

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN TURNER,	§	
	§	
Defendant Below-	§	No. 25, 2004
Appellant,	§	
	§	Court Below---Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. No. 02-05-0959
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: April 23, 2004

Decided: July 6, 2004

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

**ORDER**

This 6<sup>th</sup> day of July 2004, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Brian Turner, filed an appeal from the Superior Court's December 30, 2003 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In June 2002, Turner was charged by indictment with Trafficking in Cocaine and Maintaining a Dwelling for Keeping a Controlled Substance. Turner

subsequently filed a motion to suppress the evidence against him.<sup>1</sup> Following a suppression hearing, the Superior Court denied Turner's motion. At trial, the judge, sitting without a jury, found Turner guilty of the sole charge of Trafficking in Cocaine. Turner was sentenced to 7 years incarceration at Level V, to be suspended after 5 years for probation. Turner's conviction and sentence were affirmed by this Court on direct appeal.<sup>2</sup>

(3) In this appeal, Turner claims that it was error for the Superior Court to base its denial of his ineffective assistance of counsel claim on the ground that the underlying substantive claim already had been adjudicated at the suppression hearing.<sup>3</sup> While Turner agrees that his postconviction claim implicates generally the basis for the search, he argues that the facts upon which he bases the claim are new---that is, that the police lied to obtain the warrant to search his residence and the prosecutor used those false statements at the suppression hearing to provide probable cause for the warrant. To the extent Turner has not argued other grounds

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<sup>1</sup> At the suppression hearing, Turner argued that the search warrant was invalid because there was nothing illegal about the gun that was the object of the warrant and the information upon which the warrant was based was stale and non-specific.

<sup>2</sup> *Turner v. State*, 826 A.2d 289 (Del. 2003). On direct appeal, Turner argued that the gun was not a proper object of a search warrant, the warrant failed to establish probable cause, and the information in the search warrant affidavit was stale.

<sup>3</sup> Super. Ct. Crim. R. 61(i) (3).

to support his appeal that were previously raised, those grounds are deemed waived and will not be addressed by this Court.<sup>4</sup>

(4) In order to prevail on his claim of ineffective assistance of counsel, Turner must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>5</sup> Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."<sup>6</sup>

(5) Even assuming Turner is correct that his postconviction claim was not already adjudicated by the Superior Court at the suppression hearing, it, nevertheless, fails. To begin with, Turner's contentions of false statements by the police and the use of those false statements by the prosecution at trial are conclusory and not supported by the record and, therefore, Turner may not claim that his counsel was ineffective for failing to raise them. Moreover, because Turner's claim is presented for the first time in this postconviction proceeding, it is procedurally barred unless Turner can demonstrate that there is cause for relief

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<sup>4</sup> *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his postconviction motion, Turner also claimed violations of his 4<sup>th</sup> Amendment and due process rights.

<sup>5</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

<sup>6</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

from the procedural default and prejudice from a violation of his rights.<sup>7</sup> We have reviewed carefully the transcript of the suppression hearing and there is no evidence that any alleged error on the part of Turner's counsel resulted in prejudice to him.

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

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>7</sup> Super. Ct. Crim. R. 61(i) (3) (A) and (B). Turner has chosen to demonstrate cause and prejudice by pursuing an ineffective assistance of counsel claim.