

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID No. 1403007951
	)	
JONATHAN D. LOLLEY,	)	
	)	
Defendant.	)	
	)	

Submitted: November 21, 2016

Decided: January 6, 2017

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT  
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE DENIED.**

James K. McCloskey, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, Attorney for the State.

Jonathan D. Lolley, Howard R. Young Correctional Center, Wilmington, Delaware,  
*pro se.*

PARKER, Commissioner

This 6th day of January 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

**BACKGROUND AND PROCEDURAL HISTORY**

1. On April 24, 2014, Defendant Jonathan D. Lolley was indicted on the charges of drug dealing heroin, possession of a non-controlled prescription drug without a prescription and second degree conspiracy to commit drug dealing. These charges arose out of an incident that occurred on March 11, 2014.

2. In two jury trials, a Superior Court jury convicted Lolley of all three of the indicted charges. Following the first trial, on November 20, 2014, a Superior Court jury found Lolley guilty of second degree conspiracy and illegal possession of the prescription drugs. The jury could not reach a verdict on the drug dealing charge.

3. Lolley's second trial took place in May 2015 and was limited to the drug dealing charge. On May 20, 2015, the Superior Court jury found Lolley guilty of drug dealing.

4. Following the granting of the State's motion to declare Lolley a habitual offender, pursuant to 11 *Del. C.* § 4214(a), Lolley was sentenced on June 5, 2015. Lolley was sentenced to four years at Level V as a habitual offender on the drug dealing conviction and one year at Level V as a habitual offender on the second degree conspiracy conviction. The court also imposed a 30 day Level V sentence for illegal possession of the prescription drugs, suspended for 12 months of Level III probation.

5. Lolley filed a direct appeal to the Delaware Supreme Court. On February 4, 2016, the Delaware Supreme Court affirmed the conviction and sentence of the Superior Court.<sup>1</sup>

---

<sup>1</sup> *Lolley v. State*, 2016 WL 446736 (Del.).

## FACTS

6. On March 11, 2014, Lolley and Lenore Frankel were staying at the Super Lodge Motel north of New Castle, Delaware. The police were looking for Frankel as part of an investigation unrelated to this case and learned that she was at the motel. After the police knocked on Frankel's motel room door, and several minutes passed during which they heard shuffling inside the room, Frankel and Lolley opened the door and allowed the police to enter.<sup>2</sup>

7. Once inside the officers smelled burnt marijuana and saw a marijuana "blunt" on the nightstand by the bed. The police arrested Lolley and Frankel after finding 28 small bags of heroin, several empty heroin bags, \$281 in cash and prescription drugs.<sup>3</sup> Of the 28 bags of heroin, 26 were grouped into two "bundles" of 13 bags each, and 2 of the bags were loose.<sup>4</sup>

8. Lolley, who was detained in a police car, asked if he could retrieve his belongings from the room- a black duffle bag, his wallet with approximately \$281 in cash, and a blue or black Huawei cell phone.<sup>5</sup> It was in Lolley's duffle bag that the police found the Prednisone pills in a prescription drug container without any label.<sup>6</sup> Lolley admitted that the \$281 cash was his and was in his wallet.<sup>7</sup> Two more cell phones were also found in the room.<sup>8</sup> Additionally, in a post-Miranda statement, Lolley again admitted that the cell

---

<sup>2</sup> *Lolley v. State*, 2016 WL 446736, \*1 (Del.).

<sup>3</sup> *Lolley v. State*, 2016 WL 446736, \*1 (Del.).

<sup>4</sup> May 19, 2015 Trial Transcript, at pgs. 46-48.

<sup>5</sup> May 19, 2015 Trial Transcript, at pgs. 55-57, 62, 64, 74.

<sup>6</sup> May 19, 2015 Trial Transcript, at pg. 72; November 19, 2014 Trial Transcript, at pgs. 39-40, 51.

<sup>7</sup> May 19, 2015 Trial Transcript, at pgs. 55-57.

<sup>8</sup> May 19, 2015 Trial Transcript, at pgs. 58-59, 73.

phone found on the bed belonged to him, as did the duffle bag, and the wallet with the cash.<sup>9</sup>

9. The next day, the police used a software program to download the contents of Lolley's cell phone.<sup>10</sup> The phone contained text messages consistent with drug sales.<sup>11</sup> A valid search of Lolley's phone recovered an incoming message addressing Lolley by his nickname "Pug."<sup>12</sup> The State admitted into evidence a photo of a tattoo of the word "Pug" on Lolley's forearm.<sup>13</sup>

10. Another one of the cell phones seized also contained text messages consistent with drug sales.<sup>14</sup>

### **DEFENDANT'S RULE 61 MOTION**

11. On May 3, 2016, Lolley filed the subject motion for postconviction relief. In the subject motion, Lolley raised three ineffective assistance of counsel claims. Lolley claimed that: 1) defense counsel was ineffective for not challenging the authenticity of the text messages; 2) defense counsel was ineffective for not objecting to the testimony about the money without the money being admitted into evidence; and 3) defense counsel was ineffective for not challenging the State's accomplice liability theory.

12. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Lolley's ineffective assistance of counsel claims. Thereafter, the State filed a response to the motion and Lolley was permitted the opportunity to submit a reply thereto.

---

<sup>9</sup> See, Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at \*3.

<sup>10</sup> May 19, 2015 Trial Transcript, at pgs. 74-75.

<sup>11</sup> May 19, 2015 Trial Transcript, at pgs. 93-103, 123-130.

<sup>12</sup> May 19, 2015 Trial Transcript, at pgs. 96-97.

<sup>13</sup> May 19, 2015 Trial Transcript, at pg. 103.

<sup>14</sup> May 19, 2015 Trial Transcript, at pgs. 154, 165.

13. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.<sup>15</sup> The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.<sup>16</sup>

14. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>17</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance.<sup>18</sup> Moreover, there is a strong presumption that defense counsel’s conduct constituted sound trial strategy.<sup>19</sup>

15. In *Harrington v. Richter*,<sup>20</sup> the United States Supreme Court explained the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington*, the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.<sup>21</sup> The challenger’s burden on an ineffective assistance of counsel claim is to show that counsel made errors so

---

<sup>15</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>16</sup> *Id.* at 687-88, 694.

<sup>17</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>18</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>19</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>20</sup> *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>21</sup> *Id.*, at \*791.

serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel’s errors must be so serious as to deprive the defendant of a fair trial.<sup>22</sup>

16. The United States Supreme Court explained that a defendant is not guaranteed perfect representation, only a reasonably competent attorney. There is no expectation that competent counsel will be a flawless strategist or tactician. A defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.<sup>23</sup>

17. Counsel’s representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.<sup>24</sup>

18. Turning now to the subject case, whether or not defense counsel was a flawless strategist, it is clear from a review of the record that defense counsel provided active and capable advocacy. Indeed, the fact that the first jury could not reach a verdict on the drug dealing charge is reflective of the active and capable advocacy of Lolley’s defense counsel.

19. In his Rule 61 postconviction relief motion, Lolley first contends that his counsel was ineffective for failing to challenge the authenticity of the text messages that were obtained from Lolley’s cell phone. In response to this claim, defense counsel states that

---

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at \*787-792

<sup>24</sup> *Id.* at 787-88.

Lolley had admitted to possessing the cell phone in a post-Miranda interview. The police had obtained a valid warrant and searched the phone. Defense counsel did not object to the authenticity of the text messages because he did not have any good faith basis to do so.<sup>25</sup>

20. An ineffective assistance of counsel claim based on the failure to object to testimony is without merit if trial counsel lacked a legal or factual basis to object to the testimony.<sup>26</sup> Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>27</sup>

21. Counsel having determined that there was not a good faith basis to challenge the authenticity of the text messages on Lolley's cell phone cannot be deemed ineffective for not having done so. This claim is without merit.

22. Lolley's second claim is that defense counsel erred by not clarifying that the money seized was never taken into and marked into evidence. In response to this claim, defense counsel states that he did argue to the jury that the money seized from Lolley had a legitimate origin.<sup>28</sup> Defense counsel states that he did not request that the State admit the money into evidence. His decision not to do so was a strategic decision and he did not make that request because he preferred to focus on relevant matters.<sup>29</sup>

23. The record reflects that Lolley admitted that the money seized belonged to him.<sup>30</sup> The police testified that the denominations of the cash consisted of one \$50 bill, eleven

---

<sup>25</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at \*4.

<sup>26</sup> *State v. Exum*, 2002 WL 100576, at \*2 (Del.Super.), *affirmed*, 2002 WL 2017230, at \*1 (Del.).

<sup>27</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, \*2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

<sup>28</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at \*4.

<sup>29</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at \*4.

<sup>30</sup> May 19, 2015 Trial Transcript, at pgs. 56-57.

