

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, )  
 )  
 v. ) ID. No. 0202006501  
 )  
 TERRY K. WHITFIELD, )  
 )  
 Defendant. )  
 )

OPINION AND ORDER

**On the Defendant's Motion for  
Post-conviction Relief**

Submitted: March 1, 2005  
Decided: June 30, 2005

Brian J. Robertson, Deputy Attorney General, Department of Justice, 820 North French Street, Wilmington, DE 19801.

Anthony A. Figliola, Jr., Esquire, FIGLIOLA & FACCIOLO, 1813 Marsh Road, Suite A, Wilmington, Delaware, 19810.

Terry K. Whitfield, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware 19977, Defendant.

**TOLIVER, JUDGE**

Presently before the Court is the motion filed by the

defendant, Terry K. Whitfield, seeking post-conviction relief pursuant to Superior Court Criminal Rule 61.

### **FACTS AND PROCEDURAL POSTURE**

In January of 2002, Wilmington Police detectives received reliable information that the defendant was storing and selling drugs in an alley in the 700 block of East 8<sup>th</sup> Street.<sup>1</sup> Relying on the information from the informant, the detectives set up video and live surveillance at the 700 block of East 8<sup>th</sup> Street. During this period of surveillance the detectives witnessed eight hand to hand transactions between the defendant and other individuals. After each transaction, the detectives would question the individuals and each would then either name or describe the defendant as the person from which they purchased drugs.

On February 8, 2002 the defendant was arrested. He was indicted on twenty-nine criminal charges on April 8, 2002.<sup>2</sup>

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<sup>1</sup> The detectives were already familiar with the defendant because they had been involved with him in a previous drug case in 2000. In that particular case detectives had executed a search warrant at 823 Bennett Street where they found large amounts of crack cocaine and other contraband. The defendant was implicated, but the case was dismissed after witnesses failed to appear at trial.

<sup>2</sup> The twenty-nine charges included: eight counts of Delivery of a Narcotic, three counts of Possession with Intent to Deliver, one count of Maintaining a Dwelling, eight counts of Possession with a Narcotic within 1000

On May 28, 2003 at the first case review, the defense requested a continuance. Thomas A. Pederson, Esquire whose name was entered at the arraignment as counsel for the defendant told the court that he did not in fact represent the defendant. The case review was then rescheduled for June 17, 2002. On June 17, the defense again requested a continuance stating that he needed more time to prepare. The request was granted.

Dean A. DelCollo, Esquire who had been assigned to represent the defendant, filed a conflict letter on July 17, 2002. On July 23, 2002, Anthony A. Figliola, Esquire, was appointed to represent the defendant. A trial date was scheduled for October 17, 2002 but due to the previously scheduled vacation of defense counsel, the trial was moved to December 13, 2002. The defendant again requested a continuance because he believed his counsel was not ready for trial. The trial date was then scheduled for April 1, 2003. Unfortunately, this date conflicted with a capital murder case that the prosecutor, Natalie Woloshin, was trying at that time. The case could not be reassigned to another prosecutor

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feet of a school, eight counts of Possession of a Narcotic within 300 feet of a place of worship, and one count of Conspiracy 2<sup>nd</sup> degree. State's Resp. to Def. Mot. for Post Conviction Relief, D.I 80, at 2.

because of the complexity of the issues in the case. The trial was then rescheduled for July 8, 2003 and the case was assigned to the undersigned.

On July 8, 2003, the defendant entered into a guilty plea for one count of Delivery of Cocaine, one count of Possession within 300 feet of a place of worship and two counts of Possession within 1000 feet of a school. The defendant was then sentenced to eight years at Level Five, followed by decreasing levels of probation.

The defendant filed the instant motion and an exchange of briefs and memoranda followed. Having now had the opportunity to review those submissions, that which follows is the Court's response to the issues so presented.

