

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

STATE OF DELAWARE,)
)
 v.)
)
SHAWN BUNTING,) I.D. No. 0407024013
)
 Defendant.)
)

Submitted: March 19, 2008
Decided: April 28, 2008

On Defendant Shawn Bunting's Motion to Amend, Motion for Designation
of Transcripts, Motion for Appointment of Counsel. **GRANTED IN PART.**
DENIED IN PART.

ORDER

Shawn Bunting, Defendant, *Pro Se*

JOHNSTON, J.

1. On February 2, 2005, a jury found Bunting guilty of: (1) possession with intent to distribute a non-narcotic controlled substance; (2) use of a dwelling for keeping controlled substances; (3) possession of drug paraphernalia; and (4) driving while license is suspended and/or revoked. On April 27, 2005, the State filed a motion to sentence Bunting as an habitual offender pursuant to 11 *Del. C.* § 4214(b). On April 29, 2005, the Court granted the State's motion and sentenced Bunting to life in prison. Bunting appealed his conviction to the Delaware Supreme Court. On September 7, 2006, Bunting's conviction was affirmed.

2. On October 18, 2007, Bunting filed a *pro se* motion for postconviction relief. On January 31, 2008, this Court denied Bunting's motion for postconviction relief. On March 19, 2008, Bunting filed a: (1) Motion to Amend; (2) Motion for Designation of Transcripts; and (3) Motion for Appointment of Counsel.

MOTION TO AMEND

3. Pursuant to Superior Court Rule 61(b)(6), a motion for postconviction relief "may be amended as a matter of course at any time before a response is filed or thereafter by leave of court, which shall be freely given when justice so requires."¹ In Bunting's previous

¹ Super. Ct. Crim. R. 61(b)(6).

postconviction relief motion, Bunting listed various claims of ineffective assistance of counsel. Bunting did not provide any elaboration. Bunting filed this motion for leave to amend his motion in order to explain his ineffective assistance of counsel claims. A claim of ineffective assistance of counsel constitutes a “constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceeding.”² Bunting’s motion to amend is hereby **GRANTED**. Therefore, the Court will consider Bunting’s claims for ineffective assistance of counsel.

4. To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel’s errors were so grievous that counsel’s performance fell below an objective standard of reasonableness; and (2) actual prejudice, that is, that there is a reasonable degree of probability that but for counsel’s errors, the outcome of the proceedings would have been different.³ In making a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.⁴ Although the *Strickland*

² *State of Delaware v. Morla*, 2007 WL 2566012, at *3 (Del. Super.).

³ *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989).

standard is a two-part test, the showing of prejudice is so central to this claim that “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”⁵ In other words, if the Court finds that there is no possibility of prejudice, even if a defendant’s allegations regarding counsel’s representations were true, the claim may be dismissed on this basis alone.

5. Bunting proffers nine grounds for ineffective assistance of counsel. Although Bunting was permitted to amend his motion, he provides little more than a list of vague allegations without explanation. The bulk of Bunting’s motion consists of a generalized description of recognized case law not applied to the specifics of his claims. The Court is not convinced that the actions of Bunting’s counsel actually prejudiced Bunting. However, the Court will examine each claim and explain why Bunting has failed to meet the standards for establishing prejudice under *Strickland*.⁶

6. Bunting claims his appellate counsel failed to: (i) argue ineffective assistance of counsel regarding sentence exposure and plea bargaining or explain that Bunting might be classified as a habitual offender;

⁵ *Strickland*, 466 U.S. at 697.

⁶ *Id.*

(ii) argue Bunting was denied his right to effective assistance of counsel based on trial counsel's inadequate performance due to his failure to investigate and develop mitigation evidence that would have supported his case during the sentencing proceeding; (iii) challenge the voluntariness of the consent and relevant factors determined from the totality of the circumstances surrounding the search of his residence under the 14th Amendment; (iv) argue the officers did not face any serious concerns regarding evidence that contraband was about to be removed or destroyed; (v) argue Bunting's mother did not freely and voluntarily give her consent to opening the door; (vi) argue that Bunting's mother did not sign a standard "consent to search" form for the search of the storage room; (vii) argue that it was prosecutorial misconduct to conduct side bar of prospective jurors without Bunting or a Court stenographer to transcribe colloquy; (viii) prepare the case, investigate or properly advise Bunting; and (ix) argue Bunting has the right to be confronted with witnesses against him.

7. **Grounds (i) & (ii).** Bunting alleges his appellate counsel failed to argue his trial counsel was ineffective for not: (i) explaining that Bunting may be classified as a habitual offender; and (ii) failing to investigate and develop mitigating evidence. In other words, Bunting is alleging his

appellate counsel was ineffective for not arguing his trial counsel was ineffective.

8. The Supreme Court “has consistently held it will not consider a claim of ineffective assistance of counsel on direct appeal if that issue has not been decided on the merits in the trial court.”⁷ Bunting’s ineffective assistance of counsel claim was not ripe for review before the Supreme Court. Therefore, the Court finds there was no possibility of prejudice based on grounds (i) & (ii).

9. **Grounds (iii), (iv), (v), (vi).** Bunting alleges his appellate counsel was ineffective for not challenging “the totality of the circumstances surrounding the search of residence.” Specifically, Bunting argues his mother did not give a valid consent to search, her consent was not voluntary, and the officers should have obtained a warrant.

