

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ID# 0904002701
	)	
SPENCER BIRCKHEAD,	)	
	)	
Defendant.	)	
	)	

**MEMORANDUM OPINION**

*Appearances:*

Brian McBride, Esquire,  
Deputy Attorney General  
Wilmington, Delaware  
Attorney for State of Delaware

Spencer Birckhead, *pro se*  
SBI 00343584, JTVCC,  
Smyrna, Delaware

**JOHN A. PARKINS, JR., JUDGE**

Defendant, Spencer Birckhead, was found guilty by a jury of Possession with Intent to Distribute Marijuana, Maintaining a Dwelling, and Conspiracy Second Degree. The trial judge also found him guilty of Possession of Firearm by a Person Prohibited. Defendant was sentenced on November 15, 2010. Defendant brought a direct appeal regarding the sufficiency of the evidence to convict him. The Supreme Court affirmed on July 28, 2011.<sup>1</sup>

On October 13, 2011 Defendant timely filed his first motion for Post Conviction relief. He cites three grounds: 1. “Denial of the right to confront witness”; 2. “Lack of Attention to Creditable Evidence” and 3. “Questionable Procedure by Experience [sic] officers.”<sup>2</sup>

In considering a Rule 61 motion, the court must first look to procedural requirements of the rule.<sup>3</sup> Defendant’s claim was timely filed within a year of the Delaware Supreme Court’s ruling in the direct appeal and this is his first motion for post-conviction relief.<sup>4</sup> Nonetheless some of his claims are barred because of his failure to timely raise them during the proceedings leading to his conviction. Defendant’s arguments will be taken up in the order in which they were presented in his petition.

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<sup>1</sup> See *Birckhead v. State*, 2011 WL 2750935, at \*1, 23 A.3d 864 (Del. 2011) (TABLE) (giving a more complete procedural history of Defendant’s case).

<sup>2</sup> Motion for Post Conviction Relief, at 3.

<sup>3</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> See Delaware Superior Court Rule of Criminal Procedure 61(i)(1),(2).

Defendant first argues that he should have had a *Flowers*<sup>5</sup> hearing with the confidential informant. He did not seek a *Flowers* hearing prior to trial, so the court construes his Rule 61 petition as alleging that his counsel failed to provide effective assistance when he decided not to seek such a hearing. The court will consider the merits of this claim because ineffective assistance of counsel claims must ordinarily be brought in the context of the first Rule 61 petition.

Before considering the merits of Defendant's *Flowers* it is useful to briefly review the standard for showing ineffective assistance of counsel. In order to succeed on an ineffective assistance claim, a defendant must show two things: "First, [Defendant] must show that defense counsel's performance was deficient. Second, [Defendant] must show that his counsel's deficient performance prejudiced the defense."<sup>6</sup> The court need not reach the first issue because, as a matter of law, the purported failure to request a *Flowers* hearing did not prejudice the defense because the court would not have granted such a request.

In *State v. Flowers*<sup>7</sup> this court tackled the difficult question when the identity of confidential informant must be disclosed to

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<sup>5</sup> See *State v. Flowers*, 316 A.2d 564 (Del. Super. 1973); D.R.E. 509.

<sup>6</sup> *Swan*, 28 A.3d at 383 (citing *Strickland*, 466 U.S. at 687).

<sup>7</sup> 316 A.2d 564 (Del. Super. 1973)

the defendant. This court categorized informant involvement in the criminal process as follows:

There are standard situations which arise. (1) The informer is used merely to establish probable cause for a search. (2) The informer witnesses the criminal act. (3) The informer participates but is not a party to the illegal transaction. (4) The informer is an actual party to the illegal transaction.<sup>8</sup>

Here the informant was used to obtain the search warrant which resulted in the discovery of the contraband in Defendant's home. The *Flowers* court held that in such instances discovery is not required.<sup>9</sup> Accordingly the court would not have granted a request for a *Flowers* hearing and therefore any assumed deficiency in Defendant's counsel in not asking for one did not prejudice Defendant.

Defendant's frivolous post trial invocation of *Flowers* brings to mind a concern expressed by the *Flowers* court itself:

[I]t is more than irksome to see defendants demand disclosure when the greater probability lies in the proposition that disclosure is unnecessary or of no benefit. More often than not only technical points are being made for an appeal. It simply makes little sense to give an uncontrolled tactical weapon to those accused of crime when the odds are against there being any material benefit to the defense on the merits.<sup>10</sup>

Defendant's remaining claims are procedurally barred. As best as the court can tell, these arguments are a rehash of the

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<sup>8</sup> *Id.* at 567.

<sup>9</sup> *Id.* (citing *Riley v. State*, 249 A.2d 863, 866 (1969)).

<sup>10</sup> *Id.* at 568

evidence leading to the jury verdict against defendant. The Supreme Court has already upheld the sufficiency of that evidence. It appears that Defendant is merely attempting to add a new rhetorical flourish to the arguments previously presented to this court and the Supreme Court. Such efforts are barred by Rule 61(i)(2) unless Defendant can show cause for failure to present them earlier and prejudice resulting from the failure to do so. He has done neither. The court will therefore not consider these arguments as they are procedurally barred.

**DENIED.**

**IT IS SO ORDERED.**

Dated: February 29, 2012

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Judge John A. Parkins, Jr.