IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. 9807021744
	)	Cr.A. No. IN98-08-0970
CLIFF A. BASS,	)	
	)	
Defendant.	)	

Submitted: March 3, 2003
Decided: May 12, 2003

ON REMAND
FROM THE SUPREME COURT OF THE STATE OF DELAWARE

UPON DEFENDANT'S MOTION
FOR POSTCONVICTION RELIEF
DENIED.

ORDER

Andrew G. Ahern, III, Esquire, Joseph W. Benson, P.A., Wilmington, Delaware, Attorney for Defendant.

Stuart E. Sklut, Esquire, Deputy Attorney General, New Castle County, State of Delaware, Attorney for the State of Delaware.

ABLEMAN, JUDGE

By Order dated December 12, 2002, the Delaware Supreme Court remanded this case to the Superior Court for a hearing on defendant Cliff Bass' Rule 61 Motion for Postconviction Relief. In so doing, the Supreme Court directed this Court to determine whether the defendant's decision to enter into a plea agreement was the result of ineffective assistance of counsel. Since the basis of defendant's conviction was his guilty plea pursuant to a plea agreement, this Court must determine whether defendant's claim of ineffective assistance of counsel directly affected the voluntary, knowing and intelligent nature of the plea.

The Court conducted an evidentiary hearing on February 10, 2003, at which defendant's former counsel and defendant related the factual circumstances and legal strategy that led up to defendant's decision to plead guilty to the charges. Following the hearing, legal memoranda were filed by defendant's present counsel and the State. As will be more fully set forth hereafter, the Court has concluded that defense counsel's representation was reasonable, competent, and professional, and that his advice to defendant to accept the plea agreement was also reasonable. Furthermore, even if defense counsel should have employed a different strategy, the result would not have altered counsel's advice to defendant regarding the outcome of this case. In other words, defendant has failed to establish either that his attorney's performance was outside "the range of competence demanded of attorneys in criminal cases," or prejudice, i.e., that the result of the proceeding would have been different. Defendant's Motion for Postconviction Relief is therefore denied.

Statement of Facts

On November 9, 1998, Defendant entered a guilty plea to the offense of Trafficking in Cocaine (over 100 grams) pursuant to former Superior Court Rule 11(e)(1)(c).[1] He was sentenced to eighteen years at Level V, suspended after fifteen years, followed by various periods of probation. He was fined $400,000.00, but the fine was suspended.

Exactly three years later, on November 9, 2001, defendant filed the instant motion for postconviction relief pursuant to Superior Court Criminal Rule 61. Defendant raised the question of ineffective assistance of counsel as a ground for relief. Specifically, he alleged that his trial counsel had: (1) failed to file a motion to suppress the fruits of an administrative search of his residence; (2) failed to investigate the facts of his case fully; and (3) neglected to advise him that a fine might be imposed.

In its initial decision on this motion, the Superior Court summarily denied defendant's Motion for Postconviction Relief. The Court concluded that defendant had asserted no basis for overruling the sentencing judge's finding that defendant entered the guilty plea knowingly and voluntarily. Defendant appealed that decision to the Delaware Supreme Court. On the basis of the holding in the case of *MacDonald v. State*, 778 A.2d 1064 (Del. 2001), the Supreme Court reversed and remanded this case to this Court for substantive hearing and findings on defendant's allegations of ineffectiveness of counsel. Citing *MacDonald*, the Court ruled " a defendant's plea agreement does not surrender the

[1] Rule 11(e)(1)(c), which was in effect at the time that defendant pled guilty provided: Plea agreement procedure. (1) In general, the attorney general and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney general will do any of the following: … (c) Agree that a specific sentence is the appropriate disposition of the case. The prosecuting attorney shall comply with 11 *Del.C.* §5106. That rule was revoked by the Superior Court on July 1, 2001.

defendant's right to argue that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel."[2] Since the ineffectiveness claim cannot be barred by the agreement itself, the Superior Court was directed to conduct a hearing on the merits of defendant's Rule 61 motion.[3]

At the evidentiary hearing following remand, the Court questioned defendant's current counsel regarding how his argument that counsel had failed to file a suppression motion or to investigate affected the voluntariness of the guilty plea. Defense counsel still maintained that trial counsel's failure to file a suppression motion made the plea presumptively or necessarily flawed. Not until the defendant filed his supplemental memorandum, did he finally attempt to link his contention that counsel's failure to move to suppress was ineffective with a lack of voluntariness of the plea. In his written submission, defendant asserted, "[w]ith regard to the defendant's assertion in his Rule 61 motion that his trial counsel failed to fully investigate the case before advising him to enter a guilty plea, thus undermining the voluntariness of the plea …."