\$20 bills, two \$5 bills and one \$1 bill, which totaled \$281.<sup>31</sup> Defense counsel questioned the police officer on cross-examination about the fact that he did not photograph the money in Lolley's wallet.<sup>32</sup>

24. The decision as to whether or not to call a witness and how to examine and/or cross-examine witnesses who are called are tactical decisions.<sup>33</sup> Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>34</sup> Defendant has failed to overcome this strong presumption.

25. Lolley has failed to show how the admission of the seized money into evidence would have bolstered his defense in any way. Lolley had admitted that the money was his. The jury was already aware of the denominations of the money. Lolley has not established how the jury actually seeing the money would have furthered his defense. Lolley has failed to establish that counsel's trial decisions were deficient in any respect or that Defendant suffered any prejudice as a result thereof. This claim is without merit.

26. Lolley's third and final claim is that defense counsel was ineffective for not challenging the State's accomplice liability theory. Lolley contends that defense counsel did not challenge accomplice liability and did not challenge text messages sent by the co-defendant Frankel. In response to this claim, defense counsel states that he did challenge the State's accomplice liability/conspiracy theory in both of Lolley's trials.<sup>35</sup> Defense counsel moved for a judgment of acquittal on the basis that the State had not established a

---

<sup>31</sup> May 19, 2015 Trial Transcript, at pg. 58.

<sup>32</sup> May 19, 2015 Trial Transcript, at pgs. 63-64.

<sup>33</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

<sup>34</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>35</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at \*5.



prima facie case of drug dealing, which was denied by the court.<sup>36</sup> In fact, the first jury could not reach a verdict on the drug dealing charge, presumably due to trial counsel's arguments.

27. In the second trial, defense counsel argued that the accomplice liability instruction was not relevant, but the objection was overruled.<sup>37</sup> Specifically, defense counsel objected to the inclusion of the accomplice liability instruction on the ground that the State had presented insufficient evidence that there had been any kind of agreement between Lolley and Frankel.<sup>38</sup> The Superior Court overruled the objection, reasoning that there was sufficient evidence for the jury to infer accomplice liability.<sup>39</sup> The decision was appealed and affirmed by the Delaware Supreme Court.<sup>40</sup>

28. Defense counsel argued to the jury that Lolley was present in the motel room at the time of the arrest because of a social relationship with Frankel and not as a participant in the drug dealing.<sup>41</sup> As stated in his Affidavit in response to Lolley's Rule 61 motion, defense counsel made a strategic decision not to admit into evidence the text messages recovered from Frankel's phone, as they would have further implicated Lolley.<sup>42</sup>

29. In denying Lolley's direct appeal, the Delaware Supreme Court commented that defense counsel's strategy to challenge the accomplice liability was "... probably the

---

<sup>36</sup> May 19, 2015 Trial Transcript, at pgs. 169-170, 173-174; May 20, 2015 Trial Transcript, at pg. 3-4.

<sup>37</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at \*5; *Lolley v. State*, 2016 WL 446736, \*1 (Del.).

<sup>38</sup> *Lolley v. State*, 2016 WL 446736, \*1 (Del.).

<sup>39</sup> *Lolley v. State*, 2016 WL 446736, \*1 (Del.).

<sup>40</sup> *Lolley v. State*, 2016 WL 446736 (Del.).

<sup>41</sup> *Lolley v. State*, 2016 WL 446736, \*2 (Del.).

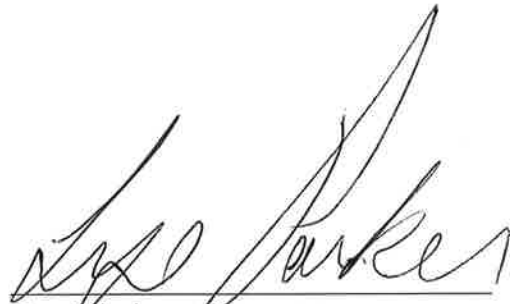
<sup>42</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at \*5; May 19, 2015 Trial Transcript, at pg. 216.

most plausible defense available considering the substantial circumstantial evidence against Defendant.”<sup>43</sup> This claim is without merit.

30. Defendant has failed to make any concrete allegations of actual prejudice and substantiate them. Defendant has failed to meet his burden to establish that defense counsel’s conduct was deficient in any regard and he has failed to establish actual prejudice as a result of any alleged deficiency. Defendant’s ineffective assistance of counsel claims are without merit.

For all of the foregoing reasons, Defendant’s Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**



Commissioner Lynne M. Parker

cc: Prothonotary  
David C. Skoranski, Esquire

---

<sup>43</sup> *Lolley v. State*, 2016 WL 446736, \*2 (Del.).