

Williams drove to Burton Village and spoke with the defendant about purchasing one-eighth ounce of crack cocaine. After they spoke in Williams' car, the defendant exited the car, walked to his white Ford Explorer and removed a small black bag from inside. The defendant then returned to Williams' car and removed a set of scales and another bag containing five to six ounces of cocaine from the black bag. The defendant weighed a small amount of cocaine to sell to Williams. The defendant then gave Williams an eighth of an ounce of cocaine in exchange for \$200 cash. A camera had been hidden in Williams' car before the buy. It recorded the transaction in both audio and video. The videotape of the transaction was properly admitted into evidence.¹ Williams also wore a "Kel" listening device which allowed Detective Marzec to listen to Williams' conversation with the defendant in real-time.² After the sale, the informant advised Detective Marzec of the approximate amount of cocaine in the defendant's possession as well as the license plate number of the defendant's white Ford Explorer. Officer Jamie Riddle ("Officer Riddle"), a Rehoboth Beach police officer, followed the defendant's vehicle.

Williams met with Detective Marzec and explained the details of the drug transaction. Officer Riddle was then instructed to perform a traffic stop of the defendant's car which he commenced. The defendant did not stop. After traveling a short distance, the defendant's vehicle stopped momentarily and a passenger ran out of the car. The passenger was later identified as Jesse Drummond, defendant's thirteen year-old cousin. Jesse was apprehended with the black bag described by the informant.

After Jesse's exit, the defendant continued traveling for a short distance. He then stopped his vehicle and attempted to flee on foot but was apprehended by the police. The police found

¹ Trial Tr. 52, 79, June 13, 2005.

² *Id.* at 37-38.

over \$1,300 in the defendant's possession including the marked bills Detective Marzec had given to the informant.

On June 14, 2005, the defendant was convicted of Trafficking in Cocaine and Possession with Intent to Deliver Cocaine. He was sentenced on January 30, 2006, to 8 years at level five on the trafficking charge and 5 years at level five followed by six months at level four work release on the possession with intent to deliver charge. He appealed to the Delaware Supreme Court. On October 5, 2006, the Supreme Court affirmed his conviction. The defendant's attorney at trial was Michael R. Abram, Esquire. His attorney on appeal was Joseph M. Bernstein, Esquire.

On September 20, 2007, the defendant timely filed a *pro se* Motion for Postconviction Relief in this Court pursuant to Rule 61. The defendant alleges six grounds for relief in his postconviction motion, none of which were raised on appeal: (1) that there was no valid arrest warrant; (2) that he was denied a preliminary hearing; (3) that the State failed to produce a properly signed grand jury indictment; (4) that there was insufficient evidence to support the jury's conviction on the charge of possession with intent to deliver cocaine; (5) that he was deprived of a fair trial because the State changed experts without notice; and (6) that his counsel was ineffective.

Because the defendant failed to raise any of these arguments on direct appeal, the arguments are procedurally barred pursuant to Rule 61(i)(3) unless he can demonstrate "cause" for failure to raise the claims and "prejudice" as a result of the default.³

³ *Oney v. State*, 482 A.2d 756, 758 (Del. 1984).

1. Arrest Warrant

The defendant alleges that there was no valid warrant for his arrest. This claim was formerly adjudicated at a Suppression Hearing on February 14, 2005. The Court found that the police had probable cause to arrest the defendant under 11 *Del. C.* § 904(b)(1). Because this ground for relief was formerly adjudicated, consideration of this claim is barred pursuant to Superior Court Criminal Rule 61(i)(4).

2. Preliminary Hearing

The defendant alleges that he was denied a preliminary hearing. There is no constitutional due process right to a preliminary hearing.⁴ Because both the preliminary hearing and the indictment serve to establish probable cause, an indictment eliminates the need for a preliminary hearing.⁵ A preliminary hearing was scheduled for August 19, 2004. On August 16, 2004, the defendant was indicted by a Grand Jury in Superior Court, thus eliminating the need for the preliminary hearing.

3. Indictment

The defendant alleges that the State has failed to produce a properly signed grand jury indictment. He alleges that the indictment was not signed by either the Attorney General or a Deputy Attorney General. The indictment in the filed returned by the Supreme Court after its review on appeal is dated August 16, 2004. It was returned by the grand jury and bears signatures from the grand jury foreman and secretary. The signature line of the Attorney General reads: “s/M. JANE BRADY”. The indictment does not bear the signature of a Deputy Attorney General.

⁴ *Jenkins v. State*, 305 A.2d 610, 614-15 (Del. 1973).

⁵ *State v. Robinson*, 417 A.2d 953, 961 (Del. 1980).

