IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0102006372
	)	Cr. A. No. IN01021618-1623
DAVID PENNEWELL,	)	
Defendant.	)	
	)	

ORDER

This 18th day of August, 2004, upon consideration of Defendant's Motion For Post Conviction Relief pursuant to Superior Court Rule 61, it appears to the Court that:

1. In April 2002, a Superior Court jury convicted Defendant David Pennewell of Trafficking Cocaine and other related charges. This Court sentenced Pennewell to eight years imprisonment, and the Delaware Supreme Court affirmed the convictions.[1] One of the grounds raised and rejected on appeal was that this Court erred in refusing to grant Pennewell

[1] *Pennewell v. State*, 2003 Del. LEXIS 258 (Del. 2003).

permission to file a suppression motion out of time.[2]

2. Pennewell now brings this Motion For Post Conviction Relief, claiming ineffective assistance of counsel. Pennewell argues that his former lawyer, Eugene Maurer, Jr., failed to adequately represent him when he determined not to file a suppression motion. Defendant was thereby prejudiced because, by the time he secured new counsel, it was too late to file the motion. Defendant's claim lacks merit and warrants denial.

3. I begin, as I am required to do by *Younger v. State*[3] and its progeny, by noting that Pennewell's claim is not procedurally barred by Superior Court Rule 61(i). Pennewell was convicted less than three years ago and this is his first post-appeal motion. He has repeatedly attempted to raise an ineffective assistance of counsel claim but has had to wait to collaterally attack his conviction by a Rule 61 motion. I will therefore consider the merits of Defendant's argument.

4. A claim for ineffective assistance of counsel must meet the well established two-part *Stickland* test: (1) that counsel's conduct fell below the standard of a reasonable attorney; and (2) prejudice such that, but for counsel's misconduct, there is a reasonable probability that the result of the

[2] *Id*.
[3] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)

proceeding would have been different.[4] The Defendant bears the burden of overcoming the strong presumption that counsel's conduct was reasonable or could have been considered sound trial strategy at the time.[5]

5. The question thus becomes whether Maurer could have reasonably decided not to file a suppression motion, regardless of whether that was the best possible trial strategy. A brief factual explanation is necessary to an understanding of the Court's ruling.[6]

On February 7, 2001, a Wilmington Police detective recognized Pennewell exiting a green Ford Taurus. The detective returned to the police station to gather officers for a sting operation. The detective then went back to the scene where he had seen Pennewell leaving the car, called him on his cell phone, and arranged to buy cocaine from him. Officers saw Pennewell parking the green Taurus approximately a block away and began to approach him, at which time Pennewell fled. As Pennewell ran, he reached back and activated an alarm system in the Taurus. The officers caught and arrested Pennewell. A pat-down search revealed $2,442 on his person. Not finding the car keys, they demanded them from Pennewell, who stated that he did not have the keys and thrice disclaimed any interest in the car, claiming that

[4] *Strickland v. Washington*, 466 U.S. 668 (1984).
[5] *Id.* at 689.
[6] This fact recitation mirrors that that the Supreme Court used in *Pennewell v. State*, 2003 Del. LEXIS 258 (Del. 2003).

it belonged to "some Spanish girl." The officers searched the car anyway and discovered 42.45 grams of cocaine, drug paraphernalia, and an insurance card for the vehicle with Pennewell's name on it.

Pennewell steadfastly refused to acknowledge any interest in the green Taurus and claimed that the police were lying in their effort to link him to it. Nonetheless, Pennewell suggested that Maurer should move to suppress the evidence found in the car as the product of an unlawful search. Maurer decided against this option, reasoning that this strategy would require Pennewell to acknowledge an interest in the car in order to achieve standing for suppression.[7] This tactic would both constitute an admission and cause serious problems in eliciting testimony from Pennewell, who would have had to be lying either in the suppression motion or at trial while pursuing his "the cops framed me" defense. Maurer also believed that the State could establish that the officers had probable cause to search the vehicle and thus defeat a suppression motion. In the long run, Pennewell would then have made admissions to establish his standing with no resulting

[7] *See e.g. State v. Parker*, 1997 WL 716905 (Del. Super. 1997). Interests that would support the "reasonable expectation of privacy" test include, "[w]hether the defendant has a possessory interest in the thing seized or the placed searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy, and whether he was legitimately on the premises." *Id.* at *2. It is difficult to see how Defendant could demonstrate any of these factors in a car owned by "some Spanish girl."

benefit, and even great prejudice, to himself.

6. These facts overwhelmingly show that Maurer's decision not to file a suppression motion was reasonable. To put it bluntly, Pennewell has no one but himself to blame for his bizarre refusal to acknowledge any interest in a car he was twice seen driving, and from which he fled with keys in his possession that remotely activated its alarm, and which he had insured. Having chosen that route, he certainly cannot fault Maurer for failing to elicit testimony that he knew to be false, either in the suppression motion or, ultimately, at trial.

Nor were Maurer's concerns about the strength of the State's case unreasonable. Pennewell answered a call on his cell phone and agreed to sell officers drugs, drove up in the Taurus to the arranged meeting point, immediately fled upon seeing police, and was stopped when he was in possession of nearly $2500 in cash. The interior of the car was within Pennewell's wingspan when he started to run. At the very least, the State had rational grounds to argue that the search of the vehicle was valid. Maurer decided that the possibility of prevailing on a suppression motion was not worth the risk, particularly when he was aware that the State could then use Pennewell's admissions of interest in the vehicle to destroy any alternative defense. There is simply no basis for this Court to disagree, let

alone to conclude that this decision was one that no reasonable attorney would make.

7. Since Pennewell has failed to establish that Maurer's conduct was unreasonable, there is no need for this Court to reach the second prong of the *Strickland* analysis, requiring a finding of prejudice. Defendant's Motion For Post Conviction Relief is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary – Criminal
cc: Joseph M. Bernstein
Eugene J. Maurer, Jr., Esq.