IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID: 0701007721
	)	
WILLIAM H. PENNEWELL,	)	
	)	
Defendant.	)	

Submitted: May 21, 2009
Decided: August 31, 2009

Upon Defendant's Motion for Postconviction Relief – DENIED

This 31st of August, 2009, upon consideration of the parties' brief and the record, it appears that:

1. Defendant was convicted by a jury on August 8, 2007 for drug-related crimes committed on January 9, 2007.

2. Upon direct appeal, the convictions were affirmed April 24, 2008. The mandate was filed on May 15, 2008.

3. Defendant filed this, his first motion for postconviction relief,

on September 15, 2008. The motion was properly referred,[1] and it appears timely. Defendant filed this motion within months after he lost on direct appeal.[2]

4. After preliminary review,[3] the court issued a preliminary order on December 23, 2008 holding that all of Defendant's claims, except ineffective assistance of counsel, were procedurally barred.[4] Accordingly, as to ineffective assistance of counsel, the court called for trial counsel's affidavit and the State's response. The court allowed Defendant to reply, consistent with Rule 61.[5]

5. Defendant filed a reply on February 13, 2009. He also filed "Supplemental Information" on May 21, 2009. The supplement's timing is odd, and not just because it was three months late. The supplement transmits three "affidavits" that are dated from before Defendant's reply. In other words, there is no apparent reason why the "affidavits" were not filed with Defendant's reply. Not only that, the "affidavits'" attestation clauses are strange.[6] At best, the supplement provides photocopies of three statements by Defendant's family.

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[1] Super. Ct. Crim. R. 61(d)(1).

[2] Super. Ct. Crim. R. 61(i)(1).

[3] Super. Ct. Crim. R. 61(d).

[4] Docket Item No. 35.

[5] Super. Ct. Crim. R. 61(f)(3).

[6] 29 *Del. C.* Ch.43.

6. Most importantly, the motion, reply and supplement speak in conclusory fashion about Defendant having a helpful witness whom trial counsel did not subpoena. Although Defendant says the witnesses' testimony would have lead to "a different outcome at trial," he does not say why. Meanwhile, trial counsel denies that he failed to subpoena necessary witnesses and he concludes that Defendant's confession trumps anything a defense witness would have said. That is probably correct, but without the witnesses' affidavits the court cannot assess potential impact. Therefore, the court has no desire for an evidentiary hearing.[7]

7. The preliminary order denying Defendant's conviction outlines the crimes. In summary, by telephone the police arranged to buy drugs from Defendant. As the parties approached the rendezvous, Defendant ran but he was captured with drugs and the cell phone used to set-up the drug deal. The weakest part of the State's case was whether Defendant's possession of the drugs was with intent to deliver. Even as to that, however, the state's case was strong. As mentioned, Defendant was found by the police at the prearranged time and place, with the cell phone used to arrange the deal.

8. As the preliminary order reflects, the motion presents 13 grounds for relief covering pre-trial and trial matters, such as "police brutality,"

[7] Super. Ct. Crim. R. 61(h)(1).

"inconsistencies in officers['] statements," "chain of custody," "tampering with evidence," and so on.

9. The preliminary order, which is incorporated here, found:

> All the claims concerning things that happened before and during Defendant's trial should have been raised before now. At the latest, they should have been presented during direct appeal. Accordingly, it appears that those claims are procedurally barred, and Defendant has not shown cause and prejudice to excuse his procedural defaults.

10. Defendant's ineffective assistance of counsel claim, which is procedurally proper, has several aspects. In summary, Defendant complains that his lawyers cost him his chance to have his confession suppressed, and his trial counsel failed to subpoena necessary witnesses. The letter has been addressed above. Defendant focuses entirely on the witnesses' failure to be called, rather than demonstrating how they might have carried the day.

11. Defendant's concerns about not having a formal suppression hearing, however, bear scrutiny. At trial, the State introduced Defendant's highly incriminating statement, which he made in response to formal interrogation at a police station, after he had been arrested. Before questioning, Defendant drank a pint of vodka, had been tasered by the police, and given perocet at the hospital where he

was treated for injuries associated with having been tasered.

12. Defendant's court-appointed counsel, did not file a motion to suppress. His retained counsel, who only appeared shortly before trial, filed a suppression motion that was denied by the Criminal Administrative Judge as untimely. Despite inconsistencies about the details of where the police found the drugs, overall, the State's case was strong. That is so, even without the confession. Nevertheless, it would be a stretch to call the confession's admission non-prejudicial. It spoke to Defendant's intent.

13. The above notwithstanding, there are powerful reasons why Defendant does not establish ineffective assistance of counsel concerning the late-filed motion to suppress. Despite the Criminal Administrative Judge's having dismissed the motion before trial, Defendant's trial counsel persisted. Before jury selection, counsel told the trial judge that he had filed a motion to dismiss, which the court had held was filed out of time. Counsel then said, "I did want to make a record my client is still of a position that his statement should not be admissible." In response, the court told the State not to mention the confession in its opening statement. The court would not promise to hear the suppression motion later, but it was "willing to make some small accommodations to allow for the possibility that the court will provide some examination of those things." The court also mentioned that

it recalled Defendant's testimony at his contested violation of probation hearing.

14. On March 28, 2007, the court had held a violation of probation hearing. The State called one of the arresting officers. The defense called another officer, and Defendant. Defendant provided details about the rough treatment surrounding his arrest and his dazed condition.

15. During the trial, the court made accommodations to hear suppression evidence. The court and the jury heard extensive direct and cross-examinations on the statement's circumstances. The court also took testimony out of the jury's presence. And, of course, the court saw the tape, which ran ten or eleven minutes.

16. The court admitted the statement, declining to disturb the suppression motion's earlier dismissal. The court, however, contemplated this proceeding following any conviction. The court encouraged record expansion on the tasering's and perocet's effect. Nothing new has been presented here. So, the court continues to view the suppression issue as it did at trial.

17. Taking everything into account, including Defendant's testimony and, of course, the videotape itself, the court does not believe Defendant was

prejudiced by counsel's failure to file a suppression motion sooner.[8] The statement appeared to be knowing and voluntary, despite what happened to Defendant before he made it. Trial counsel vigorously attempted to convince the court and the jury that the statement was untrustworthy.

For the foregoing reasons, Defendant's September 15, 2008, motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

/s Fred S. Silverman
Judge

oc: Prothonotary (Criminal)
pc: Brian Ahern, Deputy Attorney General
Michael W. Modica, Esquire
William H. Pennewell

[8] *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984) (to prove prejudice, "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").