

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE)	
)	
v.)	IK97-02-0093-R1
)	IK97-02-0094-R1
LINNARD L. SLADE,)	IK97-05-0141-R1
)	through
Defendant.)	IK97-05-0144-R1
ID No. 9701022584)	

Submitted: August 8, 2002
Decided: August 14, 2002

ORDER

On this 14th day of August, 2002, upon consideration of the defendant's Motion for Postconviction Relief, the Commissioner's Report and Recommendation, and the record in this case, it appears that:

(1) On January 20, 1999 the Defendant, Linnard L. Slade ("Slade") was found guilty by a jury as charged of two counts of Delivery of Cocaine, 16 *Del. C.* § 4751; one count of Possession of Marijuana, 16 *Del. C.* § 4754; one count of Possession of Cocaine, 16 *Del. C.* § 4753; and two counts of Conspiracy in the Second Degree, 11 *Del. C.* § 512. On January 20, 1999 the Court sentenced Slade to 10 years in prison followed by probation.

State v. Linnard L. Slade
ID No. 9701022584
August 14, 2002

A timely notice of appeal was filed with the Delaware Supreme Court. On appeal, the Supreme Court affirmed Slade's conviction and sentence.¹ Next, Slade filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61. In his motion, Slade alleges five grounds for relief including ineffective assistance of counsel.

(2) The Court referred this motion to Superior Court Commissioner Andrea Maybee Freud pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for proposed findings of facts and conclusions of law. The Commissioner has filed a Report and Recommendation concluding that the motion for postconviction relief should be dismissed as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and Rule 61(i)(4) as previously adjudicated.

(3) No objections to the Report have been filed.

NOW THEREFORE, after careful and *de novo* review of the record in this action, and for the reasons stated in the Commissioner's Report and Recommendation dated July 24, 2002,

¹ *Slade v. State*, Del. Supr., No. 45, 1999, Berger, J. (Jan. 24, 2000) (ORDER).

State v. Linnard L. Slade

ID No. 9701022584

August 14, 2002

State v. Linnard L. Slade

ID No. 9701022584

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IT IS ORDERED that:

(A) The well-reasoned Commissioner's Report and Recommendation is adopted by the Court;

(B) The defendant's Motion for Postconviction Relief is ***DISMISSED***.

/s/ Henry duPont Ridgely

President Judge

cmh

oc: Prothonotary

xc: Hon. Andrea Maybee Freud

Dennis Kelleher, Esq.

John McDonald, Esq.

Linnard L. Slade

Order Distribution (w/Report & Recommendation)

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Dennis Kelleher, Esq., Deputy Attorney General, Dover, Delaware, for the State of Delaware.

Linnard L. Slade, *pro se*.

COMMISSIONER'S REPORT AND RECOMMENDATIONS

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

FREUD, Commissioner
July 24, 2002

On January 20, 1999 the Defendant, Linnard L. Slade ("Slade") was found guilty by a jury as charged of two counts of Delivery of Cocaine, 16 *Del. C.* § 4751; one count of Possession of Marijuana, 16 *Del. C.* § 4754; one count of Possession of Cocaine, 16 *Del. C.* § 4753; and two counts of Conspiracy in the Second Degree, 11 *Del. C.* § 512. On January 20, 1999 the Court sentenced Slade to 10 years in prison followed by probation.

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A timely notice of appeal was filed. On appeal, the Supreme Court affirmed Slade's conviction and sentence.² Next, Slade filed the pending postconviction motion in which he raises five grounds for relief including ineffective assistance of counsel.

I. FACTS

The following is a summary of the facts as noted by the Supreme Court in its opinion:

Slade was convicted, after a jury trial, of two counts of delivery of cocaine, two counts of conspiracy in the second degree, and one count each of possession of cocaine and marijuana. Slade's only claim on appeal is that the Superior Court erred in refusing a plea bargain that he decided to accept during jury selection for his trial.

Several times, during the course of pre-trial preparations, the State offered to *nolle prosequere* all other charges and recommend a three year sentence if Slade would plead guilty to attempted delivery of cocaine and theft. At his final case review, one week before trial, Slade again refused the plea offer. He changed his mind shortly after jury selection began on the day of trial, and told the court that he wanted to accept the plea.

The Superior Court asked Slade whether it was the same plea offer that he had rejected at the final case review, and whether anything had happened since the final case review to make Slade change his mind. Slade said that it was the same offer and that there were no changed circumstances that caused him to change position. The Superior Court then advised Slade that he could plead guilty to all of the charges or go to trial, but that it was too late to accept a plea offer. The court explained that Slade had not established good cause to

² *Slade v. State*, Del. Supr., No. 45, 1999, Berger, J. (Jan. 24, 2000) (ORDER).

deviate from the court's case management procedures, which require the State to make its best offer and the defendant to accept or reject that offer no later than the date of the final case review.

