IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	ID #9909026371
v.	:	Supreme Court No. 422, 2000
KEAVNEY WATSON	:	
	:	

Upon Remand from the Supreme Court
Pursuant to Supreme Court Rule 19(c)

Submitted: October 25, 2001
Decided: November 6, 2001

ORDER

On September 20, 2001, this case was remanded with the direction for findings of fact and conclusions of law. The Superior Court was to (1) determine appellant's ineffective assistance of counsel claim, and (2) decide his motion for a new trial based upon newly discovered evidence. The background of this case is detailed by Superior Court Order dated June 29, 2001. Appellant's *pro se* representation was granted by Supreme Court Order dated July 18, 2001. On October 25, 2001, an evidentiary hearing was held. Mr. Watson (the defendant) testified, as did his former counsel, A. Dean Betts, Jr., Esquire (former counsel).

FINDINGS OF FACT

1. The defendant was indicted and arraigned in the Superior Court for possession of marijuana with intent to deliver, and with possession of drug paraphernalia.

2. Before arraignment, the defendant represented himself at a preliminary hearing where probable cause was found to support these charges.

3. The preliminary hearing was held in the Court of Common Pleas and the judge who presided is the sister of defendant's former counsel.

4. During the Superior Court proceedings, former counsel received police and crime reports, a laboratory report from the Medical Examiner's Office, probable cause affidavits, arrest warrants, the defendant's criminal history and Attorney General's rap sheet, and the State's discovery response. Former counsel also obtained a transcript of the preliminary hearing. A motion to suppress marijuana found in defendant's sock wrapped in a $5 bill was filed. Thereafter, a suppression hearing was held and a transcript was obtained for trial in June of 2000.

5. Defendant and former counsel disagreed about presentation of the defense. Defendant insisted that the buy/bust operation was illegal, while former counsel believed this position was frivolous.

6. In March 2000, defendant and former counsel received a letter from this Court. The letter said the challenge to the buy/bust operation was frivolous (docket entry #44).

7. The indictment filed against defendant was reviewed by former counsel before the trial.

8. At trial, former counsel's effort resulted in a verdict of guilty to the lesser included offense of possession of marijuana on the lead charge. Defendant was convicted of possession of drug paraphernalia.

9. While differences of opinion existed, defendant and former counsel were able to communicate and defend against the charges of the indictment.

10. At and before trial, former counsel acted in a professionally competent manner.

CONCLUSIONS OF LAW CONCERNING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Every citizen is guaranteed the right to effective assistance of counsel in a felony prosecution. Where a claim of ineffective assistance of counsel is made, a defendant must show that a lawyer's errors were so grievous as to fall below an objective standard of reasonableness. Further, a reasonable degree of probability must be demonstrated that, but

for counsel's unprofessional errors, actual prejudice resulted. Concrete allegations of actual prejudice must be asserted and substantiated. *Strickland v. Washington,* 466 U.S. 668 (1984); *Albury v. State*, Del. Supr., 551 A.2d 53 (1988).

Various accusations are made against former counsel. The claims are discussed below:

1. Defendant argued that his inmate account showing a $2.92 deposit should have been submitted into evidence. The account was established following his arrest for the charges. It has questionable probative value. After arrest, a police photograph of the defendant's leg was taken that showed a bill against his sock where the marijuana was found (State's Exhibit 2). At trial, two officers testified that the marijuana and $5 bill were seized from defendant's sock. The $5 was returned to the defendant, because the amount of the money was too nominal for forfeiture. With this background, former counsel would gain nothing from pursuing this point, nor would a reasonably competent defense lawyer be expected to pursue an empty trail.

2. Defendant argued that the photograph (State's Exhibit 2) was not his leg, the original $5 bill was not introduced into evidence, and, therefore, these points demonstrated a conspiracy against him. The conspiracy allegation was a conclusion without any support. As discussed above, there was secondary

evidence of the $5 bill by way of photograph and testimonial evidence. A reasonable explanation for the absence of the original currency was provided. Former counsel did not object to the admission of State's Exhibit 2, nor would a reasonably competent defense lawyer be expected to do so.

3. Defendant argued that the indictment was defective and former counsel should have attacked it. The indictment was filed on November 15, 1999, was regular on its face and no basis was presented for any objection. (docket entry #5). Former counsel reviewed the indictment before trial. A reasonably competent defense lawyer would not be expected to undertake a useless gesture by moving to dismiss this indictment.