In accordance with the Supreme Court Order, the Court conducted a hearing on February 10, 2003. Defendant's trial counsel, Dallas Winslow, Esquire, testified concerning his recollection of his representation of defendant, the basis for the strategy he employed, and the discussions he had with defendant. Although Mr. Winslow could not

[2] *MacDonald v. State*, 778 A.2d at 1074 (citing *DeRoo v. United States*, 223 F.3d 918, 923-24 (8th Cir. 2000)).

[3] In his original Rule 61 motion, defendant did not assert that he was misled into pleading guilty or that his plea was the result of duress or coercion. Nor did he allege that it was not knowingly, voluntarily, or intelligently entered. Presumably, because this case was remanded for an evidentiary hearing, defendant argued in the Supreme Court some nexus between his contention that his attorney was ineffective for failing to file a motion to suppress, and his ultimate decision to plead guilty. In other words, while not expressly stated in the Motion for Postconviction Relief, defendant is apparently arguing that counsel's failure to file the motion was so prejudicial that, but for counsel's errors, he would not have pled guilty and instead would have insisted on going to trial.

specifically recall all of the details of his representation of defendant -- which is understandable given the three-year period of time that had lapsed since defendant's guilty plea and the filing of this motion -- he did have sufficient recollection of the facts of the case and of his discussions with defendant, to provide explanations for the strategy that he employed. Mr. Winslow was also able to retrieve and review his file to refresh his memory.

Mr. Winslow began representing defendant shortly after he was indicted on August 31, 1998. Since the defendant was on probation at the time the instant charges were filed, the case was scheduled for a "fast track" probation violation hearing on October 6, 1998, where Mr. Winslow represented the defendant. Counsel testified that he had not filed a motion to suppress prior to the fast track hearing for two reasons. First, he testified that "ordinarily suppression motions are not filed by fast track," and secondly, and more significantly, that "I could have filed a Motion to Suppress if I thought there were grounds to do so."

Although counsel did not precisely recall whether he had received discovery by the time of the hearing, he stated that discovery is usually provided prior to the fast track hearing, and that it was "very likely" that he had received it or there would have been a motion filed, in accordance with his usual practice. In fact, Mr. Winslow testified that the fast track hearing was actually continued several times so that counsel would first have all discovery available to him.

Mr. Winslow testified that he is "positive" he talked to defendant about the case, as he specifically recalled doing so, and he also remembered other pertinent details of the case. Indeed, counsel recalled a "lot of conversation" with defendant about the charges

because defendant was extremely reluctant to accept the plea offer and was "very much in denial" about the facts of the case. Defense counsel's distinct recollection was that, throughout his discussions with defendant, defendant continually denied that he possessed any cocaine, or weapons, or marijuana.

When questioned about the fact that counsel did not file a suppression motion, Mr. Winslow provided a host of explanations for his decision not to file. In essence, his strategy was best summed up by his statement that "I could have filed a motion to suppress if I thought there were grounds to do so."

Further testimony at the hearing revealed that defendant was on probation at Level III following completion of a period of home confinement on a sentence for Possession of Marijuana. Probation and Parole officers had conducted an administrative search on July 31, 1998 during which contraband was seized. Defendant was thereafter charged with numerous drug offenses, including Trafficking in Cocaine (over 100 grams). Defendant was indicted on August 31, 1998.

In preparation for the case, defense counsel obtained voluntary discovery, including copies of Wilmington Police Department reports relevant to defendant's arrest on July 31, 1998 following the administrative search, as well as a post-search supplemental report from Probation Officer Mark Lewis, summarizing the basis for the search and the results of the search. In response to the defense suggestion that counsel had never received as part of the discovery, the pre-search checklist required to be completed by the Department of Corrections, Procedure No. 7.18, Mr. Winslow testified that he was not positive he received one. He did not feel that a copy of the checklist was

essential, however, since there were numerous other factors that led to his tactical decision not to file the motion.

