IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 0508014813
v.	)	
RONALD F. BROOKS	)	
Defendant	)	

Submitted: December 8, 2010
Decided: February 3, 2011

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

Brian J. Robertson, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Patrick J. Collins, Esquire, Aaronson, Collins & Jennings, LLC, Attorney for Defendant.

COOCH, R.J.

1. This 3rd day of February 2011, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

2. A jury found Defendant guilty of Trafficking in Cocaine Over 100 Grams, four counts of Possession of a Firearm During the Commission of a Felony, four counts of Possession of a Deadly Weapon by a Person Prohibited, Possession of a Firearm by a Person Prohibited, Possession of Drug Paraphernalia, Conspiracy Second Degree, and Maintaining a Vehicle

for Keeping Controlled Substances.[1] On September 1, 2006, Defendant was adjudicated an habitual offender and sentenced to the mandatory minimum term of one hundred forty-eight years in prison.[2] The Supreme Court of Delaware affirmed Defendant's convictions on direct appeal on May 22, 2007.[3]

3. Defendant's initial motion for postconviction relief, pursuant to Superior Court Criminal Rule 61, was filed by new counsel on May 22, 2008.[4] In this motion, Defendant alleged, *in toto*, as follows:

> [(a)] Trial counsel did not object properly at trial, failed to adequately present a defense, failed to objection [sic] to the admission of evidence, failed to properly advise Defendant of his right to testify.
>
> [(b)] In not obtaining expert testimony in regard to fingerprints and DNA and question and subpoena witnesses on behalf of Defendant.
>
> [(c)] In not effective [sic] cross-examining the State's witness including but not limited to Rose Epps and Joseph Tomchick and his assistance was rendered ineffective by a conflict of interest.[5]

Nothing further, legal or factual, was alleged in the motion.[6] This Court found that Defendant's motion was "completely conclusory" and that, "even taking into account the seriousness of the charges and the length of the sentence, Defendant's motion warrants summary dismissal."[7]

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[1] Immediately preceding opening statements at his trial, Defendant rejected a plea offer in which he would plead guilty to one count of Possession of a Firearm During the Commission of a Felony and four counts of Possession of a Deadly Weapon by a Person Prohibited; under the terms of the plea offer, the State would recommend the minimum mandatory sentence of 25 years. Transcript of Proceedings of March 28, 2006 at 2-3. The State would also forego seeking sentencing as an habitual offender. *Id.*
[2] Sentencing Order of September 1, 2006.
[3] *Brooks v. State*, 929 A.2d 783 (Del. 2007).
[4] *State v. Brooks*, 2008 WL 3485720 (Del. Super. Ct. 2008).
[5] *Id.* at *1.
[6] *Id.* ("These three sentences constitute the entirety of the substantive portion of Defendant's motion for postconviction relief.").
[7] *Id.* at *2.

4. Defendant appealed this Court's summary dismissal of his motion for postconviction relief to the Supreme Court of Delaware; Defendant took this appeal *pro se*.[8] On April 20, 2009, the Supreme Court of Delaware remanded this matter to the Superior Court, stating that "the record before [the Supreme Court of Delaware] is insufficient to conduct an adequate review of the merits of Brooks' appeal."[9] This Court thereupon appointed present counsel to represent Defendant on the remanded motion for postconviction relief and promulgated an order of briefing.[10] In turn, Defendant filed an Amended Motion for Postconviction Relief,[11] trial counsel filed an affidavit responding to Defendant's allegations,[12] the State's filed a Response,[13] and Defendant filed a Reply.[14]

5. In his amended motion for postconviction relief, Defendant alleges seven grounds for, relief, as follows:

> 1) "[Defendant] is entitled to a new trial due to trial counsels' ineffectiveness for failing to seek a supplemental *voir dire* of juror number three after juror number one had been excused."
> 2) "Trial counsel's ineffectiveness in advising [Defendant] not to put on a defense case resulted in a deprivation of his rights under the Fifth, Sixth, and Fourteenth Amendments and Article I § 7 of the Delaware Constitution."
> 3) "Trial counsel was ineffective for failing to investigate the fingerprint evidence and for failing to file a *Brady* or *Deberry* motion with regard to fingerprints obtained in the Chevrolet Lumina that did not belong to the Defendant."
> 4) "[Defendant] is entitled to a new trial due to trial counsel's ineffectiveness for failing to file a *Flowers* motion to

[8] *Brooks v. State*, Del. Supr., I.D. No. 415, Ridgely, J. (Apr. 20, 2009) (ORDER) at 3 n.2.
[9] *Id.* at 3 ("While we agree with the State's contention that the motion filed by Brooks' postconviction counsel was so conclusory as to warrant summary dismissal, we nonetheless conclude that the interests of justice require a fuller expansion of the issues raised in Brooks' opening brief on appeal.").
[10] *State v. Brooks*, Del. Super., I.D. No. 0508014813DI, Cooch, R.J. (Feb. 3, 2010) (ORDER).
[11] Def.'s Amended Mot. for Postconviction Relief.
[12] Affidavit of Jan. A.T. Van Amerongen, Esquire.
[13] State's Response to Def.'s Rule 61 Mot.
[14] Def.'s Reply Memorandum.

determine the identity and veracity of the confidential informant."

