

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

December 15, 2009

Donald P. Gayle  
SBI # 00  
Sussex Correctional Institution  
P.O. Box 500  
Georgetown, DE 19947

Edward C. Gill, Esquire  
16 North Bedford Street  
Georgetown, DE 19947

John W. Donahue, Esquire  
Deputy Attorney General  
Department of Justice  
114 East Market Street  
Georgetown, DE 19947

Timothy G. Willard, Esquire  
Fuqua and Yori, P.A.  
28 The Circle  
P.O. Box 250  
Georgetown, DE 19947

**RE: State of Delaware v. Donald P. Gayle**  
**Def. ID No 0802033778**  
**Letter Memorandum**

Date Submitted: August 26, 2009

Dear Mr. Gayle and Counsel:

This is my decision on Donald P. Gayle's motion for postconviction relief. Gayle was indicted by the Sussex County Grand Jury on charges of Possession of a Deadly Weapon During the Commission of a Felony, Trafficking in Marijuana, Possession with the Intent to Deliver Marijuana, Maintaining a Vehicle for Keeping Controlled Substances, Carrying a Concealed Deadly Weapon, Possession of Marijuana, Failure to Properly Use a Turn Signal, Failure to Stop at a Red Light, and Driving Under the Influence of Alcohol or Drugs.

The charges arose out of a traffic stop. Gayle was stopped in his van after he committed several traffic offenses. He failed to stop at a red light and then did not use his turn signal when he changed lanes. Gayle was pulled over by a Laurel police officer. The

police officer noticed that Gayle's eyes were glassy and bloodshot. The police officer also noticed the smell of marijuana coming from the inside of Gayle's van. The police officer asked Gayle to step out of his van so the officer could conduct field sobriety tests. While patting down Gayle for weapons, some marijuana fell out of Gayle's pant's pocket. Gayle then told the police officer that he had some "smoke" in his pocket. This led to the discovery of more marijuana on Gayle's person, as well as a knife. The police officer then put Gayle in handcuffs and placed him in his police cruiser. An inventory search of Gayle's van led to the discovery of a large quantity of marijuana in two boxes.

Gayle pled guilty to Possession with the Intent to Deliver Marijuana and Maintaining a Vehicle for Keeping Controlled Substances. I sentenced Gayle to five years at supervision level V, with credit for 30 days previously served, suspended after serving two years at supervision level V, followed by 18 months at supervision level III. This is Gayle's first motion for postconviction relief and it was filed in a timely manner. Gayle was represented by Timothy G. Willard, Esquire. The State of Delaware was represented by Deputy Attorney General John W. Donahue, Esquire.

Gayle alleges that (1) Willard had a conflict of interest in representing him because Willard was also working as a legislative counsel at the time, and (2) Willard did not raise all of the possible grounds in Gayle's motion to suppress. Gayle also alleges that the State obtained a statement from him in violation of his *Miranda* rights. Willard and Donahue have filed affidavits responding to Gayle's allegations. I have concluded that, given the nature of Gayle's allegations, it is not necessary to hold a hearing.

#### **I. Ineffective Assistance of Counsel**

The United States Supreme Court has established the proper inquiry to be made

by courts when deciding a motion for postconviction relief.<sup>1</sup> In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must show: “(1) counsel’s representation fell below an objective standard of reasonableness; and (2) counsel’s actions were so prejudicial that, but for counsel’s errors, the defendant would not have pled guilty and would have insisted on going to trial.”<sup>2</sup> Further, a defendant “must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.”<sup>3</sup> It is also necessary that the defendant “rebut a ‘strong presumption’ that trial counsel’s representation fell within the ‘wide range of reasonable professional assistance,’ and this Court must eliminate from its consideration the ‘distorting effects of hindsight when viewing that representation.’”<sup>4</sup> There is no procedural bar to claims of ineffective assistance of counsel.<sup>5</sup>

#### **A. Conflict of Interest**

Gayle alleges that Willard had a conflict of interest in representing him because Willard was also working as a legislative counsel at the time. Willard has a part-time job representing the Senate Majority Caucus. Willard’s role as legislative counsel largely involves reviewing and drafting legislation. Gayle alleges that Willard, in his role as

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 688 (1984).