### **DISCUSSION**

Before the Court can reach the merits of a motion for post-conviction relief, the movant must first overcome the substantial procedural bars contained in Superior Court Criminal Rule 61(i).<sup>3</sup> Under Rule 61(i)(1), post-conviction

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<sup>3</sup> *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990); *Saunders v. State*, 1995 WL 24888, at \*1 (Del. Supr.).

claims for relief must be brought within three years of the movant's conviction becoming final.<sup>4</sup> Further, any ground for relief not asserted in a prior post-conviction motion is thereafter barred unless consideration of the claim is necessary in the interest of justice.<sup>5</sup> Similarly, grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for the procedural default, and (2) prejudice from any violation of the movant's rights.<sup>6</sup> Any ground for relief that was formerly adjudicated in the proceedings leading to judgment of conviction or in a prior post-conviction proceeding is thereafter barred from consideration.<sup>7</sup>

In the instant case, the defendant's motion was filed within the statutorily prescribed time period. This is also the first post-conviction relief sought by the defendant and therefore raises no issues from a prior adjudication or motion. The Court must therefore proceed to examine the merits of the defendant's claims, all of which appear to

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<sup>4</sup> Super. Ct. Crim. R. 61(i)(1).

<sup>5</sup> Super. Ct. Crim. R. 61(i)(2).

<sup>6</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>7</sup> Super. Ct. Crim. R. 61(i)(4).

allege ineffective assistance of counsel. Unfortunately for the defendant, they are all without merit.

Under the standard outlined in *Strickland v. Washington*<sup>8</sup>, two factors must be established in order to prevail on a claim of ineffective assistance of counsel. First, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Second, he or she must show that counsel's actions were prejudicial to the defense, creating a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.<sup>9</sup> The *Strickland* standard is highly demanding and under the first prong of the test, there is a "strong presumption that the representation was professionally reasonable."<sup>10</sup> The Defendant must also "[o]vercome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."<sup>11</sup>

The defendant raises four basic arguments in support of his motion. First, he alleges that due to the ineffectiveness

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<sup>8</sup> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984).

<sup>9</sup> *Id.* at 694.

<sup>10</sup> *Stone v. State*, 690 A.2d 924, 925 (Del. 1996); *Flamer*, 585 A.2d at 753.

<sup>11</sup> *Strickland*, 466 U.S. at 689.

of his attorney, he was maliciously prosecuted and Judge Toliver was not recused from his case. He further asserts within this same claim that his guilty plea was not entered knowingly and voluntarily. Second, the defendant contends his attorney failed to file a motion to dismiss due to violation of his right to a speedy trial. Third, the defendant alleges that defense counsel failed to file a Franks<sup>12</sup> motion. Lastly, he insists his attorney should have challenged the indictment which he claims was obviously defective.

The defendant's claim that he did not knowingly and voluntarily enter his plea agreement is without merit. Before the defendant entered his pleas, he signed a written plea agreement indicating that he understood the rights he was waiving. The defendant also signed the Truth in Sentencing Guilty Plea form where he signified that he was satisfied with defense counsel's performance. He argues that he was forced to plead guilty, yet the defendant is nevertheless bound by his statements unless he offers evidence which would invalidate the same.<sup>13</sup> Because the defendant is unable to

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<sup>12</sup> A Franks motion is filed in order to argue that a false statement was included in the affidavit used to secure the search warrant. *Franks v. Delaware*, 438 U.S. 154 (1978).

<sup>13</sup> *Bruno v. State*, 758 A.2d 933 (Del. 2000); *Fullman v. State*, 560 A.2d 490 (Del. 1989).

direct the Court's attention to any such evidence in the record, he cannot escape the effect of the representations he made to the Court.

In light of these circumstances, the Court finds that the plea was knowingly and voluntarily entered. It was not the product of coercion or anything other than the exercise of free will by the defendant.

The defendant also insists within his first claim that his counsel failed to protect him from malicious prosecution. The defendant contends the police manufactured the case against him because the earlier charges against him in 2000 had been dropped. Even though these allegations were groundless, defense counsel investigated the defendant's claims. Defense counsel states that it was the hours of video surveillance and eyewitness evidence that led to the indictment and subsequent sentencing of the defendant.<sup>14</sup> As a result, defense counsel concluded that there was nothing malicious in the manner in which the case was prosecuted. The Court agrees.

The defendant asserts that defense counsel should have filed a motion to have the undersigned recused from the case.

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<sup>14</sup> Aff. of Prior Counsel, Anthony A. Figliola, D.I. 76, at 1.

