

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

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

July 10, 2008

Maahir B. Ismaa'eel, a/k/a Maahir B. Ismaa'eel H. Hackett  
SBI#  
James T. Vaughn Correctional Center  
1181 Paddock Road, Unit MHU23  
Smyrna, DE 19977

RE: State v. Ismaaeel, Def. ID# 0304002130 - R3

DATE SUBMITTED: July 3, 2008

Dear Mr. Ismaa'eel:

Defendant Maahir B. Ismaa'eel, a/k/a Maahir B. Ismaa'eel H. Hackett ("defendant") has filed his third motion for postconviction relief. This is my decision denying the motion.

In 2003, defendant was arrested on charges of trafficking in cocaine in an amount between 5 and 50 grams, possession with intent to deliver a controlled substance, maintaining a dwelling for keeping a controlled substance, conspiracy in the second degree, and possession of drug paraphernalia.

Defendant's trial counsel was Carole J. Dunn, Esquire ("trial counsel").

At the time of his final case review, the following exchange took place in open court:

MS. DUNN: \*\*\*

Mr. Ismaaeel has signed, and I witnessed his signature, a request to waive a jury

trial in this case. I have given that form to Mr. Gelof.

MR. GELOF: I am considering it, Your Honor. This is something new. I will probably give the Court and Ms. Dunn my decision by Monday.

THE COURT: Sure. Very well. If you are going to do that, where is he going to be on Monday? I think maybe we better go through a discussion with him so we get on the record that he knows what it means to have a trial by Judge, subject to the consent of the State.

When you have a trial by a Judge, you have to understand that, obviously, the Judge will make a decision.

THE DEFENDANT: Yes, sir.

THE COURT: And there are three Judges here. You don't have a guarantee of who the Judge will be. It will be some Judge. But what is happening when you go to a trial by a Judge is that you, of course, are giving up your right to trial by jury.

Now, in a jury trial, you would have the ability to help select the jury, and it would be a panel of people, and you get twelve people to hear the case. People who knew anything about you or knew anything about the case would be excluded. They wouldn't be on the jury. They would be off.

So with the other people, you would have six challenges. If you eyeballed someone and got a bad this feeling about them or you would rather take your chances with somebody else, you would have what they call peremptory challenges. But, in any event, you would help with and participate in selection of a jury, and you would have twelve people.

The thing about a jury is, of course, the State – and it is true of a bench trial – has the obligation of proving guilt beyond a reasonable doubt. But in a bench trial, the persuasion is with a Judge, because the Judge makes the decision based upon the evidence and the law.

In a jury trial, the prosecutor has to persuade twelve people and twelve people have to unanimously agree either for guilt or for innocence. So the prosecutor has a burden to get all twelve to say that, under the evidence and the law, the evidence shows that the case has been established beyond a reasonable doubt.

So you have to understand that you have an absolute right to have a trial by jury. That is probably one of the most fundamental rights that criminal defendants have. So you understand that with the trial going forward on Wednesday, you would be able to have a jury trial and all twelve would have to unanimously agree as to your guilt.

If they couldn't, then a mistrial would be granted. If they couldn't agree to your guilt, they might find the case wasn't proven beyond a reasonable doubt and they might acquit you. If they couldn't agree, the case would be a mistrial and it would be up to the State to decide whether it would be brought back for trial.

One thing for sure, if you have a trial in front of a Judge, you are not going to get a mistrial because the Judge will make a decision based on the evidence and the law. Do you understand what I have been talking about? Do you have any questions for me?

THE DEFENDANT: No, sir. That's my choice.

THE COURT: You talked about this with Ms. Dunn?

THE DEFENDANT: Yes, sir.

THE COURT: And do you agree you had enough time to go over your case and the evidence with Ms. Dunn?

THE DEFENDANT: No, I haven't , but —

THE COURT: Your trial is Wednesday.

THE DEFENDANT: I would like more time, but, unfortunately, it was just dropped on me. I didn't even know I was supposed to go to trial until, like, last week.

THE COURT: You are going to be going to trial. I don't think these charges were just brought forward last week. You were here on final case review this week. You don't get to the final case review until the matter has been around for a significant period of time.

But insofar as the jury trial right is concerned, is anybody forcing you or putting any pressure on you to give up your right to a jury trial?

THE DEFENDANT: No, sir. That is my decision entirely.

THE COURT: That is your decision?

THE DEFENDANT: Yes, sir.

THE COURT: Did Ms. Dunn discuss with you the advantages and disadvantages of a trial by jury, as well as a trial by a Judge?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Then insofar as I am concerned, I do believe that you understand the nature of a bench trial, that is, a trial by a Judge, and that nobody is forcing you to make this decision. It is a free and voluntary choice on your part.

You are making a knowing and intelligent waiver of your fundamental right to a trial by jury.

This is subject to two other things. Number one, of course, the State has a right to a jury trial. So the State has to consent to it, as well. And, actually, sometimes people don't realize it is also subject to the consent of a Judge. A Judge can say, "Given the situation, it should be for a jury."

Transcript of August 22, 2003, Proceedings at pp. 2-7.

Before defendant's trial began on August 27, 2003, the following exchange took place:

THE COURT: Good morning. This is a bench trial. Did he sign the waiver form? I went through the discussion with him the other week. I just want to be certain that the record has the waiver form signed.

MS. DUNN: Your Honor, Mr. Ismaaeel signed that waiver the last time he was in court, which was Friday. I believe I gave it to –

MR. GELOF: I know at one point, Your Honor, I had it, but I can't seem to locate it.

THE COURT: That is okay. We have another form. We will take one and fill it out. \*\*\*

Sir, is it your desire to have a trial by me?

THE DEFENDANT: Yes, sir.

THE COURT: We had a discussion last week about the merits and the advantages, the plusses and minuses of a judge trial versus a jury trial. So you want to go ahead with me as a trial judge and not have a jury.

THE DEFENDANT: Yes, sir.

THE COURT: I am also finding that this is not the kind of case that would be of necessity, one that a jury only should hear. This is not a murder case. I am going to go ahead and agree to it as well. So I have signed the form.

Transcript of August 27, 2003, Proceedings at pp. A-3-A-4.

The Waiver of Jury Trial form, which is docket number 14 and which defendant, his trial attorney, the prosecutor and the Court signed, provides in pertinent part as follows:

I, Mahir Ismaaeel, defendant in the above stated criminal action, having been furnished with a copy of the Indictment/Information, and fully informed of my rights in said action, do hereby waive trial by jury and request that I be tried by the Court.

Defendant was tried before this judge, after waiving a jury trial, on August 27 and 28, 2003. The Court found defendant guilty of the charges of trafficking in cocaine; possession with intent to deliver cocaine; conspiracy in the second degree; and possession of drug paraphernalia. It found defendant not guilty of the charge of maintaining a dwelling for keeping or delivering a controlled substance.

The Court considered, and denied, defendant's motion to dismiss the trafficking and conspiracy counts. The basis of the motion regarding the trafficking count was that the recently-enacted trafficking statute, 74 *Del. Laws*, c. 106 (2003), changed the first level weight criteria from 5 to 10 grams, and the lesser penalties therein should apply. The Court concluded the statute did not apply to the defendant's convictions. State v. Ismaaeel, Del. Super., Def. ID# 0304002130, Stokes, J. (Jan. 13, 2004).

Defendant's sole argument on appeal was that the trial court erred when it ruled that defendant was not entitled to the reduced sentencing provisions of the recently enacted statute. The Supreme Court affirmed the decision of this Court. Ismaaeel v. State, Del. Supr., No. 17, 2004, Steele, J. (July 9, 2004). The mandate was issued on July 28, 2004.

On July 22, 2005, defendant filed his first motion for postconviction relief. The Court denied that motion. State v. Ismaaeel, Del. Super., Def. ID# 0304002130, Stokes, J. (Oct. 28, 2005). Therein, the Court assumed trial counsel was ineffective for not timely filing a motion to suppress. It then examined whether any prejudice resulted therefrom. The Court concluded there

was no prejudice because the motion to suppress would not have been granted. In reaching that conclusion, the Court found as a fact that the probation officers detained defendant because an administrative warrant was outstanding.<sup>1</sup>

The Supreme Court affirmed this decision. Ismaaeel v. State, Del. Supr., No. 570, 2005, Steele, J. (June 12, 2006).

On November 21, 2006, defendant filed a second motion for postconviction relief. In addressing the motion, the Court determined that it had made a factual error in considering the first motion for postconviction relief, and it reexamined defendant's argument. State v. Ismaaeel, Del. Super., Def. ID# 0304002130, Stokes, J. (Jan. 4, 2007). After reviewing the record again, in particular, pages A-18 - A-23 of the August 27, 2003 trial transcript; the administrative warrant, which defendant submitted as Exhibit B to his pending motion; and the Probation Officer's Arrest/Incident Report, which defendant submitted as Exhibit C to his pending motion, the Court concluded its factual finding that the probation officers detained defendant because an administrative warrant was outstanding was incorrect. It determined that the administrative warrant was filed after defendant's arrest on violation of probation charges and on new criminal charges. Thus, the Court reviewed whether the misstatements affected the Court's decision on whether a motion to suppress would have been granted. Upon reviewing the facts and applying the law to those facts, it concluded the Court's misstatements in the October 28, 2005, decision were of no consequence to its decision on defendant's motion for postconviction relief; had the motion to suppress been heard, it would have been denied; and thus, defendant could not show

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<sup>1</sup>At page 2 of the October 28, 2005 decision, the Court stated: "[T]here was an active warrant for his arrest." At page 6 of the October 28, 2005 decision, the Court stated: "They learned he had an administrative warrant outstanding. They then detained him."

any prejudice for the motion not being presented. Consequently, the Court denied defendant's second motion for postconviction relief.

In this third postconviction motion, which was filed on July 2, 2008, defendant argues trial counsel was ineffective in a number of ways.<sup>2</sup> Defendant alleges that in the pretrial stages, trial counsel failed to properly investigate his case upon his request; trial counsel did not file any pretrial motions at defendant's request; trial counsel illegally advised defendant to be tried by a Judge, thereby causing him to waive his right to a jury trial; and trial counsel did not raise any objections during the entire trial. In connection with the claim regarding waiver of a jury trial, defendant states at page 2 of his Memorandum of Law in Support of his Motion for Post Conviction Relief:

The decision Defendant made on the Advice of Counsel to waive a Jury Trial fell below all objective standard of Reasonableness it was not establish that the waiver made by the Defendant was voluntarily, knowing and intelligently the Defendant was Prejudiced because of counsel's unprofessional errors the outcome of the trial would have different.

Defendant does not substantiate the prejudice prong. He merely makes conclusory allegations that he was prejudiced and the outcome would have been different had trial counsel not been ineffective.

Defendant explains he failed to raise these claims previously because he did not know the proper process for filing a postconviction relief.

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<sup>2</sup>To establish a claim of ineffective assistance of counsel, defendant must show that trial counsel's representation fell below an objective standard of reasonableness and but for the attorney's unprofessional errors, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). With regard to the actual prejudice aspect, "[d]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694.

The Court first reviews the procedural bars of Superior Court Criminal Rule 61(i).<sup>3</sup>

Defendant's motion is procedurally barred on two grounds. First, it is time-barred. Super. Ct. Crim. R. 61(i)(1). Defendant has made no effort to show that any exception to this procedural bar applies. Second, the motion is repetitive. Super. Ct. Crim. R. 61(i)(2). Defendant makes no effort to show that any exception to this procedural bar applies.

Even if the Court did not apply the procedural bars, all claims, with the exception of the claim regarding the waiver of a jury trial, are vague and conclusory. As such, they fail. Younger

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<sup>3</sup> In the version of Rule 61(i) which is applicable to defendant's case, it is provided as follows:

*Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

v. State, 580 A.2d 552, 555 (Del. 1990). As to the waiver of a jury trial, defendant claims that he did not knowingly or voluntarily waive his right to a jury trial. The portions of the transcripts and the Waiver of Jury Trial form set forth above establish that this assertion is completely meritless. Even if the Court considered this claim on the merits, it would deny it.

For the foregoing reasons, the Court denies defendant's third motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office  
Carole J. Dunn, Esquire  
Adam D. Gelof, Esquire