Attached to the State's Affidavit filed in connection with this motion for postconviction relief is the State's copy of the original indictment.⁶ The signature line of the Attorney General reads: "s/M. JANE BRADY". It bears the signature of the Deputy Attorney General, David Hume. This copy was retained by the Department of Justice before was sent to the grand jury. It is the same copy that was sent to the defendant in discovery.

Superior Court Criminal Rule 7(c)(1) states that the indictment "shall be signed by the attorney general."⁷ The record is ambiguous as to whether the indictment was signed.⁸ Assuming, *arguendo*, that it was not, the defendant has failed to show why this claim is not subject to the procedural bar of Rule 61(i)(3).

4. *Insufficient Evidence*

The defendant argues there was insufficient evidence to support the jury's conviction on the charge of possession with intent to deliver cocaine. This claim was not presented at trial and it must fail if "any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt."⁹

It is clear from the record that the defendant sold cocaine to Williams, a police informant, in a "controlled buy."¹⁰ As evidence that the cocaine was possessed with the intent to deliver and was not for personal use, Detective Marzec cited three specific items: (1) the scale the defendant used to weigh and apportion cocaine; (2) \$1,368 in cash found on the defendant at the time of arrest; and (3) the videotape of the defendant distributing the crack cocaine to the

⁶ Hume Aff. 1 (No. 96).

⁷ Super. Ct. Crim. R. 7(c)(1).

⁸ See generally *Smokes v. City of Wilmington*, 282 A.2d 634 (Del. Super Ct. 1971)(declining to address the validity of an indictment not signed by the Attorney General or his Deputy).

⁹ *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).

¹⁰ A controlled buy is the purchase of a controlled substance from a confidential source who is not a police officer. A direct buy is a purchase of controlled substances directly from a police officer. Trial Tr. 36, June 13, 2005.

confidential informant.¹¹ When viewed in a light most favorable to the State, the evidence presented was sufficient to support a guilty verdict.

5. Identification of Expert Witness

The defendant alleges that he was deprived of a fair trial because the State changed the expert testifying that the drugs were intended for distribution and not for personal consumption, from Detective Wright to Detective Marzec. The State notified defense counsel prior to trial that Detective Marzec would be testifying in place of Detective Wright.¹² The defendant's argument lacks merit.

6. Ineffective Assistance of Counsel

The defendant's remaining claims allege ineffective assistance of counsel. To prevail on a postconviction relief claim based on ineffective assistance of counsel, the defendant is required to show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.¹³ The defendant must satisfy the proof requirements of both prongs in order to succeed on an ineffective assistance of counsel claim. Failure to do so as to one prong will render the claim unsuccessful, and the Court need not address the remaining prong.¹⁴ To show that counsel's representation fell below an objective standard of reasonableness, the defendant bears a heavy burden. He must overcome the strong presumption that his counsel's representation was professionally reasonable.¹⁵

¹¹ Trial Tr. 78-79, June 14, 2005.

¹² *Id.* at 73.

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

¹⁴ *Id.* at 697.

¹⁵ *Id.* at 689.

The defendant argues that counsel was ineffective by allowing trial to proceed without a proper arrest warrant or indictment. As to the arrest warrant, a suppression hearing was held and the Court denied his motion. The record is inconclusive regarding the signed indictment.

The defendant next argues that trial counsel was ineffective “in failing to challenge or support defendant’s denial of scheduled preliminary examination even though being informed by his client.”¹⁶ As stated above, the defendant was not entitled to a preliminary hearing once the indictment was returned. The defendant has failed to show how counsel’s actions fell below an objective standard of reasonableness. He has also failed to show actual prejudice.

The defendant also argues that counsel was ineffective for failing to object to the State’s request to amend the indictment. The Court has power to amend indictment as to matters of form, but not as to matters of substance, as long as no new, additional or different charge is made thereby and if the accused will not suffer prejudice to substantial rights. The rule is designed to afford the accused two protections: (1) notice of the charges against him so that he has the opportunity to prepare an adequate defense; and (2) prevention from twice being placed in jeopardy for the same offense.¹⁷ Here, the amendment to the indictment eliminated the charge of Distribution of Cocaine to a Minor. As counsel’s failure to object to the amended indictment did not prejudice the defendant, this claim is barred.

¹⁶ Def.’s Mot. 7 (No. 85).

¹⁷ *Keller v. State*, 435 A.2d 152, 155 (Del. 1981).

The defendant's final allegation is that counsel was incompetent, lacked skill, failed to investigate, was unprepared, and was ineffective in his cross-examination of Williams. While this Court will accept all well-pleaded allegations as true, it will ignore conclusory allegations, such as these, which lack specific supporting factual allegations.¹⁸

IT IS SO ORDERED.

Judge Susan C. Del Pesco

Original to Prothonotary
xc: Joseph Bernstein, Esq.
Michael Abram, Esq.
David Hume, IV, Esq.
Antonio Drummond

¹⁸ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998); *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).