

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0807030656
)	
JAMES ASHLEY,)	
)	
Defendant.)	

Submitted: October 28, 2010
Decided: January 19, 2011

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED.**

Daniel B. McBride, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

James Ashley, Howard R. Young Correctional Institute, Wilmington, Delaware, *pro se*.

PARKER, Commissioner

This 19th day of January, 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. In January 2009, a Superior Court jury found Defendant James Ashley guilty of Possession with Intent to Deliver Heroin, Use of a Vehicle for Keeping a Controlled Substance and Disregarding a Stop Sign. The jury found Defendant not guilty of Driving under the Influence of Drugs. The Superior Court sentenced Defendant Ashley to eight years at Level V, suspended after the five years mandatory sentence for the Possession with Intent to Deliver charge.

2. After the close of the State's case in chief, Defendant made an oral motion for judgment of acquittal on both the Possession with Intent to Deliver and the DUI charge.¹ After hearing argument on the issue the Superior Court denied Defendant's motion.² The jury acquitted Defendant on the DUI charge and found him guilty on the remaining charges. Defendant moved again for judgment of acquittal on the Possession with Intent to Deliver charge. At the sentencing hearing, the Superior Court denied the Defendant's motion.

3. Defendant filed a direct appeal to the Delaware Supreme Court. On appeal, Defendant claimed that the Superior Court erred by denying his motion for judgment of acquittal because the evidence that Ashley intended to sell heroin was legally insufficient. On January 15, 2010, the Delaware Supreme Court concluded that Defendant's appeal was without merit and affirmed the Superior Court's convictions and sentences.³ The

¹ January 27, 2009 Trial Transcript, pgs. 151- 160; January 28, 2009 Trial Transcript, pgs. 3-4.

² January 28, 2009 Trial Transcript, pgs. 3-4.

³ *Ashley v. State*, 988 A.2d 420 (Del. 2010).

Delaware Supreme Court held that the evidence was sufficient to support Defendant's conviction on the Possession with Intent to Deliver charge.⁴

4. The facts giving rise to these offenses, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal⁵, are as follows: On July 19, 2008, Officer John Iglío ("Iglío") of the Middletown Police "pulled over" a car, which Ashley was driving erratically. Iglío approached the car, told Ashley that he had been stopped for suspected DUI, asked for Ashley's license and registration, and called for backup to conduct a DUI investigation. When Ashley stepped out of the car, Iglío noticed a ripped and empty baggie on the car floor board. Iglío searched the car using a K-9 dog, and found 115 wax paper baggies, covered with plastic wrapping and stamped "Dead End." The baggies, which contained a net weight of 1.9 grams of heroin, were divided into 9 bundles wrapped with a black rubber band. Ashley, who was sweating profusely and was disoriented, was taken from the scene to a hospital. Ashley was arrested on July 21, 2008, at which time he told Iglío that he was a heroin user, was using a bundle a day, and was also taking methadone.

5. On June 4, 2010, Defendant filed this motion for postconviction relief. In the subject motion, Defendant raises three grounds for relief. First, Defendant contends that his counsel was ineffective. Second, Defendant contends that there was an illegal search and seizure of his vehicle. Third, Defendant contends that he was pulled over and illegally arrested without probable cause. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's trial counsel to submit an

⁴ *Id.*

⁵ *Ashley*, 988 A.2d at 421-422.

Affidavit responding to Defendant's claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.⁶

6. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.⁷ If a procedural bar exists, then the claim is barred and the Court should not consider the merits of the postconviction claim.⁸

7. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;⁹ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do 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.¹⁰ Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."¹¹

8. With the exception of Defendant's ineffective assistance of counsel claim (Ground One), Defendant's claims (Ground Two and Three) are barred by Rules 61(i)(2)

⁶ Super.Ct.Crim.R. 61(g)(1) and (2).

⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ *Id.*

⁹ If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

¹⁰ Super.Ct.Crim.R. 61(i)(5).

¹¹ Super.Ct.Crim.R. 61(i)(4).

and (3), for failing to raise these claims in a prior postconviction proceeding. Defendant was required to raise the claims that he raises in the subject motion, with the exception of his ineffective assistance of counsel claim, at the time of his trial, the time of sentencing or on direct appeal. Having failed to do so, those claims are now barred pursuant to Rule 61(i)(2) and Rule 61(i)(3).

9. Turning to Defendant's ineffective assistance of counsel claim, Ground One, this claim is not procedurally barred like the other two claims, because a Rule 61 motion is the appropriate vehicle for such a claim, even where it has not been previously raised.¹²

10. To prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.¹³ The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.¹⁴

11. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹⁵ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional

¹² *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

¹³ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

¹⁴ *Id.* at 687-88, 694.