5) "Trial counsel was ineffective for failing to request a jury instruction to the effect that co-defendant Rose Epps' testimony should be viewed with great suspicion and caution."

6) "[Defendant's] constitutional right to a fair trial by an impartial jury was compromised by confusing and misleading jury instructions as to the word 'possession'; trial counsel was ineffective for failing to seek a clear statement of the law and a supplemental instruction."

7) "[Defendant] is entitled to relief because of the cumulative prejudicial effect of the errors described herein."[15]

Defendant's trial counsel, Jan A.T. Van Amerongen, Jr., Esquire, responded to these allegations via affidavit of June 30, 2010. Mr. Van Amerongen stated as follows:

1. This Affidavit is filed in accordance with the Court's Order of April 20, 2010 and in response to Mr. Brooks' April 30, 2010 Amended Motion for Postconviction Relief (the "Motion").

2. Mr. Brooks asserts in his Motion six claims asserting ineffective assistance of counsel. This Affiant will respond to the factual assertions in the Motion.

3. In Claim I of the Motion, Mr. Brooks alleges that trial counsel was ineffective for failing to seek supplemental *voir dire* of Juror No. 3 following the excusal of Juror No. 1. It is my recollection that Juror No. 1 did not imply through his demeanor or tone that he was fearful of the individuals he recognized in the courtroom. It is my recollection that I did not believe he related to anyone, including Juror No. 3, that he feared reprisals from those in the courtroom. I believed that he communicated only that he recognized these people and felt that he should not be a juror. I did not wish for Juror No. 3 to infer from the questioning that there was a reason to fear the people in the courtroom.

4. In Claim II of the Motion, Mr. Brooks alleges that trial counsel was ineffective in advising Mr. Brooks to not put

[15] Def.'s Amended Mot. for Postconviction Relief at 6-24.

on a defense case. Mr. Brooks further alleges that Terrance Waters and Mr. Brooks both were thereby precluded form testifying. With respect to Mr. Brooks testifying, it was never his intention to testify. He advised me prior to and during trial that he was not going to testify. He never indicated that he wished to testify or that his decision to remain silent was in any way related to the failure of the State to move its exhibits into evidence.

5. With respect to the testimony of Terrance Waters, Mr. Brooks alleges in his Motion what he believes would have been the substance of Mr. Waters' testimony. I recall that I had already concluded, independent of the State's failure to move its exhibits into evidence, that Mr. Waters should not be called to testify as a defense witness. I did explain this to Mr. Brooks prior to resting the defense case. Regarding the State's failure to move into evidence its exhibits, I told Mr. Brooks that I hoped the State would continue to forget to move their admission. During argument over the issue of admissibility of the State's evidence, I advised the Court that the decision to rest the defense case had been made in part due to the State's failure to move the exhibits into evidence. My recollection is that the decision to rest would have been the same if the State had not failed to move into evidence its exhibits.

6. In Claim III of the Motion, Mr. Brooks alleges that trial counsel was ineffective in failing to attempt to determine who had left the fingerprints that the police had concluded did not belong to the defendant. I was aware that fingerprint lifts had been developed by the police that were found to not match Mr. Brooks or his codefendant. I was also aware from review of the surveillance recordings that Mr. Brooks did drive the Lumina in question. Although I utilized a private investigator to assist the defense, I did not attempt to determine whose fingerprints were also on the vehicle.

7. In Claim IV of the motion, Mr. Brooks claims that trial counsel was ineffective in not filing a *Flowers* Motion to determine the identity of the confidential informant. My assessment of the warrants and discovery was that the confidential informant was used to establish probable cause. Mr. Brooks was not charged for the transactions allegedly involving the confidential informant. When the

> [T]here 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 an actual party to the illegal transaction. (4) The informer is an actual party to the illegal transaction. The privilege of [an informer's identity] is protected in category 1 and disclosure is required in category 4. Categories 2 and 3 present the difficult situation.

(citations omitted).

8. I did not file a *Flowers* motion because I did not believe a basis existed to file such a motion.

9. In Claim V of the Motion, Mr. Brooks alleges that trial counsel was ineffective for failing to request a *Bland* instruction advising the jury that it should treat the testimony of the testifying codefendant with suspicion and great caution. In reviewing my file and the trial transcript, it is clear that I did not request such an instruction. This was not a strategic decision, but must have been an oversight. Had I realized a *Bland* instruction was not included in the draft instructions provide by the trial court, I would have requested such an instruction.

10. In Claim VI of the Motion, Mr. Brooks claims that trial counsel was ineffective in not seeking a clearer definition of "possession" in the jury instructions. The trial transcripts include the prayer conference and discussions related to jury instructions. I cannot recall making any applications regarding jury instructions other than those included.[16]

The Court will address Defendant's claims in turn.

The Juror Issue

6. With respect to Defendant's first alleged ground for relief, Defendant asserts that Juror Number Three should have been excused after juror number one disclosed that he was uncomfortable remaining on the jury.[17]

[16] Affidavit of Jan. A.T. Van Amerongen, Esquire.
[17] Def.'s Amended Mot. for Postconviction Relief at 6.