A defendant has no constitutional right to have the court accept a plea agreement.³ The decision to accept or refuse a plea is committed to the discretion of the trial court and this Court, therefore, reviews for abuse of discretion.⁴

II. SLADE'S CONTENTIONS

In his motion for postconviction relief, Slade asserts the following five grounds for relief:

Ground one: Defendant was denied his fundamental right to effective assistance of counsel at every stage of his criminal proceedings. In violation of the equal protection under the Due Process of Law, secured by Article 1, Section 7 of the Delaware Constitution; 5th, 6th and 14th Amendments of the United States Constitution. This claim is warranted under Super. Ct. Crim. R. 61 (I)(5)(sic).

Ground two: The Trail (sic) Judge erred as a matter of law when he amended the indictment at trial, which did in fact prejudice the Defendant's substantial rights; in violation of the equal protection under the Due Process of Law, secured by Article 1, Section 7 of the Delaware Constitution; 5th, 6th and 14th Amendments of the United States Constitution. This claim is warranted under Super. Ct. Crim. R. 61 (i)(5).

Ground three: The indictment is insufficient. Because, (A) it failed to state the place where the offense occurred; (B) it failed to establish

³ See *Santobello v. New York*, 404 U.S. 257, 262 (1971).

⁴ See *Howard v. State*, Del. Supr., 458 A.2d 1180, 1185 (1983).

State v. Slade

ID No. 9701022584

July 24, 2002

the date and time; (C) it failed to establish the name of the person Slade delivered cocaine to; (D) it also failed to establish the elements constituting the offense charged; in violation of the equal protection under the Due Process of Law, secured by Article 1, Section 7 of the Delaware Constitution; 5th, 6th and 14th Amendments of the United States Constitution. This claim is warranted under Super. Ct. Crim. R. 61 (i)(5).

Ground four: Defendant was denied his fundamental right to a fair trial and impartial verdict, due to the fact that the State failed to prove each and every element beyond a reasonable doubt. In violation of the equal protection under the Due Process of Law, secured by Article 1, Section 7 of the Delaware Constitution; 5th, 6th and 14th Amendments of the United States Constitution. This claim is warranted under Super. Ct. Crim. R. 61 (i)(5).

Ground five: The Trial Judge instructions to the jury was erroneous. Depriving Defendant of his Fundamental Rights, secured by Article 1, Section 7 of the Delaware Constitution, 5th, 6th and 14th Amendments of the United States Constitution. Thus rendering Defendant's trial fundamentally unfair. This claim is warranted under Supr. Ct. Crim. R. 61 (i)(5).

III. PROCEDURAL CONSIDERATIONS

Under Delaware Law the Court must first determine whether Slade has met the procedural requirements of Superior Court Criminal Rule 61 (i) before it may consider the merits of the postconviction relief claims.⁵ Under Rule 61, postconviction claims for relief must be brought within three years of the

⁵ *Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991); *Younger v. State*, Del. Supr., 580 A.2d 554 (1990) (citing *Harris v. Reed*, 489 U.S. 255 (1989)). See *Dawson v. State*, Del. Supr., 673 A.2d 1186, 1190 (1996).

conviction becoming final.⁶ Slade's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Slade's 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 demonstrates: (1) cause for the procedural fault and (2) prejudice from a violation of the movant's rights.⁷ The bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim or miscarriage of justice stemming from a constitutional violation that "undermines the fundamental legality, reliability, integrity or fairness of the proceeding leading to the judgment of conviction."⁸

Arguably each of Slade's claims are premised on allegations of ineffective assistance of counsel due to his catch all claim of ineffectiveness in his first ground for relief. Thus, Slade has minimally raised counsel's effectiveness in his five grounds for relief. Slade has therefore seemingly alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. These types of claims are not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the

⁶ Super. Ct. Crim. R. 61(i)(1).

⁷ Super. Ct. Crim. R. 61(i)(3).

⁸ Super. Ct. Crim. R. 61(i)(5).

State v. Slade
ID No. 9701022584
July 24, 2002

first time on direct appeal. For this reason, many defendants, including Slade, 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”; ineffective assistance of counsel then is cause for a procedural default.¹⁰

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

⁹ *State v. Gattis*, Del. Super., ID No. 90004567DI-R2, Barron, J. (Dec. 28, 1995) (Mem. Op.) at 8.

¹⁰ *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

¹¹ 466 U.S. 668 (1984) ("*Strickland*").

