

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES A. WILSON,	§	
	§	No. 370, 2003
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE	§	Cr. I.D. No. 9912006359
	§	
Plaintiff Below,	§	
Appellee.	§	

Before **BERGER, STEELE** and **JACOBS**, Justices.

ORDER

SUBMITTED: December 16, 2003
DECIDED: February 2, 2004

This 2nd day of February 2004, upon consideration of the parties' briefs, it appears to the Court that:

(1) James A. Wilson appeals from an Order of the Superior Court, entered on July 2, 2003, denying his *pro se* motion for postconviction relief. For the reasons set forth below, Wilson's appeal lacks merit, and the Order will be affirmed.

(2) The facts, succinctly summarized, are as follows: On December 9, 2000, Federal agents and Delaware police received information

from one Okeman Davis that Wilson could be found at her residence in Newark, Delaware. At that time, Wilson was a fugitive wanted on multiple drug charges. Davis told the police that she had picked up Wilson at a hotel in Wilmington earlier that day, and had driven him to her house. She then executed a form authorizing the police to enter and search her residence. The police did that, apprehended Wilson, and in the process, discovered on a coffee table in the living room drugs, drug paraphernalia, and a large quantity of currency. As a consequence of the search of Ms. Davis' residence, Wilson was charged with, and on May 10, 2001 was convicted by a Superior Court jury of, several drug offenses, namely: Trafficking in Cocaine (in violation of 16 *Del. C.* § 4753A(a)(2)), Possession With Intent to Deliver Cocaine (in violation of 16 *Del. C.* § 4751(a)), Maintaining a Dwelling for Keeping Controlled Substances (in violation of 16 *Del. C.* § 4755(a)(5)), Possession of Marijuana (in violation of 16 *Del. C.* § 4754(a)), and Possession of Drug Paraphernalia (in violation of 16 *Del. C.* §4771)).

(3) Wilson's first trial, at which he was represented by the Office of the Public Defender, ended in a mistrial because of an "automatic discovery" violation. At his second trial, at which he was convicted, Wilson elected to proceed *pro se*. Before his second trial began, however, Wilson, who was then represented by an attorney other than the public defender who had

earlier represented him, moved to dismiss and to suppress evidence, on double jeopardy grounds. At a hearing held on those motions, Wilson argued that (1) he had already been placed in jeopardy by virtue of a jury having been sworn in his first trial before the mistrial was granted; (2) the person who executed the “consent to search” form had no authority to do so; and (3) the Dover City Police exceeded the scope of the form while conducting its search, (4) the search was not done as part of any legitimate “protective sweep” of the premises. The defendant did not testify at these hearings. The trial court thereafter denied both the motion to dismiss and the motion to suppress, assuming without deciding that the defendant had standing to contest the search.¹

(4) On September 7, 2001, Wilson was sentenced to 10 years at Level V on the Trafficking charge, three years of which were mandatory; with the remaining charges all carrying various probationary sentences. Immediately before he was sentenced, Wilson moved for a judgment of acquittal and/or a new trial, largely on the grounds that a forensic examiner was not called to establish the “chain of custody” relating to the drugs that Wilson was charged with possessing and trafficking. The Court denied the

¹ *State v. Wilson*, I.D. #9912006359 (Del. Super., Mar. 16, 2001) (Bench Ruling).

motions.² Wilson's convictions were thereafter affirmed on direct appeal.³

(5) Approximately one year later, Wilson filed a motion for postconviction relief in which he raised three arguments: (1) his counsel was ineffective at his suppression hearing because he (a) failed to establish that Wilson had "standing" to assert a constitutional violation (i.e., an illegal search and seizure at Ms. Davis's house), and (b) failed to subpoena the forensic examiner for cross-examination on the "chain of custody" issue; (2) 10 *Del. C.* § 4332 was violated because the trial court granted Wilson's motion to proceed *pro se* on May 8, 2001, but his second trial began on May 10, 2001, only 2 days later; and (3) because his first trial ended in a mistrial because of an apparent "automatic discovery" violation, Wilson should not have been re-tried.

(6) The Superior Court denied Wilson's motion. That Court found that three of Wilson's claims were procedurally barred, on the ground that they had been formerly adjudicated, under Superior Court Criminal Rule 61 (i) (4). Those claims were that: (1) trial counsel was constitutionally ineffective for failing to establish that Wilson had standing to challenge the search of the premises at which he was arrested and the evidence seized; (2)

² *State v. Wilson*, I.D. #9912006359 (Del. Super., Sept. 7, 2001) (Bench Ruling).

³ *Wilson v. State*, No. 446, 2001, 2002 WL 31106354 (Del., Sept. 18, 2002). On appeal this Court determined on the merits that the defendant had no standing to challenge the constitutionality of the search and seizure that occurred at Ms. Davis's residence.

trial counsel was ineffective for failing to insist that the medical examiner testify at his trial, and (3) the Superior Court erroneously ruled that his second trial was not barred by the Double Jeopardy clause of the Fifth Amendment of the United States Constitution. The Court further found that to the extent that Wilson's claims were not procedurally barred, they lacked substantive merit.

