

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

LARRY W. AUSTIN,	:	
	:	Cr.A. Nos. IN99-03-1467, 1468,
Petitioner,	:	1469 and 1470
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
	:	
Respondent.	:	

*Upon consideration of petitioner's motion for post-conviction relief—DENIED*

Submitted September 18, 2002  
Decided December 20 2002

**O P I N I O N**

Larry W. Austin, *pro se* petitioner, Delaware Correctional Center, 1811 Paddock Road, Smyrna, DE 19977,

James Rambo, Esquire, Deputy Attorney General, Department of Justice, 820 N. French Street, Wilmington, DE 19801, counsel for the State of Delaware, and

David Faccioli, Esquire, Assistant Public Defender, Office of the Public Defender, 820 N. French Street, Wilmington, DE 19801, trial counsel for Defendant Larry W. Austin.

Del Pesco, J.

Petitioner Larry W. Austin was arrested on various felony drug charges, and resisting arrest. He remained at liberty pending trial. A trial date was set and he was present when the trial began. Austin failed to appear for trial on the second day. He was convicted *in absentia* and later sentenced in Superior Court upon his involuntary return to the New Castle County Sheriff. Austin appealed *pro se*, to the Delaware Supreme Court. The conviction was affirmed. Austin now seeks postconviction relief citing ineffective assistance of counsel in that his lawyer failed to investigate his case, failed to prepare or consult with him, inappropriately withheld the record obstructing his *pro se* appeal, and failed to pursue potential defense witnesses.

#### ***FACTUAL BACKGROUND***

On the evening of March 6, 1999, Wilmington Police Officers Misetich and Mullin (“the officers”) were dispatched to a residence for the purpose of investigating a call/hang-up received by a 911 operator. The officers arrived at the call location, 427 Bayard Street in Wilmington. They exited their marked patrol car in uniform and walked toward the front porch. They saw two men, hands in pocket, exiting the porch toward the sidewalk. The officers approached and spoke to the men.

The men stated that they were there to visit a friend at the residence, but he was not at home. For safety purposes, the officers asked them to remove their hands from their pockets. One of the men complied and continued speaking. Petitioner Larry W. Austin (“Austin”) began nervously removing items from his pants pockets including keys, cough drops and two plastic bags. Next, Austin reached into his right jacket pocket and discarded two clear plastic bags containing a white powdery substance. Misetich testified:

[w]hen he emptied the two baggies, I looked down at the baggies because they caught my eye, because I was paying attention to his hands, I watched them fall down on the ground, looked at them, at that point I

looked up at him and he also noticed me look at the bags. And after I did that he just, he just, his eyes got real wide, he started running the other direction. *See Trial Trans. at 54.*

The officers chased Austin. He was apprehended one and a half blocks from the scene. Austin was carrying \$1,482.00 in cash. The officers returned to the scene with Austin in tow, where Missetic collected Austin's keys and the bags he had discarded. Austin was arrested. The medical examiner determined that the two bags contained 3.21 and 1.22 grams of cocaine. Capital Bonding Corp. posted a \$7,000.00 bond. After case reviews, a trial date was set. Austin was at liberty awaiting trial on three drug charges and resisting arrest.

Austin was present on the first day of his trial for jury selection and opening statements.

The second day, at 10:05 a.m., defense counsel informed the Court that:

[w]e seem to be lacking my defendant at the moment. When we left yesterday I spoke to him in the hall, he indicated that I hoped to see him around 9:30. He was going to bring in some witnesses for me to talk to at 1:30...I do know that one of the witnesses that he wanted to call was also somebody that they want to use in [a proceeding currently taking place in another court room], so some police officers... questioned me about [this witness]... and I said that, Hey, I hadn't seen her either. *See Trial Trans. at 14-15.* The only thing I can tell the Court is that his girlfriend came by a few minutes ago, we spoke to her, she's being used in another case... she indicated that when she left [home] she believed that [Austin] was on his way. *See Trial Trans. at 17.*

In an effort to locate Austin, the Court directed the State to call all law enforcement agencies and hospitals. The search was unsuccessful; Austin and his eleventh-hour witnesses were not found.

Austin's lawyer immediately asked for a mistrial stating that "[t]o complete this trial without [Austin] I think creates such a prejudicial pall over his character that I don't know if he could get a fair trial after all, you know, with his absence."<sup>1</sup> The State objected, the Court denied the motion, issued a *capias* and continued the trial *in absentia*.

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<sup>1</sup> *See Trial Trans. at 20.*

The jury convicted Austin on March 15, 2002.<sup>2</sup> Capital Bonding Corp. returned Austin to custody on July 14, 2002. He was sentenced on August 11, 2000.

Austin requested, and was permitted to proceed *pro se* in his appeal to the Delaware Supreme Court. The conviction was affirmed. Austin now petitions this Court for post conviction relief citing violations of his Sixth Amendment right to effective assistance of counsel.