¹⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

assistance.¹⁶ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.¹⁷

12. In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from the defense counsel's perspective at the time decisions were being made.¹⁸ It is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.¹⁹ A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided.²⁰

13. Furthermore, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.²¹

14. In the subject action, Defendant contends that his counsel was ineffective for failing to raise the suppression issues contained in the case. Defense counsel, in his Affidavit, represented that he did not file a suppression motion because he did not believe he had any meritorious basis to do so.²²

15. The record reflects that Defendant was lawfully stopped by the police for suspicion of driving under the influence because he was driving erratically and failed to stop at a stop sign. Given Defendant's erratic driving, the police officer had a reasonable articulable suspicion that the driver might be intoxicated. The commission of the traffic

¹⁶ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

¹⁷ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¹⁸ *Stickland*, 466 U.S. at 688-89.

¹⁹ *Stickland*, 466 U.S. at 688-89.

²⁰ *Stickland*, 466 U.S. at 688-89.

²¹ *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

²² Affidavit of Defendant's Trial Counsel.

violation, in and of itself, gave the officer grounds to stop the vehicle aside from any suspicion of DUI. When Ashley stepped out of the car, the police officer noticed a ripped and empty baggie on the car floor board which was consistent with the type of baggies used to store controlled substances. The police officer also noticed that Defendant's speech was slurred, that he was sweating profusely, and that he was disoriented. The police officer searched the car using a K-9 dog, and found 115 wax paper baggies containing heroin.

16. As the United States Supreme Court reiterated and reaffirmed in *Arizona v. Gant*,²³ if there is probable cause to believe a vehicle contains evidence of criminal activity, a police officer is authorized to search any area of the vehicle in which the evidence might be found.²⁴ Given the totality of the circumstances in this case, including the inferences and deductions that a trained officer could make, given Defendant's general demeanor (slurred speech, sweating profusely, and disoriented), his erratic driving and the ripped and empty baggie on the car floor board, sufficient probable cause was established to believe the vehicle occupied by Defendant contained evidence of criminal activity. Consequently, the warrantless search of the vehicle was permissible. Given that the investigatory stop and seizure appears to be reasonable under the circumstances, Defendant cannot show that even had a suppression motion been made, it would have been granted.

17. Trial counsel does not have to file meritless motions; in fact, counsel has an obligation not to do so. Defendant's contention that his trial counsel was somehow

²³ 129 S.Ct. 1710, 1721 (2009)

²⁴ *Arizona v. Gant*, 129 S.Ct. 1710, 1721 (2009), reaffirming its prior holding in *United States v. Ross*, 456 U.S. 798, 820-21 (1982); See also, *Hall v. State*, 981 A.2d 1106 (Del. 2009)(the strong order of PCP establishes probable cause to believe the vehicle occupied by Defendant contained evidence of criminal activity. Thus, the warrantless search of the vehicle was proper.)

ineffective for failing to file a suppression motion that counsel believed had no apparent legal or factual basis is without merit. Defendant's ineffective assistance of counsel claim on this issue fails to meet either prong of the *Strickland* standard and is denied.

18. Defendant also contends that his counsel was ineffective for failing to call a defense expert to rebut Detective Matthew Botterbusch's expert testimony. The State's expert, Detective Botterbush, testified as an expert that, in his opinion Ashley possessed the heroin with the intent to deliver it. Botterbusch based his opinion on the number of baggies and bundles seized (which exceeded significantly what a mere user would ordinarily possess), and the fact that the packaging made the heroin readily available for distribution.

19. Defendant's trial counsel, in his Affidavit, represented that all trial decisions made were strategic in nature and were made to put forward the best defense possible to the lead charge of Possession with Intent to Deliver Heroin.²⁵ Whether to call a witness, and how to cross-examine those who are called are tactical decisions.²⁶ A defendant challenging such decisions has the burden of supplying precisely what information would have been obtained had counsel undertaken the desired investigation and how this information would have changed the result. The defendant must substantiate his concrete allegations of actual prejudice or else risk summary dismissal.²⁷

20. Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial

²⁵ Affidavit of Defendant's Trial Counsel.

²⁶ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

²⁷ *Id.*

strategy.²⁸ This is precisely the post-trial attack on counsel, the second guessing and “Monday morning quarterbacking” that *Strickland* cautions against.

21. Here, Ashley has failed to substantiate his allegations of actual prejudice and has failed to demonstrate that his counsel’s tactical trial decisions fell below an objectively reasonable standard.

