IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-07-01-1283-R1 IN-07-01-1284-R1
ANDREW BLAKE	)	IN-07-01-1287-R1 IN-07-01-2830-R1
	)	IN-07-01-2832-R1 IN-07-01-2858-R1
Defendant	)	
	)	ID NO. 0701006581

Submitted: February 17, 2010
Decided: May 27, 2010

MEMORANDUM OPINION

Upon Motion of the Defendant
for Post-Conviction Relief - ***DENIED***

HERLIHY, Judge

Andrew Blake was convicted in a bench trial of aggravated menacing, possession of a firearm during the commission of a felony (PFDCF), possession of a deadly weapon by a person prohibited, maintaining a dwelling for keeping or issuing controlled substances, resisting arrest, and possession of drug paraphernalia.[1] Those convictions were affirmed on appeal.[2] The mandate was issued July 11, 2008.

Factual Background

The facts surrounding Blake's convictions were briefly summarized in the Supreme Court's opinion:

> New York Police Department ("NYPD") detective, accompanied by a Wilmington Police Department detective and uniformed officer, responded at about noon to Apartment No. 5 on the second floor of an apartment building in Wilmington, Delaware. Wilmington officers had information that an individual known to them as "Quest" (Blake) resided there. The NYPD detectives were seeking Quest because he had been identified by witnesses as the shooter in an incident on New Year's Eve in Manhattan where three people were shot and wounded.
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> Several officers went to the front door of the apartment while others covered the outside of the building. The officers at the door knocked and identified themselves as police officers. They could hear movement inside the apartment, and a baby's crying that seemed to be muffled. No one responded to the door as officers continued to knock over a twenty to thirty minute period. The Wilmington detective and an NYPD detective left to get a search warrant.
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> While the officers were on their way to apply for a search warrant, one of

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[1] Prior to trial, the State nol prossed another charge of aggravated menacing, another charge of PFDCF and two charges of criminal mischief.

[2] *Blake v. State*, 954 A.2d 315 (Del. 2008).

> the NYPD detectives saw an individual in the apartment, later identified as Blake, raise the window screen in one of the windows. Blake pointed a handgun at him and challenged the officers to shoot him. The detective relayed by cell phone to the officers at the front door of the apartment that the person inside had a gun. The detectives who had left to get a search warrant were called back to the scene. The NYPD detective saw Blake crash through the window and attempt to escape. He ran about two blocks before police apprehended him.
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> Meanwhile, the officers at the door heard the muffled crying of a baby in the apartment during the incident. The NYPD detective at the front door testified that after he heard a crash like a window breaking, he heard a sound like a "boom" and then the baby's crying turn into "blood curdling" screaming. The detective testified that the officers at the front door were concerned for the infant's safety, forced open the door, and entered the apartment. They found the infant on the floor. The officers also performed a safety sweep of the apartment and saw what appeared to be a small amount of crack cocaine and other drug paraphernalia on the floor near the infant.
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> After Blake was arrested and the apartment secured, the officers left and obtained a search warrant. Part of the application for the warrant included what the officers had seen in plain view of when they performed the safety sweep of the apartment. When the officers executed the warrant, they found a handgun hidden in a toilet tank and additional controlled substances and paraphernalia in the apartment.[3]

Blake was originally represented by a Public Defender who filed a motion to suppress the warrantless search of the apartment where Blake was located. Private counsel (hereafter "trial counsel"), substituted his appearance and he too filed a motion to suppress based on the original warrantless entry.

The motion was denied following a suppression hearing. Trial counsel indicated prior to the suppression hearing that if the motion were denied, Blake wanted to waive his

[3] *Id*. at 316-17.

right to a jury trial. After the motion was denied, that request was renewed. Trial counsel and the prosecutor indicated that, involved in Blake's choice to go non-jury, was the State's decision to *nol prosse* four charges, including another charge of aggravating menacing and one PFDCF.[4]

The Court engaged in a direct colloquy with Blake concerning his choice to proceed non-jury. The colloquy was a little longer[5] than normal because he provided, initially, no verbal response to several questions.[6] Because Blake was verbally unresponsive to a few questions, the Court repeated them and permitted him to further consult with trial counsel following which verbal responses. The defendant also signed a waiver of jury trial.[7] The Court found Blake's waiver of a jury trial to be knowing, intelligent and voluntary.[8]

As noted, Blake was convicted of the remaining charges.

On appeal, Blake was represented by experienced appellate counsel from the Public Defender's Office. The only issue raised was the Court's denial of his motion to suppress.

Blake now offers these grounds for postconviction relief:

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[4] Trial Tr. at 79-80.