Juror Number One brought to the Court's attention the fact that he was familiar with certain trial spectators, and that he remarked "oh man this ain't gonna' work" to the juror sitting next to him (Juror Number Three).[18] All parties agreed that Juror Number One should be excused, and the Court provided trial counsel with the opportunity to *voir dire* Juror Number Three about any potential interactions with juror number one.[19] Trial counsel conferred with Defendant and informed the Court that they did not wish the Court to separately question Juror Number Three.[20] According to Defendant, the decision not to conduct additional *voir dire* of Juror Number Three on the issue of her ability to remain fair and impartial constituted ineffective assistance of trial counsel and requires a new trial.[21]

7. Defendant's claims of ineffective assistance of counsel are governed by the United States Supreme Court's decision in *Strickland v. Washington*.[22] Under *Strickland*, Defendant bears the burden of proof in meeting a two prong test: that counsel's efforts "fell below an objective standard of reasonableness" and that, but for counsel's alleged error there was a reasonable probability that the outcome would have been different; a "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome.[23] The second prong requires a defendant to show that trial counsel's alleged error was prejudicial, and "the burden is on the defendant to make concrete and substantiated allegations of prejudice."[24]

To prevail on a claim of ineffective assistance of counsel, Defendant must "overcome the strong presumption that his counsel's representation was professionally reasonable."[25] The Court will evaluate trial from counsel's perspective at the time of trial to avoid "the distorting effects of hindsight."[26] Similarly, a Court "cannot require defense counsel to choose

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 8.
[22] 466 U.S. 668 (1984).
[23] *Id.* at 668-691.
[24] *Richardson v. State*, 3 A.3d 233, 240 (Del. 2010) (citations omitted).
[25] *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997).
[26] *Id.* (citation omitted).

one particular defense strategy over any other strategy that falls within the 'wide range of professionally competent assistance.'"[27]

8. Although Defendant contends that a decision "not to protect [Defendant's] Sixth Amendment rights could hardly be described as 'sound,' despite competing considerations [*i.e.*, the competing considerations potentially undiscovered bias on Juror Number Three's part versus the possibility of causing Juror Number Three undue concern or suspicion],"[28] Defendant nonetheless concedes that "it can be inferred from the record that trial counsel did not want to ask juror number three any questions for fear of highlighting the issue."[29] Therein, Defendant's contention of ineffective assistance of counsel is belied; contrary to Defendant's allegations, trial counsel balanced the option of forgoing additional *voir dire* of juror three against the risk of invoking undue concern or prejudice in juror number three.[30] Indeed, trial counsel contemporaneously stated that he was "trying to decide if [additional *voir dire* of juror number three] is going to raise a flag that doesn't need to be raised."[31] Similarly, in his affidavit, trial counsel confirmed that he "did not wish for Juror No. 3 to infer from the questioning that there was a reason to fear the people in the courtroom."[32] Thus, trial counsel's decision was a strategic choice, made after considering the alternative and the respective costs and benefits; Defendant has failed to "overcome the strong presumption that his counsel's representation was professionally reasonable."[33]

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[27] *Oliver v. Wainwright*, 795 F.2d 1524, 1531 (11th Cir. 1987) (quoting *Strickland*, 466 U.S. at 688-89).
[28] Def.'s Reply Memorandum.
[29] *Id.*
[30] It should also be noted that Juror Number One stated that he did not speak to any other jurors regarding his concerns. Transcript of Jury Trial Proceedings of March 28, 2006 at 43 ("[The bailiff] told me don't say nothing to nobody when you go in [the jury room] so I didn't say nothing.").
[31] Transcript of Jury Trial Proceedings of March 28, 2006 at 45.
[32] Affidavit of Jan. A.T. Van Amerongen, Esquire at 1.
[33] *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997).

Defendant's Decision Not to Present a Defense Case Issue

9. Defendant next alleges that trial counsel's decision not to present a defense case constituted ineffective assistance of counsel.[34] During Defendant's trial, the State inadvertently failed to move its exhibits into evidence; Defendant concedes that the exhibits were pre-marked for admission.[35] Defendant contends that trial counsel's decision not to mount a defense case on the "gambit" that the Court would not allow the State to cure this error constituted ineffective assistance.[36] Ultimately, the Court allowed the formal admission of the State's exhibits, classifying the State's error as "a ministerial oversight."[37] Neither Defendant nor the sole putative defense witness, Terrance Waters, testified during Defendant's trial.[38] Trial counsel stated that the defense "rested in part when we did to deprive the State of an opportunity for rebuttal to cure its error."[39]

Trial counsel stated in his affidavit that he "already concluded, independent of the State's failure to move its exhibits into evidence, that [Terrance Waters] should not be called as a defense witness" and that Defendant advised "prior to and during trial that he was not going to testify."[40] Further, trial counsel stated that his "recollection is that the decision to rest would have been the same if the State had not failed to move into evidence its exhibits."[41]

Defendant asserts that he was, in fact, planning on testifying, and the fact that Mr. Waters was subpoenaed for trial suggests that he would have

