IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	I.D.# 0108020880
JAMEEL ANDERSON,	)	
	)	
Defendant.	)	

Submitted: June 23, 2003
Decided: August 15, 2003

On Defendant's *Pro Se* Motion for Postconviction Relief. DENIED.

ORDER

This 15th day of August, 2003, upon consideration of a *pro se* Motion for Postconviction Relief filed by Jameel Anderson ("Defendant"), it appears to the Court that:

1. Defendant has filed this Motion for Postconviction Relief (the "Motion") pursuant to Superior Court Criminal Rule 61. It is the first such motion that Defendant has filed. For the reasons stated below, Defendant's Motion is **DENIED**.

2. On February 7, 2002, a Superior Court jury convicted Defendant of Delivery of Cocaine (title 16, section 4751 of the Delaware Code). Defendant was immediately sentenced by the Court to seven years at Level V, suspended after five years for two years at decreasing levels of

probation.[1] The main issue at trial "was the identity of the person [Defendant] who sold the drugs to [an] undercover police officer."[2] After his trial counsel had filed a "Rule 26(c)" brief,[3] the Supreme Court affirmed the conviction on direct appeal.[4] The Supreme Court did so after concluding that Defendant's appeal was "wholly without merit and devoid of any arguably appealable issue[s]."[5]

At trial, a report prepared by the Office of the Medical Examiner and establishing that the physical evidence in this case constituted cocaine was introduced into evidence without objection. Because the person who prepared the report was not actually present at trial, the investigating officer associated with Defendant's prosecution read the report's contents into the

[1] The five-year term was a minimum mandatory sentence because Defendant had previously been convicted of a drug offense. See DEL. CODE ANN. tit. 16, § 4763(a) (1995) (stating that "[i]n any case in which a defendant has previously been convicted of a[ ]…[drug] offense…the penalties [for a subsequent drug offense]…shall be increased…").

[2] Joseph M. Bernstein Aff. ¶ 3.

[3] Supreme Court Rule 26(c) provides in pertinent part that "[i]f [a] trial attorney, after a conscientious examination of the record and the law, concludes that an appeal is wholly without merit, the attorney may file a motion to withdraw."

[4] Anderson v. State, No. 115, 2002, 2002 WL 2008161 (Del. Supr. Aug. 28, 2002).

[5] Id. at *1.

record. The Medical Examiner had concluded that the item tested weighed .25 grams and was "an off-white chunky substance…[constituting] crack."[6]

3. Defendant raises four arguments in his Motion: 1) that counsel was ineffective because he "did not object to admission of the Medical Examiner Report";[7] 2) that counsel was ineffective because he "failed to object to investigating officer[ ]…testif[ying] in place of…the Medical Examiner";[8] 3) that the investigating officer "testified outside of his official capacity";[9] and 4) that counsel was ineffective because he "didn't file a proper appeal…."[10]

Defendant's trial counsel submitted an affidavit in response to Defendant's Motion. In his affidavit, counsel states that he did not object to the admission of the Medical Examiner's Report "because the Report…is admissible…without the necessity of the forensic chemist personally appearing in court."[11] With regard to the propriety of having had the investigating officer read the report into the record, counsel submits that he

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[6] Trial Tr. of 2/7/02 at 28 (Ex. "B" to Def.'s Mot.).

[7] Def.'s Mot. at 3.

[8] Id.

[9] Id.

[10] Id.

[11] Joseph M. Bernstein Aff. ¶ 3.

did not object "because there was nothing objectionable about the testimony."[12] Lastly, trial counsel contends that "[t]he above issues were not included in the direct appeal because counsel did not believe that the issues formed a factual or legal basis for an appeal."[13]

Finally, the State contends that "[t]he decision not to object to the admission of the [M]edical [E]xaminer's [R]eport and…[the investigating officer]'s testimony does not…[amount to ineffective assistance of counsel] because not only was the…report and its contents admissible…but also because the sole issue at trial was identity not whether the substance delivered was controlled."[14] The State further asserts that "even if…counsel…[had] objected, the report would have been admitted…or the forensic chemist would have testified and the report and…[that] testimony would have been the same as what…[had been] admitted."[15] The State lastly argues that "[s]ince the [M]edical [E]xaminer's [R]eport and…the [investigating officer]'s testimony were properly admitted…counsel's decision not to raise those issue on direct appeal does not…[consitute

[12] Id.

[13] Id.

[14] State's Resp. to Def.'s Mot. at 2.

[15] Id.

ineffective assistance of counsel]" and that "even if defense counsel had raised those issues on direct appeal, the result would have been no different."[16]

4. To succeed on a claim of ineffective assistance of counsel, Defendant must show that "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different."[17] In attempting to establish a claim of ineffective assistance of counsel, the defendant must allege concrete allegations of actual prejudice and substantiate them.[18] Moreover, any "review of counsel's representation is subject to a strong presumption that the representation was professionally reasonable."[19]

5. Title 10, section 4330 of the Delaware Code provides that "[f]or the purpose of establishing that physical evidence in a criminal…proceeding constitutes a controlled substance…a report signed by the forensic toxicologist or forensic chemist who performed the test or tests as to its

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[16] Id.

[17] Albury v. State, 551 A.2d 53, 58 (Del. 1988) (citing Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)).

[18] Younger v. State, 580 A.2d 552, 555-56 (Del. 1990).

[19] Flamer v. State, 585 A.2d 736, 753 (Del. 1990).

nature is *prima facie* evidence that the material delivered was properly tested [and]…that the material was delivered by the officer or person stated in the report and that the material was or contained the substance therein stated, without the necessity of the forensic toxicologist or forensic chemist personally appearing in court…." Defendant's first objection—that counsel was ineffective because he "did not object to admission of the Medical Examiner Report"—is therefore without merit.

The Court similarly finds Defendant's two contentions relating to the investigating officer (that counsel was ineffective because he "failed to object" to the investigating officer's having read part of the Medical Examiner's Report into the record and that the investigating officer "testified outside of his official capacity") to be without merit. As argued by both counsel and the State, the issue in this case was not "chain of custody," but rather the identity of the person who sold a controlled substance to an undercover police officer. That that same police officer then read into the record part of a properly admitted report that *prima facie* established that the substance was cocaine cannot now be found to be a source of error.

Lastly, the Court finds that counsel's decision to withdraw on appeal before raising any of the complained-of issues does not now amount to any actionable error. As the Supreme Court itself recognized, an independent

and careful review of the record leads to the conclusion that said appeal was "wholly without merit and devoid of any arguably appealable issue."[20] After conducting the above analysis, this Court cannot now reach an opposition conclusion.

Applying all of the above standards, Defendant has failed to show that "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different[ ]";[21] this is particular true given the "strong presumption that the representation was professionally reasonable."[22] Additionally, Defendant has failed to "allege concrete allegations of actual prejudice" and has failed to "substantiate" them.[23]

6. Because Defendant has failed to demonstrate ineffective assistance of counsel as alleged in his Motion, his Motion is **DENIED**.[24]

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[20] Anderson, 2002 WL 2008161 at *1.

[21] Albury, 551 A.2d at 58.

[22] Flamer, 585 A.2d at 753.

[23] Younger, 580 A.2d at 555-56.

[24] Given the Court's disposition of Defendant's Motion, a "Motion to Dismiss" (Dkt. #30) that Defendant had filed when the State did not file a Response within 30 days of the filing of the Motion (the Court had established a longer timeframe by Order dated 4/17/03 (Dkt. #28)) is now **DENIED** as moot.

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary
xc: Natalie S. Woloshin, Deputy Attorney General
Jameel Anderson
Investigative Services