### ***LEGAL STANDARDS***

#### *Procedural Requirements for Post-Conviction Relief.*

Before a post-conviction claim is ripe for review, each claim must meet two requirements under Superior Court Criminal Rule 61.<sup>3</sup> First, post-conviction Relief is procedurally barred in any of the following circumstances: (1) the claim is not filed within three years of the judgment becoming final, (2) the relief requested is founded upon a ground not asserted at a prior post conviction proceeding, (3) the issue was not raised or preserved of record at trial, and (4) the issue was formally adjudicated in a prior proceeding.<sup>4</sup>

Second, each claim must survive summary dismissal.<sup>5</sup> Over-broad and generalized accusations, which are wholly conclusory, do not support entitlement to relief.<sup>6</sup> “The movant must support the ineffective assistance of counsel claims with concrete allegations of actual

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<sup>2</sup> Austin was convicted on all four charges: Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance (Cocaine), Possession of a Controlled Substance Within 1000 feet of a School, Possession of a Controlled Substance Within 300 feet of a Park or Recreation Area, and Resisting Arrest. Defense counsel successfully argued to include a charge of Possession as a lesser-included offense of Possession with Intent to Deliver, the drug trafficking charge.

<sup>3</sup> See *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); see also *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> Super. Ct. Crim. R. 61(i)(1)-(4); see also *Derrickson v. State*, 399 A.2d 202 (Del. 1979).

<sup>5</sup> Rule 61(d)(4) states that “[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal...” Super. Ct. Crim. R. 61(d)(4).

<sup>6</sup> See *Younger*, 580 A.2d at 556 (allegations of mere conclusion are insufficient to establish ineffective assistance of counsel); see e.g. *Jordan v. State*, No. 270, 1994 Walsh, J. (Del. Super. Aug. 25, 1994)(ORDER); *State v. Brittingham*, Cr. A. No. IN 91-01-1009, Barron, J. (Del. Super. Dec. 29, 1994)(ORDER).

prejudice, otherwise the movant risks summary dismissal.”<sup>7</sup> Therefore, it is incumbent upon the defendant to set forth the factual basis in support of each claim.

### *Evaluation of Defense Counsel’s Performance*

If a claim is ripe for review, the Court will examine defense counsel’s performance. A claim of ineffective assistance of counsel is constitutional in nature because the defendant alleges that the “fundamental legality, reliability, integrity or fairness of the proceeding…” has been compromised.<sup>8</sup> “The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has assistance necessary to justify reliance on the outcome of the proceeding.”<sup>9</sup>

To establish an ineffective assistance claim, a defendant must prove both (i) “that counsel’s representation fell below an objective standard of reasonableness, “ and (ii) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>10</sup> Ultimately, a strong presumption exists that counsel reasonably and professionally represented the defendant.<sup>11</sup>

### ***PETITIONER’S CONTENTIONS***

Austin’s petition is rife with general allegations relating to the impropriety and wrongdoing of defense counsel. He asserts broad stroked conclusions as to the effectiveness of his lawyer’s performance, while failing to point to specific, concrete allegations. As discussed below, three claims are summarily dismissed pursuant to Super. Ct. Cr. R. 61(d)(4). Austin’s fourth claim is ripe for review but fails to meet the first prong of the *Strickland* test and it is denied.

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<sup>7</sup> *State v. Mason*, Cr. A. No. IN93-02-0279-R1, Barron, J.(Del. Super. Apr. 11, 1996) *citing Younger*, 580 A.2d at 556; *see also Duffy v. State*, No. 592,1992, 620 A.2d 857 (Del. 1992)(Order).

<sup>8</sup> *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>9</sup> *See Strickland*, 466 U.S. at 691-92.

<sup>10</sup> *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) *quoting Strickland*, 466 U.S. at 688, 964; *accord Younger*, 580 A.2d at 556. This proof must be made by a preponderance of the evidence.

<sup>11</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990)

*Defense Counsels Failure to Investigate.*

Austin alleges that defense counsel failed to investigate the State's case. Austin states that counsel did not review any of the relevant and applicable principles of law.<sup>12</sup> Austin proffers no factual basis for this assertion, nor does he indicate what further investigation would reveal.

Defendant's petition does not point to specific instances of defense counsels failures. Absent concrete allegations of specific prejudice arising from particular instances of the failure to investigate the case and apply relevant legal principles, Austin's allegations are broad generalizations. Therefore, this claim is summarily dismissed pursuant to Superior Court Criminal Rule 61(d)(4).

*Defense Counsels Failure to Prepare and Consult with Defendant.*

Austin next claims that his lawyer failed to consult with him and was therefore unprepared for trial. In support of this allegation, he points to the fact that his lawyer did not issue subpoenas for allegedly pertinent witnesses that Austin named the night before his second day at trial. Austin implies misconduct in that his lawyer should have known the names and potential testimony of allegedly exculpatory witnesses earlier, and subpoenas could have been issued. These facts are carried over from, and directly relevant to Austin's claim regarding witnesses, and they will not act to bootstrap an otherwise generalized, unsupported statement attacking the efficacy of counsel. Austin's witness claim will be addressed later.