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[34] Def.'s Amended Mot. for Postconviction Relief at 8.
[35] *Id.* at 9. ("[T]he State pre-marked numerous exhibits for admission, including all the weapons, ammunition, and cocaine.). *Id.* The trial transcript discloses that the exhibits were pre-marked upon mutual agreement by the State and trial counsel in order to streamline the process. Transcript of Jury Trial Proceedings of March 30, 2006 at 93-94.
[36] Def.'s Amended Mot. for Postconviction Relief at 9.
[37] Transcript of Jury Trial Proceedings of March 30, 2006 at 97.
[38] Def.'s Amended Mot. for Postconviction Relief at 10. According to Defendant, Mr. Waters sold the instant Chevrolet Lumina to Rose Epps and "could have testified as to his knowledge of how and by whom the Lumina was used." *Id.*
[39] Transcript of Jury Trial Proceedings of March 30, 2006 at 97.
[40] Affidavit of Jan. A.T. Van Amerongen, Esquire at 2.
[41] *Id.*

been called as a defense witness had trial counsel not rested.[42] According to Defendant, these are factual issues that require an evidentiary hearing.[43] Defendant also alleges that any decision not to testify was not "knowing, intelligent, and voluntary" because trial counsel did not fully explain the implications of his decision to testify.[44]

As noted by the State, trial counsel "has the immediate and ultimate responsibility of deciding. . .which witnesses, if any, to call, and what defenses to develop."[45] Moreover, on the issue of Defendant's waiver of his right to testify, this Court engaged in a thorough colloquy with Defendant regarding whether or not he would testify:

> The Court: [Trial counsel] has indicated to me that the defense intends to rest which means that you will not be taking the witness stand; is that correct?
> Defendant: Yes, sir.
> The Court: Do you understand that that is a decision only you in the final analysis can make? Your attorney can give you advice one way or the other, but ultimately it's your decision and your decision alone. Do you understand that?
> Defendant: Yes, sir.
> The Court: Do you understand that if you exercise your constitutional right not to testify, the jury will be instructed that you have that right and that cannot be held against you. Do you understand that?
> Defendant: Yes, sir.
> The Court: Have you had enough time, do you think, to talk about all this, the pros and cons of testifying, with your attorney?
> Defendant: Yes, sir.
> The Court: Do you understand that you'll not be able to come back at any later time and say that you wished to testify, but somehow were prevented from doing so? Do you understand that?
> Defendant: Yes, sir.
> The Court: Do you believe you are knowingly, voluntarily, and intelligently waiving your constitutional right to testify?
> Defendant: Yes, sir.

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[42] Def.'s Reply Memorandum at 3-4.
[43] *Id.*
[44] Def.'s Amended Mot. for Postconviction Relief at 10.
[45] *Cooke v. State*, 977 A.2d 803, 841-42 (Del. 2009) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977)).

> The Court: I find the waiver of defendant's right to testify to be knowingly, voluntarily, and intelligently made, so it's accepted.[46]

Given the foregoing, Defendant has not "overcome the strong presumption that his counsel's representation was professionally reasonable."[47] Consequently, Defendant cannot demonstrate that trial counsel's representation "fell below an objective standard of reasonableness" and that, but for counsel's alleged error there was a reasonable probability that the outcome would have been different.[48] Thus, this ground for relief fails.

The Fingerprint Evidence Issue

10. Defendant asserts that certain unidentified fingerprints discovered on the exterior of the Chevrolet Lumina were significant to the issue of "dominion and control" over the vehicle."[49] According to Defendant, this issue is of "crucial importance" because the cocaine and firearms were discovered in the trunk of the Lumina, and any evidence suggesting either that the vehicle was not under his control or that he was one of several individuals with access to the vehicle would be significant to his defense.[50] Defendant alleges that it was "incumbent upon trial counsel to obtain *other prints of value* and retain an expert to determine if those prints of value could be matched to any individuals."[51] Similarly, Defendant contends that, had trial counsel attempted to compel the production of said fingerprints and the State was unable to produce the fingerprints, Defendant could have

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[46] Transcript of Jury Trial Proceedings of March 30, 2006 at 86-87. Notably, the Supreme Court of Delaware, citing the foregoing colloquy with Defendant, affirmed this Court's determination that Defendant's waiver of his right to testify was knowing, voluntary, and intelligent. *Brooks v. State*, 929 A.2d 783, *4 (Del. 2007) ("[T]he record discloses no error in the Superior Court's determination that Brooks consciously and knowingly waived his right to testify.").

[47] *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997).

[48] *Strickland v. Washington*, 466 U.S. 668 (1984).

[49] Def.'s Amended Mot. for Postconviction Relief at 12-14.

[50] *Id.*

[51] *Id.* at 15.

sought a *Deberry*[52] instruction.[53] Trial counsel indicated that he utilized a private investigator to assist the defense, but he "did not attempt to determine whose fingerprints were also on the vehicle."[54]

The State responds that these unknown fingerprints on the exterior of the car would have been of no use in establishing that Defendant did not have dominion or control over the vehicle.[55] As noted by the State, there were no additional prints found in the interior of the vehicle.[56] The State does not dispute that, as a general proposition, trial counsel has a duty to undertake reasonable investigations, but contends that Defendant has not shown that trial counsel's investigations in this case were inadequate and that the unidentified fingerprints would not have been helpful to the defense.[57]

Defendant's contentions are without merit. As noted by the Supreme Court of Delaware, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."[58] Indeed, counsel is "presumed" to have fulfilled the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[59] In this case, trial counsel utilized a private investigator, but

