IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0503000921
	)	
DORION TATUM	)	
	)	
Defendant.	)	

Submitted: March 3, 2008
Decided: June 27, 2008

On Defendant's Motion for Postconviction Relief - DENIED.

ORDER

Diane C. Walsh, Department of Justice, 820 North French Street, Wilmington, Delaware 19801.

Dorion Tatum, 337 Willow Drive, Elkton, MD 21921.

CARPENTER, J.

On this 27th day of June, 2008, upon consideration of Defendant's Motion for Postconviction Relief it appears to the Court that:

1. On May 17, 2007, Dorion Tatum ("Defendant") filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). For the reasons set forth below, Defendant's Motion for Postconviction Relief is **DENIED.**

2. Following a bench trial in 2005, where the Defendant represented himself, he was convicted of seven counts of Possession of a Hypodermic Needle and Syringe, one count of Tampering with Physical Evidence, one count of Criminal Impersonation, and one count of Possession of a Controlled Substance. In conjunction with a sentence from another case, the Defendant was sentenced to a period of probation with requirements to pay fines and costs. The Delaware Supreme Court dismissed Defendant's appeal because the Court lacked jurisdiction to consider it under Article IV Section 11(1)(b) of the Delaware Constitution.[1] A mandate was issued on March 23, 2007. Subsequently, the Defendant filed the present postconviction motion on May 17, 2007. The Defendant filed a second

[1]"The Supreme Court shall have jurisdiction as follows: . . . To receive appeals from the Superior Court in criminal cases, upon application of the accused in all cases in which the sentence shall be death, imprisonment exceeding one month, or fine exceeding One Hundred Dollars, and in such other cases as shall be provided by law." Del. Const. Art. IV § 11(1)(b).

postconviction motion on May 21, 2008. Because the Court has not yet ruled on Defendant's first postconviction motion, and because the claims appear to be mere repetitions of those in the first motion, Defendant's second motion will be treated as an amendment to the first, and the Court will incorporate its claims therein. At the Court's request, Defendant's standby counsel Ralph D. Wilkinson, IV, Esquire, ("Counsel"), filed an affidavit in response to the claims of ineffective assistance of counsel.

3. The Defendant raises two grounds for relief in his postconviction motion: a violation of his Fourth Amendment rights by the police, and a claim of ineffective assistance of counsel. Prior to addressing into the merits of a postconviction claim, the Court must first determine that the motion meets the procedural requirements of Rule 61(I).[2] Rule 61(I)(4) states "Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction relief proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice."[3] Because the issue of the Defendant's constitutional protection against unlawful searches and seizures was addressed at a suppression

[2]*Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

[3]Super. Ct. Crim. R. 61(i)(4).

hearing before the Honorable John Babiarz on July 29, 2005, where Defendant appeared *pro se*, it is a formerly adjudicated ground, and therefore procedurally barred pursuant to Rule 61(I)(4).[4] Furthermore, the Defendant points to no legal or factual developments that have emerged subsequent to his conviction that would require the Court to consider this claim in the interest of justice.

4. Defendant's second ground for relief is a claim of ineffective assistance of counsel. Before discussing the merits of Defendant's claim, it is important to note

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[4]At the suppression hearing the Court made the following observations and rulings: "It appears from the evidence, in fact, undisputed, that the officer came across the vehicle that Mr. Tatum was in in a remote road, a small country road, where it was blocking the roadway."

"The officer, on running the license plate, found that there was no record of any vehicle registered to that license plate. Those two facts alone provide ample justification for the officer approaching the vehicle for further investigation. And, frankly, the fact that Mr. Tatum pops up from the back seat of this car parked in the middle of the road provides additional suspicious circumstance. The officer was justified at that point in placing Mr. Tatum in the rear of his vehicle for his own safety while he conducted a further investigation."

"...And checking the name that Mr. Tatum gave him, the officer found that there wasn't anybody in the country who had that name, address, Social Security number, and so forth. If that's not reasonable suspicion to continue to detain Mr. Tatum, I don't know what is. The officer was completely justified in taking him into custody at that point for further investigation."

"Having made that decision, the officer had to contend with what to do with the vehicle. Obviously it couldn't be left on the remote road, unattended, and he determined properly that the vehicle should be towed. If you're going to tow a vehicle, an officer is entitled to conduct an inventory search. That's for two purposes: One, to protect the property that might be in the vehicle, preserve it for the owners, and number two, to protect the towing company from being subject to unjustified claims. And that's precisely what the officer did. And his search did not exceed lawful boundaries."