¹² Del. Supr., 551 A.2d 53 (1988).

State v. Slade
ID No. 9701022584
July 24, 2002

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

¹³ *Strickland* at 687. See *Dawson*, 673 A.2d at 1190.

¹⁴ *Id.* at 694. *Dawson*, 673 A.2d at 1190; *Skinner v. State*, Del. Supr., 607 A.2d 1170 1172 (1992).

¹⁵ *Righter v. State*, Del. Supr., 704 A.2d 262, 264 (1997) *Younger v. State*, 580 A.2d at 556; *Robinson v. State*, Del. Supr. 562 A.2d 1184, 1185 (1989); *Skinner v. State*, Del. Supr., No. 318, 1993, Holland, J. (March 31, 1994) (ORDER); *Kerchliner v. State*, Del. Supr., No. 451, 1994, Holland, J. (June 21, 1995) (ORDER) *Accord Wells v. Petstock*, 941 F.2d 253, 259-60 (3rd Cir. 1991).

¹⁶ *Strickland* at 687.

¹⁷ *Id.* at 697.

State v. Slade
ID No. 9701022584
July 24, 2002

of the claim on this basis alone.¹⁸ Furthermore, the defendant must rebut a “strong presumption” that trial counsel’s representation fell within the “wide range of reasonable professional assistance,” and this Court must eliminate from its consideration the “distorting effects of hindsight when viewing that representation.”¹⁹

In the case at bar, Slade attempts to show cause for his procedural default by making merely conclusory assertions of ineffectiveness of counsel. In regards to prejudice, I can discern no effort to make concrete allegations of actual prejudice or to substantiate said allegations of prejudice. These failures are fatal to Slade’s Rule 61 petition and should result in summary dismissal for each of his ineffective assistance of counsel claims.²⁰ The Supreme Court found no error in the trial. Turning briefly to Slade’s second ground for relief; the record indicates that the indictment was amended during the trial. However, the amendment only altered a matter of form. The original indictment stated that cocaine was classified as a Schedule II narcotic substance as defined by Title 16 Section 4714(e) of the Delaware code. This was amended to read Section 4714(d). This

¹⁸ *State v. Gattis*, Mem. Op. at 9.

¹⁹ *Strickland* at 689; *Dawson*, 673 A.2d at 1190; *Wright v. State*, Del. Supr., 671 A.2d 1353, 1356 (1996).

²⁰ See e.g. *Wright*, 671 A.2d at 1356; *Skinner v. State*, supra; *Brawley v. State*, Del. Supr., No. 372, 1992, Moore, J. (Oct. 7, 1992) (ORDER); *Wright v. State*, Del. Supr., No. 400, 1991, Walsh, J. (Feb. 20, 1992) (ORDER). See also, *Dixon v. State*, Del. Supr., No. 153, 1991, Holland, J. (Jan. 14, 1992) (ORDER).

State v. Slade
ID No. 9701022584
July 24, 2002

is clearly a matter only of form and the amendment was properly permitted under Superior Court Criminal Rule 7(e).

As to his third ground for relief that the indictment was insufficient, Slade, complains that the indictment was insufficient. An indictment is required to adequately inform the defendant of the charges against him and to protect him from a subsequent prosecution for the same offense.²¹ The indictment in this case clearly spelled out the charges the defendant was facing and was sufficient in every respect.

In his fourth ground for relief, Slade claims the State failed to prove an element of the offense. This issue is barred by Rule 61(i)(4), former adjudication. Both during the trial and after trial the defense made motions for judgment of acquittal. In both instances the motion was denied. The defendant has not made any arguments that are different from those raised in the motion for judgment of acquittal and should be barred as previously adjudicated.

In his fifth and final claim, Slade argues the jury instructions were inadequate. Again his claims run afoul of Rule 61(i)(3). The instructions given by the trial judge were sufficient, the defendant has an opportunity to raise any objections to them and did not. He cannot show either cause for relief or prejudice and should be procedurally barred.

IV. CONCLUSION

After reviewing the record in this case, it is clear that Slade has failed to avoid the procedural bars of Rule 61(i). Consequently, I recommend that Slade's

²¹ *State v. Delaware Novelty House, Inc.*, Del. Supr., 74 A.2d 83 (1950).

State v. Slade

ID No. 9701022584

July 24, 2002

postconviction motion be *dismissed* as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and Rule 61 (i)(4) as previously adjudicated.

/s/ Andrea M. Freud

Commissioner Andrea M. Freud

oc: Prothonotary
xc: Hon. Henry duPont Ridgely
Dennis Kelleher, Esq.
John McDonald, Esq.
Linnard L. Slade
File