

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHAN MURRAY,	§
	§ Nos. 446/470, 2011
Defendant Below,	§ Consolidated
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
	§ for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0804021506
	§
Plaintiff Below,	§
Appellee.	§

Submitted: April 20, 2012  
Decided: June 5, 2012

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 5<sup>th</sup> day of June 2012, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Stephan Murray, filed an appeal from the Superior Court's July 29, 2011 order denying his first motion for postconviction relief under Superior Court Criminal Rule 61. We find no merit to the appeal and, accordingly, affirm.

(2) The record before us reflects that, in January 2009, following a combined jury and bench trial in the Superior Court, Murray was convicted of Trafficking in Cocaine, Possession With Intent to Deliver Cocaine, two counts of Possession of a Firearm During the Commission of a Felony,

Maintaining a Dwelling for the Keeping of Controlled Substances, Possession of Drug Paraphernalia, Endangering the Welfare of a Child, and two counts of Possession of a Deadly Weapon By a Person Prohibited. Murray was sentenced to a total of 37 years of Level V incarceration, to be suspended after 17 years for decreasing levels of supervision. This Court affirmed Murray's convictions on direct appeal.<sup>1</sup>

(3) In this consolidated appeal, Murray claims that a) his trial attorney provided ineffective assistance by failing to move to suppress the evidence until the first day of trial; and b) the Superior Court erred by failing to require his trial attorney to file an affidavit in response to the claim of ineffective assistance.

(4) To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>2</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.<sup>3</sup> The

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<sup>1</sup> *Murray v. State*, Del. Supr., No. 307, 2009, Holland, J. (Feb. 23, 2010).

<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>3</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.<sup>4</sup>

(5) Murray's first claim is that his attorney provided ineffective assistance by failing to move to suppress the evidence until the first day of trial. The record before us shows that, on the first day of trial, Murray's counsel requested the Superior Court to consider a motion to suppress on the basis of stipulated facts. Counsel explained that he had not moved to suppress before that time because he did not want to jeopardize ongoing plea negotiations. Counsel had, in fact, succeeded in negotiating a generous plea of 5 years at Level V, considering that Murray was facing 17 years of mandatory Level V time if he were convicted of all the charges against him.<sup>5</sup> Murray rejected that plea offer. Given the circumstances, the judge agreed to hear counsel's suppression motion. The judge's ruling denying the motion was affirmed on direct appeal.<sup>6</sup>

(6) We agree with the Superior Court's rationale that Murray's counsel made a reasonable professional decision to forego filing his motion to suppress during ongoing plea negotiations—negotiations that would have resulted in a positive outcome for Murray had he chosen to accept the State's

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<sup>4</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>5</sup> Unfortunately, Murray rejected the State's plea offer.

<sup>6</sup> *Murray v. State*, Del. Supr., No. 307, 2009, Holland, J. (Feb. 23, 2010).

plea offer. The suppression motion was argued on the basis of stipulated facts, none of which Murray disputes. Murray can show no resulting prejudice, because the judge permitted the motion to be heard and the denial of the motion was affirmed on appeal. We, therefore, conclude that Murray's first claim is without merit.

(7) Murray's second claim is that the Superior Court erred by not requiring his counsel to submit an affidavit responding to his claim of ineffective assistance. This Court has ruled that an adequate record for appellate review of a postconviction motion containing allegations of ineffective assistance generally should include the affidavit of the defendant's trial counsel.<sup>7</sup> The situation presented here provides an exception to that rule.

(8) Here, Murray's counsel explained to the judge before trial, his reasons for not moving to suppress the evidence in a timely manner. Because the same judge was assigned Murray's first postconviction motion and already knew counsel's reasoning for not filing a timely suppression motion, there was no need to expand the record to include counsel's affidavit

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<sup>7</sup> *Horne v. State*, 887 A.2d 973, 975 (Del. 2009); Super. Ct. Crim. R. 61(g) (2).

in response to Murray's claim of ineffective assistance on that ground.<sup>8</sup> We, therefore, conclude that Murray's second claim is without merit.

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

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>8</sup> To the extent Murray argues that the Superior Court's rulings at trial and this Court's rulings on appeal were erroneous, any such arguments are procedurally barred as formerly adjudicated. Super. Ct. Crim. R. 61(i) (4).