

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY
COURTHOUSE
GEORGETOWN, DE 19947

January 23, 2006

Kashawn D. Weston
SCI
P.O. Box 500
Georgetown, DE 19947

RE: State of Delaware v. Kashawn D. Weston, Def. ID# 0301003687

DATE SUBMITTED: November 22, 2005

Dear Mr. Weston:

Pending before the Court are the motion of defendant Kashawn D. Weston (“defendant”) for postconviction relief filed pursuant to Superior Court Criminal Rule 61 and request for a hearing thereon. Because this Court is able to resolve the matter on the record before it, no need exists for an evidentiary hearing. This is the Court’s decision denying the postconviction relief motion.

On June 11, 2003, after a three day trial, a jury convicted defendant of the charges of possession of a firearm during the commission of a felony; possession of a firearm by a person prohibited (4 counts); maintaining a dwelling for keeping controlled substances; tampering with physical evidence; conspiracy in the second degree; possession of cocaine; endangering the welfare of a child; and possession of drug paraphernalia (2 counts). After being sentenced thereon, defendant appealed the matter to the Supreme Court. That Court affirmed the judgments

of the Superior Court. Weston v. State, Del. Supr., No. 433, 2003, Berger, J. (July 2, 2004). The Supreme Court's mandate is dated July 20, 2004.

Defendant's attorney at trial and on appeal was John F. Brady, Esquire ("trial counsel").

On June 30, 2005, defendant filed his motion for postconviction relief. In that motion, he asserts ineffective assistance of counsel.

The motion is not time-barred; it was filed within three years of the date of the Supreme Court mandate. Super. Ct. Crim. R. 61(i) and (m)(2). This is the first time defendant has had the opportunity to raise an ineffective assistance of counsel claim. Thus, none of the other procedural bars of Superior Court Criminal Rule 61(i) preclude consideration of this claim.

To establish a claim of ineffective assistance of counsel, defendant must show that trial counsel's representation fell below an objective standard of reasonableness and but for the attorney's unprofessional errors, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). With regard to the actual prejudice aspect, "[d]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694.

The Delaware Supreme Court recently has expressed the necessity of obtaining an affidavit from trial counsel where a defendant asserts claims of ineffective assistance of counsel. Guinn v. State, 882 A.2d 178 (Del. 2005); Horne v. State, Del. Supr., No. 520, 2004, Holland, J. (Aug. 5, 2005) at 5-6. The affidavit requirement is important to the first prong of defendant's burden. However, because I rule that defendant either cannot establish the prejudice prong even if he shows trial counsel was ineffective or that his claims are invalid on their face, no need

exists for trial counsel to provide an affidavit.

I now turn to the various allegations defendant makes.

1) Failure to allow defendant to testify

Defendant's first argument is that trial counsel refused to allow him to testify. Defendant states as follows:

Defendant insisted he wanted to testify, but John F. Brady, esquire [sic], told Mr. Weston that if he chooses to testify, counsel would seek to withdraw from the case. Mr. Brady told defendant that he would then have to proceed pro se or ask for appointment of another lawyer. Mr. Weston was afraid that a change of attorney in the mid-trial would be worse than not testify, especially since defendant knew of all the preparation that defense counsel had put into his defense. Defense counsel forced [sic] Mr. Weston to choose between two constitutional rights: his right to testify and his right to counsel. Defendant did not intelligently and knowingly waive [sic] his fifth amendment right to testify in his own defense, and Mr. Brady knew that defendant wanted to testify at trial.

In his moving papers, defendant states to what he wanted to testify: "Defendant wanted to testify that he did not live in the room where the drugs were found."

In the midst of trial, defendant, through counsel, moved for a mistrial on the basis of ineffective assistance of counsel. Transcript of Trial Proceedings on June 11, 2003 (Volume C) at C-14 ("TT at C-__"). Defendant complained that he was not receiving effective assistance of counsel. TT at C-35-39. His specific complaints were that trial counsel would not call the witnesses whom defendant wanted called nor would trial counsel ask the witnesses the questions defendant wanted asked. Id. The Court explained defendant was receiving effective assistance of counsel and asked defendant if he had anything further. Defendant responded, "No." TT at C-39. At that point, the Court inquired if defendant was going to testify, and after being informed he was not, the following colloquy took place:

THE COURT: Okay. It is your choice, Mr. Weston. You don't wish to get on the stand and tell your side of the story?

