial Counsel]: That's correct, Your Honor.

The Court: We should probably ask Mr. Liu a few questions about that.
And I would ask the interpreter to interpret the questions to him, then interpret his answer to me.
You understand that you do have a right to testify on your own behalf at this trial?

The Defendant [through interpreter]: Yes; yes.

The Court: Okay. And your attorney has indicated that you have decided not to testify. Is that correct?

The Defendant: Mr. Liu just said, he doesn't have the intelligence to perform in the court. Therefore, he decided not to testify.

The Court: And are you in agreement with your attorney that it is in your best interest not to testify?

The Defendant: He thinks so.

The Court: Okay.

[Trial Counsel]: One other question. I would ask the Court just to inquire of Mr. Liu -- this is just something else I discussed with him through the translator -- does he understand by not testifying that it can't be used either by the State that he might be hiding something or by the jury, saying, "Well, if he wasn't guilty he

would have gotten on the stand.” That basically can’t be used against him in any way.

The Defendant: Yes.⁵¹

This issue was not raised in Liu’s first motion for post-conviction relief nor in the 1997 “motion”. The answer he gave about not being intelligent enough to “perform” in court says it all. If anything this complaint coming so many years later is disingenuous. Liu does not say what he would have said or even how that may have changed the ultimate guilty verdict. Further, based on the incriminating evidence against him about which he would have been cross-examined, counsel’s advice and his decision not to testify was wise. The Court finds no duty breached and Liu has failed to show any prejudice.

There is in this Court’s humble view no neat pigeon hole in Rule 61(i) into which to place his claim of ineffective assistance of counsel as far as procedural bars. The closest ones are Rule 61(i)(1) – time bar and (i)(2) – failure to include the claim in prior post-conviction proceedings. Both bars apply because the current motion was filed ten years after the “motion” which was rejected-as-to-form but which he did not re-file as instructed. And since the same process – initially rejected-as-to-form but within weeks properly re-filed – was undertaken here, his 1997 failure to properly file has to “count” for something. The Court is reluctant to state it counts as a waiver, but

⁵¹ Trial Tr. 13:22 – 15:9, May 28, 1991.

Liu's entire second motion is about issues known/knowable many years ago, even in 1994 when he filed his first motion.

The Court has factored into its decision and decision-making process several salient points. One is his cultural status. But that in other important contexts – waiver of *Miranda* rights, consent to search, etc. – has been thoroughly reviewed and considered by the original judge who heard the testimony and by the Supreme Court. Another is that trial counsel violated his duty to Liu by not moving for a new trial in 1995 which would have been the optimum time to do so. His inexplicable failure to do so prevented Liu from, at least, having the original judge, who presided over his trial and both of Chao's trials from examining the issues from Liu's perspective. This Court's independent evaluation of the evidence against Liu, even including the reasons Chao was given a new trial and her subsequent verdict, has led to the conclusion, however, a new trial was not and is not warranted.

First, Rule 61(i)(1) contains a means of relief from its bar, namely if there has been a constitutional right recognized since his trial. That is not the case here. Second, Rule 61(i)(2) allows for consideration of a claim which should have been raised previously but was not, when warranted in the interest of justice. None of the claims or ineffective assistance of counsel individually or collectively warrant consideration. Even though counsel's defalcations could be such an interest, Liu has not established the necessary prejudice. Third, the means to relief provided in Rule 61(i)(5) does not operate to give relief to Liu.

The Court finds that as to the appeal dismissal and failure to file the motion for new trial, counsel violated his duty to Liu. In that counsel believed himself constrained from filing for a new trial by Liu's criticisms of him, he failed again by not moving to withdraw. Nonetheless, Liu has not shown actual prejudice resulting from any of those breaches. On his other claims against counsel, he has demonstrated neither attorney breach nor prejudice. In sum, there is no valid claim of ineffective assistance of counsel. Further, the claims are procedurally barred.

At one time, Liu moved to have an evidentiary hearing on his claims. The Court has discretion whether to grant such a hearing.⁵² Based on the claims presented, supporting information or lack thereof, counsel's affidavit, Liu's responding affidavit, and the Court's disposition of Liu's claims, the Court finds an evidentiary hearing is unnecessary.

Conclusion

For the reasons stated herein, defendant Tze Poong Liu's motion for post-conviction relief is DENIED, and insomuch as the motion is also a motion for a new trial, that is DENIED. His motion for an evidentiary hearing is DENIED.

IT IS SO ORDERED.

J.

⁵² Super. Ct. Crim. R. 61(h)(1); *Maxion v. State*, 686 A.2d 148, 151 (Del. 1996).