At the evidentiary hearing, Mr. Winslow reiterated that, even without the checklist, he did not have a substantial basis to file a suppression motion because there was "plenty of evidence" that defendant was in violation of his probation. Therefore, there was no reason to question the validity of the administrative search or to verify that the checklist had been completed. Since the probation officer's supervisor was present during the search of defendant's residence, it was equally logical for counsel to assume that the supervisor had approved the search and completed the form.

In connection with his decision to forego the filing of a motion to suppress, Mr. Winslow pointed to the fact that the probation officer had learned there was a large number of glassine bags in defendant's possession. Defendant was also found to have a fair amount of United States currency despite the fact that he was not employed full time. The probation officer had other facts upon which he relied in support of the administrative search. Defendant had failed to complete a substance abuse evaluation ordered by the Court and had missed a probation appointment. These factors, when considered together with the cash and glassine bags, were consistent with the probation officer's belief that defendant was either using or selling drugs. In fact, Mr. Winslow recalled that defendant's family sought the involvement of private counsel, Sidney Balick, Esquire, who was a family friend. Mr. Balick and Mr. Winslow together met and discussed the case with defendant. Since there was, in counsel's words, "overwhelming evidence" that defendant was in violation of his probation, this same evidence provided sufficient legal justification for a search of his residence. According to Mr. Winslow,

under the factual circumstances known to defendant's probation officer at the time, he could have obtained an administrative warrant to arrest defendant, which would clearly have also supported an administrative search.

At the Rule 61 hearing, defendant testified that he could not recall any discussions with Mr. Winslow and that he was never questioned by counsel regarding the amount of the cash or for what purpose he possessed the glassine bags. Had counsel done so, he would have advised him that the cash in his pocket was only between $80.00 and $100.00, that he was working part time (four hours a day, five days a week) at the Macaroni Grill, and that the glassine bags were actually sandwich bags that he used to pack his lunch.[4] Defendant does not remember ever discussing the administrative search with his attorney, or its legality, or anything about the pre-search checklist.

On cross-examination, defendant admitted that he had previously pled guilty to a drug felony and was fully aware of the conditions of probation, including the fact that he was not permitted to own or possess drugs, guns, or drug paraphernalia. He further acknowledged that, on the day of the search, he met three probation officers on the street, who indicated that they wanted to search his house, to which he did not object. In fact, although he now claims that he was not advised that the officers were intending to search his home, he asserted that he had unlocked and opened the door for them. Finally, defendant testified that he was never advised by counsel of any fines or surcharges that might be imposed as a result of his guilty plea.

[4] Defendant did not explain at the hearing why he did not offer these explanations to his counsel at the time, despite the fact that all of this information was peculiarly within his knowledge.

Discussion

Legal Standard

When reviewing a Motion for Postconviction Relief under Superior Court Rule 61, the Court must first consider whether the movant has overcome the substantial procedural bars set forth in Rule 61(i).[5] Under Rule 61(i), postconviction claims for relief must be brought within three years after the judgment of conviction is final.[6] Since defendant's motion was filed exactly three years -- to the day -- of the date of his conviction, the Rule 61(i)(1) time bar is not applicable herein. Further, any ground for relief not asserted in a prior postconviction motion is thereafter barred, unless consideration of the claim is warranted in the interest of justice.[7] As this is defendant's initial motion for postconviction relief, the bar of Rule 61(i)(2) does not apply.

Likewise, grounds for relief not asserted in the proceedings leading to the judgment of conviction are thereafter barred, unless the defendant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.[8] The bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that "undermined the fundamental legality, reliability, integrity, or fairness of the proceeding leading to the judgment of conviction.[9]

[5] *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[6] Super. Ct. Crim. R. 61(i)(1).
[7] Super. Ct. Crim. R. 61(i)(2).
[8] Super. Ct. Crim. R. 61(i)(3).
[9] Super. Ct. Crim. R. 61(i)(5).

