

IN THE SUPERIOR COURT OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID No. 9702003987
)	
EARL EXUM)	
Defendant.)	

Submitted: December 14, 2001
Decided: January 17, 2002

UPON DEFENDANT'S *PRO SE* MOTION FOR
POSTCONVICTION RELIEF. DENIED.

ORDER

This 17th day of January, 2002, upon consideration of Defendant Earl Exum's Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 and the record in this case, it appears to the Court that:

(1) On September 10, 1998, Defendant was convicted of Possession With Intent To Deliver Heroin. On November 20, 1998, Defendant was sentenced and placed in the custody of the Department of Corrections at Supervision Level V for a period of 30 years, the first 15 years of which are a minimum-mandatory sentence.

(2) On June 12, 2001, Defendant filed a motion for postconviction relief in this Court. In his petition, Defendant raises the following three grounds in support of his motion: (i) the trial court erred in failing to give a requested *Lolly* instruction; (ii) the prosecutor's improper comments during closing argument deprived him of a fair trial; and (iii) counsel was ineffective during the trial proceeding and on direct appeal. Specifically, Defendant claims that: (1) counsel failed to object to the testimony of Officer Schmidt concerning his observations of defendant; (2) counsel failed to effectively cross-examine Officer Schmidt; (3) counsel failed to impeach Officer Schmidt's credibility; and (4) counsel failed to question Officer Schmidt concerning what, if any, statements were made by his co-defendant, James Brooks.

(3) Upon receipt of the instant Rule 61 motion, the Court directed Defendant's prior counsel and the State to file affidavits in response to Defendant's motion. Defendant's former counsel, John S. Malik, Esq., filed an affidavit on August 28, 2001. The State filed its response on September 13, 2001. Defendant thereafter filed a motion for an extension of time on October 15, 2001. On November 15, 2001, this Court granted Defendant a 30-day extension of time in which to file his reply. On December 14, 2001, Defendant filed a Motion for Enlargement of Time, which this Court denied on December 20, 2001. Defendant

filed his reply on January 4, 2002. However, due to the untimeliness of the filing, Defendant's reply has not been considered.

(4) The Delaware Supreme Court has consistently held that in reviewing a motion for postconviction relief, the Court must apply the rules governing the procedural requirements of Super. Ct. Crim. R. 61 prior to addressing the merits of the underlying claims.¹ Superior Court Criminal Rule 61(i)(4) 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 warranted in the interest of justice.”² Exceptions falling under the “interest of justice” have been “narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish [the defendant].”³

(5) Defendant's first and second claims, that (i) the trial court erred in failing to give a requested *Lolly* instruction and (ii) that the prosecutor's improper comments during closing argument deprived Exum of a fair trial, were previously ruled upon by the Delaware Supreme Court in Defendant's direct appeal of his conviction.⁴ Thus, Defendant's claims are barred unless “reconsideration of the

¹ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

² Del. Super. Ct. Crim. R. 61(i)(4).

³ *State v. Webb*, 2000 Del. Super. LEXIS 428, Cooch, J., *4 (Nov. 27, 2000)(citations omitted).

⁴ *See Exum v. State*, Del. Supr., No. 540, 1998, Berger, J. (July 19, 1999)(ORDER).

claim is warranted in the interest of justice.”⁵ Since the Defendant has not presented this Court with any argument to support reconsideration in the interest of justice, the Court declines to reconsider those claims already decided by the Delaware Supreme Court.

(6) Since a claim of ineffective assistance of counsel cannot be raised for the first time on direct appeal, such a claim is properly brought in a motion for postconviction relief pursuant to Rule 61.⁶ A review of the record reveals that this is Defendant’s first Rule 61 motion, and that it is timely filed.

(7) In order to prevail on a claim of ineffective assistance of counsel, Defendant must satisfy the two-part test set forth in *Strickland v. Washington*.⁷ Those two prongs are: (1) that defense counsel’s conduct fell below “an objective standard of reasonableness,” and (2) counsel’s actions were prejudicial, i.e., “there is a reasonable probability that, but for counsel’s errors, [defendant] would not have pleaded guilty and would have insisted on going to trial.”⁸ Further, “review of counsel’s representation is subject to a strong presumption that counsel’s

⁵ *State v. Anderson*, Del. Super., ID No. 30306671DI, Cooch, J. (Sept. 29, 1998)(ORDER).

