

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID. No. 1001009884
	)	
RASHAUN J. MILLER,	)	
	)	
Defendant.	)	

Submitted: November 13, 2012

Decided: February 26, 2013

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

Colleen K. Norris, Deputy Attorney General, Department of Justice, Wilmington,  
Delaware, Attorney for the State.

Rashaun J. Miller, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 26th day of February 2013, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Defendant Rashaun Miller was arrested and subsequently indicted by a Superior Court Grand Jury for multiple drug and weapons offenses.
2. Defendant filed a motion to suppress. A hearing was held on June 2, 2010. Following the hearing, the Superior Court denied the motion.<sup>1</sup>
3. A Stipulated Trial was held on September 7, 2010. The parties stipulated that: 1) Defendant would waive his right to a jury trial; 2) the bench trial would proceed on two charges- the charges of Possession with Intent to Deliver Heroin and Possession of a Firearm During the Commission of a Felony; 3) the State would dismiss the remainder of the charges; and 4) the State would recommend the minimum mandatory sentence of 5 years at Level V incarceration on each of the two charges, for a total of 10 years at Level V incarceration.<sup>2</sup>
4. Following the stipulated trial, the Superior Court judge found Defendant Miller guilty of the two charges.<sup>3</sup> Defendant was sentenced immediately following the trial. The Superior Court followed the stipulated sentencing recommendation and Defendant was sentenced to the minimum mandatory period of 5 years at Level V incarceration on each of the two charges, for a total of 10 years at Level V incarceration, followed by decreasing levels of probation.<sup>4</sup>

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<sup>1</sup> See, June 2, 2010 Motion to Suppress Transcript, at pgs. 65-70; Order dated June 2, 2010 denying Defendant's Motion to Suppress Evidence- Superior Court Docket No. 25.

<sup>2</sup> See, September 7, 2010 Stipulated Trial Transcript, pgs. 2-12; September 7, 2010 Stipulation and Waiver of Jury Trial-Superior Court Docket No. 31.

<sup>3</sup> September 7, 2010 Stipulated Trial Transcript, pgs. 13-19.

<sup>4</sup> See, September 7, 2010 Stipulated Trial Transcript, pgs. 19-21; Modified Sentence Order dated September 22, 2010-Superior Court Docket No. 33.

5. Defendant filed a direct appeal to the Delaware Supreme Court challenging the denial of his suppression motion. On August 11, 2011, the Delaware Supreme Court affirmed the decision of the Superior Court.<sup>5</sup>

### **FACTS**

6. In early January 2010, Detective Chris Popp (“Detective Popp”) of the Delaware State Police Governor’s Task Force (the “GTF”) received information from a cooperating individual (“informant”), about a drug delivery set for January 14, 2010, between 11:00 a.m. and 1:00 p.m.<sup>6</sup> The cooperating individual was not a past-proven, reliable source of information. The informant said that he knew the individuals involved in the delivery. The informant told Detective Popp that thirty bundles of heroin would be delivered to a specific parking lot location in the Town Court Compton Townhouses in the City of Wilmington. Each bundle was supposed to contain thirteen bags of heroin.<sup>7</sup>

7. The informant further advised Detective Popp that the individuals delivering these bundles of heroin were two young, black males who would back their vehicle into one of three to four specific spaces in the parking lot to make the delivery. According to the informant, one man had darker skin than the other and one of the men went by the nickname “O”.<sup>8</sup>

8. Based upon the informant’s information, at the given date and time, the GTF set up surveillance of the area, positioning unmarked police vehicles at both entrances to the parking lot. The GTF agents wore plain clothes covered with yellow flak jackets with

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<sup>5</sup> *Miller v. State*, 25 A.3d 768 (Del. 2011).

<sup>6</sup> *Miller*, 25 A.3d at 769.

<sup>7</sup> *Miller*, 25 A.3d at 769.

<sup>8</sup> *Miller*, 25 A.3d at 769; June 2, 2010 Motion to Suppress Transcript, at pgs. 16-18.

clearly marked “State Police” lettering. The informant was also in the parking lot area and in constant communication with Detective Popp by cell phone.<sup>9</sup>

9. At approximately 11:38 a.m., a vehicle, a 2003 Infinity G35, containing two black males, one with a darker complexion than the other entered the parking lot. As previously predicted by the informant, the vehicle backed into one of the four specifically predicted parking spaces.<sup>10</sup>

10. The informant told Detective Popp over the telephone “[t]hey’re in the parking lot right now waiting for me.”<sup>11</sup> The informant, who had been in direct telephone contact with Detective Popp the entire time confirmed that the suspect vehicle had entered the lot and parked in one of the four predicted parking spaces.<sup>12</sup>