Each of defendant's claims is premised on allegations of ineffective assistance of counsel. Defendant has therefore seemingly alleged sufficient cause for not having asserted these grounds for relief previously. The test for ineffective assistance of counsel and the test for cause and prejudice are similar but distinct standards. 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 procedural default.[10]

Notwithstanding the fact that defendant's ineffectiveness claim meet the cause requirement of Rule 61(i)(3)(A), the inquiry does not end with this consideration. Defendant's argument must still be subjected to the two-part analysis enunciated in *Strickland v. Washington*,[11] and adopted by the Delaware Supreme Court in *Albany v. State*.[12]

The *Strickland* test requires the movant to show that counsel's errors were so egregious that his performance fell below an objective standard of reasonableness.[13] Secondly, under *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors or deficiencies, the outcome of the proceeding would have been different. In other words, the second prong of the

[10] *Murray v. Carrier*, 477 U.S. 478, 487 (1986).
[11] *Strickland v. Washington*, 466 U.S. 668 (1984).
[12] *Albany v. State*, 551 A.2d 53 (Del. 1988).
[13] *Strickland*, 466 U.S. at 687.

analysis requires a showing of actual prejudice.[14] In setting forth a claim of ineffective assistance of counsel, a defendant must put forth, and substantiate, concrete allegations of actual prejudice or risk summary dismissal.

In the context of a guilty plea challenge, *Strickland* requires a defendant to show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's actions were so prejudicial that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial.[15]

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established. The *Strickland* case itself noted, however, that the showing of prejudice is often so central to the claim that "[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."[16] Stated differently, if the Court finds that there is no possibility of prejudice, even if defendant's allegations regarding counsel's representation were accurate, the Court may dispose of the claim on this basis alone.[17]

In analyzing a claim of ineffective assistance of counsel, the Court must bear in mind that there is a strong presumption that trial counsel's representation was within the "wide range of reasonable professional assistance."[18] *Strickland* further instructs that this Court must eliminate from its consideration the "distorting effects of hindsight when

[14] *Id*. at 694.
[15] *Id*. at 688, 694. *See also*, *Mapp v. State*, 642 A.2d 837 (Del. Super. Ct. 1994); *Coverdale v. State*, 788 A.2d 527 (Del. Super. Ct. 2002).
[16] *Strickland*, 466 U.S. at 697.
[17] *State v. Gattis*, 1995 WL 790961, at *4 (Del. Super.).
[18] Strickland, 466 U.S. at 689.

viewing that representation."[19] That is, judicial scrutiny of counsel's performance requires that the inquiry be highly deferential.

Defendant's Contentions

Defendant's argument of ineffective assistance of counsel is premised upon three distinct claims. First, he submits that his attorney failed to file a motion to suppress. Second, he contends that Mr. Winslow did not fully investigate the facts of the case to prepare an adequate defense. Third, defendant argues that the TIS Guilty Plea Form did not alert him of the potential for the imposition of a substantial fine if convicted. As will be discussed more fully hereafter, even after defendant was provided with a full hearing and the opportunity to develop evidence to support the conclusory allegations in his original motion regarding each of his three separate claims, defendant has failed to rebut the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance. Nor has he substantiated how counsel's alleged errors would have affected the result in this case. And finally, defendant has not successfully convinced this Court that, but for counsel's errors, he would not have entered the guilty plea under the circumstances and would have insisted on going to trial.

A) Counsel's Failure to File a Suppression Motion

I turn first to the argument that counsel should have filed a suppression motion, which is the primary focus of defendant's claim. Testimony at the hearing reveals that counsel's representation of defendant prior to the entry of the guilty plea was well within

[19] *Id*.; *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996); *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

an objective standard of reasonableness. This is so because, under the facts of the case, there was no legal or factual basis to suppress the evidence seized. Therefore, Mr. Winslow's decision to forego filing such a motion was appropriate and reasonable. Stated another way, the administrative search by the probation officers in this case was lawful and conducted in accordance with departmental procedure. Since the evidence establishes that there was ample basis under the law to conduct such a search, defense counsel's failure to file a suppression motion would have had no impact whatsoever on the outcome of this case or upon defendant's decision to plead guilty.

The evidence establishes that defendant was on probation at the time the search was conducted. Defendant was advised that, as a condition of his probation, he would be subject to periodic warrantless searches and that his probationary status meant that the range of constitutional rights afforded ordinary citizens did not necessarily apply to him as a probationer, and could be limited because of his status. Specifically, he was aware that his probation officer could conduct a search of his living quarters even in the absence of a warrant or probable cause, so long as there are reasonable grounds to believe that contraband is present, and so long as the search is conducted pursuant to regulations as provided by the Department of Corrections.