4. Defendant argued that the buy/bust operation was illegal. Defendant felt that Delaware State Police, working for the Governor's Task Force, were not permitted to do undercover work, and, therefore, the buy made by the undercover member of the Governor's Task Force was illegal. On March 24, 2000, this Court rejected this point (docket entry #44). Former counsel objected to the seizure of the marijuana and $5 bill on recognized search and seizure grounds. This was the subject of the suppression hearing and was briefed in the Supreme Court (before defendant obtained *pro se* status). No

reasonably competent defense lawyer would be expected to argue peculiar notions about search and seizure.

5. Defendant argued that trial testimony was falsely given by two officers and that he did not discuss the topics testified by them. This was a broadly based accusation without any support. Former counsel obtained transcripts of the preliminary and suppression hearings, together with other information detailed above. Former counsel used transcript excerpts in his cross examination. There was nothing to suggest tainted trial testimony. Defendant testified at the suppression hearing that he was intoxicated by use of marijuana. For that reason, he did not remember details of his encounter with the police. No reasonably competent defense lawyer could do anything more with the cross examination of the officers than what occurred at trial.

6. Defendant argued that a conflict of interest existed between former counsel and the Court of Common Pleas judge who presided at the preliminary hearing. While they are brother and sister, the preliminary hearing occurred before former counsel's appointment. The determination of probable cause by the Court of Common Pleas judge was immaterial given the return of the indictment by the grand jury. No reasonably competent defense lawyer would

be expected to challenge the preliminary hearing result. Under these circumstances, no conflict of interest existed, and no disclosure of the relationship was required when former counsel was appointed in the Superior Court.

7. Defendant also argued that inadmissible evidence, exhibits and testimony were introduced. This accusation was boilerplated, vague and merely sought to reargue the case.

FINDINGS AND CONCLUSIONS OF LAW CONCERNING MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE

The standard for what constitutes "new evidence" permitting a new trial under Rule 33 is set out in *State v. Hamilton*, Del. Super., 406 A.2d 879 (1974):

> In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial and could not have been discovered before by the exercise of due diligence; (3) that it is not merely cumulative or impeaching.

Defendant presented the following grounds of newly discovered evidence:

1. The inmate account discussed above. It was known at the time of trial and is not new evidence.

2. Defendant denied possession of marijuana and the $5 bill. This is not new evidence as understood under Rule 33.

3. Defendant denied the topics of conversation and their accuracy as testified by arresting officers. This is not new evidence as understood under Rule 33.

4. Defendant argued the buy/bust operation was illegal, the photograph of his leg with currency was fabricated, and medical examiner personnel did not testify about his possession of marijuana. These points are not new evidence as understood under Rule 33.

5. Defendant argued the indictment was defective. This is not new evidence as understood under Rule 33.

6. Defendant argued that the prosecutor engaged in a conspiracy to convict him on false evidence (Exhibit 2 - the photograph) and the State was, itself, guilty of possession of marijuana. This accusation is frivolous and without any support. It is also not new evidence as understood under Rule 33.

CONCLUSIONS

Defendant's ineffective assistance of counsel claim was not demonstrated. Former counsel's representation was effective. It was consistent with professional defense standards expected of reasonably competent defense counsel. Nothing presented undermined the

confidence in the verdict. No actual prejudice was shown. Defendant failed to carry his burden under the *Strickland* and *Albury* standards. While the relationship was strained, former counsel represented the defendant appropriately. A meaningful attorney-client relationship was not constitutionally guaranteed. *Morris v. Slappy,* 461 U.S.1 (1983).

Defendant's motion for a new trial on newly discovered evidence is denied. The thrust of the claim was not new evidence. Regardless, nothing presented would change the result at a new trial.

IT IS SO ORDERED.

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Richard F. Stokes, Judge

Original to Prothonotary

cc: Supreme Court
A. Dean Betts, Jr., Esquire
Stephanie A. Tsantes, Esquire
Keavney Watson

Mr. Keavney Watson
SBI #00256176
Sussex Correctional Institution
PO Box 500
Georgetown, DE 19947

D490
Cathy L. Howard, Clerk
Supreme Court
55 The Green
Dover, DE 19901

Stephanie A. Tsantes, Esquire
Department of Justice

A. Dean Betts, Jr., Esquire
Betts & Betts, PA