IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	ID. No. 1607020376
	)	
v.	)	
	)	RK16-09-0158-01 PFBPP (F)
JORDAN O. HARRIS,	)	RK16-09-0159-01 PFBPP PABPP (F)
	)	RK16-09-0162-01 Resist Arrest (M)
Defendant.	)	RK16-09-0163-01 DUI LIQ – Drugs (M)
	)	RK16-09-0167-01 Fail to Signal (V)
	)	RK16-09-0168-01 Fail to Signal (V)
	)	RK16-09-0170-01 Fail Stop Sign (V)
	)	RK16-09-0171-01 Inattentive Driving (V)

COMMISSIONER'S REPORT AND RECOMMENDATION

Upon Defendant's Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61

Lindsay A. Taylor, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Patrick J. Collins, Esquire and Kimberly A. Price, Esquire, Collins & Associates for Defendant.

FREUD, Commissioner
June 23, 2021

The defendant, Jordan O. Harris ("Harris") was found guilty, following a jury trial on July 20, 2017, of one count of Possession of a Firearm by a Person Prohibited, 11 *Del. C.* § 1448, one count of Possession of Firearm Ammunition by a Person Prohibited, 11 *Del. C.* § 1448; one count of Resisting Arrest, 11 *Del. C.* § 1257, one count of Driving under the Influence, 21 *Del. C.* § 4177, and several traffic charges. He was found not guilty of Tampering with Physical Evidence, Fictitious or Cancelled Registration and No Person Shall Stop or Suddenly Decrease Speed of

Vehicle Without Giving Proper Signal. The State entered nolle prosequis for several other traffic offenses. A presentence investigation was ordered by the Court. On September 12, 2017 Harris was sentenced to twenty-five years incarceration suspended after serving seven years for probation.

On appeal Harris requested to be permitted to proceed *pro se*. The request was granted following a colloquy with the Court. Harris filed a timely appeal to the Delaware Supreme Court. In his *pro se* appeal, Harris raised the following six arguments as summarized by the Delaware Supreme Court:

> (i) The flight, constructive possession, and unanimous jury verdict jury instructions as well as the stipulation that he was a person prohibited were confusing, speculative and prejudicial;
> (ii) The Superior Court erred by failing to hold a hearing on a juror's admission that he ignored the admonition not to talk to anyone about the case during the trial;
> (iii) The Superior Court erred by allowing the admission of the wrong gun into evidence;
> (iv) The State concealed and tampered with the evidence in violation of *Brady v. Maryland*;
> (v) He was deprived of materials that he needed for his appeal; and The Superior Court ignored his pro se filings, including a request to represent himself, and denied his request for additional time to[1]

The Delaware Supreme Court on April 16, 2019, affirmed Harris' conviction. On May 9, 2019 Harris filed a *pro se* motion for postconviction relief in which he raised multiple grounds for relief including ineffective assistance of counsel. Harris also filed an accompanying motion for appointment of counsel which the Court

[1] *Harris v. State*, 210 A.3d 143 (Table), 2019 WL 1752646 (Del) at *2.

granted. Next, Appointed Counsel filed an Amended Motion for Postconviction Relief. The pending amended motion alleges ineffective assistance of Trial Counsel.

FACTS

Following are the facts as set forth by the Delaware Supreme Court in its opinion on Harris' appeal:

> (2) The evidence presented at trial showed that, on the night of July 26, 2016, several members of the Delaware State Police Governor's Task Force went to the reported residence of a probationer (not Harris) in Milford with outstanding capiases. As the police approached, a 1988 Dodge Aries with two people inside pulled up to the residence. Harris was the driver. A police officer, who was wearing a tactical vest identifying her as a State trooper, and a probation officer approached the car and shone a flashlight inside to determine if one of the occupants was the probationer. The passenger looked back and then the car pulled away. The police officer switched the flashlight to strobe, but the car continued to drive away. The police officers, who were in three vehicles, activated their lights and sirens and followed the car.
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> (3) As the police followed, the car sped up, ran a stop sign, failed to signal as it turned onto Church Street, and veered from side to side. Detective Christopher Donaldson, who had a police dog with him, saw Harris was reaching into the back seat with his right hand and rummaging around. Detective Donaldson suspected that Harris might be preparing to throw something out of the car. The car turned left, without signaling, onto a gravel road between two cornfields. After Detective Donaldson hit the car, it came to a stop.
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> (4) Detective Donaldson and another officer approached the car with their guns raised and demanded that the occupants raise their hands. Both occupants initially raised their hands, but then Harris put his hands down and

refused to raise them after being ordered to do so. Unable to see Harris' hands and fearing that he had a weapon, Detective Donaldson directed the police dog to apprehend Harris by biting him. Harris held onto the steering wheel and still refused to exit the car. Detective Donaldson pulled him out of the car, but Harris still refused to show his hands. Once Detective Donaldson could see both of Harris' hands and had subdued him, he ordered the police dog to release Harris.