Indeed, both the United States Supreme Court and the Delaware Superior Court have upheld warrantless administrative searches of a probationer's living quarters by a probation officer because the "special needs" for supervision beyond normal law enforcement justify departures from usual standards.[20]

[20] *United States v. Knights*, 534 U.S. 112, 112-113 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987); *State v. Harris*, 734 A.2d 629, 635 (Del. Super. Ct. 1998).

In *Griffin v. Wisconsin*, the United States Supreme Court upheld a search of a probationer conducted pursuant to a Wisconsin regulation permitting "any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as along as there are 'reasonable grounds' to believe the presence of contraband."[21] The Wisconsin regulation that authorized the search applied to all probationers and was not an express condition of Griffin's probation. In fact, the regulation was not even promulgated at the time that Griffin was sentenced.

Griffin's probation officer had received information from a detective that there might have been guns in Griffin's apartment. Since the defendant's assigned probation officer was not available to perform the search, the supervisor of Griffin's probation officer, accompanied by three plain-clothes police officers, conducted the search. During the search -- carried out entirely by probation officers -- a handgun was found and Griffin was charged with possession of a firearm by a convicted felon. The Supreme Court held that the search of probationer's residence "was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers."[22] In finding the search valid, the Court reasoned that a state's operation of its probation system presented a "special need" for the exercise of supervision.

The *Griffin* decision has been followed by the Delaware Superior Court. In *State v. Harris*, this Court upheld a warrantless search of a probationer's home pursuant to regulations promulgated by the Department of Corrections, specifically Procedure

[21] *Griffin*, 483 U.S. at 880.
[22] *Id*.

Number 7.19 under the authority of Title 11, Section 4321 of the Delaware Code as amended.[23]

More recently, the United States Supreme Court reiterated this justification for warrantless searches in *United States v. Knights*, wherein it held that no more than "reasonable suspicion" is required for a probation officer to search a probationer's apartment where such searches were authorized as a condition of his probation. The Court noted that the very nature of probation justifies such an intrusion on individual privacy:

> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). Knights' status as a probationer subject to a search condition informs both sides of that balance. "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'" *Griffin*, *supra*, at 874, 107 S.Ct. 3164 (quoting G. Killinger, H. Kerper, & P. Cromwell, Probation and Parole in the Criminal Justice System 14 (1976)). Probation is "one point … on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." 483 U.S., at 874, 107 S.Ct. 3164. Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" *Ibid*. (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.[24]

[23] *Harris*, 734 A.2d at 636.
[24] *Knights*, 534 U.S. at 118-119.

The same circumstances that led the *Griffin, Knights* and *Harris* courts to conclude that reasonable suspicion is sufficient for a warrantless search of a probationer's home also render the search that was conducted in this case constitutional under the Fourth Amendment. Defendant's claim, that there was no reasonable basis for the search herein is flatly contradicted by the evidence in this case. Similarly, his effort to have this Court deem the search unlawful and his counsel's assistance thereby ineffective, are unavailing in light of the mounting information known to the probation officer that would have led to the officer's reasonable belief that defendant was violating the law.

Indeed, defendant provided ample reasons in this case for his probation officer to suspect that defendant was either using or selling drugs, or both. In flagrant disregard of the Court's express order, Defendant had failed to undergo a substance abuse evaluation. He had missed appointments with his probation officer, which is frequently an indication of ongoing drug use, as random urine screens are routinely conducted during such visits. He had been arrested on motor vehicle charges, which, although ultimately dismissed, provide an independent basis for a violation. Defendant had previously pled guilty to a drug felony and had been found in possession of United States currency when he was employed only 20 hours a week. Glassine bags were also in defendant's possession. Even assuming that defendant was able to come up with explanations for the cash and baggies, it is unlikely that a probation officer – or a judge -- would find those explanations sufficient to reduce the reasonable suspicion necessary for a valid search. In essence, the Court agrees with Mr. Winslow's statement at the Rule 61 hearing when he testified that there was "more than sufficient reason to conduct a search."

Since ample reasonable suspicion existed for the probation officer to conduct a search of defendant's residence, there was thus no justifiable basis for defense counsel to have filed a motion to suppress. Even in hindsight, the Court cannot conclude that Mr. Winslow's representation was below an objective standard of reasonableness. He deliberately did not file a motion because he had determined that he would not have prevailed on the motion. This decision was both reasonable and appropriate.