22. As a practical matter, there is the issue as to whether any rebuttal expert could have, in fact, been retained. For instance, would the expert be a drug user, a former drug user, a drug dealer/user, could a present or former law enforcement officer be retained. Then, assuming that such an expert was retained, there is the issue as to how that individual would have withstood cross-examination and how that individual would have presented himself/herself at trial. It is conceivable that such an expert could have undermined rather than enhanced the defense. Even if the expert made a good impression and appearance, there would then be differing expert opinions, and the jury would still ultimately have to resolve the issue.

23. As noted by the Delaware Supreme Court, Ashley’s counsel vigorously cross-examined the State’s expert to explore the possibility that the entire batch of heroin was used solely for Ashley’s personal use.²⁹ Counsel examined the State’s expert on all possible indicia of personal use and on Ashley’s claim that he consumed one bundle of heroin a day.³⁰ On cross-examination, the State’s expert conceded that the empty and torn baggie found in the car indicated that Ashley was a heroin user, and that the other common indicia of distribution (such as the possession of large amounts of cash, sales

²⁸ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

²⁹ *Ashley*, 988 A.2d at 423-24.

³⁰ *Id.*

ledger, communication devices and other dealing-related paraphernalia such as digital scales) were not present.³¹

24. The fact question- whether the nine bundles of heroin were solely for Ashley's personal use- was presented to the jury through defense counsel's vigorous cross-examination of the State's expert. The jury resolved this fact issue against Ashley. A rebuttal expert, may or may not have bolstered the defense, but Defendant has not overcome the strong presumption that it was a reasonable trial decision not to retain one. Moreover, Defendant has not established that there is a reasonable probability that the outcome of the trial would have been different if a rebuttal expert had testified.

25. To the extent that Defendant raises any other ineffective assistance of counsel contentions, trial counsel has made it clear that: "All trial decisions were strategic in nature and made to put forward the best defense possible to the lead charge of Possession with Intent to Deliver Heroin."³² As noted in *Strickland*, there is a strong presumption that defense counsel's conduct constituted sound trial strategy. Defendant has not overcome that presumption. Defendant has not pointed to anything in the record which demonstrates a lack of diligence on behalf of his counsel. Indeed, the record reflects that defense counsel consistently, vigorously and diligently defended the lead charge of Possession with Intent to Deliver Heroin. Defense counsel vigorously cross-examined the State's witnesses and diligently and persistently moved to dismiss the charges. Moreover, defense counsel was successful in the defense of Ashley on the DUI charge. Defendant's claims of ineffective assistance of counsel are without merit.

³¹ *Id.* at 422-24.

³² Affidavit of Defendant's Trial Counsel.

26. Turning to Defendant's Second and Third Grounds, Defendant claims that his Fourth Amendment rights were violated when he was stopped by the police, his vehicle was searched and he was arrested. As previously discussed, these claims are procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), since these claims were not raised at trial, on direct appeal or in any other postconviction proceeding. Defendant has not offered any explanation of cause which prevented him from raising these claims in a timely manner.³³ Moreover, Defendant has also failed to demonstrate that he was prejudiced as a result thereof. Defendant has not demonstrated that had these issues been raised on appeal, the outcome would have been different.

27. Even if Defendant's claims were not procedurally barred, they are without merit.

28. As discussed above, the police officer had a reasonable basis to believe that Ashley was a suspected DUI and that Ashley had committed traffic violations at the time he stopped Ashley. Ashley was driving erratically and had disregarded a stop sign. The evidence (the ripped and empty baggie on the car floor board) and observations of the police officer (Ashley's demeanor) that followed the vehicle stop supported a finding of probable cause to search Defendant's vehicle and subsequently arrest him. Defendant's rights were not violated by his arrest or by the search of his vehicle. Defendant's claims in Ground Two and Three are procedurally barred and without merit.

29. In this case, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of

³³ *Outten v. State*, 720 A.2d 547, 556 (Del. 1998)(a showing of cause is satisfied when a movant shows some external impediment which prevented him from raising the claim in a timely manner).

justice” exception is a “narrow one and has been applied only in limited circumstances.”³⁴ The defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”³⁵ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the “interests of justice” require it to consider the otherwise procedurally barred claims for relief.³⁶

30. Defendant’s request for an evidentiary hearing is hereby denied. Having carefully considered the parties’ submissions and the evidentiary record, Defendant’s allegations were, in fact, either reasonably discounted as not supported by the record, persuasively rebutted by counsel’s affidavit, or not material to a determination of Defendant’s claims.

For all of the foregoing reasons, Defendant’s Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
cc: Joseph M. Leager, Jr., Assistant Public Defender
Santino Ceccotti, Assistant Public Defender

³⁴ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

³⁵ *Id.*

³⁶ *Id.*