

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERMAINE KING,	§
	§
Defendant Below-	§ No. 31, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID No. 0805039623
Plaintiff Below-	§
Appellee.	§

Submitted: April 5, 2011
Decided: June 2, 2011

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

ORDER

This 2nd day of June 2011, upon consideration of the appellant’s opening brief, the State’s motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, Jermaine King, filed this appeal from the Superior Court’s denial of his first motion for postconviction relief. The State of Delaware has filed a motion to affirm the judgment below on the ground that it is manifest on the face of King’s opening brief that the appeal is without merit. We agree and affirm.

(2) The record reflects that King was arrested following an administrative search of his home by probation officers. As a result, he was later charged with

trafficking in cocaine, possession with intent to deliver cocaine, maintaining a dwelling, two counts of possession of drug paraphernalia, and four counts of endangering the welfare of a child. Through his counsel, King filed several unsuccessful pretrial motions, including a motion to suppress and a motion to compel the identity of a confidential informant. On January 27, 2009, King was convicted of all charges, except the four endangering counts, following a Superior Court bench trial. The Superior Court sentenced King as a habitual offender to a total period of twenty years at Level V incarceration to be followed by a period of probation. This Court affirmed King's convictions and sentence on direct appeal.¹ In September 2010, King filed his first motion for postconviction relief. After obtaining responses from defense counsel and the State, the Superior Court denied King's motion on its merits. This appeal followed.

(3) King raises three issues in his opening brief on appeal, asserting that his trial and appellate counsel were ineffective because: (i) trial counsel had a conflict of interest; (ii) trial counsel failed "to investigate the confidential informant's credibility and reliability;" and (iii) appellate counsel failed to argue on appeal that the Superior Court could not provide him with a full and fair opportunity to litigate the constitutionality of the search and seizure conducted by the probation officers in his case because of conflicts in the case law.

¹ *King v. State*, 984 A.2d 1205 (Del. 2009).

(4) To prevail on a claim of ineffective assistance of counsel, a defendant has the burden of establishing that: (a) counsel’s conduct fell below an objective standard of reasonableness; and (b) but for counsel’s errors, the outcome of the proceedings would have been different.² A defendant must make concrete allegations of cause and “affirmatively prove prejudice”³ to substantiate a claim of ineffective assistance of counsel.⁴ Counsel’s performance is entitled to a strong presumption of reasonableness.⁵

(5) In this case, we find no error in the Superior Court’s conclusion that King had established neither cause nor prejudice with respect to his trial counsel’s performance or his appellate counsel’s performance. King failed to provide clear and convincing evidence that his trial counsel’s prosecution of him for a criminal offense ten years earlier⁶ created a disqualifying conflict of interest.⁷ We agree with the Superior Court’s assessment that the record, in fact, reflects that trial counsel was extremely zealous in her representation of King. Accordingly, we find no merit to King’s first claim.

² *Strickland v. Washington*, 466 U.S. 668, 693 (1985).

³ *Id.*

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1980).

⁵ *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

⁶ The record reflects that King pled guilty in February 1998 to one count of possession of a deadly weapon by a person prohibited and was immediately sentenced to eleven months. This conviction did not form the basis of the State’s habitual offender motion in the present case.

⁷ See *Hitchens v. State*, 2007 WL 2229020 (Del. July 26, 2007).

(6) King's second claim of ineffectiveness, alleging that trial counsel failed to investigate the confidential informant's credibility and reliability, fails because counsel did, in fact, file a *Flowers*⁸ motion seeking to obtain the informant's identity. The Superior Court denied that motion. Accordingly, we agree with the Superior Court that King's assertion that counsel was ineffective for failing to obtain the informant's telephone records borders on frivolous given the Superior Court's ruling that King was not entitled to know the informant's identity.

(7) King's final contention is that appellate counsel was ineffective for failing to argue that he was prohibited at trial from fairly litigating his Fourth Amendment claims because of too many conflicts in the existing case law. Appellant counsel, however, zealously argued on appeal that the probation officers' search of his home was unlawful.⁹ As the Superior Court noted, this Court's opinion on King's direct appeal are proof of his appellate counsel's efforts on his behalf. That counsel's arguments ultimately were unsuccessful does not mean that counsel was ineffective. We find appellate counsel's performance entirely reasonable in this case.

⁸ *State v. Flowers*, 316 A.2d 564 (Del. Super. 1973).

⁹ *See King v. State*, 984 A.2d 1205 (Del. 2009).

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

BY THE COURT:

/s/ Randy J. Holland
Justice