IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 0604006405
v.	)	
JASON R. McKINLEY	)	
Defendant	)	

Submitted: October 1, 2009
Decided: December 16, 2009

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

Paul R. Wallace, Esquire, Chief of Appeals, Department of Justice, Wilmington, Delaware, Attorney for the State

Christopher D. Tease, Esquire, Wilmington, Delaware, Attorney for the Defendant

COOCH, J.

This 16th day of December, 2009, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. On April 8, 2006 at approximately 11:00 P.M., Defendant, Jason McKinley, was observed speeding on East Newport Pike by Newport police

officer, James Ryan.[1] Officer Ryan activated the police cruiser's emergency equipment and attempted to stop Defendant.[2]

Instead of stopping, Defendant led Officer Ryan on a high speed chase. Defendant ran several stop signs and red lights and was traveling at speeds in excess of 100 miles per hour throughout the chase.[3] Officer Ryan lost sight of Defendant moments before the crash, but continued pursuit.[4]

The chase ended when Defendant struck a vehicle driven by Erle Dobson.[5] Mr. Dobson was entering an intersection and was hit broadside by Defendant.[6] The impact caused Mr. Dobson's vehicle to strike a telephone poll and catch fire. Mr. Dobson was trapped inside the vehicle and killed.[7]

2. Eugene J. Maurer, Jr., Esquire was retained to represent the Defendant in May 2006.[8] Mr. Maurer met multiple times with Defendant and his family, reviewed police reports, visited the scene of the accident, and analyzed the factual and legal strategies being employed by the State.[9] After analyzing Defendant's prior bad acts "[i]t was believed [by Mr. Maurer] that the evidence of the prior bad acts would be admitted by the court to show the

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[1] Def. April 16 Mot. for Postconviction Relief at ¶ 2-3.
[2] *Id.*
[3] *Id.* at ¶ 3.
[4] *Id.*
[5] State's Resp. at 3.
[6] *Id.*
[7] *Id.*
[8] Aff. of Eugene J. Maurer, Jr., Esq. at ¶ 1.
[9] *Id.* at ¶ 2.

defendant's state of mind . . . In particular, the defendant felt that these facts would be admissible on the issue of cruel, wicked, and depraved indifference . . . With that in mind, and believing that the Court would rule in favor of the State with respect to the proffered evidence, counsel stipulated the admissibility of the evidence. In exchange for that stipulation, the State did agree to not oppose the testimony of Dr. Finkelstein [Defendant's mental health expert]."[10]

Additionally, Mr. Maurer evaluated whether this case should be tried before a jury. After a thorough evaluation of the facts, Mr. Maurer advised Defendant that a bench trial would be in Defendant's best interests because in exchange for a bench trial, the State would drop the Murder First Degree charge, and "[i]t was counsel's belief that the jury would not make the subtle distinctions between murder in the second degree and manslaughter that the court would hopefully make in attempting to determine the degree of the defendant's culpability in the case."[11] After being appraised of the pros and cons of a bench trial, Defendant agreed to waive his right to a jury trial.

3. After a three-day non jury trial in March 2007, Defendant was convicted of Murder in the Second Degree, Assault in the Second Degree, Reckless Endangering in the First Degree, and Driving While Suspended or

[10] *Id.* at ¶ 6.
[11] *Id.* at ¶ 7.

Revoked.[12] He was subsequently sentenced to a total of forty five years imprisonment suspended after serving a minimum mandatory term of fifteen years at Level V.[13] Defendant appealed his conviction to the Supreme Court. [14] Defendant's sole issue on appeal was that there was insufficient evidence for the trial judge "to establish the 'cruel, wicked and depraved indifference to human life' required to convict him of Murder in the Second Degree, as opposed to the lesser charge of Manslaughter."[15] The convictions were affirmed on March 31, 2008.[16]

4. After Defendant's convictions were affirmed by the Supreme Court, Defendant, represented now by Christopher D. Tease, Esquire, filed the instant motion for postconviction relief on April 17, 2009. This initial motion for postconviction relief alleged that Mr. Maurer provided ineffective assistance of counsel. Defendant's motion alleged that counsel was ineffective by "(1) failing to consent the evidence of his driving history that was stipulated to pursuant to Rule 404(b); (2) for counseling [Defendant] to waive jury trial; (3) for not presenting the 'true testimony' of