(7) Generally, this Court will review the trial court's denial of postconviction relief for abuse of discretion. Questions of law are reviewed *de novo*⁴

(8) Before addressing the merits of a petitioner's claims on a motion for postconviction relief, the court must first determine the applicability of Superior Court Criminal Rule 61(1), which provides that "[a]ny 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 required in the interest of justice."⁵ But, in order to invoke the "interest of justice" exception to obtain relitigation of a previously resolved claim, "a movant

⁴ *Dawson v. State*, 673 A.2d 1186, 1190, 1196 (Del. 1996), *cert. denied*, 519 U.S. 844 (1996).

⁵ Super. Ct. Crim. R. 61 (i) (4); *See, Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.”⁶

(9) Measured against these criteria, the trial court’s determination that most of Wilson’s claims had been formerly adjudicated, and thus were barred under Criminal Rule 61 (i), was correct. The double jeopardy claim was raised on a motion to dismiss before the defendant’s second retrial. The trial court denied the motion on the merits, ruling that the discovery violation that led to the initial mistrial fell far short of the kind of prosecutorial misconduct that would bar a retrial under the Double Jeopardy clause. Thus, that issue was raised, addressed and decided “in the proceedings leading to the judgment of conviction [i.e., at trial].” That issue was not raised again on appeal, and the defendant has made no credible effort to show that the “interests of justice” exception applies to him.

(10) Equally correct is the Superior Court’s ruling that Wilson’s claim that his trial counsel’s assistance was ineffective, was procedurally barred because the claim had been formerly adjudicated. As noted, Wilson claimed that his trial counsel was constitutionally ineffective: (a) for failing to establish that Wilson had “standing” to complain that the police entry into the premises in which he was arrested violated his constitutional right to be

⁶ *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

free from unreasonable searches and seizures, and (b) for failing to insist that the medical examiner testify at his trial. Wilson argues that claims of ineffective assistance of counsel are not procedurally barred, since such claims generally cannot be raised at trial or on direct appeal.⁷ The argument is unavailing in this case, however, because even though as a general matter a claim of ineffective assistance may be not barred, the underlying subject matter of the claim cannot be relitigated where, as here, it has been previously raised and adjudicated. In any event, however, the ineffective assistance of counsel claims fail on their merits.

(11) To establish constitutionally ineffective assistance of counsel, the defendant must show both that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's defective, unprofessional performance, the result of the proceeding would have been different.⁸ In presenting a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.⁹ In this case, Wilson's claims of ineffective assistance of counsel fail under *Strickland*'s prejudice prong.

⁷ See *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

⁸ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Albury v. State*, 551 A. 2d 53, 58 (Del. 1988).

⁹ *Younger*, 580 A.2d at 556.

(12) After the March 16, 2001 suppression hearing, the trial court denied the defendant's motion to suppress evidence on the grounds that (a) Wilson lacked a reasonable expectation of privacy in the premises in which he was arrested and in which drugs were found, and (2) the legitimate resident (Okeman Davis), whether owner or lessee, had validly consented to a search of her residence. On direct appeal, this Court affirmed that ruling, holding that Wilson had failed to establish a reasonable expectation of privacy in the premises searched.¹⁰

(13) Wilson now argues that his attorney was constitutionally ineffective because he failed to establish that he (Wilson) did, in fact, have a reasonable expectation of privacy in the premise, to contest the validity of the search and seizure. But even now, more than two years after his conviction, Wilson has failed to suggest with particularity what trial counsel should have done to establish Wilson's standing to contest the search. Moreover, the defendant ignores the trial court's alternative ground for denying his motion to suppress, i.e., that Ms. Davis had validly consented to a police search of her home. Because Wilson had failed to set forth concrete allegations of actual prejudice and substantiate them as required by *Strickland*, his claim fails.

¹⁰ *Wilson v. State*, No. 466, 2001 (Del., Sept. 18, 2001) (ORDER).

(14) For the same reason, the claim that trial counsel rendered ineffective assistance for failing to subpoena the Medical Examiner, is also fatally deficient. After the seizure of the drugs and related paraphernalia, the police reported preliminarily that the drugs weighed roughly 16 grams. The Medical Examiner's report indicated that the drugs actually weighed 13.83 grams. That discrepancy, Wilson now claims, established a need to subpoena the Medical Examiner as a witness. As with his other claim of ineffective assistance of counsel, this claim too fails for lack of any showing of prejudice. Wilson failed to make concrete allegations of prejudice and substantiate them. He has not set forth with particularity what advantages he would have gained through the Medical Examiner's in-court testimony, because to establish Trafficking, the drugs in the defendant's possession need to have weighed only 5 grams. In this case, whether they weighed 16 grams or only 13.83 grams would have made no difference, because either weight would have been sufficient to convict. Hence, Wilson has failed to show how his counsel's failure to subpoena the Medical Examiner to testify prejudiced him in any way.

(15) Finally, the Superior Court correctly rejected Wilson's argument that he should not have been required to go to trial only two days after his request to proceed *pro se* had been granted. But, Wilson did not

seek a continuance, and Wilson has not demonstrated that the trial court was required to grant a continuance *sua sponte*, or that by not doing so, the court abused its discretion.

(16) We conclude, for the reasons set forth above, that the Superior Court did not commit any errors of law or abuse its discretion in denying the defendant's motion for postconviction relief.

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

BY THE COURT:

/s/ Jack B. Jacobs
JUSTICE