

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

STATE OF DELAWARE)	
)	
v.)	ID#: 9705008339
)	
GARY RILEY,)	
)	
Defendant.)	

Submitted: May 29, 2001
Decided: June 27, 2001

ORDER

Upon Defendant's Motion for Postconviction Relief--*DISMISSED*

On May 29, 1998 a jury found Gary Riley guilty of trafficking in cocaine and related crimes. After he was sentenced, his conviction was affirmed by the Supreme Court and the mandate was filed on April 19, 2000.

On May 29, 2001, Riley filed a motion for postconviction relief under Superior Court Criminal Rule 61. Riley's motion is timely and procedurally proper. The motion for postconviction relief alleges that Riley's trial counsel was ineffective in two ways.¹ The court has reviewed the motion

¹ **Technically, Riley makes three claims. Two of them are duplicative.**

for postconviction relief under Rule 61(d)(1). For the following reasons the court finds that Riley's motion is subject to summary dismissal under Rule 61(d)(4).

I.

Defendant's criminal problems began in earnest when the police executed a search warrant involving him on May 14, 1997. During the search, the police seized highly incriminating evidence, including enough cocaine to justify Defendant's eventual conviction for trafficking. Riley's motion for postconviction relief claims that his trial counsel was ineffective for failing to request a *Flowers* hearing² in order to reveal the identity of the confidential informant who supplied some of the search warrant's probable cause. Riley also claims that trial counsel was ineffective for failing to challenge the search warrant on staleness grounds.

Riley's trial counsel vigorously attacked the search warrant, moving for its pre-trial suppression. While trial counsel challenged the search warrant on several grounds, he did not ask the court to hold a *Flowers* hearing or to consider the search warrant's staleness.

II.

² *State v. Flowers*, Del. Super., 316 A.2d 564 (1973).

The standard of review for motion alleging ineffective assistance of counsel is well-settled. A Defendant must meet the two-prong *Strickland*³ test.

As stated in *Albury v. State*,⁴ the Defendant must show that “counsel’s representation fell below an objective standard of reasonableness” and that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁵ Moreover, *Albury* states that, “[w]hen an appellate court examines the representation of counsel pursuant to the first prong of the *Strickland* test, that review is subject

³ *Strickland v. Washington*, 466 U.S. 668 *reh’g denied*, 467 U.S. 1267 (1984).

⁴ Del. Supr., 551 A.2d 53 (1988). *See also Somerville v. State*, Del. Supr., 703 A.2d 629, 631 (1997) (To prevail on an ineffective counsel claim, defendant must meet *Strickland’s* test.)

⁵ *Id.* at 58 (quoting *Strickland* at 688, 694).

to a strong presumption that counsel's conduct was professionally reasonable."⁶

As a matter of law, trial counsel is presumed to have been effective. The burden falls on Riley to overcome the presumption. Riley does not attempt to meet either prong of the *Strickland* test. He alleges trial counsel's ineffectiveness and leaves it at that.

Accordingly, the court continues to presume that trial counsel's failure to ask for a *Flowers* hearing and to challenge the search warrant's staleness did not fall below the objective standard. Furthermore, as discussed below, the court is satisfied that trial counsel's alleged shortcomings caused Riley no harm.

III.

After it conducted a formal suppression hearing on October 3, 1997, the court issued an elaborate nineteen page decision suppressing statements made by Riley and the physical evidence found during the court-authorized search. The court will not recapitulate the earlier decision, which

⁶ *Id.* (Citing *Strickland* at 689). *See also Dawson v. State*, Del. Supr., 673 A.2d 1186, 1190, *cert. denied*, *Dawson v. Delaware*, 519 U.S. 844 (1996) ("Counsel's efforts . . . enjoy a strong presumption of reasonableness." (citing *Flamer v. State*, Del. Supr., 585 A.2d 736, 753-754 (1990))).

sets out in detail the events surrounding the search.