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[52] *Deberry v. State*, 457 A.2d 744, 754 (Del. 1983) (holding that the State's failure to produce the defendant's clothing or conduct scientific tests, as had been done on the victim's apparel, permitted the inference that any evidence obtained from such testing would have been favorable to the defendant.). A *Deberry* instruction is a jury instruction that requires the jury to infer that, if the State failed to preserve potentially exculpatory evidence, such evidence would in fact have been exculpatory. *See*, *e.g.*, *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998) ("The remedy for failure to preserve potentially exculpatory evidence is a missing evidence instruction commonly referred to as a *Lolly* or *Deberry* instruction. This instruction requires that the jury infer that had the evidence been preserved, it would have been exculpatory to the defendant.").
[53] Def.'s Amended Mot. for Postconviction Relief at 15.
[54] Affidavit of Jan. A.T. Van Amerongen, Esquire at 2-3.
[55] State's Response to Def.'s Rule 61 Mot. at 6.
[56] *Id.*
[57] State's Response to Def.'s Rule 61 Mot. at 6-7.
[58] *Shelton v. State*, 744 A.2d 465, 504 (Del. 1999) (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).
[59] *Id.* (quoting *Strickland*, 466 U.S. at 691).

did not further investigate the fingerprints discovered on the exterior of the Chevrolet Lumina. Given that these unidentified fingerprints are on the exterior of the vehicle, no unidentified fingerprints were discovered in the interior of the vehicle, and there was significant independent evidence indicating Defendant's control over the Lumina,[60] this Court applies a "heavy measure of deference" to trial counsel's judgment that the identification of such prints would be of minimal, if any, consequence to Defendant's defense.[61] Accordingly, this ground for relief fails.

The Confidential Informant Issue

11. Defendant asserts that the police had received information from a "past, proven and reliable confidential source" that Defendant was selling cocaine in New Castle County and that he frequently drove around with a loaded handgun; this confidential information was also used in a controlled purchase of cocaine from Defendant.[62] According to Defendant, the case against him was developed "exclusively through the statement of the confidential source" and trial counsel's failure to request a *Flowers*[63] hearing constituted ineffective assistance of counsel.[64] Defendant argues that a *Flowers* motion, if granted, would have disclosed the identity of the confidential informant, thereby assisting in the preparation of the defense.[65]

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[60] Additional evidence included surveillance of Defendant operating the Lumina, surveillance of Defendant carrying the bag that was found to contain the firearms and cocaine, and the testimony of the "straw" purchaser of three of the four handguns at issue. State's Response to Def.'s Rule 61 Mot. at 8.

[61] *Shelton*, 744 A.2d at 504. Notably, the reasonableness of trial counsel's judgment that these unidentified fingerprints would not vitiate the appearance of Defendant's dominion or control over this vehicle is further supported by the fact that police surveillance captured images of Defendant operating the instant Chevrolet Lumina. *See* Def.'s Amended Mot. for Postconviction Relief at 16.

[62] Def.'s Amended Mot. for Postconviction Relief at 17.

[63] *State v. Flowers*, 316 A.2d 564, 567-68 (Del. 1973) (discussing the situations in which the police utilize a confidential informant and the privilege to withhold the confidential informant's identity that applies to each situation.). The purpose of a *Flowers* hearing "is to determine whether the State's privilege to withhold the identity of its informant is outweighed by the defendant's right to prepare his defense." *Butcher v. State*, 931 A.2d 1006, *1 (Del. 2006).

[64] Def.'s Amended Mot. for Postconviction Relief at 17.

[65] *Id.*

In short, Defendant contends that, "[i]n a major trafficking and gun case, especially where the defendant is potentially about to be declared an Habitual Offender, defense counsel should have left no stone unturned in its investigation of the case."[66]

Trial counsel responded that he did not file a *Flowers* motion because he did not believe there was a basis for such a motion.[67] Trial counsel noted that, because the confidential informant was used only to establish probable cause, the informant's identity would be protected, pursuant to *State v. Flowers*.[68]

The State likewise noted that, even if there had been a *Flowers* hearing, disclosure of the confidential informant's identity would not have been required under *Flowers*.[69] Defendant does not dispute the accuracy of trial counsel's and the State's positions as a legal matter, but instead contends that "the level of detail and specificity provided by the informant was so complete that, given the severity of the potential punishment in this case, the issue should have been placed before the Court by the filing of a motion."[70] Defendant characterizes trial counsel's duty as one to "investigate and make any filing which, within the limits of the law, comports with the duty of zealous representation."[71]

Given the foregoing, there was no basis for the filing of a *Flowers* motion. Neither the alleged high level of specificity provided by the confidential informant nor the severity of the potential punishment has any effect on the legal standard applicable to a *Flowers* motion. Likewise, Defendant's characterization of trial counsel's duty as one to "investigate and make any filing which, within the limits of the law, comports with the duty of zealous representation"[72] is also irrelevant to the legal standard for

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[66] *Id.* at 18.
[67] Affidavit of Jan. A.T. Van Amerongen, Esquire at 3.
[68] *Id*; *Flowers*, 316 A.2d at 567 ("The [confidential informant] privilege is protected [when the informer is used merely to establish probable cause for a search].").
[69] State's Response to Def.'s Rule 61 Mot. at 7.
[70] Def.'s Reply Memorandum at 5.
[71] *Id.* at 6.
[72] *Id.*

evaluating trial counsel's effectiveness, as defined in *Strickland*, *supra*. Trial counsel's decision not to file a *Flowers* motion is not ineffective assistance of counsel.[73]

More significantly, Defendant cannot show prejudice for this alleged deficiency; Defendant's motion merely asserts that "the issue should have been placed before the Court by the filing of a motion"[74] and that trial counsel "should have left no stone unturned in its investigation of the case."[75] Critically, Defendant does not allege that there is a "reasonable probability"[76] that a *Flowers* motion would have been granted, or that the granting of a *Flowers* motion would have led to a different result at his trial, likely because the lack of any factual or legal basis for a *Flowers* motion precludes this argument.