11. In fact, the suspect vehicle was the only vehicle that had entered the parking lot in the previous 15 minute period. It was the only vehicle that was occupied by two younger black males. It was the only vehicle that entered the parking lot and parked in one of the four predicted parking spaces.<sup>13</sup>

12. Detective Simpler placed his vehicle facing the suspect vehicle “nose-to-nose” so that it could not leave the parking space without striking the officer’s vehicle. Detective Popp testified that the GTF members then approached to make contact with the two individuals in the vehicle, but that both of the individuals immediately fled.<sup>14</sup>

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<sup>9</sup> *Miller*, 25 A.3d at 769; June 2, 2010 Motion to Suppress Transcript, at pgs. 19-20.

<sup>10</sup> *Miller*, 25 A.3d at 769-770; June 2, 2010 Motion to Suppress Transcript, at pgs. 20-21, 30.

<sup>11</sup> *Miller*, 25 A.3d at 769-770; June 2, 2010 Motion to Suppress Transcript, at pgs. 20-21.

<sup>12</sup> *Miller*, 25 A.3d at 769-770; June 2, 2010 Motion to Suppress Transcript, at pgs. 20-21, 43, 45-46.

<sup>13</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 46.

<sup>14</sup> *Miller*, 25 A.3d at 770.

13. Detective Popp and Detective Simpler apprehended Defendant Miller almost instantly, as he was climbing over a fence. Detective Lanski chased and quickly apprehended the other occupant, Tavar Smith.<sup>15</sup>

14. Defendant Miller, after his arrest, confirmed that Tavar Smith's nickname was "O".<sup>16</sup>

15. When Miller fled, he left the car door open. As Detective Popp approached Miller's vehicle he could see, in plain view, what appeared to be a large quantity of heroin leaning up against the center console and a handgun protruding from underneath the driver's seat. Those items were introduced without objection at Miller's stipulated trial.<sup>17</sup>

#### **DEFENDANT'S RULE 61 MOTION**

16. On October 12, 2011, Defendant filed this motion for postconviction relief. Thereafter, Defendant Miller supplemented and amended his motion several times. In the subject motion, Defendant contends that both his trial counsel and his appellate counsel provided ineffective assistance for a variety of reasons.

17. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's former counsel to submit their respective Affidavits responding to Defendant's ineffective assistance of counsel claims. Thereafter, the State filed a response to the motion. Defendant filed a reply thereto.<sup>18</sup> After the first round of briefing, supplemental briefing was required to address additional issues not covered by the initial submissions.

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<sup>15</sup> *Miller*, 25 A.3d at 770.

<sup>16</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 27.

<sup>17</sup> *Miller*, 25 A.3d at 770.

<sup>18</sup> Super.Ct.Crim.R. 61(g)(1) and (2).

18. In the subject motion, Defendant claims that his counsel, both trial and appellate, were ineffective for a number of reasons. In order to prevail on an ineffective assistance of counsel claim, 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.<sup>19</sup> 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.<sup>20</sup>

19. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>21</sup> 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 assistance.<sup>22</sup> Moreover, there is a strong presumption that defense counsel’s conduct constituted sound trial strategy.<sup>23</sup>

20. 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.<sup>24</sup>

21. Turning now to the subject case, Defendant has raised a number of ineffective assistance of counsel claims against both his trial and appellate counsel. Many of these

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<sup>19</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>20</sup> *Id.* at 687-88, 694.

<sup>21</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>22</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>23</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>24</sup> *Strickland*, 466 U.S. at 691.

claims stem from the denial of Defendant's motion to suppress. Defendant moved to suppress the drugs and handgun taken from his vehicle claiming that they were the fruit of his illegal seizure.

22. The Superior Court has already held, and the Delaware Supreme Court has already affirmed, that there was "reasonable articulable suspicion" based on the "totality of the circumstances" justifying Miller's seizure and that therefore his seizure was lawful.<sup>25</sup>

23. In the subject motion, Defendant is attempting to restate and recouch the issues raised in his motion to suppress. Now Defendant has recouched, reframed and restated the legality of his seizure as ineffective assistance of counsel contentions. The court is not required to re-examine claims that already received substantive resolution on direct appeal simply because the claim has now been refined, restated and recouched as ineffective assistance of counsel claims.<sup>26</sup> The Superior Court has already held, and the Delaware Supreme Court has already affirmed, that Defendant Miller's seizure was lawful. Defendant's claims again challenging the legality of his seizure are now procedurally barred by Rule 61(i)(4), as previously adjudicated.