⁶ See *State v. Mason*, Del. Super., Cr. A. No. IN98-02-0279-R1, Barron, J. (Apr. 11, 1996), Mem. Op. at 6, *citing*, Del. Super. Ct. Crim. R. 8; *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986); *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985); *appeal docketed*, Del. Supr., No. 203, 1996 (May 6, 1996).

⁷ *Strickland v. Washington*, 466 U.S. 668 (1984), *reh’g denied*, 467 U.S. 1267 (1984).

⁸ *Albury v. State*, 551 A.2d 53, 58 (Del. 1988); *Hill v. Lockhard*, 474 U.S. 52, 58 (1985).

conduct was professionally reasonable.”⁹ Defense counsel’s performance should be evaluated by eliminating “the distorting effects of hindsight” or speculation about what trial counsel could have done better.¹⁰

Under *Strickland*, Defendant must make a concrete allegation of ineffective assistance of counsel.¹¹ Conclusory allegations are legally insufficient to substantiate the claim.¹² In addition, a claim of ineffective assistance of counsel based solely on counsel’s strategic choices made after a thorough investigation of law and facts is insufficient to prove the claim that counsel’s professional performance was ineffective.¹³

(8) Defendant claims that counsel was ineffective because his attorney failed to: 1) object to the testimony of Officer Schmidt concerning his observations of defendant; 2) effectively cross-examine Officer Schmidt; 3) impeach Officer Schmidt’s credibility; and 4) question Officer Schmidt concerning what, if any, statements were made by his co-defendant, James Brooks.

⁹ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990). See also *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996), cert. denied, *Dawson v. Delaware*, 519 U.S. 844 (1996)(Counsel’s efforts . . . enjoy a strong presumption of reasonableness.)(citing *Flamer*); *Wright*, 671 A.2d at 1356.

¹⁰ *Gattis v. State*, 697 A.2d 1174, 1178 (1997).

¹¹ *Outten v. State*, 720 A.2d 547 (Del. 1998); *Dawson*, 673 A.2d at 1196 (Del. 1996).

¹² *Duffy v. State*, Del. Supr., No. 529, 1992, Horsey, J. (Jan. 27, 1993).

¹³ *Strickland*, 466 U.S. 66.

(9) After a careful review of the trial transcript and the affidavits submitted by the State and Mr. Malik, the Court makes the following findings. First, Defendant's claim that counsel failed to object to the testimony of Officer Schmidt concerning his observation of defendant is baseless, as there was no legal or factual reason to object to the testimony other than the fact that it was inculpatory.

Second, Defendant's allegation that counsel failed to effectively cross-examine Officer Schmidt is without merit. The Court finds that there is nothing in the record to support Defendant's contention.

Third, Defendant's argument that counsel failed to impeach the credibility of the testimony of Officer Schmidt is also without merit. The Court finds that there was no basis to challenge the credibility of the witness after considering the evidence presented at trial. It is settled Delaware law that allegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel."¹⁴

Finally, Defendant's contention that counsel failed to question Officer Schmidt concerning statements allegedly made by his co-defendant, James Brooks, again fails. Counsel argues, and the Court concurs, that counsel's failure to

¹⁴ *State v. Brittingham*, 1994 Del. Super. LEXIS 582, *4, Barron, J. (Dec. 29, 1994)(ORDER) (citing *Younger v. State*, 580 A.2d at 556; *Jordan v. State*, 1994 Del. LEXIS 260, *3, Walsh, J. (Aug. 25, 1994)(ORDER)).

question Officer Schmidt concerning any statements made by Brooks would have been purposeless since any such statement would have constituted hearsay. Any questions concerning statements made by Brooks would have been improper hearsay responses. Thus, it would have been inappropriate for counsel to knowingly elicit such inadmissible testimony.

(10) Because Defendant does not present the Court with any specific factual information that his counsel's conduct fell below that of reasonable professional standards or that he was prejudiced as a result of his attorney's conduct, his claim of ineffective assistance of counsel must be denied as conclusory.¹⁵

Accordingly, Defendant's Motion for Postconviction Relief is hereby **DENIED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

oc: Criminal Prothonotary
cc: Peter N. Letang, Esq.
John S. Malik, Esq.
Mr. Earl Exum

¹⁵ See *State v. Mason*, Del. Super., Cr. A. No. IN98-02-0279-R1, Barron, J. (Apr. 11, 1996)(Mem. Op.); see also *Walls v. State*, 1996 Del. LEXIS 5, *11, Holland, J. (Jan. 4, 1996)(ORDER).