(5) After Detective Donaldson read Harris his *Miranda* rights, he was taken to the hospital for treatment of his dog bite wounds. The police officer who accompanied Harris to the hospital noticed that Harris was swaying at the scene, smelled of alcohol, and had glassy, bloodshot eyes. Harris could not recite the alphabet correctly and would not count backwards. The police officer obtained a search warrant for a blood sample. Harris' blood alcohol level was .06 and his blood tested positive for marijuana.

(6) The police searched the path of the car chase and found a loaded .40 caliber black handgun. The police were unable to recover any fingerprints from the gun but they did collect DNA. The swab from the handgun trigger contained DNA that was consistent with Harris' DNA. Harris was charged with PFBPP, PABPP, Tampering with Physical Evidence, Conspiracy in the Second Degree, Resisting Arrest, Driving a Vehicle While Under the Influence of Drugs, Driving Without a License, Fictitious of Cancelled Registration, Operation of an Unregistered Motor Vehicle, Failure to Stop at a Stop Sign, Stopping or Suddenly Decreasing Speed Without giving a Proper Signal, Inattentive Driving, and two counts of No Turn Signal.

(7) Before jury deliberations, the State dismissed the Conspiracy in the Second Degree, No Valid License, and Operation of an Unregistered Motor Vehicle charges. The jury found Harris guilty of all the remaining charges, except Tampering with Physical Evidence, Fictitious or

> Cancelled Registration, and Stopping or Suddenly Decreasing Speed Without Giving a Proper Signal. The Superior Court sentenced Harris to 25 years of Level V incarceration, suspended after 7 years for decreasing levels of supervision. This appeal followed. On appeal, Harris exercised his right to represent himself.[2]

HARRIS' CONTENTIONS

In Harris' Amended Motion for Postconviction relief he raised the following ground for relief:

> Trial Counsel was ineffective for failing to move to suppress the evidence obtained from the unlawful stop and seizure of Mr. Harris, resulting in prejudice to Mr. Harris.

DISCUSSION

Under Delaware law, the Court must first determine whether Harris has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.[3] Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.[4] Harris' motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Harris' initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant's demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.[5] The bars to relief are inapplicable to a jurisdictional challenge or "to a claim

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[2] *Harris v. State*, 210 A.3d 143 (Table), 2019 WL 1752646 at *1-2.
[3] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).
[4] Super. Ct. Crim. R. 61(i)(1).
[5] Super. Ct. Crim. R. 61(i)(3).

that satisfies the pleading requirements of subparagraph (2)(i) or (2)(ii) of subdivision (d) of Rule 61.[6] To meet the requirements of Rule 61(d)(2) a defendant must plead with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted.[7] or that he pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United State or Delaware Supreme courts, applies to the defendant's case rendering the conviction invalid.[8] Harris' motion pleads neither requirement of Rule 61(d)(2).

Harris' sole ground for relief is premised on allegations of ineffective assistance of counsel. Therefore, Harris has alleged sufficient cause for not having asserted this ground for relief at trial and on direct appeal. Harris' ineffective assistance of counsel claim is not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Harris, allege ineffective assistance of counsel in order to overcome the procedural default. "However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards."[9] The United States Supreme Court has held that:

> [i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that the responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance;' [i]neffective assistance of counsel then is cause for a procedural default.[10]

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[6] Super. Ct. Crim. R. 61(i)(5).
[7] Super. Ct. Crim. R. 61(d)(2)(i).
[8] Super. Ct. Crim. R. 61(d)(2)(ii).
[9] *State v. Gattis*, 1995 WL 790961 (Del. Super.).
[10] *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two-part analysis enunciated in *Strickland v.* Washington[11] and adopted by the Delaware Supreme Court in *Albury v. State.*[12]

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.[13] Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.[14] In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.[15] Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.[16] However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[17] In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.[18] Furthermore, Harris must rebut a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance," and this Court must eliminate