#### **DEFENDANT'S CLAIMS CHALLENGING THE LEGALITY OF HIS SEIZURE**

24. Defendant first contends that his counsel was ineffective because the "Officer relied on information from a tip that was uncorroborated and blocked defendant's vehicle by pulling unmarked police car in front of defendants." This claim is procedurally barred by Rule 61(i)(4) because the Superior Court, and thereafter the Delaware Supreme Court, have already considered the lawfulness of Defendant's seizure and both courts have

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<sup>25</sup> See, *Miller*, 25 A.3d at 770, 773-774; June 2, 2010 Motion to Suppress Transcript, at pgs. 65-70.

<sup>26</sup> *Johnson v. State*, 1992 WL 183069, at \*1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

already determined that the seizure was supported by reasonable articulable suspicion and was lawful. This claim is procedurally barred and without merit.

25. Defendant next contends that his trial counsel was ineffective by allowing suspicion to replace probable cause for the warrantless seizure, search and arrest. This claim is procedurally barred by Rule 61 (i)(4) because the Delaware Supreme Court has already held that Defendant's seizure was lawful. Both the Superior Court and the Delaware Supreme Court held that the correct legal standard was whether Defendant's seizure was supported by a reasonable articulable suspicion of criminal activity, and both concluded that the standard was met.<sup>27</sup> This claim is procedurally barred and without merit.

26. Defendant next contends that his trial counsel "with deliberate indifference, neglected to mention the fact that officers lacked exigent circumstances to justify warrantless search, seizure or arrest." Defendant contends that his trial counsel failed to challenge the fact that officers received information ahead of time and could have obtained a warrant. This claim is procedurally barred by Rule 61(i)(4) because the Supreme Court already held that Defendant's seizure was justified and lawful. This claim is procedurally barred and without merit.

27. In Claim Five, Defendant contends that his trial counsel was ineffective for failing to file a "*Franks*" motion challenging the information in the police report and/or affidavit of probable cause. Trial counsel, in her Affidavit, represents that she did not file a "*Franks*" motion challenging the information in the police report and/or affidavit of probable cause because there was no legal basis to do so.<sup>28</sup> Trial counsel cannot be

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<sup>27</sup> See, *Miller*, 25 A.3d at 773-774; June 2, 2010 Motion to Suppress Transcript, at pgs. 65-70.

<sup>28</sup> Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 5, Ground Five.



deemed ineffective for failing to pursue a motion that lacked merit. Defendant has not established what good faith basis existed for the filing of this motion.

28. In Claim Six, Defendant contends that his trial counsel was ineffective for failing to seek the identity of the informant, and for failing to find out whether or not the conversation between the officers and informant was recorded. Trial counsel, in her Affidavit, represented that she did not file a *Flowers* motion, seeking the identity of the informant, because she did not believe there was any legal basis on which to do so.<sup>29</sup> Trial counsel cannot be deemed ineffective for failing to file a motion which lacked merit.

29. In Claim Seven, Defendant contends that trial counsel was ineffective for refusing to ask questions during the suppression hearing or to remind Detective Poppo of his testimony during the preliminary hearing, which would have refuted the alleged parking spaces that Defendant was supposed to have parked in. Trial counsel, in her Affidavit, explains that the Superior Court held that Defendant was seized at the time the police officers blocked in Defendant's car.<sup>30</sup> It was irrelevant, therefore, which of the particular parking spaces Defendant parked his vehicle.<sup>31</sup>

30. The decision as to whether or not to call a witness, and how to examine and/or cross-examine witnesses who are called are tactical decisions.<sup>32</sup> 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 strategy.<sup>33</sup> Trial counsel, an experienced trial attorney, focused on the issues she found relevant at the

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<sup>29</sup> Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 5, Ground Six.

<sup>30</sup> June 2, 2010 Motion to Suppress Transcript, pgs. 62-63.

<sup>31</sup> Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 5-6, Ground Seven.

<sup>32</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

<sup>33</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

suppression hearing and focused her cross examination on those questions that she felt furthered the Defendant's defense. Defendant has failed to overcome this strong presumption that defense counsel's conduct constituted sound trial strategy and his ineffectiveness claim must fail.

31. Defendant contends that his appellate counsel was ineffective for not arguing on direct appeal that: 1) Detective Popp only identified the specific parking spaces that the suspect vehicle was predicted to be parking in at Defendant's suppression hearing; and 2) that his appellate counsel was ineffective for not bringing to the Supreme Court's attention that the State has misrepresented the fact that the cooperating individual had identified the specific vehicle, a 2003 Infinity G35, that the suspects would be driving.

32. As to the first issue, trial counsel aptly cross-examined the detective on the omission of any reference to the specific parking spaces in his report and on the fact that it was raised for the first time at the suppression hearing.<sup>34</sup> The court was free to give it whatever weight the court felt it deserved. The detective's testimony at the suppression hearing as to the suspect vehicle parking in one of four designated spaces was, however, not contradicted at the suppression hearing. In addition, the testimony at the suppression hearing was also that no other vehicle had entered the parking lot within the 15 minute period of the suspect vehicle entering. Moreover, the testimony at the suppression hearing also included the fact that the cooperating individual was at the scene and when the Defendant's vehicle entered the parking lot, the cooperating individual contacted the detective by cell phone and confirmed that the vehicle they were waiting for had arrived.

33. Appellate counsel, in his Affidavit, represented that he did not raise any issue about the parking spaces in his appellate brief because he "was not aware of what basis

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<sup>34</sup> June 2, 2010 Motion to Suppress Transcript, at pgs. 30-32.

existed to dispute this information.”<sup>35</sup> Whether or not counsel was ineffective for not raising this issue, any error (if any) was harmless and had no effect on the outcome of the case. Any alleged error would not change the outcome of the decision because it was just one circumstance of a totality of circumstances and the error (if any) was not factually significant relative to the other evidence.

34. As to the second issue, Defendant contends that the State misrepresented to the Delaware Supreme Court that the cooperating individual identified the specific type of vehicle that the suspects would be driving. Appellate counsel, in his Supplemental Affidavit, stated that if the State had misrepresented this fact to the Delaware Supreme Court, and the Delaware Supreme Court relied on the State’s misstatement, then appellate counsel was deficient in not identifying and rebutting the misleading statement.<sup>36</sup>

35. Whether or not the State misrepresented to the Delaware Supreme Court that the cooperating individual identified the specific type of vehicle that would be driven by the suspects, the Delaware Supreme Court did not rely on that misrepresentation in reaching its decision. Consequently, whether or not appellate counsel was deficient for not correcting the State’s alleged misrepresentation, Defendant cannot show any actual prejudice resulting from his counsel’s alleged omission.

36. The Delaware Supreme Court’s analysis addressing whether the seizure of Defendant was lawful is set forth in its opinion (*Miller v. State*, 25 A.3d 768) at pages 773-774 under the heading “Reasonable Suspicion Established”. In rendering its decision, the Delaware Supreme Court set forth the facts upon which it based its conclusion, and from the Court’s analysis it is clear that the Court was aware that the

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<sup>35</sup> Affidavit of Appellate Counsel, Superior Court Docket No. 50, at pg. 2.

<sup>36</sup> Appellate Counsel’s Supplemental Affidavit, Superior Court Docket No. 49.

informant had not described the specific type of vehicle that the suspects would be driving.

37. Specifically, the Delaware Supreme Court stated as follows:

### **Reasonable Suspicion Established<sup>37</sup>**

In the present case, the informant told Detective Popp that two black males, one lighter in complexion than the other, would arrive at a specific parking lot between 11:00 a.m. and 1:00 p.m. to deliver bundles of heroin. He also said that when they arrived, they would back into one of four specific parking spots. Detective Popp saw a 2003 Infinity G35 pull into the designated parking lot carrying two black males, and watched it back into one of the four spots identified by the informant. Detective Popp then received contemporaneous confirmation from the informant by cell phone that the car they had observed back into the parking space was the correct one before he ordered his team to move in.

. . . In this case, the informant accurately predicted the time (11:00 a.m. – 1:00 p.m.), the method (would arrive in a vehicle and back into one of four parking spots), and the destination of the delivery (Town Court Compton Townhouses). . .<sup>38</sup>

. . . In this case, the record also reflects that the information was more than an anonymous tipster. Anonymous tipsters generally make contact with the police by calling 911. This informant made contact with Detective Popp on multiple occasions, and even made contact with the police contemporaneous to the investigatory operation. . . This suggests some sort of familiarity between the police and the informant. For these reasons, the informant's tip was more reliable than the information of a one-time anonymous caller.<sup>39</sup>

The Superior Court properly denied Miller's motion to suppress evidence. The informant's ability to predict specific future behavior of the subjects demonstrated his knowledge of inside information and illegal criminal activities. . . We hold that the specific predictive information that was independently

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<sup>37</sup> *Miller v. State*, 25 A.3d 768, 773 (Del. 2011).

<sup>38</sup> *Miller*, 25 A.3d at 773.

