SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: December 9, 2004
Decided: March 30, 2005

STATE OF DELAWARE	)	
	)	
v.	)	ID#: 0205008166
	)	
TIMOTHY O. ANDERSON,	)	
	)	
Defendant.	)	

ORDER

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

This is Defendant's Motion for Postconviction Relief under Superior Court Criminal Rule 61. Defendant alleges errors before, during, and after his trial. He also alleges ineffective assistance of counsel. As discussed below, the motion is subject to summary disposition.

Specifically, the motion presents five grounds for relief:

1. Insufficient evidence as to intent to deliver, possession and conspiracy;

2. Violation of the "knock and announce" rule;

3. Failure to re-instruct the jury on "reasonable doubt" as part of the court's supplemental jury instruction;

4. Allowing the State's expert to offer opinion evidence on Defendant's intent to deliver; and,

5. Ineffective assistance of counsel, before, during and after trial.

All of Defendant's claims, except for ineffective assistance of counsel, are barred by Rule 61(i)(3) and (4). Defendant was obligated to bring the barred claims to the court's attention as they arose. Then, after he was convicted, he was required to raise those claims during his appeal.[1] Defendant has not established cause for relief from the procedural default and prejudice from any violation of his rights.

II.

For the most part, the court will present the facts as they are needed, below. In summary, around dawn on May 10, 2003, the Delaware State Police, acting under a search warrant, raided the house where Defendant, his paramour and

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[1] Super. Ct. Crim. R. 61(i)(3); *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995) ("Before a defendant can initiate postconviction relief, he must have exhausted the direct appeal process, if the latter remains available"); *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) (providing that the Superior Court must apply Rule 61's procedural bars before reaching the claim's merits); *Younger v. State*, 580 A.2d 552, 555 (Del. 1990) (holding issues not raised on appeal are procedurally barred).

his children lived. While the police struggled to get in, Defendant apparently tried to flush down the toilet a black bag holding thirteen small baggies containing crack cocaine, and four baggies containing five grams, total weight, of marijuana.

The police testified that when they first encountered Defendant after they battered-in the door, they did not know what he had been up to. But, they noticed that his left leg, and only his left leg, was wet. After receiving *Miranda* warnings, Defendant told the police he "happened to have been using the bathroom" when the police barged in. While the police were attending to Defendant, his paramour asked to use the bathroom. When she finished, the paramour mentioned that the toilet was stopped-up. Putting two and two together, the police dismantled the toilet and, along with a used tampon, the police recovered the black bag containing drugs, mentioned above. The police found no evidence anywhere of personal use, such as wrapping papers, pipes, etc.

The police arrested Defendant and his paramour. She pleaded guilty to a count of endangering the welfare of a child. Defendant was indicted and went to trial by jury on several drug-related crimes; tampering with physical evidence, for trying to flush the drugs; and endangering the welfare of a child, three counts. As to one drug offense, the jury found Defendant guilty of a lesser-included charge. The case against Defendant was largely circumstantial. Even so, unless the State's case was a colossal fabrication, it was very strong.

III.

Defendant was convicted on March 26, 2003. He was sentenced on June 20, 2003 to five years, minimum/mandatory imprisonment, followed by probation at decreasing levels, beginning with work release at Level IV. This was not Defendant's first drug-related conviction.

Defendant filed an appeal on June 25, 2003. While his appeal was pending, on September 23, 2003, Defendant filed a motion for postconviction relief. The motion was referred to chambers under Superior Court Criminal Rule 61(d)(1) on October 15, 2003. After preliminary review, on October 22, 2003, the court ordered that the record be expanded under Rule 61(g)(1). The court called for trial counsel to respond to Defendant's allegations of ineffective assistance of counsel: "In particular, trial counsel should focus on Defendant's claims that trial counsel failed to investigate the case and prepare for trial."

On November 19, 2003, the court realized that Defendant had filed an appeal and, therefore, the court was without jurisdiction to consider Defendant's motion for postconviction relief. Accordingly, the court dismissed Defendant's motion, without prejudice.