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[11] 466 U.S. 668 (1984).
[12] 551 A.2d 53, 58 (Del. 1988).
[13] *Strickland*, 466 U.S. at 687; *see Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).
[14] *Id.*
[15] *See* e.g.,*Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).
[16] Strickland, 466 U.S. at 687.
[17] *Id.* at 697.
[18] *State v. Gattis*, 1995 WL 790961 (Del. Super.)

from its consideration the "distorting effects of hindsight when viewing that representation."[19]

Harris claims that because his attorney did not file a motion to suppress the evidence obtained by an alleged unlawful stop and seizure, she was ineffective. The crux of Harris' argument is that once the police officer activated the strobe function on her flashlight Harris was "seized" and therefore the police required reasonable articulable suspicion that Harris was engaged in criminal conduct. Next, Harris argues that the police did not have reasonable suspicion to "seize" him and consequently his Trial Attorney was ineffective because she failed to file a motion to suppress. Trial Counsel denies it was ineffective to not file a motion to suppress. Trial Counsel states in her affidavit that in evaluating whether or not to file a motion to suppress she thoroughly reviewed the police report and the dash cam video provided during discovery and discussed with Harris the allegations against him and his recollection of the night in question. Trial Counsel concluded based on the totality of the circumstances as they appeared to the police that evening, including the fact that the car Harris was in initially parked directly in front of the wanted person's address, that the car remained in drive and that the car began to flee as the police approached the vehicle along with the police officers safety concerns that having an unknown occupied vehicle behind them as they approached the suspect's home provided a reason to initially approach the Harris vehicle to ascertain if the subject of the police warrant was in the vehicle was reasonable and that therefore a motion to suppress would be futile. Harris, as noted, pins his argument on his assertion that once the police activated the strobe function, they "seized" Harris and therefore the fact that he subsequently fled cannot be considered in the suppression analysis.

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[19] *Strickland*, 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

The threshold question before the Court therefore is was Harris "stopped" when the officer activated the strobe on her flashlight. To briefly set the stage I will review the facts. Police and Probation Officers were, in the late evening of July 26, 2016, on their way to locate and arrest Dana Legrand, a probationer with an outstanding capias. Legrand's address was 417 North Street, Milford, Delaware. As the police turned off N.W. 4th Street on to North Street, and still a ways from 417 North Street, they officers observed a red car in front of them moving oddly back and forth, not in a straight line, along the street.[20] The police then observed that the red car stopped directly in front of 417 North Street. The police, given the lateness of the hour and their legitimate safety concerns, approached the red car to see who was in the vehicle and to make sure that Legrand was not one of the occupants. The officers also stated that they did not want to have unknown persons at their backs, as they attempted to enter 417 North Street to arrest Legrand, for their safety. As the officers approached the red car to make sure Legrand was not one of the occupants and to assure their safety, one of them turned on her flashlight to see inside the vehicle. As they did so the officers noticed that the passenger looked back and saw the police who were wearing clearly marked and visible police uniforms. At this point the red car moved forward at which point the officer with the flashlight turned on the strobe function and immediately the red car took off and the pursuit began ultimately leading to the driver, Harris' arrest. It is clear to me that Harris was never "seized" prior to his initiation of the chase that led to his arrest. Certainly common sense dictates that if a car that had been driving arguably erratically down a one-way street and which stops directly in front of the subject home would lead to the conclusion that the subject of the police warrant could be in the vehicle. Given that it was late at night and the valid safety concerns of the officers (not wanting an

[20] The State in their response mistakenly stated North Street was a two-way street. In fact it is one-way, nevertheless the vehicle was not driving in a straight line down the block.

unknown person at their back as they attempted to enter Legrand's home), it makes perfect sense that they should contact the occupants of the vehicle to make sure Legrand was not in the car. The simple action of the officers shining their flashlights on a dark street does not arise to a "seizure." Once the passenger looked back and saw the police and the red car then moved forward, the police had even more reason to want to assure that Legrand was not in the car and subsequently activated the strobe in order to get the attention of the driver so they could speak with him.

