SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

February 22, 2011

N440 STATE MAIL
David R. Wright
SBI: 00158184
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Nicole M. Walker, Esquire
Office of the Public Defender
820 N. French Street, 3rd Floor
Wilmington, DE 19801

Robert H. Robinson, Jr., Esquire
Office of the Public Defender
14 The Circle, 2nd Floor
Georgetown, DE 19947

Melanie C. Withers, Esquire
Deputy Attorney General
114 E. Market Street
Georgetown, DE 19947

RE: ***David R. Wright v. State of Delaware***
I.D No. 0802023870

Dear Counsel and Mr. Wright:

This is my decision denying Defendant David R. Wright's Motion for Postconviction Relief filed pursuant to Super.Ct.Crim.R. 61 ("Rule 61"). My summary dismissal of Defendant's motion was remanded by our Supreme Court for expansion of the record. I have now received the affidavits of trial counsel and appellate counsel, the State's affidavit and Defendant's Reply. The motion is denied.

Defendant raised four issues which are phrased in terms of ineffective assistance of counsel under *Strickland v. Washington*.[1] To prevail, Defendant must show (1) deficient performance by counsel (2) which caused defendant actual prejudice.[2] Deficient

[1] 466 U.S. 668 (1984).

[2] *Id.* at 688, 694.

performance means that the attorney's representation fell below an objective standard of reasonableness.[3]

On January 28, 2008, Defendant was arrested in connection with a robbery and kidnaping that occurred at the Lewes/Rehoboth Moose Lodge on December 31, 2007. In November 2008, Defendant was tried on charges of First Degree Robbery, Possession of a Firearm During the Commission of a Felony, Second Degree Kidnaping, and Wearing a Disguise During the Commission of a Felony.[4] Defendant was convicted of these charges and found to be a habitual offender pursuant to 11 *Del. C.* § 4214(a). He was sentenced to a total of 74 years in prison. On direct appeal, Defendant's conviction and sentence were affirmed.[5]

Defendant's first postconviction claim is that the warrantless search of his van after it was impounded was unreasonable under the Fourth Amendment and it was therefore error to allow Det. Chambers testify that he saw Defendant's ID in the van. Defendant argues that trial counsel was ineffective for failing to determine that the search occurred after impoundment and that the search was a pretext for finding evidence regarding the robbery.

In their affidavits, trial counsel and the State assert that the van was abandoned because it was parked half way into a road with no driver nearby. Trial counsel also argues that Defendant did not have standing to challenge the search because the van was still registered to its previous owner, Homer Markland. The State argues that Det. Chambers performed a proper inventory search.

Corporal Gary Fournier found the van while checking the area around the Moose Lodge, just after he received a call about the robbery. The van appeared to have broken down and been abandoned. Corp. Fournier ran a computer check of the license plate number, learning that the registered owner was Homer Markland. At trial, Markland testified that he had given the van to Defendant in return for home repairs, prior to the incident at Moose Lodge. Thus, the police established a link to Defendant by way of Markland.

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[3] *Id.* at 688.

[4] The parties stipulated to Possession of a Deadly Weapon by a Person Prohibited. The State entered a *nolle prosequi* on Third Degree Assault.

[5] *Wright v. State*, 980 A.2d 372 (Del. 2009).

The van sat halfway onto Log Cotton Hill Road behind the moose Lodge. Det. Chambers came to look at it. He and Corp. Fournier checked that no one was in the van, which was locked. A towing company in Lewes was called to pick up the van for impoundment.

Det. Chambers testified that he tried to open the van but could not because it was locked. At the impoundment lot, employees had the appropriate tools to gain entry without damage. Det. Chambers conducted an inventory search, noting the van's contents but removing nothing. This is the nature of an inventory search.

Because the Fourth Amendment protects reasonable expectations of privacy, the abandonment inquiry is an objective test of whether the actions of a person show relinquishment of privacy, as opposed to giving up ownership.[6]

In this case, the objective facts are that the van was parked partly on the road, blocking traffic in one lane. It was parked within one-tenth of a mile of the Moose Lodge, and no driver could be located. The actions of the driver constitute abandonment, along with a loss of a reasonable explanation of privacy under the Fourth Amendment.

Defendant cannot show attorney error on the part of either trial counsel or appellate counsel. The van was abandoned and the inventory search was proper. Nor is there a showing of prejudice because the police linked the van with Defendant through Markland. This claims fails to meet the *Strickland* test.

Defendant also argues that trial counsel was ineffective for failing to suppress the evidence obtained when Det. Chambers used one of Defendant's cell phones without benefit of a search warrant. At trial, defense counsel objected, but I ruled that the cell phones were abandoned and that Det. Chambers properly scrolled through the one in working condition to determine ownership.

Defense counsel testifies that he considered a suppression motion on the cell phones but found no basis for one in the record. He reasons that the phones were abandoned and Defendant therefore had no legitimate expectation of privacy in the phones. Appellate counsel came to the same conclusion. The State asserts that Defendant abandoned the phones and that Det. Chambers did a cursory examination to determine ownership. He ceased when he saw messages related to the robbery in order to get a search warrant.

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[6] *Vick v. Ellingsworth*, 1998 WL 14158, at *2 (Del. Super.)(citing *United States v. Jones*, 707 F.2d 1169 (10th Cir.), c*ert. denied,* 104 S.Ct. 184 (1983).

The record shows that Defendant had been living at his sister's home without her knowledge or permission. When he departed, he left some belongings in her house, including two cell phones. When his sister found these items, she moved them to her shed and gave police access to them. Defendant's decision to leave the phones in the house when he departed constitutes abandonment.[7] There was no Fourth Amendment violation or ineffectiveness on the part of defense or appellate counsel for not pursuing the matter.

Next, Defendant challenges the search warrants dated 1/4/08 and 2/11/09. Both trial counsel and appellate counsel reviewed the search warrants and independently concluded that there was no basis for suppression.

The State argues that the January warrant to search Defendant's sister's camper revealed nothing related to the robbery. This assertion is confirmed by the record. Furthermore, Defendant had given this address to his probation officer. Neither prong of *Strickland* has been met, and this claim is without merit.

Defendant complains that the February warrant for the cell phones is based on tips from an informant not known to be reliable. As support he point to the informant's statement that he had seen Defendant in possession of $6000, whereas the amount stolen was $4000. This is a minor point, especially in light of the averment in the affidavit of probable cause that the informant's tips were consistent with details of the crime not publically known. Defendant further asserts that neither affidavit is based on results of police investigation. In fact, the police offered information regarding the location of the broken down van, the Defendant's identification card, his shotgun and his temporary residence.

The affidavits set forth adequate facts for the magistrate to form a reasonable belief that a criminal offense had been committed and that the property to be seized would be found in the specified place.[8] There is no merit to this claim under *Strickland* as to either search warrant.

Defendant's final claim of error is that appellate counsel was ineffective for not arguing on appeal that this Court erred in failing to suppress the information obtained when Det. Chambers checked Defendant's cell phone for ID without a warrant.

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[7] *Jackson v. State*, 2009 WL 2006879 (Del.); *State v. Poteat*, 2005 WL 914472 (Del.).

[8] *Morgan v. State*, 962 A.2d 248 (Del. 2008).

Appellate counsel is not constitutionally required to raise all possible issues on appeal.[9] The duty is to focus on one or two central issues which offer, in the attorney's professional judgment, the strongest chance of success.[10] To show that counsel's failure to present a meritorious claim on appeal was objectively unreasonable, a defendant must show that the non-frivolous issue counsel did not present was clearly stronger that the issue or issues counsel did present.[11] Appellate counsel states that she did not believe that this argument would prevail with our Supreme Court. At trial, this Court ruled that the phone was abandoned because it was in a pile of items which Defendant's sister found in her home and which did not belong to her. That ruling stands. Defendant has not shown that appellate counsel was ineffective for not raising this issue, nor has he shown prejudice arising from Det. Chambers' ID of the phones, other than vague and conclusory assertions. This claim has no merit under *Strickland*.

Defendant's motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Cathy Howard, Clerk of the Supreme Court
Prothonotary

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[9] *State v. Washington*, 2007 WL 2297092, at *2 (Del. Super.)(citing *Jones v. Barnes*, 463 U.S. 745 (1983)).

[10] *Id.* (citing *Jones*, 463 U.S. at 751-53).

[11] *Id.* (citing *Fink v. State*, 2006 WL 659302, at *2 (Del.).