[5] *Id.*

[6] Blake includes that portion of the transcript in his current motion. They are transcript pages 86-87.

[7] Docket #23.

[8] Trial Tr. at 89.

(a) that the affidavit in support of the search warrant in this case allowing for the search and seizure of items (instrumentalities) at the residence where defendant resided, was based upon false and perjurous information known by the Delaware and New York State police to have been false; U.S.C.A., CONST. AMEND IV; Del. Const. art. I, § 6, N.Y. Const. art. I, § 12, and:

(b) that defendant did not knowingly and voluntarily and intelligently waive his State and Federal Constitutional right to a jury trial; U.S.C.A., Const. art. [III, § 2]; Amend. 6, and:

(c) that the defendant was denied his right under the State and Federal Constitutions to the effective assistance of defense and trial counsel in the case, prior to, during the pretrial evidentiary hearing, during the trial, and at the sentencing proceedings in this case; Del. Const., art. I, §, U.S.C.A., CONST. AMENDS VI, [XIV].[9]

He has also filed a motion for an evidentiary hearing.

Discussion

Prior to examination of Blake's claims for postconviction relief, the Court must determine if there are any procedural bars to doing so.[10] The motion was filed within one year of the mandate and is, therefore, timely. But there is a potential procedural bar. It is that Blake did not include in his grounds for appeal one of the grounds for relief proffered now: the issue of the voluntariness of his waiver of a jury trial. Whether Blake voluntarily waived his right to a jury trial is an issue Blake was capable of raising on

[9] Def.'s Mot. for Postconviction Relief at 2.

[10] *Guinn v. State*, 882 A.2d 178, 181 (Del. 2005).

appeal but did not and is barred.[11]

The transcript pages he supplied with his current motion on this claim are from the trial. The point he tries to make was known to him at the time of appeal. Appellate counsel did not raise the issue and Blake makes no claim that: (1) appellate counsel was ineffective or (2) he asked appellate counsel to raise the waiver issue and counsel did not.

Blake has shown neither procedural default nor prejudice by appellate counsel not raising this issue which if he had, would be means of relief from this bar.[12] Further, he has not shown, nor is there anything in the record to show, a miscarriage of justice of a constitutional proportion which also would be a means of relief from the procedural bar.[13]

The claim lacks merit, in any event. The Court has re-examined its colloquy with Blake and reaches the same conclusion it did at trial on July 31, 2007. Blake's waiver of jury trial was knowing, intelligent, and voluntary.

Blake's remaining grounds for postconviction relief overlap. Some of them are claims of ineffective assistance of counsel. Others, while not express claims of ineffectiveness, so clearly interrelate, the Court will review them with the claims of ineffectiveness.

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[11] Super. Ct. Crim. R. 61(i)(3).

[12] *Id*.

[13] Super. Ct. Crim. R. 61(i)(5).

An example is his challenge to the search warrant where he makes two arguments. After the incident when the police entered the apartment without a warrant, during which they saw items to be seized, then obtained a search warrant, executed it, and seized the items.[14] His complaint about the warrant is that it contained false information. The false information is that he had not been identified as a shooter in the New York incident. In his motion, Blake says he learned that only upon his extradition back to New York after this trial, and before his trial he did not know he had not been so identified. In other words, this is information he did not have at the time of his direct appeal. This ground for post-conviction relief is not procedurally barred.

Related to this claim about the warrant, Blake makes a claim of ineffective assistance of counsel. He contends counsel should have done some investigating about the identification issue. This claim of ineffectiveness is not barred as such claims are generally not considered on direct appeal.[15]

Part of his claim is that the New York police detectives who came to Delaware looking for "Quest" did not have an arrest warrant for him. That is in fact true, but that fact came out at the suppression hearing. The New York police had contacted Detective Michael Gifford of the Wilmington Police about "Quest." Gifford knew "Quest" and

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[14] Curiously, several of the police officers who had been at Blake's apartment building left to obtain a warrant for his arrest. They received a radio call about the rapidly unfolding events in the apartment and returned to the scene without getting a warrant.

[15] *Duross v. State*, 494 A.2d 1265, 168-9 (Del. 1985).

knew where "Quest" lived, which is where all this happened. Now, however, Blake denies Quest is his nickname. Yet in trial counsel's response to the current motion, he reports Blake acknowledged in their first interview that he used "Quest." Blake does not deny this in his response to trial counsel's affidavit.