Defendant's conviction was affirmed and the Supreme Court's mandate was received on April 27, 2004. Defendant filed the instant motion for postconviction relief on July 7, 2004. That precipitated the Second Interim Order

for Expansion of Record, on October 19, 2004. Basically, the second order simply re-instituted the original call for trial counsel's affidavit.

Unfortunately, Defendant's trial counsel ignored both orders. Contemplating sanctions, the court re-reviewed Defendant's motion and the record. Although it would have benefitted from the required submission, the court is satisfied now that the record is adequate. In this instance, at least, the court will take no further action. In any event, by order dated December 8, 2004, the record was closed. Again, so there is no confusion, upon closer inspection, the motion's claims about failure to investigate and prepare are conclusory and insubstantial on their face.

IV.

As a courtesy and for the sake of completeness, the court has reviewed the procedurally defaulted claims and they appear to be without merit. Generally, Defendant supports his broad arguments by selectively presenting bits and pieces of the record that seem to help his position, while he ignores those that are not helpful.

For example, when Defendant presents his first defaulted claim, "Ground Two," (that the State presented insufficient evidence of his intent to sell drugs) he argues "evidence of the quantities of drugs alone, does not prove intent to deliver it." Defendant then continues, that although the State's expert testified

that drug dealing is a cash business, cash was not found in Defendant's residence. Defendant further argues, "Even if I had thirteen bags = 1 gram of crack cocaine alone does not prove my intent was to deliver drugs."

Defendant, however, largely dismisses the evidence and expert testimony establishing that the drugs were packaged for sale, not personal use. Moreover, Defendant completely ignores the testimony of Defendant's paramour, who is the mother of his children and with whom he was living. She told the jury that people were selling drugs out of the residence she and Defendant shared. Furthermore, a police officer testified that when he interviewed Defendant's paramour, "she finally told me then she knew that [Defendant] was selling drugs out of the residence . . . ." In other words, when the jury considered the quantity of drugs Defendant possessed, the way the drugs were packaged, the lack of paraphernalia for personal use (mentioned above) and his paramour's statements, there was ample evidence from which the jury could conclude that Defendant's intent was to sell. While Defendant may challenge the State's evidence, the jury was entitled to rely on it.

As to "Ground Three," also by way of example, Defendant alleges: "At around 6:00 a.m. on [May 10, 2003], I woke up to the sound of my door being battered down. I never heard them knock . . . ." Defendant's paramour, however, testified that she recalled being awakened "by banging." She testified that

Defendant "got out [of] the bed and went to see what the banging was . . . . He walked back to the room, and then he turned around, and my kids started crying, so he turned around and walked out [of] the room." Although the paramour's testimony indirectly supports Defendant's claim that the police did not announce who they were before they battered-in the door, she flatly contradicts Defendant's claim that the police did not knock and pause before entering.

Moreover, Defendant's "knock and announce" claim is, at best, ironic. The most incriminating evidence related to Defendant's attempt to stymie the police is flushing the contraband down the toilet. The proven fact that Defendant almost managed to destroy the evidence before the police could stop him knocks his "knock and announce" claim into a cocked hat. In hindsight, it appears that the police waited *too long* after making their presence known.[2]

On close examination, taking the full record into account, none of

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[2] *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) ("In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (holding that whether an officer knocks and announces his presence before entering, as required by common law, is a factor to consider in determining the reasonableness of the search); *Seward v. State*, 723 A.2d 365, 371 (Del. 1999) (upholding the denial of motion to suppress evidence where officers did not knock and announce).

Defendant's barred grounds for relief pans-out. They all reflect Defendant's misconstruing the law and the evidence. As presented above, the State's evidence was highly incriminating.

V.

Defendant's claims of ineffective assistance of counsel suffer from the same infirmities as his claims of pre-trial, trial and post-trial errors. In summary, Defendant presents a litany of alleged mistakes, failures or omissions by his trial counsel. The standard of review for claims of ineffective assistance of counsel, however, are well-established. Not only must Defendant demonstrate that his trial counsel's efforts fell below a reasonable standard, he must demonstrate that those deficiencies caused prejudice. Typically, prejudice means that but for counsel's sub-standard performance, Defendant would have been acquitted.[3]

As discussed above, it is difficult to sort through Defendant's ineffective assistance of counsel claims because they amalgamate snippets from the record, unsubstantiated allegations and unreasonable conclusions. For example, Defendant's first ineffective assistance of counsel claim concerns trial counsel's failure to move to suppress the evidence obtained after the police battered-in the

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984); *Albury v. State*, 551 A.2d 53, 59 (Del. 1988) ("Review is subject to a strong presumption that counsel's conduct was professionally reasonable").

door to Defendant's and his paramour's residence. That re-invokes the meritless "knock and announce" claim discussed above.