This claim is otherwise unsupported by his petition. The record shows that there was a case review and a final case review, two opportunities for the defendant to provide information to his counsel. He does not claim that such information was provided and overlooked. He does not explain what any witness could possibly have said in his defense, given the circumstances of

the offense. Therefore, this claim is summarily dismissed for lack of specificity pursuant to Super. Ct. Cr. R. 61(d)(4).

*Defense Counsels Failure to Disclose Documents.*

Austin claims here that his lawyer did not “disclose essential material facts, consisting of police reports, evidence test results, or other pertinent trial transcripts to give the defendant an appropriate direct appeal review.”<sup>13</sup> He does not allege any prejudice suffered due to these events. Austin’s allegations are confusing as to whether he wishes this Court to address the production of these items during trial, or address their tardiness with respect to his appeal. The Court will not speculate about the substance of the alleged ineffectiveness or the prejudice it caused.

Austin sought, and was granted leave to pursue his direct appeal, *pro se*. Austin’s request to dismiss his trial lawyer carried with it the associated responsibility of securing the necessary information to prepare briefs.

The record reflects that Austin was provided the full file well in advance of the deadline for his appellate brief to the Delaware Supreme Court. Austin has failed to allege any prejudice suffered except to say that this is an example of a personal conflict between himself and his lawyer. This claim is summarily dismissed for failing to meet the requirements of Super. Ct. Cr. R. 61(d)(4).

*Failure to Pursue Potential Defense Witnesses.*

Austin alleges that “[despite] being giv[en] the names and substantial facts of their relevant testimonies...” defense counsel failed to interview several witnesses “that defendant had

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<sup>12</sup> See Defendant’s Petition at II, and 1-2.

<sup>13</sup> See Defendant’s Petition at II, and 6.

acquired... through other means.” Austin claims in particular, that “Donna”<sup>14</sup> would have given testimony that the drugs carried by Austin were in fact owned by “Robert Austin”, the defendant’s brother. Austin further states that Delaware Correctional Officer “Bovell” would be able to testify that defendant’s brother openly admitted that “Larry Austin is going to jail for nothing, because he claimed the drugs in question.”

Austin points to the fact that his lawyer did not issue subpoenas for these allegedly pertinent witnesses. Austin then states that his lawyer failed to discover and call relevant witnesses. He claims that because his lawyer was unaware of the names and potential testimonies of exculpatory witnesses until the night before the second day of trial, counsel was derelict.

To begin, after Austin’s arrest, he posted bond and was at liberty awaiting trial set for March 14, 2000. He was present at both case reviews and said nothing to his lawyer about these witnesses. Additionally, on the morning of March 14, he was present with his attorney for trial. A jury was selected and sworn, and both the state and defense counsels made their opening statements. Austin remained silent. Trial was recessed for the day. Only then did Austin tell his lawyer of two alleged exculpatory witnesses. The record indicates that nothing beyond their first names was given to counsel. Further, the common element in the three drug charges against Austin was the possession of drugs. None of the potential testimony proffered by Austin, i.e. actual ownership, would serve as a defense.

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<sup>14</sup> Defendant’s Petition only supplies the potential witnesses first name without any further address or contact information. The record shows that Defense counsel was not privy to any of this information even after the Defendant had informed counsel that he would be bringing two additional witnesses. From the record, it appears that Austin informed counsel of the potential witnesses the eve of the second day of trial merely stating that Austin would compel the attendance of the eleventh hour witnesses in time for counsel to interview, and potentially elicit testimony.



Austin told his lawyer that he would meet him the next morning at 9:30 a.m., to discuss witness testimony. He promised to secure the attendance of his witnesses by 1:30 p.m. so that his lawyer could interview and evaluate their allegedly exculpatory testimony. The next morning, Austin failed to appear for trial. The Court, and counsel on both sides attempted to locate him. His girlfriend indicated that Austin was on his way to the courthouse. Furthermore, defense counsel spoke to police officers about the witness scheduled to testify in the courtroom next door, and she was nowhere to be found.

Nothing in the record suggests that Austin's lawyer was ineffective. When Austin failed to appear on the second day of his trial, his attorney asked for a mistrial. Further, defense counsel made additional attempts to locate Austin and to locate the additional witnesses. Defense counsel then continued to defend Austin. Therefore, Austin does not meet the first prong of the *Strickland* test because he has failed to show that defense counsel's representation was unreasonable.

Austin's motion for postconviction relief is DENIED.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary

xc: Larry W. Austin, Delaware Correctional Center  
James Rambo, Esquire, Deputy Attorney General  
David Faccioli, Esquire, Assistant Public Defender