Defendant has not alleged any prejudicial effect from the lack of a *Flowers* hearing; rather, he merely expressed a belief that an unsupportable *Flowers* motion should have been filed based on the detail provided by the informant and the potential severity of his sentence. However, Defendant's "failure to state with particularity the nature of the prejudice experienced is fatal to a claim of ineffective assistance of counsel."[77] Therefore, this ground for relief fails.

The Accomplice Testimony Jury Instruction Issue

12. Defendant alleges that trial counsel was ineffective for failing to request a *Bland*[78] instruction, which would have directed the jury to view codefendant Rose Epps' testimony with suspicion and caution.[79] In brief, Ms. Epps testified that Defendant she was Defendant's ex-girlfriend, they

[73] The Court notes that, even under Defendant's proposed standard for trial counsel, trial counsel would not have been required to file a *Flowers* motion; in this case, there was no basis in law or fact for such a motion. Thus, trial counsel's decision not to file a *Flowers* motion cannot be deemed ineffective; "[r]ather, it is the hallmark of a good attorney to refuse to submit unmeritorious claims. . .and pursue those claims that, in good faith, the attorney believes have merit." *State v. Jones*, 2008 WL 4173816, *8 n.52 (Del. 2008).
[74] Def.'s Reply Memorandum at 5.
[75] Def's. Amended Motion for Postconviction Relief at 18.
[76] *Strickland v. Washington*, 466 U.S. 668, 695 (1984).
[77] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996) (citations omitted).
[78] *Bland v. State*, 263 A.2d 286 (Del. 1970)
[79] Def.'s Amended Mot. for Postconviction Relief at 19.

cohabitated at the time of the instant offense, Defendant possessed the keys to the Lumina containing the cocaine and firearms, and Defendant would "clear the house out at night" by placing any firearms or drugs in the bag that contained the instant cocaine and firearms.[80] Specifically, she indicated that she saw him put "either a gun or a bag of white substance, cocaine" into the bag "a couple of times a week."[81] Ms. Epps also testified that, after she and Defendant had been arrested for the instant charges and placed in holding cells, Defendant briefly saw her and was "shouting things to [Ms. Epps]. . .basically telling [her], you know. . .what to say when [the police] brought [her] down to question."[82] She stated that Defendant instructed her to tell the police "that the Lumina wasn't his or whatever and it wasn't ours and whatever and that the keys, the reason why the keys were in the house was because. . .a lady named Leta was supposed to come and get them. . . .he was just telling [Ms. Epps] to 'stick to the script, stick to the script.' Don't say nothing, you know."[83] Ms. Epps stated that she was charged with numerous serious offenses, including possession with intent to distribute, trafficking, and conspiracy, and she pled guilty to one count of second degree conspiracy the day before she testified at Defendant's trial.[84] She further testified that, in exchange for this plea, the State to recommend that Ms. Epps' receive a two year Level V sentence, to be suspended for time served, and a probationary period to begin as of the date of her guilty plea.[85]

Defendant asserts that the lack of a *Bland* instruction deprived him of a fair trial because codefendant Rose Epps' testimony was "self serving and uncorroborated."[86] Trial counsel now acknowledges that this was an oversight, rather than a strategic decision on his part.[87]

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[80] Transcript of Trial Proceedings of March 29, 2006 at 110-13.
[81] *Id.*
[82] *Id.* at 110.
[83] *Id.*
[84] *Id.* at 129-30.
[85] *Id.*
[86] Def.'s Amended Mot. for Postconviction Relief at 20.
[87] Affidavit of Jan. A.T. Van Amerongen, Esquire at 3.

In 2010, the Supreme Court of Delaware addressed this issue in *Smith v. State*.[88] Defendant contends that *Smith* stands for the proposition that a *Bland* instruction is required "when an accomplice testifies and at least some of the testimony is not corroborated. . . ."[89] In the *Smith* case, "the outcome of [the defendant's] trial turned on the credibility of [the defendant] versus the credibility of [defendant's accomplice and another eyewitness]."[90] The Court found that, under the facts presented, trial counsel's failure to request a *Bland* instruction constituted ineffective assistance of counsel, as defined by *Strickland, supra*.[91]

In *Bland v. State*, the Supreme Court of Delaware endorsed the following jury instruction regarding uncorroborated accomplice testimony:

> A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with suspicion and great caution. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.[92]

The continuing applicability of *Bland* has been "reaffirmed numerous times over the past 40 years."[93] Indeed, the *Smith* Court stated that the current "best practice is to give the *Bland* instruction on accomplice liability rather than the [accomplice credibility] pattern jury instruction given in [*Bordley v. State*, 832 A.2d 1250 (Del. 2010)]."[94] A general credibility instruction is