THE DEFENDANT: No.

THE COURT: That is your choice.

The record belies defendant's contention that he did not testify because he was concerned he was going to have to obtain a new attorney or proceed pro se. That, conclusion, however, is irrelevant to resolving this claim because the claim fails since defendant cannot meet his Strickland burdens. Defendant's only specific allegation¹ with regard to testifying is that he wanted to testify that he did not live in the master bedroom.² Defendant has not made any attempt to establish how the outcome of the trial would have been different if he had so testified. Even assuming trial counsel was ineffective for failing to allow defendant to testify, defendant has failed to show prejudice. This claim fails.

2) Failure to consult with defendant regarding grounds for appeal

Defendant explains that trial counsel did not consult with him as to what issues to raise on appeal. The only specific allegation he makes is as follows:

Counsel failed to federalized [sic] claims raised on appeal. The issue regarding insufficient evidence cited no U.S. Supreme Court authority which supports the argument, therefore denying defendant federal review of his constitution claim. No legal basis existed for trial counsel to cite to a United States Supreme Court case

when arguing that insufficient evidence existed to support convictions for certain of the crimes

¹Vague, conclusory allegations of ineffective assistance of counsel fail. Younger v. State, 580 A.2d 552, 555 (Del. 1990).

²The person who lived in the master bedroom testified defendant sometimes stayed in the room with her and sometimes stayed in another room. Another resident of the house testified defendant stayed in his bedroom, not the master bedroom.

on which defendant was convicted. Thus, trial counsel was not ineffective. Furthermore, defendant cannot show prejudice. Citing to a United States Supreme Court case would not have changed the Delaware Supreme Court's decision on the sufficiency of the evidence issue; i.e., the outcome of the proceedings would not have been different. This claim fails.

3) Failure to file pretrial motion

Defendant argues trial counsel was ineffective for failing to file a motion to dismiss Count 3 of the indictment. Although trial counsel admitted he should have filed the motion before trial, the trial court stated that it would have allowed an amendment to the indictment. Thus, the trial court would have denied the motion to dismiss even if trial counsel had timely filed that motion. TT at C-15. Consequently, defendant cannot show prejudice. This claim fails.

4) Failure to raise critical issues

Defendant argues as follows:

Trial counsel failed to object to the prosecutor's expressing his³ personal opinion on the merits of the case during closing arguments, referring to the defendant as a drug dealer, and making references as to the defendant remaining silience [sic].

The Court had the opening, closing and rebuttal arguments transcribed due to these specific allegations of prosecutorial misconduct. These allegations are completely bogus. The prosecutor did not express her personal opinion, refer to defendant as a drug dealer or make any reference to defendant remaining silent. There is absolutely nothing in the prosecutor's arguments which provide any basis for these allegations. This completely meritless claim fails.

5) Failure to order transcripts of opening and closing statements

Defendant argues that trial counsel was ineffective for not ordering the transcripts of the

³The prosecutor was female, not male.

opening and closing statements. He argues that had they been ordered, trial counsel would have reflected “numerous of [sic] instances of prosecutorial misconduct during closing arguments by the State.” He alternatively argues that it was ineffective, per se, not to order the transcripts of those arguments because their omission from the record meant he did not have a meaningful appeal.

Trial counsel had no obligation to have the opening and closing arguments transcribed unless they supported an issue on appeal. A review of the arguments, which were transcribed for this motion solely because of defendant’s factually meritless assertions of prosecutorial misconduct, shows there was absolutely no basis for raising any issues on appeal regarding the opening, closing or rebuttal arguments. This claim fails.

For the foregoing reasons, defendant’s motion is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary’s Office
Peggy J. Marshall, Esquire
John F. Brady, Esquire