Moreover, defendant's contention that the search itself was invalid because it was not conducted pursuant to regulations of the Department is equally unavailing. Procedure No. 7.19 sets forth specific guidelines for the search of a probationer's living quarters. Defendant has failed to establish that any of those procedures were not followed in the search in this case, or that the purpose for which they were promulgated was frustrated in this instance. Specifically, defendant argues that there was no pre-search checklist afforded to trial counsel in discovery and that the search was therefore not in accordance with the guidelines. He further submits that the failure to contact law enforcement officers and have them present during the search violated Department of Corrections Procedure No. 7.19.

Whether a pre-search checklist was available in this instance is irrelevant since there is no question that the probation officer's supervisor was actually present at the time the search was conducted. Since more than three years had elapsed from the time the defendant entered his plea, Mr. Winslow understandably could not recall whether he had a copy of the checklist. Since its purpose is to "assist in the decision-making process" leading to the approval of a supervisor or designee, the presence of the supervisor at the search would clearly suggest that the necessary approval pre-existed the search. Thus,

even if counsel had not received the list in discovery, the purpose of the regulation requiring it was fulfilled.

Moreover, the fact that the pre-search checklist was never requested by, nor produced to, defense counsel does not mean that the search itself was invalid, as defendant contends. Because this Court finds that there was a sufficient factual basis to support the search, irrespective of whether counsel had obtained a copy of the pre-search checklist, the list is immaterial to defendant's present claim.

Similarly, the argument that the absence of other law enforcement officials invalidates the search in this case is not persuasive. Police presence is intended to insure the safety of the participants and bystanders and is not a right that defendant can invoke. In fact, the guideline specifically states that "[t]his is to provide security only and they (police officers) should not assist in the search."[25]

Taking into consideration all of the above factors that led to the warrantless search of probationer's home, the Court has concluded that there was reasonable suspicion to conduct the search, which was conducted pursuant to Department of Corrections Regulations, notwithstanding the procedures challenged by defendant. It therefore follows that, by not challenging the search, counsel's representation was within the bounds of an objective standard of reasonableness. Since the second prong of the *Strickland* standard requires a showing that the result would have been different had counsel filed a suppression motion, the fact that the motion would not have been granted renders defendant incapable of meeting this prejudice standard.

[25] STATE OF DELAWARE DEPARTMENT OF CORRECTIONS PROCEDURE NUMBER 7.19 (Searches/Seizure), § 7 V.B. (3) (1991).

B) Counsel's Failure to Investigate

Defendant's second contention is that his counsel was ineffective for failing to investigate. While this argument might be meaningful in the context of tracking down alibi witnesses or eyewitnesses, who might corroborate defendant's position, or discredit the probation officer, the very facts that would support defendant's defense in this case were facts that were singularly known to defendant himself.[26]

The *Strickland* Court recognized this common sense approach to counsel's duty to investigate further when it observed:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. *See United States v. Decoster*, supra, at 372-373, 624 F.2d at 209-210.[27]

In this case, there was simply no need for further investigation. Defendant's explanations for the cash and baggies, not atypical for any drug dealer or user, were

[26] The mere fact that defendant now (or then) offered explanations for the cash and baggies does not alter the fact that, in the mind of an experienced probation officer, these items provided more than reasonable suspicion necessary for the search.
[27] *Strickland*, 466 U.S. at 691.

undoubtedly discounted by counsel as not being credible, and in light of all the other factors known to the probation officer at the time of the search, would not have resulted in a decision to forego the search. Nor would such additional information have altered defendant's chances of prevailing on a suppression motion. The fact that defendant, in hindsight, has explanations for the cash and baggies does not mitigate the circumstance that all of the facts known to the probation officer at the time of the search, under the totality of circumstances analysis, provided the reasonable suspicion necessary to conduct a search of defendant's home.

By the same token, counsel was presumably aware of these same facts known to the probation officer when he determined that a suppression motion would not prevail. Moreover, even assuming that defendant gave him the same explanations for the cash and baggies about which he testified at the recent Rule 61 hearing – since, presumably, it was in his best interests to provide such information -- the reasonable justification still existed for a valid search of defendant's home.