<sup>39</sup> *Id.*

corroborated by the police officers constituted reasonable articulable suspicion justifying Miller's seizure. . . .<sup>40</sup>

38. Even if the State had misrepresented that the cooperating informant identified the specific type of vehicle that the suspects would be driving, and even if Defendant's appellate counsel's conduct was deficient for not correcting this misrepresentation, Defendant cannot establish that he suffered any actual prejudice as a result thereof. The Delaware Supreme Court did not rely on any "misinformation" that the cooperating individual knew the specific identity of the vehicle in reaching its conclusion that the seizure of Miller was lawful.

#### **DEFENDANT'S SPEEDY TRIAL AND DOUBLE JEOPARDY CLAIMS**

39. Defendant contends that his trial counsel was ineffective for not pursuing a motion for dismissal on the grounds of unnecessary delay, speedy trial violation, and re-indictment. Defendant contends that his trial counsel was ineffective for withdrawing his motion to dismiss without Defendant's consent. Defendant further contends that his trial counsel was ineffective for not challenging the initial indictment, reindictment and also not challenging the fact that it took four months for arraignment, and never challenged the fact that there was no arraignment on the initial indictment.

40. Defendant's case was accepted in the Superior Court on January 21, 2010.<sup>41</sup> The indictment was filed on March 1, 2010.<sup>42</sup> At the time of the indictment, Defendant was scheduled for case review and arraignment on April 19, 2010. Trial counsel filed a Substitution of Counsel on April 16, 2010. Defendant was arraigned on the original

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<sup>40</sup> *Miller*, 25 A.3d at 773-774.

<sup>41</sup> Superior Court Docket No. 1.

<sup>42</sup> Superior Court Docket No. 3.

indicted charges, by written pleading, on April 19, 2010.<sup>43</sup> The reindictment was filed on April 26, 2010.<sup>44</sup> The reindictment did not substantively change any of the charges against Defendant.<sup>45</sup> On May 25, 2010, Defendant was arraigned on the reindictment.<sup>46</sup>

41. There were no significant delays in this case, let alone any significant delay caused by the State. Defendant has not even alleged that there was some delay caused by the State which was somehow prejudicial to him. Defendant was brought to trial within reasonable time limits. There were no irregularities in this case. Defendant was arraigned on the original indictment by written pleading and was then arraigned on the reindictment. The reindictment did not substantively change the charged offenses against Defendant. There was no basis to support a successful motion to dismiss and counsel cannot be deemed ineffective for failing to file or pursue a motion that lacked merit.

42. Defendant has failed to demonstrate how his speedy trial rights were denied, how his attorney was deficient in any regard, or how he has been prejudiced. This claim is without merit.

43. In Defendant's Rule 61 motion, he contends that his trial counsel was ineffective because he was found guilty on the heroin charge and the co-defendant already pled guilty to that charge thereby subjecting Defendant to "double jeopardy." Trial counsel, in her Affidavit, represented that double jeopardy principles were not applicable and there was a factual basis for the court's finding of guilt as to Defendant on the heroin charge.<sup>47</sup>

44. The indictment charged Defendant and his co-defendant, Tavar J. Smith, with conspiracy second degree. They were both charged in the same indictment. The

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<sup>43</sup> Superior Court Docket No. 11: 10-C filed by counsel entering not guilty pleas on all the indicted charges.

<sup>44</sup> Superior Court Docket No. 14.

<sup>45</sup> See, Superior Court Docket No. 3 and Superior Court Docket No. 14.

<sup>46</sup> Superior Court Docket No. 19.

<sup>47</sup> Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 7, Ground Nine.

informant advised Detective Popp that 30 bundles of heroin would be delivered to a specific parking lot location in the Town Court Compton Townhouses and that the individuals delivering the bundles of heroin were two young black males. Based on the State's theory of accomplice liability and the location of the heroin in the vehicle<sup>48</sup>, there was a factual basis for the court's finding of guilt.<sup>49</sup> The fact that co-defendant Travar Smith resolved his charges had no impact on the resolution or prosecution of the charges against Defendant. Defendant's claim of ineffectiveness on this issue is without merit.

### **DEFENDANT'S CLAIMS RELATED TO THE PLEA OFFERS**

45. Defendant raises claims of counsel ineffectiveness related to decisions he made in response to the State's plea offers. Essentially, Defendant contends that his decisions were not made knowingly and intelligently as a result of his trial counsel's ineffectiveness. Defendant bases his claims on the recent United States Supreme Court decisions in *Missouri v. Frye*, 132 S.Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). Defendant contends that his decisions would have been different had he been better apprised of the law by his trial counsel. Contrary to Defendant's contentions, the record does not reflect that trial counsel was deficient in any regard.

