

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| KENNETH E. FINK, | § |
| | § No. 578, 2005 |
| Defendant Below, | § |
| Appellant, | § Court Below – Superior Court |
| | § of the State of Delaware, |
| v. | § in and for New Castle County |
| | § Cr.A. Nos. IN00-05-1260 thru 1285 |
| STATE OF DELAWARE, | § IN00-05-1752 thru 1755 |
| | § |
| Plaintiff Below, | § |
| Appellee. | § |

Submitted: March 1, 2006
Decided: March 14, 2006

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

O R D E R

This 14th day of March 2006, it appears to the Court that:

1) Kenneth E. Fink, the defendant-below, appeals from the denial of his Rule 61 motion for post-conviction relief. On March 18, 2004, Fink filed a Rule 61 motion for post-conviction relief, which the Superior Court Commissioner recommended be denied in a report dated April 29, 2005. The Superior Court rejected Fink's objections and adopted the Commissioner's Report, denying his motion on October 28, 2005. Fink now appeals to this Court from the denial of his Rule 61 motion.

2) Fink claims that his defense counsel failed to raise a meritorious argument on appeal, and that that failure constituted ineffective

assistance of counsel. We review the denial of a motion for post-conviction relief based on claims of ineffective assistance of counsel to determine whether competent evidence supports the trial court's findings of fact and whether its conclusions of law are free from legal error.¹

3) In March 2000, the Office of Attorney General began investigating Fink, an attorney and member of the Delaware Bar, for misuse and for conversion of client funds for personal use.² To assist its investigation, the State obtained a search warrant for Fink's car and residence to look for client records, financial information and legal documents. The State executed the search warrant on March 21, 2000, seizing two desktop computers, two hard drives, forty-two zip disks, two CD-ROMs and three floppy disks.

4) A second search warrant, granted the following day, permitted a search of the seized computer equipment. While searching a seized CD, a police officer opened a file named "pre-teen.jpg" and discovered that it was child pornography. The State then obtained a third search warrant to search the same computer equipment for additional evidence of child pornography.

¹ *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996); *Shockley v. State*, 565 A.2d 1373, 1377 (Del. 1989).

² On June 3, 2003, Fink was disbarred. *See In re Fink*, 2003 WL 21295919 (Del. Supr.).

Execution of that third warrant revealed more than 190 images of child pornography.

5) Fink filed a pre-trial motion to suppress all of the child pornography seized during the execution of the second and third warrants. Fink argued that: (i) the discovery of the pornography resulted from a search that was beyond the scope of the second warrant, (ii) the second warrant's execution did not adhere to the guidelines outlined in its supporting affidavit, and (iii) the second warrant lacked sufficient particularity and was overbroad. Fink also claimed that the third warrant, and all evidence seized during its execution, was the tainted fruit of the overbroad execution of the second warrant. The Superior Court denied Fink's suppression motion.

6) On March 8, 2002, a jury convicted Fink of fifteen counts of Unlawfully Dealing in Child Pornography and fifteen counts of Possession of Child Pornography. Fink was sentenced to ninety-eight years at Level V, suspended after serving eight years, for thirty-five years probation.³ Fink raised seven claims of error on direct appeal, including an argument that the first warrant was vague and overbroad. He did not, however, challenge the

³ On March 24, 2004, the Superior Court reduced the Level V time from eight years to six years.

propriety of the issuance or execution of the second and third warrants. We affirmed Fink's judgments of conviction and sentence on appeal.⁴

7) To establish a claim of ineffective assistance of counsel, Fink must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficiencies in counsel's representation caused him actual prejudice.⁵ Counsel's efforts benefit from a strong presumption of reasonableness in that analysis.⁶

8) To satisfy the first prong, in the context of a failure to raise a particular claim on appeal, Fink must show that counsel was objectively unreasonable because the not-raised, nonfrivolous issue was clearly stronger than the issues that counsel did present.⁷ If Fink succeeds in such a

⁴ *Fink v. State*, 817 A.2d 781 (Del. 2003).

⁵ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997); *Dawson v. State*, 673 A.2d at 1196.

⁶ *Dawson v. State*, 673 A.2d at 1196 (citing *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990)).

⁷ *Smith v. Robbins*, 528 U.S. 259, 288 (2000). To analyze the first prong of *Strickland*, Fink urges this Court to adopt the Seventh Circuit's interpretation, which considers whether: (i) the omitted issue was significant and obvious; (ii) counsel ignored an issue that was clearly stronger than the issues actually presented; and (iii) the failure to raise the issue may have been a strategic decision by counsel. *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). The United States Supreme Court cited *Gray v. Greer* with approval as to only the second factor: namely, whether the overlooked issue was stronger than those presented. *Smith v. Robbins*, 528 U.S. at 288. Because Fink cannot demonstrate even that single consideration, it is unnecessary to reach the merits of adopting the entire *Greer* analysis.

showing, he must then establish a reasonable probability that, but for his counsel's failure to raise the issue, he would have prevailed on his appeal.⁸

9) Fink claims that a challenge to the issuance and execution of the second warrant (permitting a search of the computer equipment) was the stronger issue to raise on appeal, and that his counsel's failure to do so amounted to constitutionally ineffective assistance. Fink contends that: (i) the police seized the computer equipment without any assurance that there was financial information contained in its files; (ii) even if counsel had successfully challenged the first warrant on appeal, the second and third warrants would have remained valid, because the Superior Court's denial of the motion to suppress concerning those warrants was the law of the case; (iii) nothing in counsel's affidavit showed that a strategic decision was made not to appeal; (iv) the police officer executing the warrant did not use proper limiting searches and tools that were available to particularize electronic searches; and (v) that officer had no expertise in conducting that type of electronic search.

10) Upon review of the record and the contentions of the parties, we conclude that Fink has not established that his counsel's decision was objectively unreasonable. The Commissioner's Report, as adopted by the

⁸ *Smith v. Robbins*, 528 U.S. at 285.

Superior Court in denying Fink's Rule 61 motion, correctly performed the *Strickland* analysis and concluded that counsel's decision not to appeal the denial of Fink's motion to suppress (based on warrants two and three) was a strategic decision and not at all unreasonable under the circumstances.

11) The record supports the Commissioner's conclusions. Fink's counsel advanced seven thorough and careful arguments on appeal, including several arguments challenging the search warrant for Fink's home and car. Contrary to Fink's assertion, had counsel prevailed on the appeal of the first search warrant, it may have resulted in a suppression of the computer images, because without a warrant to search the home, there would be no seizure of any computer equipment—let alone later warrants authorizing a search of that seized equipment.⁹ Fink's counsel stated in his affidavit that before deciding not to appeal the second and third warrant issue, he reviewed the warrants, the motion, the hearing transcript, and the Superior Court's decision. He ultimately concluded that the trial court acted within its discretion in denying the underlying motion.

12) In its denial of Fink's motion to suppress, the Commissioner carefully considered the scope of the warrant to search the computer equipment, and the conduct of the officer executing the warrant, and

⁹ It is now established that Fink's appeal challenging that first warrant also lacked merit. *Fink v. State*, 817 A.2d 781 (Del. 2003).

concluded that Fink's challenges were meritless. Because Fink has not shown that his counsel's failure to appeal the denial of Fink's initial motion to suppress was an objectively unreasonable decision, we do not reach the second prong of *Strickland*, which is whether that decision actually prejudiced Fink.

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

BY THE COURT:

/s/ Randy J. Holland
Justice