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[88] 991 A.2d 1169 (Del. 2010).
[89] Def.'s Reply Memorandum at 6.
[90] *Smith*, 991 A.2d at 1172.
[91] *Id.* at 1180.
[92] 263 A.2d 286, 289-90 (Del. 1970).
[93] *Washington v. State*, 4 A.3d 375, 379 (Del. 2010) (citations omitted).
[94] *Smith*, 991 A.2d at 1179.

insufficient to "cure" the omission of a specific instruction on accomplice credibility.[95]

Although the *Smith* Court somewhat broadly stated that when an accomplice's "uncorroborated testimony [is] central to the State's case,gh" trial counsel's failure to request a "*Bland*-type" instruction is "'deficient attorney performance,' under the first part of [the] *Strickland* analysis,"[96] it remains that such failure must also be prejudicial to Defendant, pursuant to *Strickland*, *supra*.[97] In *Smith*, the Supreme Court found that trial counsel's failure to request such an instruction was prejudicial, but *Smith* is in the context of the jury's verdict turning on the credibility of uncorroborated accomplice testimony, which "should be subjected to enhanced scrutiny."[98] In contrast, in this case the State presented significant independent evidence of Defendant's guilt; as noted by the State, the evidence at trial included surveillance of Defendant operating the instant Lumina, surveillance of Defendant carrying the bag that was found to contain the firearms and cocaine, evidence of Defendant's fingerprints inside the Lumina, and the testimony of the "straw" purchaser of three of the four handguns at issue.[99] Consequently, the outcome of Defendant's trial did not "turn" on the credibility of his testimony vis-à-vis the allegedly uncorroborated testimony of his accomplice, Rose Epps.[100]

Further, in *Smith*, the Supreme Court of Delaware observed that "trial counsel's failure to request [a *Bland* instruction] will not always be

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[95] *Id.* at 1178.
[96] *Id.* at 1177; *see also id.* ("There is no reasonable trial strategy for failing to request the cautionary accomplice testimony instruction and corroboration instruction. . . .We cannot envision an advantage that could have been gained by withholding a request for th[ese] instruction[s].") (quoting *Freeman v. Class*, 95 F.3d 639, 642 (8th Cir. 1996)).
[97] *Strickland*, 466 U.S. at 687 ("Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").
[98] *Smith*, 991 A.2d at 1179.
[99] State's Response to Def.'s Rule 61 Mot. at 8.
[100] Indeed, this plethora of independent incriminating evidence may have contributed to trial counsel's admittedly inadvertent failure to request a *Bland* instruction. As noted by the State, "[w]hile the testimony of Rose Epps. . .was no doubt beneficial to the State's case, it can hardly be argued that her testimony constituted the weight o the evidence." *Id.*

prejudicial *per se*," but rather, "[t]he prejudicial effect depends upon the facts and circumstances of each particular case."[101] While it is true that the first prong of *Strickland* is satisfied based on the Supreme Court of Delaware's holding *Smith*, the quantity and quality of evidence presented at trial makes *Smith* inapposite herein with respect to the second prong of *Strickland*.[102] Accordingly, this claim for relief fails.

The Possession Instruction Issue

13. Defendant next contends that his constitutional right to a fair trial and impartial jury was compromised by "confusing and misleading jury instructions as to the word 'possession.'"[103] Defendant concedes that the six separate instructions regarding "trafficking possession and [possession of a firearm during the commission of a felony] were correct statements of the law" but nonetheless maintains that "the inherent ambiguity of the term and the numerous references to unnamed 'previous definitions'" resulted in confusing and misleading instructions.[104] Specifically, Defendant asserts that the Court's "four statements of 'I have previously defined possession for you' were each confusing in their own right because possession had already been defined in two different ways and the four statements are silent as to which definition the jury was to use."[105] According to Defendant, trial counsel was ineffective for not requesting more specific instructions on the issue of "possession" and not requesting an omnibus instruction clarifying the definitions of possession, particularly given that different definitions of "possession" applied to the firearms and the cocaine, despite the fact that both were discovered in the same location.[106] Defendant noted that there is a

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[101] *Smith*, 991 A.2d at 1180.
[102] Indeed, this quantity and quality of independent evidence also confirms that the outcome of Defendant's trial would have been the same even if this Court had given a *Bland* instruction, thereby defeating any claim of prejudice to Defendant.
[103] Def.'s Amended Mot. for Postconviction Relief at 22.
[104] *Id.* at 23.
[105] *Id.*
[106] *Id.* at 23-24. Trial counsel could not recall making any applications for jury instructions beyond those included in the trial transcripts. Affidavit of Jan. A.T. Van Amerongen, Esquire at 4. The trial transcript confirms that there was no application for a *Bland* instruction during the prayer conference. Transcript of Trial Proceedings of March 30, 2006 at 69-79.