Furthermore, Defendant insists that the police "took drugs from my neighbor's house and placed them in my residence. . . ." Apparently, Defendant's trial counsel was skeptical about that notion. And so, Defendant alleges that due to his "trial counsel's willingness to accept the government['s] version of fact . . . [trial counsel] failed to file any motions because he relied on the government['s] version of fact and not based on his own reasonable investigation . . . ."

The court is satisfied that Defendant's wishful speculation that the police took his neighbor's drugs and planted them in Defendant's toilet hardly bears discussion, much less pre-trial investigation by Defendant's trial counsel. Defendant's allegation is conjecture. As presented above, the police had to dismantle the toilet and sort through sewage in order to recover the drugs. If trial counsel was skeptical that the police chose to plant the drugs in a toilet bowel, who can blame him? Defendant has not come close to establishing either of the *Strickland* standards. There is no reason to believe that trial counsel's decision not to pursue the "planted evidence" defense amounted to sub-standard practice, much less that the jury would have bought it.

None of Defendant's other allegations bears discussion, except one.

During its deliberations, the jury sent out a note. Because the note was unclear, the court discussed its possible meaning with counsel. Then, the court brought the jury into the courtroom and took the unusual step of clarifying with the jury, directly, the jury's question. The court stated to the jury:

> The way I read your note is, you are asking that if you were to find that the Defendant possessed either marijuana or cocaine, but he did that without the intent to deliver, would that meet the requirements of the first element of Endangering the Welfare of a Child. Is that what you're asking?

After the jury indicated its agreement with the court's interpretation, the court instructed the jury:

> If you were to find the Defendant guilty of either Count I or Count II [drug charges], including either of the lesser-included offenses, any one of those four possibilities, then, as a matter of law, that would satisfy the first element of the charge of Endangering the Welfare of a Child.

The court further charged the jury:

> Now, as you go back to deliberate, please remember that you are to bear in mind all of the instructions about all of the charges. And, also, do not take the instructions that I just gave you as any indication as to what I think the verdict should be. I'm simply answering the question that I think you've given me.

Trial counsel took no exception to the court's supplemental charge. Defendant argues that it was plain error for the court not to have re-instructed the jury on reasonable doubt and trial counsel was ineffective when he failed to ask the court to re-instruct the jury on reasonable doubt.

First, this claim should have been raised on appeal. In reality, Defendant is challenging the court's instruction, not his counsel's performance. This claim, therefore, is barred.

Second, it was not sub-standard practice for trial counsel not to have requested a re-instruction on reasonable doubt. And if he had, the court would not have given one. Thus, Defendant's ineffective assistance of counsel claim as to the supplemental instruction fails to meet either of the *Strickland* standards.

Third, the court's supplemental instruction was appropriate, especially in light of its referring to all of the instructions. Defendant misconstrues the jury's note when he insists that "the jury wanted to convict me only on child endangerment, and had a reasonable doubt as to my guilt of my drug charges."

Finally, as to this point, Defendant claims:

> that the trial judge instructing the jury that "in order to convict me (the Defendant) of child endanger[ment], the jury must first convict me of my drug charges," misled the jury to convict me of my drug charges, in order for the jury to convict of child endangerment.

Not only is that claim barred, it is flatly belied by what the court actually told the jury in the supplemental instruction, presented above in its entirety.

VII.

For the foregoing reasons, Defendant's Motion for Postconviction Relief is summarily **DISMISSED**. The Prothonotary shall cause Defendant to be notified.

IT IS SO ORDERED.

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Judge

oc: Prothonotary
Edmund Hillis, Esquire
Andrew Vella, Deputy Attorney General
Mark Conner, Deputy Attorney General
Timothy Anderson, DCC