

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
(302) 856-5257

August 21, 2013

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RE: **State vs. Russell Hurst**  
**ID #1110018999A**

Dear Counsel:

On April 29, 2013 the defense filed a timely Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). On May 1, 2013 the Court established a schedule for Rule 61(g) affidavits as well as legal positions. The matter became ripe for a decision on August 16, 2013.

## The Conviction

Russell Hurst (“Defendant”) became the target of a drug investigation in the early fall, 2011. Police suspected the Defendant was involved in selling drugs at 10643 Concord Road in Seaford, Delaware.

The investigation led to obtaining a search warrant for 10643 Concord Road. The Governor’s Task Force Special Operations Team was involved in executing the warrant. Before executing the warrant, the Defendant left the house in an automobile, but returned fifteen minutes later with a female.

The warrant was then executed by the police, initially setting off a “flash bang” diversionary device. Everyone started running. The Defendant was observed running from the house with his hands in his hooded sweatshirt. During his flight he fell on his face, but never took his hands from the hooded sweatshirt. He ran behind the house, along a fence line to an adjacent property where he was apprehended by a police dog and then the police. He was the only person who fled in that direction and on that pathway. On the other side of the fence that the Defendant ran by, police found two (2) purple Royal Crown bags which contained one hundred and fifteen (115) Oxycodone pills, 5.58 grams of crack cocaine; 9.37 grams of powder cocaine in forty-one (41) baggies, a small quantity of heroin in two (2) baggies; twenty-one (21) Clonazepam pills; and marijuana packaged in

multiple baggies. He also had \$320.00 on his person.

The evidence included not only the circumstantial evidence that the drugs found along the path of flight were his, but also the direct testimony of the female that was with him when he returned to the house. She was a reluctant witness who testified as to his possession of drugs. She was at the house to obtain drugs from him in return for sexual acts.

Following his conviction, the Defendant was sentenced, based upon his record as a habitual offender, to life imprisonment.

The Defendant's conviction was affirmed. *Hurst vs. State*, 2013 WL 85109 (Del.). (Jan. 7, 2013)

### Discussion

All of Defendant's present claims are contained in Ground One. All involve claims that trial counsel was ineffective.<sup>1</sup>

The defense alleges that counsel was ineffective for not attempting to learn the identity of the informants who provided information used in the search warrant. If that information was known "Defendant Hurst would have been able to impeach the State's confidential informant at trial". The problem with this

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<sup>1</sup> Therefore, it is the Defendant's present burden to establish that his trial counsel committed professional errors or omissions that actually caused prejudice by contributing to the Defendant's conviction. *Strickland v. Washington*, 466, U. S. 668 (1984).

argument is that the informant never testified at trial. The search warrant affidavit was not evidence at trial. There was no trial evidence at all involving the informant's purchase of drugs from the Defendant which was part of the information contained in the search warrant affidavit. This allegation is frivolous and therefore is denied.

The defense also alleges that trial counsel was ineffective because trial counsel "could have explored an entrapment defense". This is a conclusory claim presumably based upon the use of informants in obtaining the search warrant. As trial counsel noted in his Rule 61(g) affidavit, there was no evidence of an entrapment as to the drugs found on the path of the Defendant's flight. This ground is denied.

The defense also claims that by not filing a Flowers Motion<sup>2</sup>, the Defendant lost the opportunity to attack the search warrant and suppress the search of 10643 Concord Road. As trial counsel notes in his Rule 61(g) affidavit, the Defendant had an existing felony warrant at the time of the search and therefore, knowing he was at the property they could have seized and arrested the Defendant on that warrant. Grabbing the Defendant didn't require the search warrant. Trial counsel notes the evidence used to convict the Defendant was not found at the residence,

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<sup>2</sup>State vs. Flowers, 316 A.2d 567 (Del. Super 1973)

but found abandoned on the other side of the fence at the back of the lot where the Defendant ran.

Any suppression effort would have failed and would not have kept the drug evidence out of the Defendant's trial. Counsel was not ineffective for failure to file a Motion to Suppress as to 10643 Concord Road. This claim is hereby denied.

The defense claims trial counsel was ineffective for not filing a Motion to Suppress. This is discussed above and is denied for these same reasons. In addition, the Court notes a suppression motion based on the four corners of the affidavit would not have been successful. With information obtained from "CS-1", surveillance was conducted. More information was obtained as to drug activity at the residence from "CS-2", a past proven reliable individual. "CS-2" executed a controlled buy of illegal drugs at the Concord Road residence. Another past proven reliable informant, "CI-3", provided information as to the ongoing drug sales at the Concord Road residence. The information in the warrant included other persons selling drugs at the residence. Another controlled buy was subsequently completed by "CI-1", involving Oxycodone pills. Then another controlled buy was completed by "CS-2".

In short, the above brief summary of the contents of the affidavit established probable cause to issue the warrant. The defense position that the warrant contains minimal information as to the Defendant's criminal activity is wrong.

The affidavit provided evidence that ongoing drug sales were taking place at the residence with others being involved. Trial counsel was not ineffective for not filing a suppression motion. Such a motion would have been denied. Therefore, this ground is denied.

The defense argues that trial counsel was ineffective for not seeking recusal of this Judge because this Judge authorized the search i.e. approved the warrant. The defense claims this Judge had information from the State which was obtained when the affidavit was read. This ground is hereby denied. The defense had this same information. Trial Judges regularly have to consider allegations and evidence that the jury does not hear. When a trial Judge grants a suppression motion as to a Defendant's confession, that Judge does not recuse himself or herself from further proceedings. Had there been a suppression motion then, of course, this Judge would not have ruled upon his own decision. The reality is that the warrant was issued on October 27, 2011 and the trial took place in the Spring of 2012. The search warrant applications and affidavits are kept secured in chambers and do not subsequently get moved to any other Court file. Therefore, unless a judge has a really good memory or a suppression motion is filed, the trial Judge would not normally connect the affidavit to the trial. Nevertheless, it just does not matter because we always deal with collateral matters as noted above.

Finally, as to this Defendant there can be no claim the Court used the

affidavit contents as to any discretionary sentencing decisions because as a “Section b” habitual offender the Court had to impose a life sentence.<sup>3</sup>

Lastly, the defense claims that trial counsel was ineffective for not calling William Collick, the owner of 10643 Concord Road, as a witness. Mr. Collick wrote a “To Whom It May Concern” letter six weeks following the Defendant’s arrest claiming he put the Royal Crown bags by the fence an hour before the police arrived and the Defendant had no knowledge of same.

Trial counsel acknowledges having a copy of the above letter. Trial counsel reports in his Rule 61(g) affidavit that he communicated with Mr. Collick’s defense attorney. Mr. Collick also had charges pending.

Mr. Collick’s defense attorney reported that (i) if called as a witness Mr. Collick would invoke his right not to testify because of his pending charges; and (ii) should he testify it would be contrary to the contents of the letter. Trial counsel learned Mr. Collick would testify that Mr. Hurst paid Mr. Collick in cash or drugs to be allowed to use the residence to sell drugs.

Having this information trial counsel was not ineffective for not calling Mr. Collick to the witness stand. Therefore, this ground is denied.

**THEREFORE**, the Defendant’s Motion for Postconviction Relief is hereby denied.

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<sup>3</sup>11 *Del. C. Section 4214.*

**IT IS SO ORDERED.**

Very truly yours,

*/s/ T. Henley Graves*

T. Henley Graves

THG/ymp

cc: Prothonotary