

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

November 6, 2009

Troy C. Hudson
SBI#
SCI
P.O. Box 500
Georgetown, DE 19947

RE: *State of Delaware v. Troy C. Hudson*, Def. ID# 0701011871 (R-1)

DATE SUBMITTED: August 30, 2009

Dear Mr. Hudson

Pending before the Court is a motion for postconviction relief which Troy C. Hudson (“defendant”) has filed pursuant to Superior Court Criminal Rule 61 (“Rule 61”). This is my decision denying the motion.

Defendant was arrested on January 15, 2007, on charges of trafficking in cocaine, possession with intent to deliver a narcotic Schedule II controlled substance (“cocaine”), possession of drug paraphernalia, possession of a firearm during the commission of a felony, possession of a deadly weapon (firearm) by a person prohibited, and resisting arrest. The Grand Jury indicted defendant on these charges on January 22, 2007. The State of Delaware (“the State”) nolle prossed the trafficking

charge. It proceeded to trial on the remaining five charges.

The evidence at trial established the following facts.

At approximately 9:00 p.m. on January 15, 2007, Corporal Lance Skinner and Corporal Hudson Keller, both members of the Delaware State Police, attended a meeting with members of the community of Polly Branch in Selbyville, Delaware. The owners of property off Lincoln Avenue told Corporal Skinner that they did not want people on their property and they gave the officers permission to contact anyone on their property because they did not want them there.

Later that evening, when Corporal Skinner and Corporal Keller pulled up in their vehicle at the above-described property, Corporal Skinner saw three males. He knew two of the males. He did not know the third one. This third male ultimately turned out to be defendant. Corporal Skinner saw the three walk towards the rear of the yard. Defendant went behind a pump house and squatted as if he were hiding something. Defendant then started walking away.

Corporal Skinner and Corporal Keller exited their vehicle and Corporal Skinner identified himself as the State Police. The two men Corporal Skinner knew stood still. Defendant took off running around a trailer. As Corporal Skinner was chasing defendant, he saw defendant lean forward and throw an object under a vehicle and then take off running again. Defendant also took off rubber gloves while he was running and threw them down.

Corporal Skinner caught defendant. He searched defendant and found \$680.00 in United States currency in defendant's left front pants pocket. Corporal Skinner located under the vehicle a plastic baggie which contained what appeared to be crack cocaine. The substances field-tested positive for cocaine. In one big bag were several loose pieces of crack cocaine. The evidence established there was 8.1 grams of crack cocaine in the big bag.

In the meanwhile, Corporal Keller had searched the other two men and had not found anything. After searching them, he came over to aid Corporal Skinner. Corporal Skinner asked him to secure the area of the pump house. After putting defendant into his vehicle, Corporal Skinner went to the pump house. The officers located a 9 mm handgun loaded with 13 clips and another, smaller baggie containing what appeared to be cocaine. The matter in the baggie field-tested positive for cocaine. Expert testimony established the matter was cocaine and its weight was approximately one gram.

On June 12, 2007, a jury found defendant guilty of the charges of possession with intent to deliver a narcotic Schedule II controlled substance (cocaine), possession of drug paraphernalia, possession of a firearm during the commission of a felony, possession of a firearm by a person prohibited, and resisting arrest. Defendant was sentenced thereon.

Defendant appealed the matter to the Supreme Court. Trial counsel represented defendant on the appeal. On appeal, defendant raised three claims.

First, the trial judge erred by allowing the chief investigating officer to testify both as a fact witness and as an expert witness. Second, even assuming that a police officer may testify as a fact witness and as an expert witness, Hudson argues this particular police officer was not qualified to testify as an expert and should not have been permitted to do so. Third, the trial judge erred in allowing the State, during trial, to “educate” the chief investigating officer about how to testify as an expert witness.

Hudson v. State, 956 A.2d 1233, 1234-5 (Del. 2008). The Supreme Court found defendant’s arguments to be meritless and affirmed the judgments of the Superior Court. *Id.* at 1242. The Supreme Court mandate was dated September 3, 2008.