<sup>2</sup> *State v. Thompson*, 2003 WL 21244679 (Del. Super. April 15, 2003), *citing Strickland v. Washington*, 466 U.S. 688 (1984).

<sup>3</sup> *State v. Coleman*, 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

<sup>4</sup> *Coleman*, 2003 WL at \*2, *quoting Strickland*, 466 U.S. at 689.

<sup>5</sup> *Coleman*, 2003 WL at \*1, *citing State v. Johnson*, 1999 WL 743612, at \*2 (Del. Super. Aug. 12, 1999); *State v. Gattis*, 1995 WL 790961, at \*2 (Del. Super. Dec. 28, 1995), *aff’d*, 637 A.2d 1174 (Del. 1997).

legislative counsel, represented a client that enacted the laws that Gayle allegedly violated. Gayle also alleges that the Legislature had an interest in seeing that the laws it enacts are enforced. Gayle alleges that if Willard did not have this conflict of interest, then he would have pursued the motion to suppress more vigorously, allowing Gayle to reject the State's plea offer.

I conclude that Willard did not have a conflict of interest. Rule 1.7 of the Professional Conduct Rules states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client..." Willard's representation of the Legislature was not adverse to Gayle's interests and it did not limit Willard in his representation of Gayle. This case was a criminal case between the State of Delaware and Gayle. The issue in this case was whether or not Gayle committed the offenses that he was charged with committing. The Legislature was not a party to this case, had no known interest in the outcome of this case, and had not retained Willard to represent it in this case. The State was represented by a Deputy Attorney General, who was responsible for representing the State's interests. Willard's only responsibility was to represent Gayle. Willard's role as a reviewer and drafter of legislation for the Legislature was simply not implicated in his representation of Gayle. There was a clear separation between Willard's job as a legislative counsel and his role as Gayle's defense counsel and his respective responsibilities never conflicted with each other.

## **B. Motion to Suppress**

Gayle alleges that Willard was ineffective because he did not raise and pursue all of the available grounds in Gayle's motion to suppress. Gayle alleges that if Willard had raised all of the appropriate grounds in his motion to suppress, then he would not have pled guilty. Willard filed a motion to suppress. He challenged the police officer's "pat down" of Gayle, the seizure of the knife, and the opening of the two-boxes of marijuana without a search warrant. Gayle argues that Willard should have also challenged the initial stop of Gayle's van as "pretextual." The basis for this allegation is that Gayle is a Jamaican. Gayle also alleges that Willard should have challenged the removal of Gayle from his van and subsequent search of his person.

I conclude that Willard's decision not to raise these grounds was appropriate. The initial stop of Gayle was not pretextual. Gayle was stopped for committing two motor vehicle violations right in front of two police officers. Thus, there clearly was probable cause to stop Gayle for the two motor vehicle violations. There is absolutely no reason to believe that Gayle was stopped for any other reason than the commission of the two motor vehicle offenses.<sup>6</sup> When the police officer stopped Gayle's vehicle and went up to the driver's side door, he noticed that Gayle's eyes were glassy and bloodshot. The police officer also smelled the odor of marijuana coming from the inside of Gayle's van. These facts gave the police officer probable cause to arrest Gayle for Driving Under the Influence and Possession of Marijuana and then to search him incident to that arrest.<sup>7</sup> Regarding the grounds that

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<sup>6</sup> *State v. McDannell*, 2006 WL 1579818 (Del. Super. May 16, 2006).

<sup>7</sup> *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009).

Willard did raise in Gayle's motion to suppress, Gayle could have pursued them if he had wanted to, but he decided to take the State's plea offer instead. Gayle knew he was giving up certain rights by pleading guilty. One of these rights was the right to challenge the State's evidence.

## **II. *Miranda***

Gayle alleges that the State obtained the statement that "he had some smoke in his pocket" in violation of his *Miranda* rights. This allegation is not supported by the facts. Gayle said this when he was merely being patted down by the police officer. Thus, he was not in custody and his statement was not made in response to police interrogation.

### **CONCLUSION**

Donald P. Gayle's motion for postconviction relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley