IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	Def. ID# 0904025840
v.	:	
VICTOR RODRIGUEZ	:	

MEMORANDUM DECISION

UPON DEFENDANT'S MOTIONS FOR POSTCONVICTION RELIEF, AN EVIDENTIARY HEARING, AND FOR FUNDS TO HIRE AN INVESTIGATOR - DENIED

DATE SUBMITTED: January 14, 2014

DATE DECIDED: April 14, 2014

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Stokes, J.

Pending before the Court is a motion for postconviction relief which defendant Victor Rodriguez, Jr. ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61").[1] Initially, defendant represented himself in this motion. An amended version of Rule 61(e)(1)[2] was enacted after the State of Delaware ("the State") filed a response,[3] trial counsel filed his January 4, 2013 Rule 61(g) affidavit,[4] defendant filed his response to trial counsel's affidavit,[5] and defendant submitted further arguments in connection with a motion for an evidentiary hearing.[6] The Court appointed counsel to represent defendant in the postconviction proceedings in accordance with the new version of the rule. Postconviction counsel filed an amended Rule 61 motion.[7] Trial counsel filed another affidavit, dated October 9, 2013, pursuant to Rule 61(g).[8] Postconviction counsel responded to this affidavit.[9] The State weighed in on the pending claims.[10] Finally, defendant filed a reply to the State's submission.[11] Besides seeking

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[1]Docket Entry No. 146.

[2]At the time, Rule 61(e)(1) read in pertinent part: "The Court will appoint counsel for an indigent movant's first postconviction proceeding."

[3]Docket Entry No. 145.

[4]Docket Entry No. 144.

[5]Docket Entry No. 151.

[6]Docket Entry No. 150.

[7]Docket Entry No. 161.

[8]Docket Entry No. 162.

[9]Docket Entry No. 163.

[10]Docket Entry No. 165.

[11]Docket Entry No. 166.

postconviction relief, defendant has requested funds to hire a forensic expert to determine if the fires set were the result of arson and he has requested an evidentiary hearing. This is my decision denying each of defendant's outstanding requests.

Defendant faced charges of setting fires at five different locations in Milford, Delaware and in Milton, Delaware, on two dates in April, 2009. Three of the fires occurred on April 13, 2009, with locations at the Hampton Inn, Milford, Delaware; 24286 Reynolds Pond Road, Milton, Delaware; and Daniel Drive, Milton Meadows, Milton, Delaware. Two of the fires occurred on April 24, 2009; their locations were at 104 Heritage Boulevard, Milton, Delaware and 113 Arch Street, Milton, Delaware. Defendant ultimately was indicted on five counts of arson in the second degree, three counts of criminal trespass in the third degree, one count of reckless burning, and one count of burglary in the third degree.

The jury trial took place July 12, 2010 through July 15, 2010; it resumed on July 19, 2010 and continued until July 22, 2010. The State's opening argument and the presentation of witnesses began July 13, 2010. The State rested on July 21, 2010. On that same date, defense counsel gave his opening statement and presented the defense that the State had not established defendant committed the crimes. Defendant maintained he had not caused the fires nor was he present at any of the fires.

No physical evidence tied defendant to the scene of the fires at the Hampton Inn and 24286 Reynolds Pond Road. Boot prints and bicycle tracks consistent with defendant's boots and the tires on his mountain bike tied defendant to the scenes of the remaining fires.

Defendant moved for judgment of acquittal on three counts of arson and two counts of criminal trespass in the third degree stemming from the fires occurring on April 13, 2009. The

Court granted the motion as to the counts of arson in the second degree relating to the fires at the Hampton Inn and at 24286 Reynolds Pond Road. It also granted the motion with regard to the criminal trespass in the third degree charge relating to the fire at 24286 Reynolds Pond Road. The jury then had to determine defendant's guilt or innocence on the charges of reckless burning, burglary in the third degree, two counts of criminal trespass in the third degree, and three counts of arson in the second degree resulting from three fires: the April 13, 2009 fire on Daniel Drive, Milton Meadows and the two fires occurring in Milton on April 24, 2009. The jury found defendant guilty of all these charges. Defendant was sentenced as an habitual offender. On each of the arson convictions, he was given life imprisonment.

Defendant appealed. His sole argument on appeal was that the Trial Court abused its discretion in finding that a latent fingerprint examiner qualified as an expert in tire track and shoe print analyses.[12] The Supreme Court concluded the Trial Court did not abuse its discretion and it affirmed the judgment below.[13] The mandate was issued on November 29, 2011.

On November 5, 2012, defendant filed his pending motion for postconviction relief. I set forth below defendant's claims, both *pro se* and as represented by counsel. I address whether they are procedurally barred.[14] If they are not procedurally barred, then I set forth trial counsel's

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[12]*Rodriguez v. State*, 30 A.3d 764 (Del. 2011).

[13]*Id.*

[14]In 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.

responses thereto, the State's responses, and defendant's responses to both trial counsel and the State.

1) Defendant's arrest was without probable cause or a warrant in violation of 4th, 5th and 14th amendments.

Without addressing the procedural issues, I address the contention that defendant was arrested without a warrant. Defendant and postconviction counsel are wrong about this fact. Defendant was arrested pursuant to a warrant.[15] Any argument based on the contention the arrest was warrantless fails and is not examined.

> (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 in warranted in the interest of justice.
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> (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
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> (A) Cause for relief from the procedural default and
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> (B) Prejudice from violation of the movant's rights.
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> (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.
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> (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.

[15]A copy of the warrant is attached as Exhibit B to the State's Answer to Defendant's Motion for Postconviction Relief, Docket Entry No. 165. Dale Magee testified at the suppression hearing held on January 7, 2010, that he told defendant the warrant was for defendant's arrest for arson. Docket Entry No. 120 at 46.

The contention that defendant's arrest was without probable cause is procedurally barred pursuant to Rule 61(i)(3). Defendant has not tried to overcome the bar by showing cause for relief from the procedural default and prejudice or by showing that the alleged deficiencies resulted in "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."[16] Furthermore, as both trial counsel and the State note, the probable cause issue became moot once defendant was indicted. This claim fails.

2) There was an illegal search and seizure.

Defendant argues as follows. All evidence seized from his person without a valid search warrant should have been deemed inadmissible. An illegal search and seizure occurred. The Fire Marshal, without probable cause or a valid search warrant, took pictures of his bicycle and work boots, and when defendant returned home from work, both the bicycle and work boots were seized in violation of his constitutional rights. The Fire Marshals were not peace officers and therefore, did not have jurisdiction to make an arrest or obtain a search warrant. The totality of the circumstances did not give rise to reasonable and articulable suspicion of criminal activity to seize defendant. There was no physical evidence linking him to the crime scenes.

Before I address the procedural bars, I address another factual misstatement. Both defendant and postconviction counsel argue that the Fire Marshal actually handled defendant's boots before they arrested him. The affidavit of probable cause to the arrest warrant contains information explaining how the Fire Marshal connected boot prints at the scene to defendant's

[16]Rule 61(i)(3) and (5).

boots:

> 8. I [Deputy State Fire Marshal Dale Magee] was assisted by fm3 (Ward [Fire Marshal Richard Ward]) at the scene. Ward examined the boot print at the scene and responded to Allens Poultry Plant. Ward advised me that he saw standard plant boots being worn by several employees at the plant. Ward advised me that he checked the tred [sic] on a pair of boots and they looked similar to the print at the scenes. The accused was wearing the same type boots while working.

There is no logical basis for arguing that the Fire Marshal handled defendant's boots, which were **on his feet,** before his arrest. All arguments based on this misrepresentation of the facts fail and are ignored.

Also before addressing the procedural bars, I address defendant's contention the Fire Marshal did not have authority to arrest him. Defendant is legally incorrect. The Fire Marshal has arrest powers by way of statute.[17] This meritless contention bears no further examination.

The remaining portions of the arguments under this heading are procedurally barred pursuant to 61(i)(3). Defendant has not tried to overcome the bar by showing cause for relief from the procedural default and prejudice or by showing that the alleged deficiencies resulted in "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."[18]

3) Defendant's speedy trial rights were violated.

Defendant argues the State caused delay by filing a superseding indictment and by filing a

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[17]16 *Del. C.* § 6611(f), now located at 16 *Del. C.* § 6614(g).

[18]Rule 61(i)(3) and (5).

motion *in limine* to use his past convictions against him in trial.[19]

This vague, conclusory claim, also, is procedurally barred under Rule 61(i)(3). Defendant did not assert the argument in his direct appeal. Defendant has not tried to overcome the bar by showing cause for relief from the procedural default and prejudice or by showing that the alleged deficiencies resulted in "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."[20]

4) Prosecutorial misconduct occurred.

Defendant argues the State committed prosecutorial misconduct when it submitted improper evidence without a proper foundation or with false evidence. He specifically asserts that the State called Rodney Hegman ("Hegman") as an expert witness and he was not an expert.

The argument that Hegman was not an expert witness is procedurally barred pursuant to Rule 61(i)(4). This is the sole issue defendant advanced on appeal, and as noted earlier, the Supreme Court affirmed the decision deeming him to be an expert. Defendant has failed to show that the issue should be reconsidered in the interest of justice. In any case, proffering Hegman as an expert witness could not be deemed prosecutorial misconduct.

The argument the State committed prosecutorial misconduct by submitting improper evidence without a proper foundation or with false evidence is conclusory and will not be

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[19]The motion *in limine* regarding the use of defendant's past convictions against him was resolved in defendant's favor; thus, prior convictions and bad acts of defendant were not presented at his trial.

[20]*Id.*

considered.[21]

5) Incomprehensible argument

Defendant makes an incomprehensible argument regarding the Court's refusal to admit Hegman's report into evidence because it was provided to defendant too late. He "contends that his right to confrontation was violated by inadequate cross examination of a prosecution witness, his right to a speedy trial was denied ..., and his right to a fair trial was violated."[22]

The Court will not speculate as to what defendant means by this argument. The Court refuses to consider it.

6) Insufficient evidence

Defendant argues the evidence adduced at trial was insufficient to sustain a conviction.

This issue is procedurally barred pursuant to Rule 61(i)(4). Trial counsel moved for a judgment of acquittal on the ground of insufficiency of the evidence. Although the Court granted the motion with regard to two of the fires, it denied it regarding three of the fires. Thereafter, the jury found him guilty on the remaining charges. Thus, the issue was decided in the proceedings leading to the judgment of conviction. Defendant has failed to establish that the issue should be addressed again in the interest of justice.

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[21] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[22] Docket Entry No. 146 at 3.

7) Ineffective assistance of counsel

Defendant himself as well as his postconviction counsel argue trial counsel was ineffective in numerous respects. There are no procedural bars to these ineffective assistance of counsel claims and I consider them below.

Initially, I set forth the standards for reviewing an ineffective assistance of counsel claim. The law set forth in *State v. Dickinson*,[23] is helpful, where the Superior Court stated:

> 15. The burden of proof for ineffective assistance of counsel claims is on the defendant and is governed by the two prong *Strickland* test, each of which must be satisfied to reverse a conviction.FN26 First, Defendant must prove that trial counsel's representation was objectively unreasonable by a preponderance of the evidence.FN27 When assessing counsel's performance, judicial scrutiny is highly deferential because of a defendant's temptation to second guess counsel's assistance after conviction.FN28 The Court must ignore the "distorting effects of hindsight" and the defendant must overcome the strong presumption that counsel's conduct was reasonably professional and sound under the circumstances.FN29 However, showing that counsel's "conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound" may rebut this presumption.FN30
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> FN26. *Strickland v. Washington*, 466 U.S. 668 (1984).
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> FN27. *Id.* at 688.
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> FN28. *Id.* at 689.
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> FN29. *State v. Wright*, 653 A.2d 288, 293–94 (citation omitted).
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> FN30. *Thomas v. Varner*, 428 F.3d 493, 499–500 (3rd Cir.2005).
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> 16. Within this first *Strickland* prong, there is an important distinction between certain fundamental rights inherent to criminal defendants contrasted against "decisions that involve tactics and trial strategy." FN31 Defendants have fundamental rights for plea decisions, jury trial waivers, and whether to testify.FN32 Fundamental rights may also include the decision to forego appeals

[23]2012 WL 3573943, ** 5-6 (Del. Super. Aug. 17, 2012), *aff'd,* 2013 WL 1296263 (Del. March 28, 2013),

and accept the death penalty, whether to waive the right to counsel, and whether to appeal.FN33 Such fundamental rights are "so personal to the defendant 'that they cannot be made for the defendant by a surrogate.' " FN34 "[T]hese fundamental decisions are indeed strategic choices that counsel might be better to make, because the consequences of them are the defendant's alone, they are too important to be made by anyone else." FN35 However, clients normally defer to a lawyer's special knowledge and skill for accomplishing legal objectives, particularly regarding tactical matters which are non fundamental.FN36 Accordingly, counsel is responsible for deciding whether to request a lesser included offense or level of liability instruction because jury instructions fall within trial strategy. FN37

FN31. *Bradshaw v. State*, 806 A.2d 131, 138 (Del.2002).

FN32. Prof.Cond.R. 1.2(a) (2008) stating a lawyer: "shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

FN33. *Cooke v. State*, 977 A.2d 803,841–42 (2009); *Bradshaw*, 806 A.2d at 138.

FN34. *Cooke,* 977 A.2d 803, 841 (2009) (*citing Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) *(citing Strickland*, 466 U.S. at 688; *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)).

FN35. *Id.* at 842 (citations omitted).

FN36. Prof.Cond.R. 1.2 cmt. 2 stating: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."

FN37. *Cf. Cooke*, 977 A.2d 803,841–42 (2009) ("The defense attorney's duty to consult with the defendant regarding 'important decisions' does not require counsel to obtain the defendant's consent to 'every tactical decision.' ") (citations omitted); *Bradshaw*, 806 A.2d at 138 (citing Prof.Cond.R. 1.2(a) (providing that a lawyer "shall consult with the client as to the means by which [the objectives of representation] are to be pursued"); Ann. Model Rules of Prof'l Conduct R. 1.2 cmt. at 20 (3d ed. 1996) ("[D]ecisions that involve tactics and trial strategy are reserved for

the professional judgment of the lawyer after consultation with the client.").

17. In addition to the requirement of satisfying *Strickland's* first prong by demonstrating that counsel's performance was objectively unreasonable, Defendant must also satisfy the second prong by showing a reasonable probability that, but for counsel's objective unreasonability, the trial result would have differed.FN38 "A reasonable probability is a probability sufficient to undermine confidence in the outcome." FN39 In making this determination, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding" because "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." FN40 Courts must consider the "totality of the evidence." FN41 Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." FN42

FN38. *Strickland*, 466 U.S. at 694.

FN39. *Id.* at 693.

FN40. *Id*.

FN41. *Id*. at 695.

FN42. *Id*. at 692.

Ground One

Defendant argues as follows.

Defense counsel at trial did not provide constitutionally effective representation. He completely abrogated his responsibility by waiving opening statement. There was no strategy behind this other than his unpreparedness or lack of interest in the case. It was completely constitutionally defective to waive opening statement under the circumstances of this case, particularly in a multi-day trial where the jury never heard from defense counsel until after the close of the State's case. Defense counsel then made a perfunctory opening statement which only covers four pages of the transcript. He did not outline any theory of the case from the defense nor provide any justification whatsoever as to why the defense would have tactically chosen not to provide an opening statement at the beginning

of the trial.[24]

Trial counsel responds as follows:

> Trial counsel elected to reserve presentation of an opening statement until after the presentation of the State's evidence. Trial counsel believed that the State's ability to connect the defendant with various incidences of arson was tenuous and therefore reserved opening statements until the full presentation of the State's case.[25]

Defendant's response thereto is as follows. Trial counsel failed to offer a tactical reason for not making his opening statement at the beginning of the case. Defendant questions why trial counsel did not inform the jury from the outset that the State's case was tenuous. Instead, because the jury did not hear the defense's theory from the start, trial counsel allowed the State to control the story of the case from the outset and the jury members to become fixated in their opinions.

The State's response is as follows. Trial counsel did make a strategic decision and that decision was to waive opening argument. That is an acceptable strategy and it was not objectively unreasonable. It does not constitute ineffective assistance of counsel.

In response thereto, defendant asserts that defense counsel does not say it was a tactical decision to postpone his opening. He further argues:

> There is no tactical reason. Defense counsel simply lost control of the story line of the case from the beginning, thus presenting a theme of ineffective assistance of counsel and a lack of motivation on behalf of defense counsel to adequately defend the defendant from the very first.[26]

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[24]Docket Entry No. 161.

[25]Docket Entry No. 162 at 1.

[26]Docket Entry No. 166 at 1.

Discussion

Trial counsel, without using the words "tactical decision" explains he made the tactical decision to wait until the State finished its case before giving his opening. After the State had finished its case, his opening consisted of arguing that the State, while presenting a multitude of witnesses over numerous days, had not met its burden of proving the charges against defendant.

The timing of the presentation of trial counsel's opening statement was a matter of litigation strategy.[27] Waiting to make an opening statement after days of testimony was a reasonable strategy. Had defense counsel spoken to the jury at the beginning of the trial, five and a half trial days and eight calendar days would have passed before defendant put on his defense. The timing of the opening statement allowed the jury members to have defendant's position fresh in their minds when trial counsel began the defense. Thus, I find trial counsel's timing of his opening statement to be effective assistance of counsel.

In the alternative, defendant has not even attempted to establish any, let alone a reasonable, probability that the outcome of his case would have been otherwise had trial counsel given his opening statement before the trial commenced as opposed to after the State presented its case. Asserting that trial counsel's opening statement should have occurred at the start of the case rather than immediately before the defense presentation is insufficient to undermine confidence in the trial outcome.

This ground fails.

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[27] *See State v. Manlove*, 1986 WL 14001, *2 (Del. Super. Nov. 17, 1986), *aff'd*, 527 A.2d 281, 1987 WL 37711 (Del. June 3, 1987) (nature of an opening statement is mostly a litigation strategy).

Ground Two

Defendant makes the following argument.

> Numerous witnesses testified in this case as to cause and origin of fire, incendiary nature of the fire, that the fire was arson, that the fire was deliberately set, and that the fire was of human origin. This was never challenged by defense counsel. In fact, when defense counsel finally brought this up the Court found that he had waived any objection since some of the testimony had already come into evidence. (D9) This testimony is based upon junk science concerning arson which has been rebuked in the literature and should have been challenged in a pre-trial posture in the form of a Daubert hearing. Defense counsel completely failed to do this, thus subjecting the defendant to a trial in which the jury was inundated with junk science. Defense counsel even elicited an opinion on cross examination from Fire Marshal Ward that one of the fires in this case was a set fire. This caused the unjust conviction at bar to occur.[28]

The Court interjects at this point to clarify a misrepresentation in this argument. Trial counsel's referenced objection was not based on the origin of the fire being something other than arson. Instead, it was to whether the witness had been qualified as an expert.[29]

Trial counsel responds to this ground as follows:

> Defendant asserted that he had not caused the fires nor was in the presence of any of the fires. The issue of whether the fire was deliberately set or otherwise was not material to the defense that Defendant had no connection to any of the fires. Accordingly, trial counsel did not file for a pre-trial *Daubert* determination.[30]

Defendant's response is to criticize trial counsel for not attacking the State's science. "The jury was left with the given that the fires were in fact set and that the only person in the courtroom to blame the set fires on was the defendant."[31]

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[28]Docket Entry No. 161.

[29]Docket Entry No. 111 at 9.

[30]Docket Entry No. 162 at 1.

[31]Docket Entry No. 163 at 1.

The State's response follows. Not challenging the admissibility of the fire investigation testimony was a reasonable strategy. Defendant has failed to articulate what benefit such an expert might provide and he cannot establish prejudice. The witnesses were trained and experienced in investigating causes and origins of fires. The claim that arson investigation science is junk is conclusory and without merit.

Defendant's final response is:

> The State defends its use of junk science to attempt to prove that arsons occurred in the case at bar. It is undisputed that that evidence was not challenged in any respect from defense counsel. This is the type of evidence that has resulted in many false convictions nationwide and at least one false execution. There is absolutely no tactical reason for the defense to not have challenged the State's allegation that fires in this case were the result of a human intentionally setting them.
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> It should be noted that filed at the same time as this memorandum it [sic] is the defendant's request for funds to hire an independent forensic investigator to prove these claims. Defendant then will seek to present this independent forensic investigator at the time of the evidentiary hearing in this case to show the impropriety of the evidence which the State presented.[32]

Discussion

This argument is meritless. Numerous credible, qualified expert witnesses established that all five fires were the result of arson. The evidence of arson was overwhelming. Merely calling this testimony junk science does not give defendant's argument any legs. Because evidence tied defendant to the scene, trial counsel, if he had sought to show the fires were not arson, would have had to present the inconsistent defenses that the fires were not arson but if they were, defendant did not commit them. Such inconsistent defenses most probably would have failed. Trial counsel's strategy was reasonable in this instance and defendant has failed to

[32]Docket Entry No. 1.

establish deficient performance.[33]

Defendant knows that merely labeling something to be junk science is insufficient to meet his burden here and thus, he requests fees to hire an investigator to test out this argument. The Court will not grant defendant's request for funds to hire an investigator. The funds available for supporting postconviction proceedings filed by hundreds of defendants are extremely limited. To grant a request to use these limited funds to conduct a fishing expedition based on a completely conclusory argument that the State presented "junk science" would be fiscally and legally wrong. This request is denied.

This ground fails.

Ground Three

Defendant argues:

> Defense counsel failed to object to Fire Marshal Ward's opinion that in his over thirty years of experience he never heard of three major arsons within such a short period of time and indicated that it would be more likely that lightning would strike. Defense counsel did not object to this. His excuse for that was, "I guess I was, during the course of the testimony, taking notes and consulting with my client and, you know, reviewing other records." (D-6) The defendant could not have constitutionally effective counsel if counsel is not paying attention to what is going on in the actual trial process. If that is the case there is no need for counsel to even be present. The Court actually brought this issue up and then the next day proffered a curative instruction. The defendant agreed that the curative instruction should be given which simply only highlighted what the Fire Marshal had said.
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> At the close of the State's case a judgment of the Court was entered with regards to two of the fires. Defense counsel failed to make a Motion for mistrial based on this despite the fact that what occurred in the case at bar is that the jury took the evidence of the other fires and used that to convict the defendant of the charges at bar. A mistrial would have been warranted at the end of the State's

[33] *Harrison v. State*, 707 N.E.2d 767, 780 (Ind. 1999).

case.[34]

Trial counsel admits that he did not object to the Fire Marshal's statement. He denies the Court's curative instruction was ineffective. He admits he did not make a motion for a mistrial following the Court's granting of defense counsel's motion for judgment of acquittal.

Defendant responds as follows:

> Defense counsel admirably makes no excuse for failing to pay attention and then failing to make a proper objection. As to the efficacy of the curative instruction it is impossible to believe that any juror could unring the bell that had been rung here.
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> Defense counsel once again admirably admits that no motion for mistrial was made. Thus, without any pun intended, the jury had to believe that where there was smoke in multiple fires that in fact there was a fire. This caused the defendant's unjust conviction.[35]

The State's response is as follows. The statement regarding the odds addressed the likelihood that the fires were arson, not that the defendant set them. Any prejudice that might have resulted was ameliorated by the curative instruction given the next day. Any prejudice was further precluded by the fact that the Court dismissed counts related to two of the three fires to which the Fire Marshal Ward was referring.

The State further argues it was not ineffective for trial counsel not to request a mistrial after the Court dismissed counts of the indictment relating to two of the fires. The State argues:

> The State based its case, in part, on the theory that Defendant was riding his bicycle to work along two particular routes and was setting fires as he went. Tr. B at 26-28. When two of the fires were dismissed by the Court, the State could no longer rely on that theory with regard to the April 13, 2009 fires. There was a chance that the jury, seeing that two of the fires had been dismissed by the Court, would see holes in the State's theory of the case and acquit the Defendant of the

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[34]Docket Entry No. 161.

[35]Docket Entry No. 163 at 1-2.

other fires. Had trial counsel requested and been granted a mistrial, he risked that the State would be able to regroup and strengthen its case for trial the second time around.

In addition, any evidence related to the dismissed counts was not provided to the jury during deliberations and the Court instructed the jurors that they were not to consider evidence pertaining to those counts. Tr. G at 148; Tr. H at 14 [Citations omitted.][36]

Defendant's final response is:

It should be noted that Deputy Fire Marshall [sic] Ward was referring not just to fires being arson but also to the allegation that they were connected to others. Thus, it is difficult to see how this testimony from the unchallenged expert for the State was not devastating to the defense.

Further, the State, completely contrary to the record, makes an assertion that this was once again a tactical decision not to object. That, in fact, without any support from the record whatsoever, seems to be the theme of the State's response in this case. However, the evidence is very clear that defense counsel admirably admitted that he was simply not paying attention and that was the reason for the lack of objection.

The State argues that the curative instruction was enough to cure the problem here. However, it should be noted that the curative instruction was not promptly given. It was only given one day later when the Court called to the attention of counsel this error. Giving the curative one day later only served to reinforce the improper testimony.

The State on the same grounds attempts to defend defense counsel's failure to move for mistrial after two of the counts were dismissed. It is hard to see how the fact that other alleged arsons had occurred which the Fire Marshal was saying were absolutely related to his one could not be prejudicial to this defendant. The cumulative weight of this improper evidence was simply too much for the jury to resist.[37]

Discussion

I first address the witness's statement that he never had heard of three major arsons occurring within such a short period of time and indicating that it would be more likely that lightning would strike. I will assume that trial counsel was ineffective for not objecting to the

[36]Docket Entry No. 165 at 6-7.

[37]Docket Entry No. 166 at 1-2.

statement. However, defendant must show prejudice. The Court issued a curative instruction the next day and it is presumed that the jury followed the trial judge's instruction.[38] Defendant cannot establish prejudice. This claim fails.

I next address the failure of trial counsel to seek a mistrial once the Court granted defendant's motion for acquittal on some of the charges. Had the motion for a mistrial been made, the Court would not have granted it. Defendant would have had to demonstrate that granting a mistrial was a "'manifest necessity'" or "'the ends of public justice would be otherwise defeated'."[39] That is an extremely high standard which the defendant could not meet on the facts here. The Court gave an instruction regarding the dismissed charges and the evidence related to it, and the instruction was sufficient to "remedy whatever prejudice may result from the admission of inadmissible evidence." [40] Defendant could not have established, on these facts, a basis for a mistrial and the Court would not have granted a mistrial. Trial counsel was not ineffective for making a meritless motion merely for the sake of making the motion and defendant cannot establish prejudice.

This claim fails.

Ground Four

Defendant argues:

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[38] *Money v. State*, 957 A.2d 2, 2008 WL 3892777, *3 (Del. Aug. 22, 2008).

[39] *Wainer v. State*, 869 A.2d 328, 2005 WL 535010, * 2 (Del. Feb. 15, 2005); *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998).

[40] *Wainer v. State, supra.*

> Prior to trial defense counsel filed a Motion to Suppress. However, he did not challenge the warrantless arrest of the defendant without probable cause. Thus, when the defendant attempted to bring up this issue at the suppression hearing the Court ruled that he had waived that valid issue. If this had been properly brought the motion to suppress would have been granted and the inculpatory evidence which led to the conviction would have been suppressed from use as evidence by the State. It was constitutionally ineffective assistance of counsel to not include this argument in the motion, which caused the Court to rule that it was waived.[41]

Discussion

No point exists to set forth the various parties' arguments. As noted earlier, defendant was arrested pursuant to a warrant. This claim fails.

Ground Five

Defendant argues:

> There was a seizure of the defendant's bicycle and shoes. The seizure occurred when representatives of the State manipulated the bicycle and the shoes to look at the tire tracks and treads to attempt to make a comparison prior to actually taking those items. Defense counsel never brought up this suppression issue with the Court, never filed a motion on this, and never discussed this issue with the defendant. If this issue had been raised the subsequent search and seizure of those items would have been the fruits of the earlier illegalities and would have been suppressed from use by the State. Thus, defendant's conviction is tainted.[42]

Discussion

Again, as noted earlier, no factual basis exists for the argument regarding the manipulation of defendant's boots. The warrant clarifies that the Fire Marshal viewed boots of defendant's co-workers and saw that they were similar.

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[41]Docket Entry No. 161.

[42]*Id.*

As to the contention the bicycle was manipulated, defendant presents absolutely no facts to support such a contention. All of the testimony regarding the bicycle established that no one touched the bicycle before it was seized. Harry Miller testified that he went to defendant's place of employment on April 15, 2009,[43] located defendant's bicycle, and took pictures of the tires.[44] Miller testified several times that he did not disturb the bicycle in any way.[45]

Because the factual premises of defendant's argument are meritless, the argument itself is meritless.

The Court denies this ground.

Ground Six

Defendant argues as follows.

> Improper statements were allowed into evidence. The State submitted a statement from an EMT as to a statement from the defendant to the EMT during the course of medical care. No objection was raised based upon patient/physician privilege. In addition hearsay evidence was submitted without any objection, including a confrontation clause objection, in violation of the hearsay and confrontation clause requirements that other people had been eliminated as suspects with regards to setting the fires in this case.[46]

Trial counsel states:

> The witness, medical personnel from Defendant's place of employment, testified that a week prior to the first fire Defendant had passed out on the line. Defendant advised witness that on that day he had left Smyrna between 6:00 and 7:00 p.m. on his bicycle and arrived at the Harbeson plant about 11:00 p.m and slept in the

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[43]Docket Entry No. 111 at 28.

[44]*Id.* at 28, 35.

[45]*Id.* at 34, 45, 78.

[46]Docket Entry No. 161.

> cafeteria until his shift at 5:00 a.m. No objection was raised as to the witness's statement based on patient/physician privilege.[47]

Defendant responds that because trial counsel admits the error which occurred, no response is necessary.

The State responds as follows.

It cannot respond to defendant's claim that trial counsel was ineffective for failing to object to hearsay evidence that other people had been eliminated as suspects with regard to setting the fires in this case because it was unclear to what statements defendant was referring.

The State responded to the remaining contentions as follows. Trial counsel made a strategic decision not to object to the admission of the emergency medical technician's testimony that defendant had stated he rode his bicycle to work in Harbeson from Smyrna. Furthermore, the statement did not prejudice defendant because no fires were set on the date he admitted riding his bicycle to work. The State goes on to argue:

> The statement also arguably helped the defense's case. Defendant stated he had ridden his bike to work the night before and had slept at the premises until his early morning shift. Tr. D at 140. If that was his habit, it contradicted the State's contention that he was riding his bike South in the early morning hours at the time when the fires on April 13, 2009 were set.[48]

The State argues that even if the statement was excluded, the outcome would have been the same. At least four other witnesses testified defendant rode his bicycle to work. A police officer saw him riding it on April 23, 2009, just north of the location of the April 24, 2009 fires. Officers saw his bicycle at his place of employment, including April 24, the day of some of the

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[47]Docket Entry No. 162 at 2-3.

[48]Docket Entry No. 165 at 9.

fires. Furthermore, there was testimony that defendant's bicycle tires appeared similar to tracks found at the scenes of the fires.

Defendant's response is that the State seeks to expand the record with the unsupported assertion that this was a strategic failure.

Discussion

The Court will assume that defense counsel was ineffective for not objecting to this testimony by the EMT. However, defendant has not even attempted to establish what the prejudice was. The Court will not speculate on the prejudice prong in lieu of defendant meeting his burden to establish prejudice. This claim fails.

Ground Seven

Defendant argues:

> The testimony of a canine in this case as an expert was submitted and a demonstration was held. No objection was made by the defense despite the fact that no foundation has been laid for this testimony.[49]

Trial counsel agrees the K9 demonstration was admitted without objection.

Defendant responds that because trial counsel admits the error, no response is necessary.

The State responds:

> The canine testimony was used to show only what the dog would have done had it found an accelerant at a fire scene. Tr. 86-87. According to testimony during trial, the dog only went to the Hampton Inn fire, and he found no accelerant. Tr. B at 123; Tr. D at 91-92. In addition, the counts related to the Hampton Inn fire were dismissed upon Defendant's motion for judgment of acquittal at the close of the State's case. Tr. G 139-40. The canine presentation neither hurt nor helped Defendant's case. Therefore, trial counsel's decision not to object to it was not

[49]Docket Entry No. 161.

ineffective and the absence of the presentation would not have altered the outcome of the case.[50]

Defendant's final response is:

> The State's argument is that the dog evidence is irrelevant. The question then becomes, if the State's argument is correct, why the State would introduce the evidence in the first place at trial. The obvious answer is that the State was attempting to show the jury that all avenues had been explored. Once it is accepted that this evidence is in fact relevant [sic][51] the failure of the defense counsel to properly object constituted ineffective assistance.[52]

Discussion

The Court will assume that trial counsel was ineffective for failing to object to the demonstration by the canine. However, once again, defendant has made no attempt to establish prejudice. Also, again, the Court will not develop defendant's argument for him.

This claim fails.

Ground Eight

Defendant argues as follows:

> In the course of establishing Mr. Hageman as an expert witness the trial Judge inserted himself into the questioning to the extent that this questioning served to qualify Mr. Hageman. This was the case of the Judge becoming an advocate. Despite that defense counsel made no objection or attempt to prevent this from occurring.[53]

Trial counsel agrees he did not object to the Court's questioning of the witness.

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[50]Docket Entry No. 165 at 9.

[51]I assume defendant means "irrelevant".

[52]Docket Entry No. 166 at 2.

[53]Docket Entry No. 161.

Defendant responds that because trial counsel admits the error which occurred, no response is necessary.

The State responds as follows.

A judge is permitted to question witnesses.[54] The judge's questions were not asked before the jury nor were they biased. Instead, the judge was carrying out the role of gatekeeper to the admissibility of the expert witness and properly trying to assess whether Hegman's testimony was reliable and relevant. Trial counsel was not ineffective for failing to object to the judge's questions.

Defendant's final response is:

> The defendant respectfully submits that this is not a settled issue. The issue now before the Court is by laying the foundation for the admission of a crucial expert's testimony, the Court became an advocate for one side. The failure of defense counsel to object and insert himself into this proceeding constituted continuing ineffective assistance.

Discussion

Had defense counsel objected, the Court would have overruled his objection after finding that the questioning was being undertaken out of the presence of the jury, was impartial and stemmed from its role as a gatekeeper for determining if the witness qualified as an expert.[55] Thus, defendant cannot establish ineffective assistance for trial counsel not making a meritless objection merely for the sake of making an objection and he cannot establish prejudice.

This claim fails.

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[54]D.R.E. 614(b).

[55]*Cf. Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203 (Del. 2002); *Lagola v. Thomas*, 867 A.2d 891 (Del. 2005). *See Lawrence v. State*, 925 A.2d 504, 2007 WL 1329002 (Del. May 8, 2007).

Ground Nine[56]

Trial counsel failed to investigate the charges against him, present a defense, make objections to illegally obtained evidence, and file a motion to suppress illegally obtained evidence.

This contention is too conclusory to be considered.[57] It fails.

Ground Ten[58]

Trial counsel failed to obtain an arson expert for the defense to support a claim that an accelerant "may have or have not been used" in the fires.

Trial counsel responded as follows. The use of an accelerant was related to defendant's prior crimes and bad acts. That evidence was deemed inadmissible. Trial counsel explains that because defendant denied involvement in the arsons or being present at any of the fire scenes, the use of an accelerant was immaterial to the defense.

Discussion

Trial counsel's decision not to obtain an arson expert regarding the use of an accelerant based upon the defense employed was reasonable in light of the facts of the case and the defense presented. This ground fails.

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[56]This is a contention advanced by defendant before postconviction counsel was appointed.

[57]*Younger v. State, supra.*

[58]This is a contention advanced by defendant before postconviction counsel was appointed.

Ground Eleven

In his motion for an evidentiary hearing, which was submitted after trial counsel and the State filed their first responses, defendant incorrectly asserts that trial counsel failed to move for a suppression hearing regarding the laptop, cell phone and thumb drives.[59]

Discussion

As trial counsel notes, he did file a suppression motion, a hearing was held on the motion, and the Court, in denying the motion, specifically addressed the validity of the seizure of these items.[60]

This claim is denied as meritless.

Ground Twelve

In the motion for an evidentiary hearing, defendant argues that trial counsel was ineffective for not seeking to suppress the evidence on the grounds that the chains of custody regarding the boots and bicycle were not established and the State did not properly authenticate the evidence.[61]

Discussion

Defendant's facts are wrong. Chains of custody were established and authentications were

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[59]This ground was not presented appropriately and should be ignored. However, the Court addresses it anyway.

[60]Transcript of January 24, 2010 Proceedings, Docket Entry No. 121.

[61]This ground was not presented appropriately and should be ignored. However, the Court addresses it anyway.

made.[62] This ground fails.

CONCLUSION

For the foregoing reasons, defendant's motion for postconviction relief and request for funds to hire an investigator are denied. No issue in the postconviction motion necessitates an evidentiary hearing. Thus, I also deny the request for such a hearing.

IT IS SO ORDERED.

[62]Docket Entry No. 117 at 12-18, 39-40, 193-94.