"more limited definition of possession to [possession of a deadly weapon during the commission of a felony] than [possession of a deadly weapon by a person prohibited] because, unlike establishing [possession of a deadly weapon by a person prohibited], establishing [possession of a deadly weapon during the commission of a felony] requires evidence of physical availability and accessibility."[107]

The State responds that the instant jury instructions were legally correct and adequate. As noted by the State, in *Lecates v. State*, the Supreme Court of Delaware held "a felon is in 'possession' of a deadly weapon, within the meaning of [possession of a deadly weapon during the commission of a felony], only when it is physically available or accessible to him during the commission of the crime. As further stated by the Supreme Court of Delaware, "[g]eneral 'dominion and control' of a weapon located elsewhere, and not reasonably accessible to the felon, obviously is not the test under [possession of a deadly weapon during the commission of a felony]."[108]

In this case, the jury was instructed as follows:

> In order to find the defendant guilty of Possession of a Firearm During the Commission of a Felony, you must find that all of the following elements have been established beyond a reasonable doubt:
>
> One, that the defendant committed a felony, in this case, the felonies charged are Trafficking in Cocaine and/or Possession With Intent to Deliver cocaine and/or Maintaining a Vehicle, and,
>
> Two, During the commission of the felony, the defendant possessed a firearm, and,
>
> Three, the defendant acted knowingly.
>
> A firearm means any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas and/or mechanical means, whether the weapon is operable or inoperable, loaded or unloaded.

[107] *Lecates v. State*, 987 A.2d 413, 418 (Del. 2009).
[108] *Id.* at 419 (quoting *Mack v. State*, 312 A.2d 319, 322 (1973)).

> By possession, I do not mean merely that the firearm may have been in the area or the vicinity of the defendant so that it might have been taken possession of if the defendant wanted to do so. Rather, in order for the defendant to be found guilty of possession of a firearm, as that word is used in the statute, you must find that the firearm was in the immediate personal possession or under the immediate control of the defendant so that it was physically available or accessible during the commission of the crime. The defendant acted knowingly if he was aware that a deadly weapon-that a firearm was in his possession at the time and place of the alleged offense.[109]

Notwithstanding the foregoing instructions, Defendant maintains that "[t]he unique facts of this case demanded that 'possession' be more clearly defined for each offense."[110] Defendant asserts that "[e]ven if the definitions for trafficking and [possession of a firearm during the commission of a felony] were correct, as a whole, the jury instructions as to ambiguous were decidedly ambiguous. . . ."[111]

A jury instruction will not be a ground for reversal if the instruction is "reasonably informative and not misleading, judged by common practices and standards of verbal communication."[112] A jury instruction will warrant reversal "only if the 'deficiency undermined the ability of the jury 'to intelligently perform its duty in returning a verdict.'"[113] When considering the adequacy of jury instructions, the instructions must be considered "as a whole."[114]

In this case, Defendant concedes that the disputed instruction was legally correct.[115] Thus, there can be no dispute that there was no violation of Defendant's "unqualified right to a correct statement of the substance of

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[109] Transcript of Jury Trial Proceedings of March 30, 2006 at 142-43.
[110] Def.'s Reply Memorandum at 8.
[111] *Id.*
[112] *Floray v. State*, 720 A.2d 1132, 1137 (Del. 1998) (citatons omitted).
[113] *Id.* (citations omitted).
[114] *Id.* (citation omitted).
[115] Def.'s Amended Mot. for Postconviction Relief at 23 ("The instructions with regard to trafficking possession and PFDCF possession were correct statements of the law.").

the law."[116] The crux of Defendant's claim is that the supposed "unique facts" of this case required a more clear definition of "possession" given that the "immediate access and control" element of Possession of a Firearm During the Commission of a Felony was, Defendant argues, such a "significant" issue herein.[117] However, Defendant's contention that the jury instructions were confusing is belied by the very language of the disputed instruction; the Court instructed the jury that "in order for the defendant to be found guilty of possession of a firearm. . .you must find that the firearm was in the immediate personal possession or under the immediate control of the defendant so that it was physically available or accessible during the commission of the crime."[118]

The issue of possession and control was correctly addressed in the disputed jury instruction. When considering the language of this specific instruction and the jury instructions as a whole, it is clear that the instructions were "reasonably informative and not misleading, judged by common practices and standards of verbal communication."[119] Different legal standards regarding "possession" applied to certain offenses herein and necessitated that the Court provide variable definitions of "possession" in the jury instructions; this was an inherent consequence of Defendant's instant charges, rather than a ground for postconviction relief. Therefore, this ground for relief also fails.

14. Finally, Defendant contends that the aggregate affect of the foregoing claims resulted in prejudice sufficient to warrant a new trial.[120] However, having found that all of Defendant's previous claims are without merit, it necessarily follows that a claim premised exclusively on the cumulative effect of the foregoing claims must fail.

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[116] *Floray*, 720 A.2d at 1137 (citation omitted).
[117] Def.'s Reply Memorandum at 8.
[118] Transcript of Jury Trial Proceedings of March 30, 2006 at 143.
[119] *Floray v. State*, 720 A.2d 1132, 1137 (Del. 1998) (citatons omitted).
[120] *Id.* at 9.

15. Therefore, for the reasons stated above, Defendant has failed to satisfy the *Strickland* test for ineffective assistance of counsel.[121] It follows that Defendant's motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services

[121] Defendant also alleges ineffective assistance of appellate counsel "[t]o the extent that the eligible claims were not presented on direct appeal. . . ." *Id.* Given that all of Defendant's claims of ineffective assistance of trial counsel fail, it necessarily follows that such claims are not viable with respect to appellate counsel.