Defendant filed his Rule 61 motion on August 11, 2009.

In his motion, defendant asserts numerous claims.

The first three claims defendant asserts are that the Supreme Court erred in its decisions on his three arguments on appeal. This Court does not review decisions of the Supreme Court. Thus, those three claims fail and each of those grounds are denied.

The defendant's final claims are based upon assertions of ineffective assistance of counsel.

I first must consider whether any procedural bars preclude consideration of the ineffective assistance of counsel claims.¹ The motion was timely filed. Ineffective assistance of counsel claims normally are raised for the first time during a postconviction proceeding. Thus, no procedural bars exist to preclude consideration of these 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

¹In Rule 61(i), it is provided as follows:

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 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.

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 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) Trial counsel failed to raise the issue of probable cause for defendant’s arrest.

The Grand Jury determined probable cause existed for defendant’s arrest when it indicted him on the charges on which he was arrested. Trial counsel was not ineffective for failing to raise the issue of probable cause for defendant’s arrest.

2) Trial counsel failed to perform a proper pre-trial investigation and failed to interview potential witnesses who could have helped defendant.

In connection with this argument, defendant explains the following. Both Stephanie Tsantes, Esquire, and Dean Johnson, Esquire, worked on his case and Ms. Tsantes failed to interview people whom defendant identified would be helpful. However, defendant fails to name these witnesses and fails to explain how their testimony would have changed the outcome of his case. This conclusory allegation fails. *Younger v. State, supra*.

3) Trial counsel failed to file a suppression motion on defendant's behalf.

Defendant argues that trial counsel should have filed a suppression motion. He argues that had Mr. Johnson or Ms. Tsantes filed a suppression motion, then the Court would have seen that the State did not have evidence against defendant.

In support of his argument, defendant cites to a supposed recantation of Roosevelt Bailey ("Bailey") wherein Bailey relates the following. He was high on crack and beer the night of defendant's arrest and consequently, was "not in my right frame of mind." The police threats against him resulted in his statement during an interview that he saw defendant with a gun. He actually did not see defendant with a gun that night. Bailey expresses bitterness at the fact that he ultimately had to go to jail on some other charges.

This statement is dated October 15, 2007, four months after defendant's trial. Defendant asserts that Bailey's recantation was available to trial counsel before his trial. Even if this recantation was available to trial counsel, it would not have entitled defendant to the granting of the suppression motion. Whether Bailey saw defendant with a gun that night would have been a factual issue for a jury to decide. Thus, this claim fails.

4) Trial counsel failed to call Roosevelt Bailey as a witness.

Defendant asserts that trial counsel was ineffective for failing to call Bailey as a witness.

However, defendant fails to show how the testimony of Bailey, that he did not see defendant with a gun, would have caused the jury to find defendant not guilty. Furthermore, Bailey's testimony most likely would have hurt him. It would have been subject to a serious credibility attack since Bailey clearly is bitter towards the State and, by his own admission, was so high on crack and beer at the time in question that he was not in his "right frame of mind." Trial counsel was not ineffective for not calling Bailey as a witness and, alternatively, defendant has failed to show prejudice. This claim fails.

5) Trial counsel failed to bring to the Court's attention the fact that one member of the jury was asleep during the trial.

Defendant asserts that he told trial counsel a juror was asleep during the trial and trial counsel failed to raise the issue with the Court. Defendant does not provide any other information. He does not state at what point the juror allegedly was asleep. Defendant has made no effort to show the juror was asleep during any essential portion of the trial. *Durham v. State*, 867 A.2d 176 (Del. 2005). This claim is conclusory and consequently, it fails. *Younger v. State, supra*.

6) Trial counsel failed to fully investigate and develop mitigating evidence that would have supported defendant's case during sentencing.

Defendant sets forth this argument in the summary of his arguments. However, he does not develop it in any way. It is a conclusory argument and consequently, fails. *Id.*

Thus, for the foregoing reasons, I deny defendant's motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
The Honorable William C. Carpenter, Jr.
John W. Donahue, IV, Esquire
Dean C. Johnson, Esquire