

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 v.) ID No. 0612022950
)
 RYEKI STEWART)
)
 Defendant.)

Submitted: August 8, 2008
Decided: September 24, 2008

On Defendant's Motion for Postconviction Relief - DENIED

OPINION

Brian D. Ahern, Department of Justice, 820 North French Street, Wilmington, Delaware, 19801. Attorney for the State of Delaware.

Joseph M. Bernstein, Esquire, 10354 Flat Stone Loop, Bonita Springs, FL 34135. Attorney for Ryeki Stewart.

CARPENTER, J.

On this 24th day of September 2008, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Ryeki Stewart ("Defendant"), has filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"), to which the State has responded. At the request of the Court, Defendant's trial attorney, John S. Malik, Esquire ("Counsel"), filed an affidavit refuting the allegations of ineffective assistance of counsel. For the reasons set forth below, the Defendant's Motion for Postconviction Relief is **DENIED**.

2. On June 19, 2007, a stipulated trial¹ was held and the Defendant was found guilty of: (1) Trafficking Cocaine over 100 Grams, (2) Possession With Intent to Deliver Cocaine, (3) Maintaining a Vehicle, and (4) Resisting Arrest. Thereafter, the Delaware Supreme Court denied the Defendant's appeal and issued a mandate on March 14, 2008. On April 16, 2008, the Defendant filed this Motion for Postconviction Relief asserting two claims of ineffective assistance of counsel. As indicated above, both the State and trial counsel have responded to the Defendant's motion and he has since replied.

3. Prior to addressing the merits of a postconviction relief claim, the Court must first determine whether the Motion meets the procedural requirements of Rule

¹The stipulated trial was held to preserve the right of the Defendant to appeal the Court's previous denial of the suppression motion.

61(i).² After reviewing the Defendant's present Motion, the Court finds that the claims contained therein only allege ineffective assistance of counsel, which is not generally subject to the procedural bars of Rule 61(i).³ Therefore, the Court will address the Defendant's substantive arguments.

4. To prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-part test set forth in *Strickland v. Washington*.⁴ First, the Defendant must establish that "counsel's representation fell below an objective standard of reasonableness."⁵ Second, the Defendant must show that counsel's performance was prejudicial to his defense.⁶ This requires a showing that a reasonable probability exists that the outcome of the proceeding would have been different but for counsel's error.⁷ As to the first prong, whenever evaluating the conduct of counsel, the Court must indulge "a strong presumption that counsel's conduct was professionally reasonable."⁸ As to the second prong, a reasonable probability is

²See *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

³*State v. Denston*, 2003 WL 22293651 at *3 (Del. Super. Oct. 2, 2003) (noting that "an allegation of ineffective assistance of counsel is a type of claim not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal unless the claim was adequately raised in the lower court.") (citing Del. Sup. Ct. R. 8).

⁴466 U.S. 668 (1984).

⁵*Id.* at 688; see also *Cook v. State*, 2000 WL 1177695, *3 (Del. Aug. 14, 2000).

⁶*Id.* at 687.

⁷*Id.* at 694; see also *Wright v. State*, 608 A.2d 731, 731 (Del. 1992) (citing *Albury v. State*, 551 A.2d 53, 58 (Del. 1988)).

⁸*Albury v. State*, 551 A.2d 53, 59 (Del. 1998) (citing *Strickland*, 466 U.S. at 689).

defined as “a probability sufficient to undermine confidence in the outcome” of the proceeding.⁹

5. The Defendant first claims that counsel was ineffective for failing to file a motion to dismiss the Defendant’s drug charges once the State missed the deadline for filing the Medical Examiner’s Report (“ME Report”) analyzing the substance taken from the Defendant’s car at the time of his arrest.¹⁰ The parties agree that the original deadline for filing the ME Report was Friday, June 8, 2007, just before the Defendant’s Final Case Review on Monday, June 11, 2007.¹¹ The parties also agree that the ME Report was not filed with the Court or produced to the Defendant’s counsel by June 8. However, according to the Court’s record, the State filed a Motion for Extension of Time (“Extension Motion”) to produce the ME Report, which was docketed on June 12, 2007.¹² Thus, the Defendant contends that at the Final Case Review on June 11, his counsel should have, at the minimum, alerted the Court to the fact that the ME Report had not been produced.¹³ The Defendant claims that had his counsel objected to the absence of the ME Report at the Final Case Review, the Court

⁹*Strickland*, 466 U.S. at 694.

¹⁰Def.’s Mot. at 2; *see also* Def.’s Reply at 1.

¹¹Def.’s Mot. at 2; State’s Reply at 2.

¹²According to the Superior Court’s criminal docket record, the State’s motion was filed on June 12, 2007. The date on the motion is June 8, 2007 and it indicates service was made upon Mr. Malik on June 8, 2007 by first-class mail. The copy attached to Mr. Malik’s affidavit as Exhibit A is time stamped as June 11, 2007. Presumably that stamp reflects the date the motion arrived at Mr. Malik’s office.

¹³Def.’s Reply at 2.

could have excluded the report from evidence, leaving the State unable to prosecute the case.¹⁴ While the Defendant agrees that attorneys do have wide latitude to pursue a variety of avenues in furtherance of their litigation strategy, he argues that his counsel's chosen course of action does not amount to reasonable strategy.

6. The Court finds that this claim of ineffective assistance of counsel fails the two-prong test outlined in *Strickland*. First, counsel's failure to move to dismiss the Defendant's drug charges does not qualify as "deficient conduct" under *Strickland*.

In his affidavit, counsel stated:

Counsel's practice was to file a motion in limine after the passage of the deadline for the ME's Report and prior to trial to exclude the ME's Report from evidence at trial if the State had failed to comply with a deadline for production of the report either scheduled in a Pretrial Order or re-scheduled by the granting of a motion to extend the deadline.¹⁵

Based on his affidavit, it appears that counsel was aware at the time of the Final Case Review that the State had filed the Extension Motion. As such, until the Extension Motion had been decided by the Court, there would be no basis to file a motion in limine requesting the exclusion of the ME Report. In effect, the Court's decision would resolve the issue without further action by counsel. If granted, the State would have additional time to produce the report and if denied, the State would be unable to present evidence as to the nature of the drugs seized, which would likely result in the

¹⁴*Id.* at 4.

¹⁵Malik Aff. at ¶ 3(e).

case ultimately being dismissed or nolle prossed.¹⁶ The *Strickland* Court noted:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.¹⁷

Since it appears that counsel was aware of the State's timely Extension Motion prior to the Final Case Review and that such extensions were routinely being granted by the Court,¹⁸ an argument to exclude the drugs was not ripe on June 11 as asserted by the Defendant. As such, counsel's conduct here was appropriate and reasonable. In addition, since there is nothing to support the proposition that the Defendant's ability to properly prepare for the trial was affected by the later disclosure, the Court finds that counsel's conduct was not deficient. In other words, the Defendant's first claim also fails the second prong of *Strickland* as he has not demonstrated that counsel's deficient performance prejudiced his defense.

7. The Defendant's second claim is that his counsel was ineffective for failing to argue at the suppression hearing that the police had not corroborated the informant's tip leading to the Defendant's arrest.¹⁹ The Defendant asserts that the police neither saw him use a cell phone to contact the informant nor found him in

¹⁶The docket reflects that the Extension Motion was granted on June 12, 2008 and the ME Report was timely disclosed.

¹⁷*Strickland*, 466 U.S. at 689 (citing *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982)).

¹⁸Malik Aff. at ¶ 2(e).

¹⁹*Id.* at 4-5.

possession of a cell phone at the time of his arrest²⁰ and that the alleged drug transaction was set up by phone, there was a lack of corroboration by the police, which rendered his arrest illegal. He further argues that counsel erred when he did not present such an argument to the Court at the suppression hearing.²¹

8. This claim also fails both prongs of *Strickland*. First, counsel did argue that the police failed to corroborate the informant's tip and that the arrest of the Defendant was invalid because the police did not have probable cause to arrest him.²² The Defendant's argument is simply that he should have argued other grounds. In his affidavit, counsel stated:

I do not believe that I would have argued at the suppression hearing that no cell phone was found on Defendant Stewart's person or in his car after his arrest, since the focus of the suppression hearing was what, if any, observations had been made by the police officers prior to arresting Defendant Stewart that corroborated the tip of a first time informant with no past proven record of reliability. My position would have been that what was found on Defendant Stewart or in his vehicle after his arrest was irrelevant to any evaluation of the totality of the circumstances that existed before his arrest, which was the time period relevant to the suppression motion.²³

Clearly, the decision to pursue the ground for suppression which counsel believed had the most merit and had the greatest opportunity for success is not unreasonable. Counsel made an appropriate argument at the suppression hearing and made reasonable tactical decisions regarding what suppression issues to pursue.

²⁰*Id.* at 5.

²¹Def.'s Mot. at 2-3; Def.'s Reply at 4-5.

²²Malik Aff. at ¶ 4(a).

²³Malik Aff. at n.5.

9. This argument also fails the second prong of *Strickland*. The Defendant has not shown how counsel's performance prejudiced his defense. A review of the transcript of the suppression hearing reveals that there was no opportunity for the police to observe the cell phone interaction between the Defendant and the informant.²⁴ The calls to set up the deal were made when the Defendant was in an unknown location and it was only after the Defendant had parked in the Wal-Mart parking lot and confirmed that he had arrived and the conversation had concluded that the informant located the Defendant's vehicle.²⁵ The Court is confident the police would have preferred to coordinate the cell phone interaction so it could be observed, however, the circumstances simply did not provide that opportunity. In addition, the Defendant asserts that no cell phone was recovered, but that fact is not part of the record presented to the Court either at the suppression hearing or at the stipulated trial. As a result, not only were counsel's decisions appropriate and reasonable, but his failure to argue the Defendant's cell phone theory had no effect on the outcome of the case. Thus, the Court finds trial counsel's conduct was consistent with the requirements established in *Strickland*.

²⁴Suppression Hr'g Tr. at 9-12.

²⁵*Id.*

10. 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.