[12] State's Resp. at 1.
[13] *Id. at* 2.
[14] *McKinley v. State*, 945 A.2d 1158 (Del. 2008).
[15] *Id.* at 1159.
[16] *Id.*

Alisha Carr, and (4) for failing to present RECOM radio transmissions."[17] In the initial motion, Defendant also asked for an evidentiary hearing.[18]

After Defendant filed his initial motion for postconviction relief, the Court ordered Defendant to file an amended motion for postconviction relief that "more completely sets forth legal authorities relied upon in support of [Defendant's] various contentions . . ."[19] This amended motion was filed on June 6, 2009 and did not restate Defendant's request for an evidentiary hearing, but reiterated Defendant's claims of ineffective assistance of trial counsel. After the State's Response to Defendant's motion for postconviction relief was filed, Defendant was directed to file a Reply by October 1, 2009. Defendant has not filed a Reply.

5. Defendant's claims of ineffective assistance of counsel are governed by the United States Supreme Court's decision in *Strickland v. Washington*.[20] Under *Strickland*, Defendant bears the burden of proof in showing that counsel's efforts "fell below an objective standard of reasonableness" and that, but for counsel's alleged error there was a reasonable probability that the outcome would have been different.[21] When evaluating counsel's performance, "[a] court must indulge a strong

[17] State's Resp. at 8.
[18] Def. April 16 Mot. for Postconviction Relief at ¶ 15.
[19] *See* Super. Ct. Crim. Docket as of Dec. 15, 2009.
[20] 466 U.S. 668 (1984).
[21] *Id.* at 668-691.

presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[22] A Court "cannot require defense counsel to choose one particular defense strategy over any other strategy that falls within the 'wide range of competent assistance[.]'"[23] "Choices of trial strategies and tactics are insufficient to establish ineffective representation even though others may have made different choices and such choices may be subject to criticism."[24]

6. First, Defendant has alleged that counsel was ineffective because counsel stipulated to the admission of Defendant's prior driving history, and Defendant was prejudiced by this stipulation. This contention fails to meet the test established in *Strickland*. Mr. Maurer stated that he relied on the case of *Moorhead v. State*, a case holding that a defendant's prior convictions of DUI were admissible to show a reckless state of mind required for a conviction of second degree murder, and concluded that Defendant's prior driving violations would be admissible to show a reckless state of mind.[25] Relying on *Moorhead*, Mr. Maurer entered into a stipulation with the State to introduce the favorable testimony of Dr. Finkelstein

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[22] *Id.* at 689.
[23] *Oliver v. Wainwright*, 795 F.2d 1524, 1531 (11th Cir. 1987) (quoting *Strickland*, 466 U.S. at 688-89).
[24] *Tyra v. State*, 574 N.E.2d 918, 924 (Ind. Ct. App. 1991) (quoting *Cochran v. State*, 445 N.E.2d 974 (Ind. 1983)).
[25] *Moorhead v. State*, 638 A.2d 52, 54 (Del. 1994).

without objection from the State in exchange for the State's introduction of Defendant's prior driving history without objection.

Mr. Maurer's decision to stipulate to the admission of Defendant's driving history did not violate an objective standard of reasonableness as defined by *Strickland*. Counsel made a reasonable decision, based on *Moorhead*, to stipulate to the admission of the 404(b) evidence. Even if counsel did not stipulate to the admission of Defendant's prior driving history, the evidence might well have been admitted over counsel's objection based on *Moorhead*. Defendant cannot show that Mr. Maurer's decision fell below an objective standard of reasonableness or definitively establish that a different outcome would have resulted but for the alleged error.

7. Second, Defendant has alleged that Counsel was ineffective because Counsel advised Defendant to waive a jury trial. Once again, Defendant has failed to meet the *Strickland* test. Mr. Maurer fully studied the evidence and came to the conclusion that presenting the case before a judge was advantageous because a judge could understand the legal nuances of the criminal charges that a jury might overlook. Additionally, Mr. Maurer understood that the victim was particularly sympathetic and that a jury might be biased against Defendant. Mr. Maurer informed Defendant of the pros

and cons of a jury trial before Defendant voluntarily agreed to waive his right to a jury trial.

