

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.) ID No. 0807030656
)
 JAMES ASHLEY,)
)
 Defendant.)

Submitted: February 2, 2011
Decided: March 14, 2011

MEMORANDUM OPINION

On Defendant's Appeal from Commissioner's
Findings of Fact and Recommendations
DENIED

Daniel B. McBride, Esquire, Department of Justice, Wilmington, Delaware,
Attorney for the State

James Ashley, *Pro Se*, Defendant

JOHNSTON, J.

Defendant James Ashley was convicted of Possession with Intent to Deliver Heroin, Use of a Vehicle for Keeping a Controlled Substance, and Disregarding a Stop Sign. The convictions stem from a July 19, 2008 traffic stop. On June 4, 2010, defendant filed a Motion for Postconviction Relief, which was referred to a Superior Court Commissioner pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of fact and conclusions of law. The Commissioner issued the Report and Recommendation on January 19, 2011. The Report sets forth the procedural history, defendant's asserted grounds for Rule 61 relief, and analysis of the relevant facts and law. The Commissioner recommended that defendant's motion for postconviction relief be denied.

On February 2, 2011, defendant filed an "Appeal from Commissioner's Findings of Fact and Recommendations."

Defendant claims that: (1) his counsel was ineffective; (2) the search and seizure of his vehicle was illegal; and (3) the police stopped his vehicle and arrested him without proper justification.

Rule 61(i)(2) bars any "ground for relief that was not asserted in a prior postconviction proceeding . . . unless consideration of the claim is warranted in the interest of justice."¹ Rule 61(i)(3) bars any "ground for

¹ Super. Ct. Crim. R. 61(i)(2).

relief that was not asserted in the proceedings leading to the judgment of conviction.”² Defendant did not raise his second and third claims in a proceeding leading to the judgment of conviction.³ Defendant has not established that the interest of justice exception applies. Therefore, defendant’s claims that the search and seizure of his vehicle was illegal and the police stopped his vehicle and arrested him without proper justification are procedurally barred by Rule 61(i)(3).

Defendant’s ineffective assistance of counsel claim is not procedurally barred. To prevail, defendant is required to show that: (1) counsel’s errors were so grievous that counsel’s representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.⁴ Defendant must overcome the strong presumption that his counsel’s representation was professionally reasonable.⁵ “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s

² Super. Ct. Crim. R. 61(i)(3).

³ Defendant alleges error because this is his first motion for postconviction relief. Therefore, Rule 61(i)(2) does not apply. Because Rule 61(i)(3) procedurally bars defendant’s claim, the Court need not consider the applicability of Rule 61(i)(2).

⁴ *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

⁵ *Strickland*, 466 U.S. at 697.

challenged conduct, and to evaluate the conduct from counsel's perspective at the time.”⁶

Defendant argues that his trial counsel was ineffective because he chose not to file a motion to suppress. Defendant also contends that counsel should have commissioned an expert to rebut the State’s expert Detective Matthew Botterbusch, who testified that defendant possessed heroin with intent to deliver. Through affidavit, counsel responds that he did not file a motion to suppress because there was no meritorious basis on which to do so. Counsel stated that it was a tactical decision not to provide an expert to rebut Detective Botterbusch’s testimony.

The Court accepts the Commissioner’s recommendation that counsel’s decision not to file a motion to suppress was objectively reasonable and did not amount to ineffective assistance of counsel. Counsel believed there was no legal or factual basis on which to file a motion to suppress. The Court agrees. An attorney is under no obligation to file a meritless motion to suppress. Defendant’s claim that counsel was ineffective by not filing a motion to suppress fails both prongs of the *Strickland* test.

⁶ *Id.* at 689.

The Court accepts the Commissioner's recommendation that counsel's decision not to present an expert witness was objectively reasonable and did not amount to ineffective assistance of counsel. Counsel's decision was tactical, one that is given great deference.⁷ Further, counsel vigorously cross-examined Detective Botterbusch. Defendant's claim that counsel was ineffective by not presenting an expert witness fails both prongs of the *Strickland* test.

THEREFORE, defendant's objections to the Commissioner's Report and Recommendation are hereby **DENIED**. The Court, having reviewed *de novo* the Commissioner's Report and Recommendation, pursuant to Superior Court Criminal Rule 62, hereby **ACCEPTS THE REPORT AND RECOMMENDATION IN ITS ENTIRETY. DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF IS HEREBY DENIED.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

⁷ *Id.*