Blake says trial counsel was ineffective for not checking pre-trial with people in New York about whether Blake had been identified as a shooter in the incident there. If trial counsel had checked, Blake contends, he would have learned he had not been so identified. He names no names nor provides any support for that assertion. After all four New York City detectives came to Wilmington looking for him.

But since Blake makes an ineffective assistance claim on this and other issues he, to prevail, must show (1) trial counsel's errors were so egregious that they fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a probability that the outcome of the proceeding would have been different.[16]

Even though Blake claims trial counsel did not respond to his claim of failure to investigate, he did. Trial counsel notes the obvious: the real issue was the original warrantless entry. That issue was litigated at the suppression hearing and was the one issue raised on direct appeal. The search warrant, as trial counsel notes, was replete with references to things the police saw once (properly) inside on the warrantless entry. As trial

[16] *Ayres v. State*, 802 A.2d 278, 281 (Del. 2002).

counsel states,[17] if the warrantless entry were unlawful the search warrant was invalid.

What Blake misses also is that the New York incident was the reason for the detectives trip here and going to his apartment. It was not the reason or basis for the warrantless entry. Nothing trial counsel would have learned if he investigated New York sources would have changed that even if true. In short, on this claim, trial counsel was not ineffective, and this claim is without merit. The disposition of the ineffectiveness claim disposes of his contention about the search warrant, basically for the same reasons.

Blake next makes a broad-brushed claim of ineffectiveness for all stages of the proceedings against him. He does provide some details. One is that trial counsel did not interview certain members of Blake's family prior to trial. He says if trial counsel had interviewed them, he would have learned the forced emergency entry would have been unwarranted. Blake seems to ignore the testimony of the New York City Detective Ralph Hannah that while the police were outside his apartment door, Blake's grandmother was there outside the building. She was yelling at Blake to open the door, which he did not, but as she was speaking, the police heard noises inside the apartment that prompted the officers to go inside. Hannah gave chase, after Blake jumped from the window, and caught him.

In his response to Blake's motion, trial counsel notes various family members, including Blake's grandmother, were present at the time of the suppression hearing. None

[17] State's Resp. To Def.'s Mot. for Postconviction Relief at 11.

of the relatives, counsel reports, offered to testify. The grandmother did not testify. New York City Detective Ralph Hannah testified that after the police had been at Blake's apartment for a while, the grandmother arrived. From outside, she yelled at Blake to open the door, which, like he had with the police, he did not do.[18] Under these circumstances, the Court cannot see how calling the grandmother would have helped Blake. Further, he would not open the door for her, why would he have done so for other family members? Blake does not explain that. Trial counsel cannot be faulted for not calling the grandmother or other family members.

The police were confronted with fast-moving events, and as they unfolded, Blake (who was also wanted by the Wilmington Police) was in no mood to wait, even for other family members.

The Court finds this claim of ineffectiveness to be without merit.

One of the issues in this case was whether Blake had a gun in his hand which he showed to or pointed at the police outside his apartment window. Blake testified during the suppression hearing that he was holding a cell phone and not a gun and was calling a friend. That evidence, by agreement, was carried over to the bench trial.

Trial counsel reports he asked Blake for the number of the person to whom Blake claims he was speaking before and when the police broke in. He did not or would not supply it. Counsel was also concerned that the person allegedly called may testify falsely

[18] Suppression Hr'g. Tr. 37-38.

since Blake did not identify that alleged person or his cell number.[19] In the end, Blake's ineffectiveness claim here fails to show: (1) where counsel neglected to investigate or (2) that his conduct was otherwise below any objective standard of reasonableness.

Blake's next claim of ineffectiveness is that counsel did not move to suppress a "statement" he made after being arrested and later interrogated. It was to the effect that he, Blake, should have come outside with his vest on and started shooting (demonstrating how he would have done it).[20] A motion to suppress would have been unnecessary, or denied, if made. When the State started to introduce the statement at trial, the Court interrupted the questioning to first make sure the statement was made in conformity with *Miranda v. Arizona*.[21] Trial counsel did not object and re-reading the transcript reveals no basis for doing so. Blake's claim of ineffectiveness for counsel's failure to move to suppress that statement is without merit. He cannot show a violation of any objective standard.

Under the circumstances as described in this opinion, the Court sees no reason to conduct on evidentiary hearing.

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[19] Aff. of Defense Counsel at ¶ 6,7.

[20] Suppression Hr'g Tr. at 22.

[21] Trial Tr. at 120-22; 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Conclusion

For the reasons stated herein, defendant Andrew Blake's motion for postconviction relief is **DENIED**. His motion for an evidentiary hearing and to expand the record is **DENIED**.

IT IS SO ORDERED.

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J.