Lastly, there is the issue of defendant's consent to the administrative search. The evidence reveals that, when approached by probation officers who requested entry into his residence, defendant gave his approval to the search. Defendant does not dispute that he did not object to the search, or that he unlocked and opened the door, and told the officers to "go ahead". Although, in retrospect, he now argues that he believed that the officers were just there to "see" his residence, it is more likely that his attorney did not accept his explanation and was reasonably certain that the Court also would not "buy" it.

In this instance, defense counsel did not need to investigate further the circumstances surrounding the search, in order to determine his course of action. Mr.

Winslow rendered adequate assistance and made his tactical decisions in the exercise of reasonable professional judgment. He determined that further investigation was unnecessary because the defendant already knew all of the facts that would be helpful to his cause and would have been able to advise his attorney about them. He also determined that, even if those facts were established, they would not change his tactical decision regarding suppression since the State had more than ample evidence to conduct a search of this probationer. Moreover, defendant himself consented to the search, even going so far as to unlock and open the door to his residence. Applying a heavy measure of deference to counsel's judgments, I conclude that Mr. Winslow was not ineffective in his decision not to investigate further and the strategic choices he made after less than a complete investigation are not now subject to challenge.

C) Counsel's Failure to Advise Defendant of the Potential Fine

As defendant's third and final ground in support of his argument that his trial counsel was ineffective, he asserts that he did not understand that any statutory fines or costs would be assessed, as neither the Rule 11(e)(1)(c) plea agreement, nor the TIS Guilty Plea Form, made mention of the potential for fines. He further submits that, during the plea colloquy, the Court did not advise him that a fine could be or would be imposed. Since defense counsel did not object when the fine and surcharges were imposed, defendant contends his attorney was thereby ineffective.

When the Court considers the number of very serious charges and the maximum amount of jail time that could have been imposed if defendant had been convicted, his argument regarding the fine -- which was imposed but suspended in this case -- is nothing short of disingenuous. Defendant's argument suggests that, but for counsel's failure to

advise him of the fine, he would not have pled guilty but would have insisted upon going to trial -- the applicable standard under *Strickland* in the context of a guilty plea. Defendant's position in this regard is untenable because it is simply not credible.

Defendant was offered a plea to Trafficking in Cocaine (over 100 grams), which carries a mandatory minimum term of imprisonment of 15 years and a maximum of 30 years. The remaining charges in the indictment, if defendant were convicted, could have subjected him to an additional 39 years imprisonment, or a total of 69 years. The plea agreement, which defendant voluntarily and willingly accepted, limited his exposure to at most 30 years, but also included an agreement that the State would recommend only the 15-year minimum mandatory amount of jail time. It is inconceivable that defendant, under these extreme circumstances, would have given any thought whatsoever to his potential financial liability, or would have rejected the generous plea offered by the State because of the prospect of a fine. Defendant and his defense attorney were understandably far more concerned about defendant's imprisonment than about a fine.

Moreover, defendant's plea was entered pursuant to former Criminal Rule 11(e)(1)(c), which allowed a defendant to withdraw his guilty plea in the event that the sentencing judge imposed a sentence different from what the State recommended. In this case, although a fine was not listed in the written Plea Agreement, the Court imposed a fine of $400,000.00, but suspended it. The fact that defendant did not see fit to seek to withdraw his plea, or even raise the issue with the Court until three years after his sentence was imposed, and then only in the context of this motion -- citing it as a reason why his attorney was ineffective – speaks volumes with respect to the impact of the Court's imposition of a suspended fine on defendant's willingness to enter a guilty plea.

To the extent that defendant now claims that his counsel was ineffective on this basis, the Court finds that defendant has clearly failed to meet his burden under *Strickland*.

Conclusion

Having carefully considered the evidence in this case, and the record of the prior proceedings, the Court is convinced that defendant's attorney made all significant decisions, including the decision not to file a motion to suppress, in the exercise of reasonable professional judgment. Therefore, defendant has failed to meet the first prong of the *Strickland* test because he has failed to demonstrate that defense counsel's representation was outside the wide range of professionally competent assistance.

Moreover, the Court is satisfied from the evidence and the law that, defendant has not demonstrated, and in fact cannot establish actual prejudice.

For all of the foregoing reasons, the Rule 61 Motion for Postconviction Relief is hereby **DENIED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Clerk of the Delaware Supreme Court
Andrew G. Ahern, III, Esquire
Stuart E. Sklut, Esquire
J. Dallas Winslow, Jr., Esquire
Presentence
Prothonotary