SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

September 10, 2010

Edward C. Gill, Esquire
16 North Bedford Street
P.O. Box 824
Georgetown, DE 19947

RE: ***State of Delaware v. Rodolfo Osorto***
I.D. No. 0311002129

Dear Counsel:

Pending before me is Defendant Rodolfo Osorto's first motion for postconviction relief, filed pursuant to Super. Ct. Crim. R.61 ("Rule 61"). The motion is summarily dismissed.[1]

On June 22, 2004, Defendant pled guilty to one count of Vehicular Homicide 2nd degree, one count of Vehicular Assault 1st degree, two counts of Vehicular Assault 2nd degree and one count of Driving Under the Influence of Alcohol. Sentencing was scheduled for August 13, 2004. Defendant absconded and was returned on a *capias* on July 8, 2010. He was immediately sentenced. Throughout this period of time, Defendant was represented by John F. Brady, Esquire.

On August 31, 2010, through new counsel, Defendant filed a postconviction relief motion. He alleges that Mr. Brady was constitutionally ineffective for failing to file a suppression motion on the blood test results obtained at Nanticoke Memorial Hospital on the day of the collision.

[1]*See* Rule 61(d)(4).

Defendant also asserts that the State issued a subpoena for the Nanticoke records without providing him notice. The Court rejects this assertion at the outset. The record shows that the State informed Mr. Brady by letter dated April 28, 2004 of the subpoena and enclosed a copy of the subpoena with the letter. Moreover, the issue of the blood was addressed in an office conference and was scheduled for argument on July 22, 2003. Defendant's assertion of lack of notice has no legal or factual basis, as required by Rule 61(a)(1), and cannot stand.

As to counsel's ineffectiveness, this type of claim is typically raised for the first time in a postconviction relief motion.[2] The motion was timely filed, and the Rule's other procedural bars do not apply. To prevail on the merits, Defendant must show first that defense counsel's conduct fell below an objective standard of reasonableness. He must also show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty but would have insisted on going to trial.[3]

The record shows the following relevant facts. The collision occurred in Sussex County on July 20, 2003 at approximately 1:30 a.m. While traveling west on State Route 20, Defendant crossed into the east-bound lane in order to pass the car ahead of him. While still in the east bound lane, Defendant's Dodge Caravan struck an oncoming Ford Taurus traveling east. As a result of the collision, one passenger of the Taurus was killed, and the driver and the two other passengers were injured.

Immediately after the collision, Defendant was taken to Nanticoke Memorial Hospital for treatment. Based on blood serum analysis, Defendant's blood alcohol concentration (BAC) on admission to Nanticoke was 0.180. Applying the formula used by the Delaware State Police to extrapolate from blood serum results to whole blood results, Defendant had a BAC of 0.154 at the time of the collision. At the time of Defendant's arrest, 21 *Del. C.* § 4177 (a) provided that a person was guilty of driving under the influence of alcohol if the person's BAC was 0.10 or higher within 4 hours after the time of driving.[4]

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[2]*Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

[3]*Cannon v. State*, 2007 WL 2323790 (Del.)(citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

[4]Effective July 12, 2004, the General Assembly amended the DUI statute by lowering the legal limit of BAC while driving from 0.10 to 0.80.

After Defendant was indicted, the State made known its intention to use the Nanticoke blood test results at trial. Following an office conference, the Court issued a Pretrial Scheduling Order dated April 30, 2004, which directed the State to file a motion in limine regarding the blood evidence on May 14, 2004. The hearing on the motion was to be held on June 22, 2004. Thus, a motion to suppress would have been redundant, and defense counsel's conduct did not fall below an objective standard of reasonableness.

Furthermore, if the hearing had taken place, the State would have prevailed. The proponent of any evidence has the burden of establishing its admissibility.[5] Test results obtained from a hospital instrument used for therapeutic purposes and relied upon by physicians for the treatment of patients are sufficiently reliable to establish a foundation for admitting the evidence.[6] Evidence of a hospital blood draw may be admitted as a business record if the proponent shows the regularity and reliability of the tests, as well as the record-keeping practices.[7]

The State's expert witnesses on blood alcohol and blood analysis included a Forensic Toxicologist from the Office of the State Chemist, a laboratory technician and a laboratory director from Nanticoke who would testify as to the manner and significance of Defendant's blood draw on July 20, 2003.

Based on the case law and the State's readiness to meet the admissibility requirements for the Nanticoke blood test results, it is clear that the State's motion would have been granted. Thus, Defendant cannot show prejudice stemming from the lack of a suppression motion. That is, he cannot show that but for defense counsel's errors he would have insisted on going to trial.

For these reasons, Defendant's motion for postconviction relief is **SUMMARILY DISMISSED.**

IT IS SO ORDERED.

Very truly yours,

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[5] *Hammond v. State*, 569 A.2d 81, 91 (Del. 1990).

[6] *Id.*

[7] *McLean v. State*, 482 A.2d 101, 105 (Del. 1984). *See also State v. McCabe*, 1995 WL 562130 (Del. Super.).

Richard F. Stokes

Original to Prothonotary
cc: Donald R. Bucklin, Esquire, Attorney General's Office
John F. Brady, Esquire