

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

	STATE OF DELAWARE,	)	
		)	
v.		)	I.D. # 0603015797
		)	
	KENDAL ROBERTSON,	)	
		)	
	Defendant.	)	

**ORDER**

AND NOW, TO WIT, this 13<sup>th</sup> day of January, 2009, **IT IS**

**HEREBY ORDERED** as follows:

1. On September 13, 2006, Defendant, Kendall Robertson (“Robertson”) pled guilty to one count of Trafficking in Heroin. On February 14, 2007, this Court permitted Robertson to withdraw his guilty plea.<sup>1</sup> On July 30, 2007, Robertson’s motion to suppress was denied.<sup>2</sup> On August 7, 2007, he pled guilty to one count each of Trafficking in Heroin and Possession with Intent to Deliver

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<sup>1</sup> Robertson claimed that his plea was not knowing, intelligent and voluntary because it was not clear to him or his counsel whether the plea included dismissal of his two violations of probation. After entering the plea, when Robertson learned that his two probation violations would not be dismissed, he motioned the Court to withdraw his guilty plea.

<sup>2</sup> Opinion and Order, Docket Item (“D.I.”) 38.

Heroin.<sup>3</sup> Robertson was sentenced to eighteen years at Level V incarceration to be suspended after serving fifteen years for decreasing levels of supervision.<sup>4</sup>

2. On August 17, 2007, Robertson appealed his case to the Delaware Supreme Court. On August 22, 2007, he filed a *pro se* postconviction motion.<sup>5</sup> Because his case was on appeal to the Delaware Supreme Court, the Superior Court was without jurisdiction to consider his motion at that time. On June 2, 2008, the Delaware Supreme Court affirmed Robertson's conviction and sentence on direct appeal.<sup>6</sup> On October 16, 2008, Robertson filed a motion to amend his postconviction motion.<sup>7</sup> The Court will now consider Robertson's amended postconviction claims.

3. In his amended postconviction motion, Robertson claims three instances of ineffective assistance of counsel, all of which pertain to the presentation of his suppression motion. First, he points out that defense counsel did not file a reply to the State's Answering Memoranda pursuant to the suppression hearing scheduling order. Second, he claims that during the suppression hearing, defense

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<sup>3</sup> D.I. 39.

<sup>4</sup> Sentence Order, D.I. 41.

<sup>5</sup> Mot. for Postconviction Relief, D.I. 45.

<sup>6</sup> *Robertson v. State*, 2008 WL 2232680 (Del. June 2, 2008).

<sup>7</sup> Mot. to Amend, D.I. 58.

counsel failed to call attention to the inconsistent testimony of Officer Jodie Hunter and Officer Kevin Hunter. Third, he claims that defense counsel failed to argue that the Probation Officer did not follow proper Department of Corrections procedure.

4. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61 (“Rule 61”).<sup>8</sup> Robertson’s ineffective assistance of counsel claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a claim, even when it has not been previously raised.<sup>9</sup>
5. In order to prevail on a claim of ineffective assistance of counsel in the case of a guilty plea, a defendant must demonstrate that (i) his counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, the defendant would not have pled guilty but would have insisted on going to trial.<sup>10</sup> The defendant must make concrete allegations of

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<sup>8</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). See also *Bailey v. State*, 588 A.2d 1121, 1127 (Del. Super. 1991).

<sup>9</sup> See *Reynolds v. Ellingsworth*, 843 F.2d 712, 723 (3d Cir.1988), *cert. denied*, 488 U.S. 960 (1988).

<sup>10</sup> *Salih v. State*, 2008 WL 4762323 (Del. Oct. 31, 2008), citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1984); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

actual prejudice, and substantiate them or risk summary dismissal.<sup>11</sup> There is a “strong presumption” that counsel's representation was professionally reasonable.<sup>12</sup>

6. Robertson fails to set forth any allegations upon which the Court could find either prong of *Strickland* satisfied. He makes no argument that defense counsel’s representation fell below an objective standard of reasonableness or that but for defense counsel’s poor representation, he would not have pled guilty. For example, although the Court acknowledges that defense counsel did not file a reply to the State’s Answering Memorandum, Robertson fails to explain how filing such a reply would have caused him not to plead guilty. His second and third claims are deficient for the same reason.
7. The gist of Robertson’s argument appears to be that had defense counsel not been ineffective, his suppression motion would have been granted and he would not have pled guilty. This argument is without merit. On appeal, the Supreme Court already ruled that by pleading guilty Robertson waived any right to challenge the

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<sup>11</sup> *State v. Donohue*, 2008 WL 5206779 (Del. Super. Dec. 4, 2008).

<sup>12</sup> *Salih*, 2008 WL 4762323, at \*1.

constitutionality of the administrative search leading to his arrest.<sup>13</sup>

Upon careful review of the record, the Court is satisfied that defense counsel's performance in preparing and presenting that suppression motion did not fall below an objective standard of reasonableness.

8. Moreover, in his Truth-in-Sentencing Guilty Plea Form and during his plea colloquy, Robertson indicated that he was fully satisfied with his counsel's performance. In the absence of clear and convincing evidence to the contrary, Robertson is bound by his answers on the guilty plea form and by his testimony at the plea colloquy.<sup>14</sup>

WHEREFORE, Robertson's ineffective assistance of counsel claim fails to meet the standard set forth in *Strickland*. Thus, his motion for postconviction relief is **DENIED**.

**IT IS SO ORDERED.**

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Jan R. Jurden, Judge

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<sup>13</sup> *Robertson*, 2008 WL 2232680.

<sup>14</sup> See *State v. Stuart*, 2008 WL 4868658, \*3 (Del. Super. Oct. 7, 2008) citing *Savage v. State*, 815 A.2d 349 (Del. 2003).