The actions of the police up to that point including activating the strobe feature on the flashlight did not rise to a "seizure." As the State Supreme Court noted in *Williams v. State*:

> ***Williams was not seized during the initial encounter***
>
> Williams contends that his encounter with Officer Brittingham, which resulted in Williams's giving his name and date of birth, was an unreasonable seizure in violation of 11 *Del. C.* 1902, Article I, Section 4 of the Delaware Constitution, and the Fourth Amendment of the United States Constitution. Specifically, Williams argues that once Officer Brittingham determined that he did not need assistance, the officer no longer had any reason to detain Williams, and Officer Brittingham lacked reasonable articulable suspicion for further detention and questioning.
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> The United States Supreme Court has repeatedly held that not every encounter with the police is a seizure under the Fourth Amendment. Where, as here, the alleged seizure was a brief investigatory stop, the Fourth Amendment does not require that the officer have probable cause to support an arrest. Rather the officer need only possess a reasonable and articulable suspicion of criminal activity. However, before we can determine whether the seizure was supported by reasonable suspicion, we must first answer the threshold inquiry of whether a seizure actually occurred.

As the United States Supreme Court has explained, under the Fourth Amendment "police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " Later, as its jurisprudence evolved, the Court indicated in *California v. Hodari D.,* this standard must be read more closely, explaining that "it states a *necessary,* but not a *sufficient,* condition for ... a seizure effected through a show of authority." The Court clarified that a seizure requires more than a mere assertion of authority, even if it would cause a reasonable person to believe that he or she was not free to leave. Instead, there must be some physical force or *submission* to the assertion of authority. Consistent with this requirement, the Court has held that under the Fourth Amendment "mere police questioning does not constitute a seizure. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual."

Although we have acknowledged the parameters of the Fourth Amendment as set forth by the Supreme Court, we have declined to follow *Hodari* when enforcing the protection from illegal searches and seizures afforded by the Delaware Constitution. Instead, we have retained a pre-*Hodari* standard based on the articulation by the Supreme Court in *Michigan v. Chesternut.* Like *Chesternut,* our standard under the Delaware Constitution focuses on the actions of the police officer and whether a reasonable person would have believed he or she was not free to ignore the police presence.

Even under this more stringent standard, "law enforcement officers are permitted to initiate contact with citizens on the street for the purpose of asking questions." This type of interaction is an encounter and, if consensual, neither amounts to a seizure nor implicates the Fourth Amendment. During a consensual encounter, a person has no obligation to answer the officer's inquiry and is free to go about his business. Only when the totality of the

> circumstances demonstrates that the police officer's actions would cause a reasonable person to believe he was not free to ignore the police presence does a consensual encounter become a seizure.
>
> Here, Williams's first encounter with Officer Brittingham was not a seizure. The officer observed Williams walking on a highway median at 3:50 a.m. in cold and windy weather. He parked his patrol car about ten feet behind Williams, activated his strobe light—not his emergency flashers—and approached Williams to ask if he needed a ride. Williams voluntarily answered Officer Brittingham's questions, including his name and date of birth. After a brief period, the encounter ended with Williams continuing to walk toward his destination.
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> Under the Fourth Amendment, this encounter lacked the physical force or submission to the assertion of authority to amount to a seizure. Furthermore, viewing the totality of the circumstances—Officer Brittingham's inquiry, Williams's voluntary response to questions, and the amicable end to the encounter—a reasonable person would believe he was free to ignore the police presence. Because the encounter was consensual and not a seizure; the pedigree information gathered by Officer Brittingham was obtained lawfully.[21]

With Harris as with Williams, the police activated a strobe light although in *Williams* it was the more powerful strobe on the police car, as opposed to a single flashlight strobe used in this case, in order to speak with Williams. In this case the police clearly had a reason to speak with the occupants of the red car, to determine if one of them was the person they were looking for and additionally to make sure the persons in the vehicle would not pose a danger to the officers while they executed the search of 417 North Street. The simple act of approaching the car and using a

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[21] *Williams v. State,* 962 A.2d 210, 214-216 (Del. 2008) (footnotes omitted).

flashlight cannot reasonably be seen as the use of force necessary to be classified as a "seizure." Consequently, it was not necessary for the officers to have a suspicion that the occupants of the red car had committed a crime. As such a motion to suppress would have been futile in this case and Harris' counsel made the correct decision in not filing the motion.

CONCLUSION

After reviewing the record in this case, it is clear that Harris has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). A review of his counsel's affidavit clearly shows that counsel represented Harris in a competent fashion and was not ineffective. Additionally, Harris has failed to demonstrate any concrete prejudice. Consequently, I recommend that Harris' motion be denied as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice.

/s/ Andrea M. Freud
Commissioner

AMF/dsc