46. Trial counsel, in her Supplemental Affidavit, represents that she filed a Motion to Suppress on May 10, 2010, and provided a copy of the motion to Defendant Miller.<sup>50</sup> The motion clearly articulated the applicable standard of law, the standard of reasonable articulable suspicion, required to detain an individual. The motion to suppress cited the

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<sup>48</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 42 (the heroin was on the ground leaned up against the center console of the vehicle).

<sup>49</sup> Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 7, Ground Nine.

<sup>50</sup> See, Supplemental Affidavit of Trial Counsel, Superior Court Docket No. 59.

controlling cases on the issue. Counsel discussed the controlling cases and the motion to suppress at length with Defendant Miller prior to the June 2, 2010 suppression hearing.<sup>51</sup>

47. Defendant was informed and fully aware that the issue presented in the motion to suppress was whether the State could demonstrate a reasonable articulable suspicion that he was committing, had committed, or was about to commit a crime at the time when the police officer stopped him.<sup>52</sup>

48. On May 20, 2010, less than two weeks before the suppression hearing, the State offered a plea to eight years minimum mandatory Level V incarceration. Following receipt of the plea offer, trial counsel met with Defendant to discuss the plea. Trial counsel explained that Defendant was facing a 16 year minimum mandatory sentence if convicted of all the indicted charges; however, the State was offering a plea with a recommendation of an eight year minimum mandatory term of incarceration.<sup>53</sup> Defendant advised that he wanted to proceed with the suppression hearing.<sup>54</sup>

49. On June 2, 2010, the day of the suppression hearing, the State offered a plea that would result in a recommendation of a six year minimum mandatory Level V sentence. The Superior Court judge conducted a lengthy colloquy as to the plea offer.<sup>55</sup> Following the lengthy colloquy, Defendant rejected the reduced plea offer of a recommendation of 6 years at Level V incarceration.<sup>56</sup> The court found Defendant's decision to reject the State's plea offer, with a recommendation of 6 years at Level V incarceration, to be knowing and voluntary.<sup>57</sup>

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<sup>51</sup> Supplemental Affidavit of Trial Counsel, Superior Court Docket No. 59.

<sup>52</sup> *Id.*

<sup>53</sup> Supplemental Affidavit of Trial Counsel, Superior Court Docket No. 59.

<sup>54</sup> Supplemental Affidavit of Trial Counsel, Superior Court Docket No. 59.

<sup>55</sup> June 2, 2010 Motion to Suppress Transcript, at pgs. 2-15.

<sup>56</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 15.

<sup>57</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 15.



50. During the plea colloquy, Defendant represented that he discussed the nature of the charges with his counsel and the allegations in support of those charges. He understood that a motion to suppress had been filed on his behalf. He understood that if he did not prevail on the motion to suppress and proceeded to trial and was convicted of all the charges he was facing 16 years of minimum mandatory Level V incarceration and up to 87 years of incarceration.<sup>58</sup>

51. Defendant was asked whether he had any questions about the plea offer that he wanted to discuss with trial counsel, or with the court.<sup>59</sup> Defendant understood that he was taking a risk and that he could lose the suppression hearing.<sup>60</sup> Defendant represented on the record that he did not wish to discuss the plea any further with trial counsel.<sup>61</sup>

52. Defendant represented that nobody was forcing him to reject the plea or take the matter to trial.<sup>62</sup> Defendant represented that it was his decision to reject the State's plea offer. The court found Defendant's decision to reject the State's plea offer to be knowing and voluntary.<sup>63</sup>

53. Defendant's assertion that he was not apprised by his counsel of the controlling law that would control his suppression motion, and his assertion that his decision to reject the plea offer before the suppression hearing was not knowing and voluntary is belied by the record. Defendant is bound by his testimony at the plea colloquy regarding his

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<sup>58</sup> June 2, 2010 Motion to Suppress Transcript, at pgs. 2-13.

<sup>59</sup> June 2, 2010 Motion to Suppress Transcript, at pgs. 13-14.

<sup>60</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 14.

<sup>61</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 14.

<sup>62</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 15.

<sup>63</sup> June 2, 2010 Motion to Suppress Transcript, at pg. 15.

rejection of the plea absent clear and convincing evidence to the contrary.<sup>64</sup> Defendant has not presented any clear, contrary evidence to call into question his prior testimony.

54. Defendant contends that his decision not to accept the plea should be set aside and he should be entitled to accept the plea offer of six years because trial counsel said that he “could” prevail on the motion to suppress.

55. In *Lafler*, the defendant rejected a plea offer based on the faulty advice of counsel which all parties conceded was ineffective.<sup>65</sup> The *Lafler* defendant rejected the plea offer on two occasions based on his counsel’s advice that the prosecution *would* be unable to meet its proofs at trial. In *Lafler*, defense counsel conceded, and all the parties agreed, that defense counsel provided ineffective assistance in his faulty advice to defendant.<sup>66</sup>

56. In the subject action, however, the record reflects that no such faulty advice was provided to Defendant. Trial counsel filed a meritorious motion and Defendant could have prevailed. Indeed, the State’s actions in offering a better, reduced, plea on the day of the hearing on Defendant’s motion to suppress reflects that both parties recognized the uncertainty of the result and that either party could prevail.

57. From the colloquy with the court, it is clear that Defendant understood that the motion to suppress was pending, that he “could” prevail on the motion, but he also understood that he was taking a risk and he could lose the motion as well. In this case, the record reflects that Defendant was aware that there was no guaranty that he would prevail on the motion and that he knew he was rolling the dice as to the outcome.

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<sup>64</sup> See, *State v. Harden*, 1998 WL 735879, \*5 (Del.Super.); *State v. Stuart*, 2008 WL 4868658, \*3 (Del.Super. 2008).

<sup>65</sup> *Lafler*, 132 S.Ct. at 1383-1391.

<sup>66</sup> *Lafler*, 132 S.Ct. at 1390-91.

Defendant made a knowing and a calculated gamble, which was placed on the record, to reject the State's plea offer and proceed with the hearing.

58. Following the suppression hearing and the denial of Defendant's motion, Defendant was provided with various options: 1) proceed to trial by jury; 2) accept the State's offer to proceed to a stipulated trial on the charges of possession with intent to deliver heroin and PFDCF with an agreed upon recommended sentence of ten years at Level V, thereby preserving his right to appeal the denial of the suppression motion; or 3) accept the State's offer to a plea of guilty to Trafficking in Heroin and PFDCF with a minimum mandatory sentence of eight years at Level V, but Defendant would have to forfeit his right to appeal.<sup>67</sup>

59. Following the suppression hearing and the denial of Defendant's motion, Defendant chose to proceed with a stipulated trial on the charges of possession with intent to deliver heroin and PFDCF with an agreed upon recommended sentence of ten years at Level V. Defendant's decision to accept this offer was based on his desire to preserve his right to appeal the Superior Court's suppression ruling but to avoid the additional minimum mandatory Level V time on the Trafficking in Heroin charge.<sup>68</sup> Indeed, the 10 year Level V sentence being offered with the stipulated trial was far better than the 16 years to 87 years of incarceration Defendant was facing if convicted of all the pending charges.

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<sup>67</sup> Affidavit of Trial Counsel, Superior Court Docket No. 47, at pg. 3, and Exhibit 3-letter to Defendant by Trial Counsel of August 12, 2010 discussing the offers made by the State following the denial of Defendant's suppression motion.

<sup>68</sup> Affidavit of Trial Counsel, Superior Court Docket No. 47.

60. Prior to proceeding with the stipulated trial, the court engaged in a colloquy with Defendant to determine whether Defendant's decision to proceed to the stipulated trial was knowing and voluntary.<sup>69</sup>

61. On the record, Defendant represented that he fully discussed with his trial counsel his decision to agree to a stipulated trial.<sup>70</sup> He represented that nobody was forcing him to make the decision to proceed to a bench trial with a stipulated record.<sup>71</sup> Defendant represented that he was satisfied with his counsel's representation.<sup>72</sup> Defendant also represented that he understood the consequences of his decision to agree to a stipulated trial.<sup>73</sup> Based on Defendant's representations during the colloquy, the Superior Court found that Defendant's decision to agree to a stipulated trial was knowing and voluntary.<sup>74</sup>

62. Again, Defendant is now bound by his testimony at the colloquy regarding his waiver of his jury trial and his decision to proceed to the stipulated trial absent clear and convincing evidence to the contrary. Defendant has not presented any clear, contrary evidence to call into question his prior testimony.

63. In the subject action, Defendant falls far short of establishing a claim of ineffective assistance of counsel as to his trial counsel's conduct related to the plea offers. In this case, all offers were communicated to Defendant and discussed. Despite his contention to the contrary, Defendant's decisions as to the rejection of the plea offer prior to the suppression motion and his acceptance of the stipulated trial with a 10 year Level

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<sup>69</sup> September 7, 2010 Stipulated Trial Transcript, at pgs. 9-12.