10. On July 28, 2004, Bunting’s car and residence were searched. At the time Bunting was already on probation. Bunting’s probation officer observed him driving a motor vehicle without a license. The probation officer contacted her supervisor for approval to stop Bunting. The probation officer was given approval. Permission also was given to search Bunting’s home. With the assistance of State police, Bunting’s home was searched.

⁷ *Desmond v. State*, 654 A.2d 821, 829 (Del.1994.).

11. On appeal, Bunting challenged the warrantless search of his home. Specifically, Bunting alleged his probation officer did not follow proper procedure prior to the search. The Court found the probation officer complied with the Department of Correction's search regulations and 11 *Del. C.* § 4321(d).

12. Bunting's claim that the search of his residence was invalid is not persuasive. Probation officers may conduct a warrantless search of a probationer's residence, if conducted pursuant to State law and the 4th Amendment's reasonableness requirement.⁸ On appeal, the administrative search of Bunting's home was upheld. Therefore, Bunting has not demonstrated he was prejudiced by his counsel's failure to argue the police conducted an invalid warrentless search of Bunting's residence.

13. **Ground (viii).** Bunting alleges his counsel "failed to prepare the case, failed to investigate and failed to properly advise petitioner." Bunting does not elaborate on these allegations. Bunting must offer more than vague and conclusory allegations to support a motion for ineffective assistance of counsel.⁹

⁸ *Griffin v. Wisconsin*, 483 U.S. 868, 872-80 (1987).

⁹ *HYounger*, 580 A.2d at 555.

14. **Grounds (vii) & (ix).** Bunting’s allegation outlined in ground (vii) and (ix) are difficult to discern. Grounds (vii) & (ix) are as follows:

Not arguing or presenting it was prosecutorial misconduct of the highest order for the deputy attorney general to deprive Bunting of his Fifth, Sixth and Fourteenth Amendment right to Due Process of Law enunciated in the United States Constitution by conduction [sic] side bar of prospective jurors with trial counsel trial judge with recommendation Bunting’s presence is not needed without consent or waiver from Bunting and/or court stenographer to transcribe collguy [sic].

Not arguing or demonstrating Bunting has the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.

15. Prospective jurors usually are questioned outside the defendant’s presence for the purpose of challenges for cause. Further, Bunting’s vague assertions do not demonstrate what effect his counsel’s action had on the outcome of his case. Bunting’s vague assertions do not meet the “actual prejudice” standard as required under *Strickland*.¹⁰

16. In addition, Bunting’s counsel is not required to present all “non-frivolous issues on direct appeal.”¹¹ “Highlighting those arguments that are most likely to prevail ‘is the hallmark of effective appellate

¹⁰ *Strickland*, 466 U.S. at 697.

¹¹ *Washington v. State*, 2008 WL 697591, at *2 (Del.).

advocacy.’”¹² Bunting’s counsel chose to argue Bunting did not receive a fair trial based on statements made by various witnesses for the State.¹³ Bunting’s counsel also challenged the Superior Court’s ruling denying a motion to suppress evidence seized during a search.¹⁴ Bunting has not demonstrated with reasonable probability that his direct appeal was affected by his counsel’s failure to argue ineffective assistance of counsel at the trial stage.

MOTION FOR APPOINTMENT OF COUNSEL

17. Bunting also asked the Court to appoint counsel to pursue the Rule 61 motion. Pursuant to Rule 61(e)(1), “[t]he court will appoint counsel...only in the exercise of discretion and for good cause shown, but not otherwise.”¹⁵ Considering the Court’s findings concerning Bunting’s ineffective assistance of counsel claims, appointment of counsel is not warranted. Therefore, Bunting’s Motion for Appointment of Counsel is hereby **DENIED**.

¹² *Id.*, citing *Smith v. Murray*, 477 U.S. 527, 536 (1986).

¹³ *Bunting v. State*, 2006 WL 2587074, at *1 (Del.).

¹⁴ *Id.*

¹⁵ Super. Ct. Crim. R. 61(e)(1).

MOTION FOR DESIGNATION OF TRANSCRIPTS

18. Finally, Bunting requests transcripts of specific sections of his trial, including side-bar conferences, prayer conferences, jury instructions and opening and closing statements. While Bunting “is entitled to transcripts at State expense to pursue a direct appeal, there is no such right with respect to a postconviction motion.”¹⁶ Bunting must demonstrate a “particularized need,” to obtain transcripts for a postconviction motion.¹⁷

19. Bunting claims he needs transcripts to “glean the info therein and present a fair and accurate account of the claimed errors to the court and the context which they occurred.” Bunting offers no factual reason why a transcript of the trial proceedings would assist him. Bunting’s has not established a particularized need for transcripts. Therefore, Bunting’s Motion for Designation of Transcripts is hereby **DENIED**.

CONCLUSION

20. Defendant’s Motion to Amend is hereby **GRANTED**. Defendant’s Motion for Postconviction Relief based on ineffective assistance of counsel is hereby **DENIED**. Defendant’s Motion for

¹⁶ *HUnited States v. MacCollum*, 426 U.S. 317, 325-26 (1976)H.

¹⁷ *HFreeman v. State*, 2003 WL 1857605, at *1 (Del.)H.

Appointment of Counsel is hereby **DENIED**. Defendant's Motion for
Designation of Transcripts is hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston