SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

October 8, 2009

Samuel H. McGlotten
S.B.I. No.
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. McGlotten, Def. ID# 0707015477 (R-1)

DATE SUBMITTED: August 31, 2009

Dear Mr. McGlotten:

Pending before the Court is the motion of defendant Samuel H. McGlotten ("defendant") for postconviction relief filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). This is my decision denying the motion.

After trial on December 12, 2007, a jury found defendant guilty of the charges lodged against him: trafficking in cocaine in an amount greater than 10 grams but less than 50 grams; possession with intent to deliver cocaine; maintaining a vehicle for keeping controlled substances; and possession of drug paraphernalia. The facts presented at trial showed the following.

On or about July 12, 2007, William Holloman ("Holloman") was arrested by members of the Governor's Task Force ("GTF" or "police") on drug charges. The GTF asked him if he could provide the name of suppliers. Holloman gave them defendant's name. While being monitored by the police, Holloman contacted defendant by telephone and made arrangements for defendant to sell him drugs at the Tru Blu station on the outskirts of Seaford, Delaware. The police recorded these telephone calls between Holloman and defendant regarding this transaction. The GTF set up surveillance at the Tru Blu station. During the early morning hours of July 12, 2007, they watched defendant drive his vehicle into the parking lot of the Tru Blu station. Defendant parked the vehicle next to the portable toilets in the station's parking lot and exited the vehicle. The GTF saw defendant hold something up to his face which appeared to be a cellular phone. Testimony was presented that during this same time, defendant called Holloman and told Holloman that he was by the bathroom at the Tru Blu. The front seat passenger exited defendant's vehicle and entered a portable toilet. Members of the Governor's Task Force closed in on defendant. They located him as he stood between his vehicle and the portable toilets. On the ground where he had been standing were numerous plastic baggies which later were determined to contain a total of 40.06 grams of cocaine base crack.

The defense was that the State of Delaware ("the State") had failed to prove its case because not one of the witnesses ever saw defendant with the drugs in his hands. The jury returned guilty verdicts on all counts.

Defendant was sentenced to substantial periods of incarceration followed by probation.

Defendant appealed the judgment of the Superior Court. On appeal, defendant's trial counsel filed a motion to withdraw pursuant to Supreme Court Rule 26(c). Defendant himself

submitted the following issues on appeal: insufficiency of the evidence/credibility of witnesses; untimely discovery; denial of *pro se* motions; denial of right to testify; ill-timed jury instructions; and prosecutorial leniency for State's witnesses. *McGlotten v. State*, 963 A.2d 139, 2008 WL 5307990, *1 (Del. Dec. 22, 2008) (TABLE).

The Supreme Court concluded as follows. The State's evidence was sufficient to allow the jury to find defendant guilty beyond a reasonable doubt. The Superior Court acted within its discretion when it allowed into evidence the late production of a DVD recording of a police interview with defendant.[1] The Superior Court properly refused to consider defendant's *pro se* motions when counsel represented him. Defendant failed to present any evidence of record to support his contention that the Superior Court interfered with his right to testify. Defendant's contention that the trial court erred when it instructed the jury before closing arguments was a meritless argument; the timing of giving jury instructions was within the sound discretion of the trial court. Finally, trial counsel cross-examined Holloman on the possibility that the State might be offering him leniency on his charges in exchange for his testimony. Thus, the Supreme Court ruled the appeal was without merit and it affirmed the judgment of the trial court. *Id.* at **1-3.

The Supreme Court mandate was dated January 8, 2009.

On August 5, 2009, defendant filed his first motion for postconviction relief.

I first must consider whether any procedural bars preclude consideration of the claim.[2]

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[1]Defendant actually argued that it was error to allow introduction of a tape and forensic lab report outside of the discovery deadline. *McGlotten v. State, supra* at *2. The Supreme Court considered the argument to be addressing the late introduction of the DVD recording of this police interview and consequently, that is the argument it addressed. *Id.*

[2]In Rule 61(i), it is provided as follows:

The motion was timely filed. All of defendant's claims assert ineffective assistance of counsel. These claims normally are raised for the first time during a postconviction proceeding. Thus, no procedural bars exist to preclude consideration of defendant's claims.

In making a claim for ineffective assistance of counsel, defendant has the burden of establishing (i) a deficient performance by his trial counsel (ii) which actually caused defendant prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984) ("*Strickland*"). Deficient performance means that the attorney's representation of defendant fell below an objective standard of reasonableness. *Id.* at 688. In considering post-trial attacks on counsel, *Strickland* cautions judges to review trial counsel's performance from the defense counsel's perspective at

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Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than one year 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 one year 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 in 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.

the time decisions were being made. Second guessing or "Monday morning quarterbacking" should be avoided. *Id*. at 689.

A finding of counsel's deficient performance needs to be coupled with a showing of actual prejudice. Actual prejudice is not potential or conceivable prejudice. "The Defendant 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." *Id*. at 694. *Strickland* establishes that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id*. at 686.

Conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel. *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

I examine below each of defendant's claims.

1) Judgment of Acquittal

Defendant argues that trial counsel was ineffective because he did not file a motion for judgment of acquittal. He basically restates the argument he made on appeal that there was insufficient evidence to support his convictions. Because the Supreme Court ruled there was sufficient evidence to support his convictions, defendant cannot establish the prejudice prong of the ineffective assistance of counsel claim. In other words, even assuming trial counsel's performance was deficient because he failed to file a motion for judgment of acquittal, defendant cannot show the outcome of the trial would have been otherwise because he cannot show that the motion would have been granted. This claim fails.

2) Untimely preliminary hearing

Defendant argues that trial counsel was ineffective for failing to object to the action proceeding against him because his preliminary hearing was not held within ten days of his initial appearance before the Justice of the Peace Court.

Defendant was arrested on July 12, 2007, and his initial appearance before the Justice of the Peace took place on that date. His preliminary hearing was scheduled for July 19, 2007. It was continued until July 26, 2007, because the testifying police officer was not available on July 19, 2007. Defense counsel[3] did not object to the continuance request. The preliminary hearing took place on July 26, 2007. Defendant's preliminary hearing was held fourteen days from his arrest.

A preliminary hearing should be held within ten days of a defendant's initial court appearance if a defendant is in custody. Super. Ct. Crim. R. 5(d); CCP Crim. R. 5(d).[4] However, the hearing may be continued if a defendant does not lodge an objection to the continuance request. *Id.* The defense did not object. Even if this Court assumed the failure of the public

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[3]At this time, the Public Defender's office represented defendant. That was before it was determined there was a possible conflict with Holloman.

[4]Both Superior Court Criminal Rule 5(d) and Court of Common Pleas Criminal Rule 5(d) contain the same pertinent language:

> Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody.... With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times. In the absence of such consent by the defendant, time limits may be extended only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

defender and/or trial counsel to object constituted deficient performance, defendant cannot establish the prejudice prong.

First, defendant cannot show that the request for a continuance would have been denied even if the public defender's office had raised an objection to it. Furthermore, even if the continuance request was denied and the matter had been dismissed, defendant still would have been indicted and the case would have proceeded. That outcome is established by the fact that he actually was indicted.

Second, defendant cannot show any prejudice from trial counsel not lodging an objection, once he entered his appearance, because of the continuance of the preliminary hearing. Defendant had been indicted. The delay in the preliminary hearing was irrelevant at that point.

Thus, defendant cannot show that the outcome would have been other than what it was. Since he cannot establish prejudice, this claim fails.

3) Conflict of counsel

Defendant, within the context of the delayed preliminary hearing argument, argues that his rights were violated because he was represented at this hearing by a member of the Public Defender's office, and that office had a conflict because it also represented Holloman.

This claim, too, fails because defendant cannot show that the outcome of the matter would have been different. Defendant ultimately was indicted, tried before a jury and convicted. Who represented defendant at his preliminary hearing had no impact on his case. An inability to establish prejudice renders this claim meritless.

4) Lack of pretrial investigation and failure to interview witnesses

Defendant makes the following conclusory arguments:

> The defendant should be granted Post-conviction Relief Due [sic] to ineffective assistance of counsel because counsel failed to conduct any pretrial investigations and also failed to interview any witnesses. During trial, 6 witnesses for the state against the defendant, 4 officers and 1 informant and 1 medical examiner. However, counsel did not interview any of the states [sic] witnesses before trial, nor did counsel request for [sic] production of the witnesses [sic] statements after trial was completed. **See:** *Superior Ct. R. 26.2.*

First, to clarify, Superior Court Criminal Rule 26.2[5] does not provide authority for the defendant to obtain any post-trial statements. The demand for a production of statements must occur during trial. Because defendant misunderstands the rule, he has not made an argument which can be considered.

Defendant's remaining arguments are conclusory. Defendant has failed to specify what information the investigations and/or interviews would have produced which would have rendered the outcome of the trial different from what it was. Thus, these conclusory, unsubstantiated arguments fail. *Younger v. State*, 580 A.2d at 555. This claim is denied.

5) Failure to obtain discovery in a timely manner

The State was allowed to introduce a forensic lab report; i.e., the Medical Examiner's Report, outside of the discovery deadline the Court had set. This Court ruled there was no basis for granting a motion to suppress the Medical Examiner's Report. Transcript of December 12, 2007, Proceedings at 4-5. Defendant seeks to relitigate this issue within the context of the ineffective assistance of counsel claim. Defendant has not attempted to show he suffered any

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[5]This rule provides in pertinent part:

> (a) *Motion for production.* After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney general ... to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

prejudice from the late production of the Medical Examiner's Report. Failure to establish prejudice renders his claim meritless.

Defendant also alleges that trial counsel was ineffective because of other discovery violations. These claims fail because they are vague and conclusory. *Id.*

6) Failure to seek dismissal because of State's requested continuances

Defendant argues that trial counsel was ineffective when he failed to seek a dismissal of the case pursuant to Superior Court Criminal Rule 48(b)[6] after the case was continued because the State was awaiting the results of the Medical Examiner's Report.

A review of the file shows the following. Defendant's final case review was scheduled for November 21, 2007, and his trial date was scheduled for November 27, 2007. At his case review on November 21, 2007, the State represented that the Medical Examiner's Report was not yet available. The Court rescheduled the case review until November 26, 2007, and kept the trial date for November 27, 2007. On November 26, 2007, the State asked for a continuance because the Medical Examiner's Office had not yet gotten its result to it. Trial Counsel objected. It was noted that the charges would be nolle prossed if the results were not in by December 5, 2007. The next case review was set for December 5, 2007, and the trial was scheduled for December 12, 2007. Thus, the trial was continued for two weeks.

Defendant argues that trial counsel was ineffective for failing to file a motion to dismiss for unnecessary delay in bringing defendant to trial. Defendant has made no attempt to establish

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[6]In Superior Court Criminal Rule 48(b), it is provided in pertinent part as follows:

> *By court.* ... [I]f there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment....

the prejudice prong. Had the motion been made, it would have been denied. A two week continuance of defendant's trial based upon a delay in obtaining the Medical Examiner's Report would not have supported a dismissal pursuant to Superior Court Criminal Rule 48(b).

This claim fails.

7) Failure to object to perjured testimony

Defendant argues that trial counsel was ineffective because he did not object to what defendant labels perjured testimony.

Defendant sets forth two situations where he maintains witnesses perjured themselves.

At the preliminary hearing, one of the witnesses testified as follows regarding the transaction between defendant and Holloman:

> Q. Did you know the details of what was arranged to be served?
>
> A. No, there was not an amount stated.

Transcript of July 26, 2007, Proceedings at 5.

Frankly, the statement, "Did you know the details of what was arranged to be served?" is unclear. Defendant interprets the question to be asking whether the officer knew the amount of drugs to be delivered. I will assume, for purposes of this motion only, that the question is referring to the amount of drugs to be delivered.

During his trial testimony, the same officer testified that Holloman ordered an ounce of cocaine from defendant. Transcript of December 12, 2007, Proceedings at 48-9. Holloman, too, testified that he ordered an ounce of cocaine from defendant. *Id.* at 38; 44.

I will assume, without deciding, that trial counsel's performance was deficient because he did not cross-examine the police officer on these allegedly inconsistent statements. However,

again, defendant has not shown any prejudice. He has failed to show how the outcome of the trial would have been different if the inconsistencies in these statements had been called to the attention of the jury. Hollomon testified he ordered an ounce. The drugs were located where defendant had been standing. Defendant has not tried to show prejudice and the Court does not find any prejudice.

This claim fails.

Defendant also argues that Holloman lied when he testified that he was testifying willingly because it was the right thing to do and he was not sure whether the outcome of his case would be affected by his testimony. Defendant argues that the charge of possession with intent to distribute was dismissed and Holloman went home.[7]

Defendant's argument is meritless. Defendant does not explain how trial counsel could have been ineffective for not pointing out events that occurred *after* the trial. During the trial, trial counsel cross-examined Holloman and brought out that Holloman could obtain a plea agreement based on his testimony. *Id.* at 43-4. Trial counsel was effective. This claim is meritless.

8) Failure to timely file a motion to suppress

Defendant argues trial counsel was ineffective for failing to timely file a motion to suppress. At the start of the trial, trial counsel explained he had discussed this issue with defendant and had found the motion to be meritless. *Id.* at 4. Trial counsel does not have to file

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[7]Defendant mischaracterizes the plea agreement. Holloman pled guilty to charges of possession of cocaine (a lesser included offense of the charge of possession with intent to deliver cocaine), maintaining a vehicle for keeping controlled substances, resisting arrest with force, disregarding a police officer's signal and reckless endangering in the second degree.

meritless motions; in fact, he has an obligation not to do so. Trial counsel was not ineffective.

Even if this Court deemed the failure to file a suppression motion to constitute deficient performance, defendant, again, has failed to establish prejudice.

Defendant argues trial counsel ineffectively failed to seek to suppress his arrest on the ground the police failed to obtain a warrant before arresting him. There is no legal basis for this argument. The police, in this case, had reasonable ground to believe a felony had been committed; thus, no warrant was required. 11 *Del. C.* § 1904(b).[8]

Defendant also argues he was not given *Miranda* warnings and thus, trial counsel was ineffective for failing to move to suppress those statements. Even if defendant's representations are true, defendant has not shown how the suppression of those statements would have affected the outcome of his case. In the statements, defendant denied he had been talking on the telephone, something the police saw him do; he denied to whom he was talking, which was contradicted by the police recording the telephone call between defendant and Holloman; and he said he was at the Tru Blu to use the restroom, yet he never used the restroom. Had those statements been suppressed, they would have had no impact on the case. The State's evidence, which consisted of eyewitness testimony, established the elements of the charges and the

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[8]This statute provides in pertinent part as follows:

> (b) An arrest by a peace officer without a warrant for a felony, whether committed within or without the State, is lawful whenever:
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> > (1) The officer has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed: or
> >
> > (2) A felony has been committed by the person to be arrested although before making the arrest the officer had no reasonable ground to believe the person committed it.

outcome of the case would not have been different. Defendant's failure to establish prejudice renders his claim meritless.

Finally, defendant argues that trial counsel was ineffective for failing to suppress the telephone conversations between him and Holloman on the ground that the police officers failed to obtain a warrant beforehand. The recordings of the overheard conversation were legal, 11 *Del. C.* § 2402(c)(5)(a),[9] and there was no basis for such a motion.

This meritless claim is denied.

9) Withdrawal of objection to untimely produced DVD

The following events are related at pages 67-74 of the Transcript of the December 12, 2007, Proceedings. During the trial, one of the State's witnesses referenced a DVD recording of an interview of defendant. Trial counsel objected, stating this was the first he had heard of a DVD. The State explained the failure to provide the DVD to trial counsel was inadvertent; it occurred because the prosecuting attorney thought the attorney previously handling the case had provided it to trial counsel. The trial court provided trial counsel the opportunity to review the DVD. After he reviewed it, trial counsel explained he had no objection to it. The Court ruled as follows:

> THE COURT: I just want to make a contemporaneous record with respect to the oral statements on the DVD. Obviously, they are Rule 16 statements that would be

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[9] In 11 *Del. C.* § 2402(c)(5), it is provided in pertinent part as follows:

> (c) *Lawful acts.* – It is lawful:
> ***
> (5) For a law-enforcement officer in the course of the officer's regular duty to intercept an oral communication, if:
> a. the law enforcement officer initially detained 1 of the parties and overhears a conversation....

> routinely turned over. I find that in this case that the statement on the DVD, they were additional statements that the defense did not know about with respect to the use of the telephone, that the other statement on the DVD has been supplied through other materials. I am finding that the State, it's [sic] reason for not turning it in was inadvertent. There was a change, as I understand it, in the prosecutor and trial counsel. Mr. Donahue, was under the belief all the information had been provided. This isn't a case of sandbagging or anything like that. I find that the defense is not suffering any kind of prejudice here. The additional statements are not out of line with what has already been disclosed. With respect to the defense strategy, there is nothing that has changed, especially so considering we had a recess and during the recess he had the opportunity to review the DVD. And if there was a violation by not turning it over, it certainly has been cured.
> As to the defense, you are fully able to cross-examine and you have suffered no prejudice at all.
>
> MR. HUTCHISON: Absolutely.
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> THE COURT: And in balancing the needs of society with the defendant's right to a fair trial, if the application had been for the exclusion of the additional statement, it would have been denied for the reasons that I have stated.
>
> MR. HUTCHISON: The reason I did not make an application is for the reasons I cited. I talked to Mr. Donahue. I reviewed the tape. I don't see any prejudice in that.

Transcript of December 12, 2007, Proceedings at 72-4.

On appeal, the Supreme Court ruled that defendant had not shown any prejudice due to the late production. *McGlotten v. State*, *supra* at *2.

Trial counsel was not ineffective for not pursuing an objection to the inadvertent late production of the DVD. Alternatively, as the trial court and the Supreme Court ruled, defendant did not suffer any prejudice from the late production of the DVD. This claim is meritless.

10) Failure to object to defendant wearing prison garb

Nothing in the record shows that defendant was forced to wear prison garb during his trial. Absent such a showing, there was no constitutional violation and consequently, trial counsel

was not ineffective for failing to object to his appearance at trial in prison garb. *Smith v. State*, 976 A.2d 172, 2009 WL 1659873, * 2 (Del. June 15, 2009) (TABLE). This claim fails.

CONCLUSION

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

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
John W. Donahue, IV, Esquire
Christopher M. Hutchison, Esquire