In summary, according to the search warrant's affidavit of probable cause, the drug enforcement police officers' attention was focused on Harrisburg Avenue in Eden Park, New Castle, Delaware in November 1996. Relying on investigative leads, the police executed a search warrant at 15 Harrisburg Avenue. Based on what they found during that search, the police arrested the owner of 15 Harrisburg Avenue on drug charges. The police also found Riley at the scene, although they did not arrest him. In other words, a confidential informant may have led the police to 15 Harrisburg Avenue, but Riley came into focus through direct observation by police officers.

By the time they applied for the search warrant for 10 Harrisburg Avenue, the police not only had reason to believe that Riley had been involved in drugs for several months on Harrisburg Avenue, they knew he was associated with 10 Harrisburg Avenue and an anonymous caller had told them that he was renting a room there.

Four months after they found Riley at 15 Harrisburg Avenue, the police received several anonymous calls concerning drug activity at several addresses in Eden Park. One of the places mentioned in the calls was 10 Harrisburg Avenue. In response to the anonymous calls, the police enlisted a confidential informant, who made a "controlled buy" in front of 7 Harrisburg Avenue. The confidential informant told the police that the dealer had obtained

the drugs from Gary Riley at 10 Harrisburg Avenue.

In response to all of that, the police again used a confidential informant who made a controlled buy directly from Gary Riley. Most significantly, the controlled buy was observed directly by the police. During the transaction, the police saw Riley walk towards 10 Harrisburg Avenue. While the confidential informant told the police that Riley obtained the drugs from 10 Harrisburg Avenue, no one was certain whether Riley was keeping his supply in the house or its garage.

The controlled buy directly implicating Riley happened on April 30, 1997. The police applied for and received the search warrant for 10 Harrisburg Avenue on May 7, 1997 and they executed it on May 13, 1997. Again, the pre-trial decision provides more details concerning the circumstances leading up to the search warrant's execution.

IV.

If trial counsel had requested a *Flowers* hearing, it is unlikely that the request would have been granted. While the confidential informant bolstered the affidavit of probable cause, the confidential informant's testimony could not have undermined the affidavit seriously. Through personal observation, the police had reason to believe that illegal drug activity was taking place on Harrisburg Avenue. Through personal observation, the police also were aware as early as December 1996 that Riley was involved in the illegal drug

activity on Harrisburg Avenue, at least peripherally. Riley's name came to the authorities' attention not only through their personal observation, but through anonymous telephone calls, as well as confidential informants. Most significantly, as mentioned above and as discussed in the earlier decision, the police watched Riley make a drug sale and it appeared to them that Riley was operating out of 10 Harrisburg Avenue.

Taking all that the police learned through personal observation and sources other than the confidential informant, it is unlikely that the confidential informant could have provided enough to change the suppression hearing's outcome. As a matter of probability, it is far more likely that if the confidential informant had been revealed, the additional information provided by the confidential informant would have been incriminating. In any event, it appears that trial counsel's decision not to ask for a *Flowers* hearing was prudent, or at least consistent with objective standards. Furthermore, Riley has not established prejudice resulting from trial counsel's failure to request a *Flowers* hearing.

By the same token, the search warrant was not stale. The police had probable cause to believe that Riley was conducting an on-going drug operation based at 10 Harrisburg Avenue that probably went back at least as far as December 1996. Under all the circumstances, it was entirely reasonable to believe that Riley still would be keeping drugs at 10 Harrisburg Avenue

roughly two weeks after he was seen making a sale near there.

V.

In light of the above, 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. Accordingly, Defendant's May 29, 2001 Motion for Postconviction Relief is summarily DISMISSED. The Prothonotary shall notify Riley of this decision, consistent with Rule 61(4).

IT IS SO ORDERED.

Date

Judge

**oc: Prothonotary
pc: James A. Rambo, Deputy Attorney General
Jerome E. Capone, Esquire**