<sup>70</sup> September 7, 2010 Stipulated Trial Transcript, at pgs. 9-10.

<sup>71</sup> September 7, 2010 Stipulated Trial Transcript, at pg. 11.

<sup>72</sup> September 7, 2010 Stipulated Trial Transcript, at pgs. 11-12.

<sup>73</sup> September 7, 2010 Stipulated Trial Transcript, at pgs. 11-12.

<sup>74</sup> September 7, 2010 Stipulated Trial Transcript, at pg. 12.

V recommendation following the denial of his motion were knowingly and voluntarily made. Defendant's ineffective assistance of counsel claims are without merit.

**DEFENDANT'S CLAIM AS TO THE SUPPRESSION TRANSCRIPT**

64. In Claim Eight, Defendant contends that his counsel was ineffective for failing to provide him with the suppression hearing transcript until 11 weeks after the hearing took place and one week before he was to decide whether to accept a plea or proceed to trial. Defendant contends that by his counsel's delay in providing him with the transcript, he was denied an adequate amount of time to prepare his defense.

65. First, trial counsel, in her Affidavit, represents that she forwarded the suppression hearing transcript to Defendant promptly upon her receipt on same.<sup>75</sup> Consequently, trial counsel cannot be deemed ineffective for failing to provide Defendant with a copy of a transcript any earlier because she, herself, did not have the transcript.

66. Second, Defendant was present at the suppression hearing, which consisted of one witness. Defendant heard the testimony and the Superior Court's ruling. The transcript did not provide anything Defendant had not already heard.

67. Third, the evidence presented at the suppression hearing was that as Detective Popp approached Defendant's vehicle he could see, in plain view, what appeared to be a large quantity of heroin leaning up against the center console and a handgun protruding from underneath the driver's seat. Defendant was aware of this testimony. The receipt of the transcript did not hinder the decision as to whether to accept a plea nor did it hinder trial preparation.

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<sup>75</sup> Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 6, Ground Eight; See also, letter dated August 25, 2010 from trial counsel to Defendant enclosing copy of the Suppression Hearing transcript-attached to Defendant's Memorandum of Law at Exhibit F.

68. Fourth, trial counsel represents that the receipt of the suppression hearing transcript was not the determinative factor in Defendant's decision to accept a plea or proceed to trial. Defendant's decision to proceed with a stipulated trial, and plead to two charges (possession with intent to deliver heroin and PFDCF) was driven by his desire to preserve his right to appeal the Superior Court's suppression ruling while avoiding the additional minimum mandatory Level V time on the Trafficking in Heroin charge.<sup>76</sup>

69. Counsel was not deficient in any respect related to this claim and Defendant has not established any actual prejudice allegedly as a result thereof. This claim is without merit.

70. In this case, for those claims that are procedurally barred, 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 justice" exception is a "narrow one and has been applied only in limited circumstances."<sup>77</sup> The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."<sup>78</sup> 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.<sup>79</sup>

71. Defendant's motion for the appointment of counsel has previously been denied. Rule 61(e) permits the court to appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown. The Delaware Supreme Court has

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<sup>76</sup> Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 6, Ground Eight.

<sup>77</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

consistently held that there is no constitutional right to counsel in a postconviction proceeding.<sup>80</sup> The United States Supreme Court's decision in *Martinez v. Ryan*,<sup>81</sup> did not change Delaware's longstanding rule that defendants have no constitutional right to counsel in a postconviction proceeding.<sup>82</sup> Indeed, the United States Supreme Court in *Martinez* made it clear that when, like Defendant's Rule 61 motion, a Rule 61 motion is insubstantial, wholly lacking in merit, and wholly without any factual support, a request for the appointment of counsel is properly denied.<sup>83</sup>

72. Defendant's request for an evidentiary hearing is hereby denied. The parties' submissions and the evidentiary record were carefully considered. Defendant's allegations were reasonably discounted as not supported by the record, persuasively rebutted by counsels' affidavits, or not material to a determination of Defendant's claims. There is no just reason to delay the issuance of this decision in order to further expand the record or to otherwise hold any type of hearing.

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

**IT IS SO RECOMMENDED.**

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Commissioner Lynne M. Parker

oc: Prothonotary  
cc: Jennifer-Kate Aaronson, Esquire  
Bernard J. O'Donnell, Esquire

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<sup>80</sup> *Garnett v. State*, 1998 WL 184489 (Del.); *Cropper v. State*, 2001 WL 1636542 (Del.).

<sup>81</sup> *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

<sup>82</sup> See, *Martinez*, 132 S.Ct. at 1315-1320.

<sup>83</sup> *Id.*