"[H]e looked in the inside of the vehicle, found hypodermic needles. He looked in the glove compartment, which he was justified in doing because an opened glove compartment would be subject to thievery by somebody. He saw a fanny bag on the front seat. And, again, it's reasonable for him to take a look at the contents of that to preclude a claim that there was some valuable property that disappeared while the car was in the tow truck or the police's custody. So the detention was lawful, the vehicle search was lawful, and the motion is denied." Suppression Hr'g. Tr. 46-48 July 29, 2005.

that generally such a claim by a *pro se* litigant would be summarily dismissed as being without merit since one cannot make the decision to represent himself and then request a new trial arguing that he had not performed up to the standards of a trained lawyer. However in this case, Mr. Wilkinson represented Defendant prior to the suppression hearing before Judge Babiarz, and it is this period of representation that is now at issue. Mr. Wilkinson would not file a suppression motion on Defendant's behalf, so the Defendant argues he was forced to proceed *pro se* and filed the motion himself. Defendant's only claim of ineffective assistance of counsel relates to Mr. Wilkinson's failure to file the motion.

To establish an ineffective assistance claim, a defendant must meet the two-part test set forth in *Strickland v. Washington*.[5] The Defendant must show that, first, counsel's representation fell below an objective standard of reasonableness, and second, a reasonable probability exists that the Defendant would not have been convicted but for counsel's error.[6] Whenever evaluating the conduct of counsel, the Court must acknowledge a strong presumption that counsel's conduct was professionally reasonable.[7]

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[5]466 U.S. 668 (1984).

[6]*Wright v. State*, 608 A.2d 731 (Del. 1992), citing *Albury v. State*, 551 A.2d 53, 58 (Del. Super. Ct. 1988).

[7]*Albury v. State*, 551 A.2d at 59.

5. The Defendant first appears to be claiming that had Mr. Wilkinson filed a suppression motion on his behalf, he would not have proceeded *pro se*, and with Mr. Wilkinson's presentation the motion would have been granted and the Defendant would not have been convicted of the charges. The Court finds this argument to be without merit under *Strickland*. First, counsel's conduct was not unreasonable under the facts of his client's case. Simply because the Defendant does not like counsel's strategy or trial tactics does not render counsel's conduct unreasonable. Mr. Wilkinson states in his affidavit "I carefully reviewed the police reports, the affidavit of probable cause and fully discussed the factual circumstances of Mr. Tatum's arrest with him. After reviewing these materials and discussing the factual circumstances with Mr. Tatum, I concluded there were no meritorious grounds."[8] Furthermore, Judge Babiarz's denial of Defendant's *pro se* motion lends support to Mr. Wilkinson's contention that Defendant's claim lacked merit. Counsel's conduct certainly qualifies as reasonable, especially in light of his duty to the Court not to file frivolous motions. Litigation decisions of this nature are within the province of counsel to decide and a defendant's disagreement with that decision does not provide a basis for the Court to second guess counsel .

[8]Wilkinson Aff. ¶ 2.

6. The Defendant's claim also fails under the second prong of *Strickland*. The Defendant cannot show that had Mr. Wilkinson, or "counsel trained in the ability to do so"[9] filed a suppression motion, it would have been granted, or that he would have been acquitted of the crimes charged. While perhaps Mr. Wilkinson would have been better skilled in his questioning of the officer, the facts here were so overwhelming to establish the appropriateness of the search, the Court can find nothing more that could have been done by Mr. Wilkinson to support an argument for suppression. The Defendant's claims that the police officer who arrested him did not have reasonable suspicion or probable cause simply demonstrate Defendant's ignorance of Fourth Amendment law. Regardless of who represented the Defendant at his suppression hearing, the facts of the State's case would not have changed, and testimony presented by the officer would have been substantially the same. It follows that the reasons articulated by Judge Babiarz for denying Defendant's motion to suppress would remain the same whether Defendant had counsel or not. Therefore, the Defendant has made no concrete allegations of actual prejudice, and for the above reasons this ground fails.

[9]Def.'s Motion at 3.

7. For the reasons set forth above, the Defendant's Motion for Postconviction Relief is hereby DENIED.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.