

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT BROWN,	§
	§
Defendant Below-	§ No. 40, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0703022100
Plaintiff Below-	§
Appellee.	§

Submitted: June 11, 2010  
Decided: August 16, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

**ORDER**

This 16th day of August 2010, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Albert Brown, filed this appeal from the Superior Court's summary dismissal of his first motion for postconviction relief. After careful consideration of the parties' contentions on appeal, we find no error in the Superior Court's judgment. Accordingly, we affirm.

(2) The record at trial established that, on the afternoon of March 20, 2007, Wilmington police officer Todd Riley was conducting surveillance using binoculars from an elevated position on Jefferson Street. In a half-hour period, Riley twice observed Brown, who carried a cane, cross the street, retrieve a small

package from a plastic bag lying on the ground and return to other side of the street, where he handed the small package to an unknown individual in exchange for another object. A short while later, Riley saw Brown cross the street a third time, remove an object from the plastic bag and continue walking down the block. Riley called for other officers to apprehend Brown. Riley retrieved the larger plastic bag that Brown had left on the street. Inside were smaller zip lock bags, which were described in the police report (written by a different officer) as “pink-tinted” bags. The contents of the bags field tested positive for crack cocaine. The responding officers arrested Brown and found \$159 in his pockets.

(3) The Superior Court jury convicted Brown in November 2007 of possession with intent to deliver cocaine and possession of drug paraphernalia. This Court affirmed Brown’s convictions on direct appeal.<sup>1</sup> In February 2009, Brown filed his first motion for postconviction relief, as well as several amendments to the motion. After considering Brown’s motion and amendments, as well as trial counsel’s affidavit, and the State’s response, the Superior Court denied relief. This appeal followed.

(4) Brown raises four issues in his opening brief on appeal. First, he contends that his trial counsel was ineffective in several respects. Second, he contends that his arrest violated his Fourth Amendment right to be free from an illegal search and seizure. Third, he argues that a proper chain of custody was not

---

<sup>1</sup> *Brown v. State*, 2008 WL 5308097 (Del. Dec. 22, 2008).

established for the drug evidence admitted at trial. Finally, he contends that the police report and medical examiner's report were both falsified.<sup>2</sup>

(5) Before we can address the substantive merits of Brown's claims on appeal, this Court must first consider the procedural requirements of Superior Court Criminal Rule 61.<sup>3</sup> Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred unless the movant can establish cause for the procedural default and prejudice. Brown did not assert his Fourth Amendment, chain of custody, or falsified documents arguments at trial. Moreover, on appeal, Brown's trial counsel filed a brief pursuant to Supreme Court Rule 26(c). Brown filed a response to counsel's brief raising forty-one *pro se* claims. Brown, however, did not raise any of these three issues in his direct appeal. Accordingly, we find no error in the Superior Court's conclusion that these claims were procedurally barred by Brown's failure to raise them on direct appeal and that Brown had failed to overcome this procedural hurdle.

(6) Brown's remaining claim on appeal is that his trial counsel was ineffective in several respects. Specifically, Brown argues that his trial counsel

---

<sup>2</sup> To the extent that Brown raised additional issues in the motion and amendments he filed in the Superior Court, those additional issues are deemed waived for his failure to brief them on appeal. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997). The Court will only address the issues raised in Brown's opening brief.

<sup>3</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

was ineffective because he: (i) stipulated to the admission of the medical examiner's report; (ii) failed to subpoena for trial all of the police officers involved in the surveillance of Brown and his arrest; and (iii) failed to file a suppression motion. The real gist of Brown's claims is that there were "major" inconsistencies between the facts set out in the police report, the testimony of the police officer at Brown's preliminary hearing, and Riley's testimony at trial. Brown also contends that the description of the drugs in the medical examiner's report, which described the drugs as being in "red" baggies, was not the same as the police report, which described the baggies as "pink-tinted." Brown concludes that all of these inconsistencies are proof that the evidence against him was falsified, testimony was perjured, and his counsel was ineffective for failing to expose this fraud.

(7) To prevail on a claim of ineffective assistance of counsel, a defendant is required to establish that: (i) trial counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different.<sup>4</sup> A defendant must set forth and substantiate concrete allegations of actual prejudice<sup>5</sup> in order to overcome the "strong presumption" that counsel's representation was professionally reasonable.<sup>6</sup>

---

<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

<sup>5</sup> *Younger v. State*, 580 A.2d at 556.

<sup>6</sup> *Strickland v. Washington*, 466 U.S. at 689.

(8) Having reviewed the parties' contentions and the record on appeal very carefully, we find it manifest that the judgment below should be affirmed on the basis of, and for the reasons set forth in, the Superior Court's well-reasoned decision dated January 13, 2010. There was neither attorney error nor prejudice to Brown from counsel's failure to call the medical examiner or other officers besides Riley to testify at trial. As the Superior Court found, whatever discrepancies may have existed between the police report and the preliminary hearing testimony and between the police report and the medical examiner's report were "insignificant and [of] no consequence."<sup>7</sup> Calling these additional witnesses would not have changed the outcome of Brown's trial. Moreover, there was no error in counsel's failure to file a suppression motion because the record clearly established that the officers had probable cause to arrest Brown and search him incident to arrest.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland  
Justice

---

<sup>7</sup> *State v. Brown*, Del. Super., Cr. ID 0703022100, Herlihy, J. (Jan. 13, 2010).