SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

October 28, 2005

Maahir B. Ismaaeel, a/k/a Maahir B. Ismaaeel H. Hackett
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Ismaaeel, Def. ID# 0304002130

DATE SUBMITTED: July 26, 2005

Dear Mr. Hackett:

Pending before the Court is a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("R.61") which defendant Maahir B. Ismaaeel, a/k/a Maahir B. Ismaaeel H. Hackett ("defendant") filed. This is my decision denying the motion.

On or about April 3, 2003, defendant was arrested on charges of trafficking in cocaine in an amount between 5 and 50 grams, possession with intent to deliver a controlled substance, maintaining a dwelling for keeping a controlled substance, conspiracy in the second degree, and possession of drug paraphernalia.

Defendant's trial counsel was Carole J. Dunn, Esquire ("trial counsel"). At the time of case review, trial counsel asked to pursue a motion to suppress. The Court denied the motion as untimely.

Defendant was tried before this judge, after waiving a jury trial, on August 27 and 28, 2003. The evidence showed the following.

On April 3, 2003, Probation Officers Timothy Jones and Lisa Fell undertook a home confinement check at the home of Carol Murray, who was on probation. While there, they came into contact with defendant. Defendant was acting in a nervous manner. They asked him his name and whether he was on probation. Defendant gave the name "Maahir Bin Ismaaeel" and stated he was not on probation. Because of the nervous way he was acting, the officers had his name run and learned that he actually was on probation and there was an active warrant for his arrest.

The probation officers contacted SUSCOM and asked for a Delaware State Trooper to respond to the home. Defendant told the responding officers that he was in possession of cocaine, which was in his front left pocket. Inside one large clear plastic bag were ninety-three (93) individually-sealed plastic bags with pieces of rock cocaine in them. The cocaine weighed approximately 7.65 grams. Defendant admitted to authorities and Carol Murray that he intended to sell the drugs in order to raise bail money for his brother. The evidence also showed that Carol Murray told the defendant the name of a source who would buy from him; defendant and Carol Murray agreed to find a buyer for the cocaine.

The Court found defendant guilty of the charges of trafficking in cocaine; possession with intent to deliver cocaine; conspiracy in the second degree; and possession of drug paraphernalia. It found defendant not guilty of the charge of maintaining a dwelling for keeping or delivering a controlled substance.

The Court considered, and denied, defendant's motion to dismiss the trafficking and conspiracy counts. The basis of the motion regarding the trafficking count was that the recently-enacted trafficking statute, 74 *Del. Laws*, c. 106 (2003), changed the first level weight criteria from 5 to 10 grams, and the lesser penalties therein should apply. The Court concluded the statute did not apply to the defendant's convictions. State v. Ismaaeel, Del. Super., Def. ID# 0304002130, Stokes, J. (Jan. 13, 2004).

Defendant's sole argument on appeal was that the trial court erred when it ruled that defendant was not entitled to the reduced sentencing provisions of the recently enacted statute. The Supreme Court affirmed the decision of this Court. Ismaaeel v. State, Del. Supr., No. 17, 2004, Steele, J. (July 9, 2004). The mandate was issued on July 28, 2004.

In his motion for postconviction relief, defendant makes several arguments, some of which are procedurally barred except to the extent they are contained within his claims of ineffective assistance of counsel. I will address each claim below and deal with the procedural bars within those claims.[1] The three year time bar in effect when defendant filed his motion does

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[1] In Rule 61(i), it is provided as follows:

> *Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
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> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim in warranted in the interest of justice.
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> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
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> (A) Cause for relief from the procedural default and

not preclude defendant's claims. Rule 61(i)(1).

Defendant first argues the probation officers did not comply with their departmental policies and procedures in conducting a search. This claim is procedurally barred because defendant failed to raise it at the trial by means of a motion to suppress and, except to the extent he alleges trial counsel was ineffective for raising the issue, he has not attempted to overcome the procedural bar.

Defendant also argues that the trial court abused its discretion in not suppressing the evidence based on an illegal search and seizure. This claim is procedurally barred because defendant failed to raise it on appeal, and except to the extent he alleges trial counsel was ineffective for raising the issue, he has not attempted to overcome the procedural bar.

I now turn to the ineffective assistance of counsel claims. "[T]o use ineffective assistance of counsel to justify `cause' for not asserting the claim earlier, the movants must establish that counsel was truly ineffective." Holden v. State, Del. Super., Def. ID#s 9605000739, et al., Graves, J. (August 14, 1997) at 3, aff'd, 710 A.2d 218 (Del. 1998). To establish a claim of ineffective assistance of counsel, defendant must show that trial counsel's representation fell

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(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction 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 proceedings leading to the judgment of conviction.

below an objective standard of reasonableness and but for the attorney's unprofessional errors, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). With regard to the actual prejudice aspect, "[d]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694.

In addition to using ineffective assistance of counsel as cause for relief from the procedural bar of Rule 61(i)(3), defendant also employs ineffective assistance of counsel to independently support his claim that trial counsel was ineffective for failing to gather evidence and pursue a suppression motion. Those claims are not procedurally barred since this is the first opportunity defendant has had to raise them.

The Supreme Court recently has expressed the necessity of obtaining an affidavit from trial counsel where a defendant asserts claims of ineffective assistance of counsel. Guinn v. State, Del. Supr., No. 52, 2005, Holland, J. (Sept. 7, 2005) at 5; Horne v. State, Del. Supr., No. 520, 2004, Holland, J. (Aug. 5, 2005) at 5-6. The affidavit requirement is important to the first prong of defendant's burden. However, because in this case this Court will assume that trial counsel was ineffective for not timely filing a motion to suppress, it does not obtain an affidavit.

Defendant's arguments boil down to the following. The evidence against him should have been suppressed because the probation officers did not have a reason to detain him and search him and they did not follow departmental procedure for conducting a search and seizure. He cites

to 11 Del. C. § 4321(d) and the Department of Correction Procedure 7.18. In 11 Del. C. § 4321,[2] the legislative authority permitting probation officers to effect searches of the individuals they supervise is set forth. Pursuant to that authority, the Department of Correction has adopted regulations regarding warrantless searches of probationers. As explained in McAllister v. State, 807 A.2d 1119, 1123 (Del. 2002):

> Those regulations provide that, prior to a personal search or a living quarters search, the probation officer and the supervisor "shall have a case conference" and "the Pre-Search Checklist should be used as a guideline unless emergency circumstances dictate otherwise." Dept. of Correction Procedure 7.18. Further, "before any search is conducted, Officers must first have the approval of a supervisor or designee, unless emergency circumstances dictate otherwise." Dept. of Correction Procedure 7.19.

Defendant seeks to reargue facts and set forth unsupported facts which differ from what was presented at trial. The Court ignores these unsubstantiated facts. Instead, it looks at the facts on the record.

The facts show that the probation officers were paying a visit to Carol Murray, who was on their probation caseload. They happened upon defendant. His evasive, nervous behavior raised red flags with them. They asked him if was on probation and he said he was not, but he did admit to having been recently released from incarceration. They were doubtful of his response

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[2]In 11 Del. C. § 4321(d), it is provided:

> Probation and parole officers shall exercise the same powers as constables under the laws of this State and may conduct searches of individuals under probation and parole supervision in accordance with Department procedures while in the performance of the lawful duties of their employment and shall execute lawful orders, warrants and other process as directed to the officer by any court, judge or Board of Parole of this State; however, a probation and parole officer shall only have such power and duties if the officer participates in and/or meets the minimum requirements of such training and education deemed necessary by the Department and Board of Examiners.

and had him checked out. They learned he had an administrative warrant outstanding. They then detained him.[3] He was read his Miranda rights. Defendant agreed to talk to them. He thereafter admitted he was on probation and he confessed he had cocaine on him. Because Ms. Murray's son had come into the house, the probation officers did not search him. They held him in handcuffs until the State Police Officers came. The State Police performed the physical search of defendant.

Defendant's arguments with regard to a violation of departmental policy fail. The probation officers had no idea that defendant was in the house nor did they have any prior information that drugs might be in the house. They were there to check on Ms. Murray. They had every right to be in Ms. Murray's house. Once there, defendant's behavior led them to discover that he was wanted. They had probable cause, at that time, to detain him. McAllister v. State, 807 A.2d at 1124; Gibbs v. Hewes, Del. Super., C.A. No. 98C-03-294, Del Pesco, J. (April 16, 1998). The State Police searched defendant, not the probation officers.

On the facts of this case, the invoked procedure is not implicated. Thus, defendant's arguments that the search and seizure protocols were not followed are meritless. Had the motion to suppress been heard, it would have been denied. Defendant, thus, cannot show any prejudice for the motion not being presented and heard.

For the foregoing reasons, defendant's motion for postconviction relief is denied.

IT IS SO ORDERED.

Very truly yours,

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[3]Defendant argues the officers could not do anything since his probation had not been transferred to Sussex County. That is a legally frivolous argument.

Richard F. Stokes

cc: Prothonotary's Office
Carole J. Dunn, Esquire
Adam D. Gelof., Esquire