Again, defense counsel investigated the previous case and discovered this judge had no involvement in that case, other than to dismiss it for failure to prosecute. The undersigned also had little involvement in this case other than to preside over the entry of the plea agreement by the defendant. There was, therefore, absolutely no basis for this judge to recuse himself from the case and no reason for defense counsel to file a motion in that regard. Again, the Court must conclude that the defendant's attorney acted reasonably under the circumstances and his performance was in no way deficient.

The defendant's second claim asserts his counsel was ineffective because he failed to file a motion declaring the defendant's right to a speedy trial was violated. When determining whether a defendant's right to a speedy trial has been violated, the Court must look at four factors, 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right to a speedy trial, and 4) prejudice to the defendant.<sup>15</sup>

Though there was some delay in bringing charges against the defendant to trial the length of the delay was not unusual. The trial was delayed due to scheduling conflicts

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<sup>15</sup> *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) citing *Barker v. Wingo*, 407 U.S. 541, 530 (1972).

from both the defense and the prosecution. There is no evidence of a deliberate attempt to force a delay of the trial.

On April 9, 2004 the defendant filed a *pro se* motion to dismiss the case due to the violation of his right to a speedy trial. This motion, in the form of a letter, came to the Court after the defendant had previously requested two continuances himself. No such motion was filed by Mr. Figliola, and under the circumstances existing in this case, the decision not to so do must be deemed tactical one which will not be questioned by the Court.

Lastly the Court must address the prejudice to the defendant as a result of the delay. When considering whether prejudice to the defendant occurred, the Court is guided by the interests that the right to a speedy trial were meant to protect.<sup>16</sup> Those interests are, 1) preventing pre-trial incarceration, 2) minimizing the anxiety and concern of the accused, and 3) limiting the possibility that the defense will be impaired.<sup>17</sup> As stated above, some delay in scheduling a trial is likely to occur. In the instant case, the State

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<sup>16</sup> *Barker*, 407 U.S. 531.

<sup>17</sup> *Middlebrook*, 802 A.2d at 276.

requested one continuance based on the scheduling conflict of the assigned prosecutor, while the defendant requested two. Nor was there any evidence otherwise of intentional delay by the State.

The defendant does not argue that he suffered anxiety and concern because his trial was delayed and fails to point to any evidence which occurred as a result of his defense. Consequently these contentions are deemed without merit.

The defendant's third claim lies with his belief that counsel should have filed a Franks motion. Defense counsel investigated defendant's claims and believed that filing a Franks motion would have been frivolous. Yet the defendant still argues that two affidavits were written by a Mr. Ramos and a Mr. Sowinski stating they did not purchase drugs from the defendant. This information is not helpful. The search warrant obtained for 823 Bennett Street was based primarily on the personal observations of the officers and the video surveillance of the scene. Its legal vitality remains undiminished and the Court cannot conclude that the representation offered by defense counsel in this regard was inadequate or professionally deficient.

The defendant's last claim insists his counsel should

have challenged his indictment which he maintains was obviously deficient. Essentially defendant claims the charges were duplicitous. Again, there is no evidence to support such a claim. It is within the State's prerogative to charge any defendant with Delivery and also with delivery and possession within 1000 feet of a school and 300 feet of a place of worship.<sup>18</sup>

As the Court has concluded with regard to the defendant's other arguments, the defendant has not met the standard pronounced in *Strickland* relative to this argument. The defendant has not shown how defense counsel's representation fell below an objective standard of reasonableness in anything other than vague and conclusory statements. He is not, as a consequence, able to overcome the strong presumption that counsel's actions were proper. Even if the defendant could have proven that defense counsel's actions were lacking, he has offered no credible evidence that the outcome of the trial would have been different if counsel had acted differently.

\_\_\_\_\_No matter how the defendant's challenges to his conviction are viewed, whether separately or together, he is not entitled to the relief sought. His right to counsel was

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<sup>18</sup> 16 Del. C. §§ 4767(b), 4768(b).

not abridged and his treatment during the course of the instant prosecution was not otherwise subject to challenge.

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CONCLUSION

For the foregoing reasons, the Defendant's motion for post-conviction relief must be, and hereby is, **denied**.

**IT IS SO ORDERED.**

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**Toliver, Judge**