Defendant's motion has failed to establish that counsel's advice to waive a jury trial was not a product of sound legal strategy and has additionally failed to demonstrate that the result would have been different if Defendant had proceeded with a jury trial. Therefore, Defendant has failed to meet the *Strickland* test.

8. Next, Defendant asserts that "an undated and unsworn written statement by his passenger, Alisha Carr, compels relief either because, of itself, it is evidence of her perjury or because it demonstrates evidence of ineffectiveness as trial counsel did not either elicit – or present post-trial – the 'truth' of what she said to [Defendant] as he fled from the police."[26]

This letter was brought to the Court's attention post-trial, and this Court must evaluate any potential prejudice caused by this letter using the test for granting a new trial based on "witness recantation."[27] The test for witness recantation requires that the Court grant a new trial only when "(a) [t]he Court is reasonably well satisfied that the testimony given by a material

[26] State's Resp. at 19-20. The letter in question states that Defendant's passenger, Alisha Carr, did not tell Defendant to pull over as she testified at trial, but instead told Defendant "just don't get caught." *See id.*

[27] *Blankenship v. State*, 447 A.2d 428 (Del. 1982). *See Downes v. State*, 771 A.2d 289, 291 (Del. 2001) (no abuse of discretion when Superior Court used "witness recantation" test during postconviction review).

witness is false . . . (b) [t]hat without it the jury *might* have reached a different conclusion . . . [and] (c) [t]hat the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial."[28]

Here, the credibility of the letter is questionable. The Court must "be reasonably well satisfied that the testimony given by a material witness is false."[29] A recantation is viewed with suspicion.[30] Ms. Carr's letter directly contradicts her trial testimony, which was given under oath. Given the obvious bias held by Ms. Carr, this Court is not thoroughly convinced that Ms. Carr's trial testimony was false.

Even if this Court were to determine that Ms. Carr's trial testimony was false, Defendant must establish that the Court "*might* have reached a different conclusion."[31] Here, the evidence against Defendant was substantial such that the circumstances surrounding the chase were virtually uncontested. No matter what Ms. Carr may or may not have said to Defendant, Defendant acknowledged the danger by stating "[j]ust put on your seatbelt" because "I don't want to get in trouble."[32] Therefore, it is unlikely that the Court would have reached a different conclusion.

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[28] *Blankenship*, 447 A.2d at 433.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] State's Resp. at 21.

Finally, there is no indication that Defendant was unfairly surprised by Ms. Carr's allegedly false statement. Defendant was aware of the statement and took steps to mitigate its damage at trial. Therefore, the Court will not grant a new trial based on alleged "witness recantation."

9. Finally, Defendant argues that counsel was deficient for failing to introduce into evidence RECOM recordings because these radio transmissions would have shown Officer Ryan's speed and potentially introduced a statement from another officer telling Officer Ryan to "back off and discontinue the pursuit."[33]

Once again, Defendant has failed to satisfy the *Strickland* test. Defendant has failed to allege that introduction of RECOM recordings would have changed the outcome of the trial. There was sufficient evidence to find Defendant guilty, and the Court will not speculate as to what effect, if any, the RECOM transmissions might have had because Defendant has failed to allege any cognizable claim of actual prejudice from counsel's failure to introduce these transmissions.

10. For the reasons stated above, Defendant's claims for ineffective assistance of counsel are deficient when analyzed under the *Strickland* test.

[33] Def. April 16 Mot. for Postconviction Relief at ¶ 13.

Therefore, Defendant's motion for postconviction relief is **DENIED**. To the extent that Defendant still requests an evidentiary hearing, that request is **DENIED** as an exercise of the Court's discretion.[34]

IT IS SO ORDERED

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Eugene J. Maurer, Jr., Esquire

[34] *State v. Jackson*, 2008 WL 5048424, at *16 (Del. Super.) ("This Court has broad discretion in determining whether or not an evidentiary hearing is necessary on a motion for postconviction relief.").