

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

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0411013992
	)	
TYRONE L. GUINN,	)	
	)	
Defendant.	)	

Submitted: April 25, 2006  
Decided: May 25, 2006

**ORDER**

**UPON DEFENDANT’S MOTION FOR NEW TRIAL  
AND MOTION FOR POST CONVICTION RELIEF**

**DENIED**

Upon review of Tyrone L. Guinn (“Defendant”)’s Motions for New Trial, and Ineffective Assistance of Counsel and the record, it appears to the Court that:

1. Defendant was found guilty of Assault in a Detention Facility following a jury trial on May 20, 2005. Effective July 1, 2005, Defendant was sentenced to 8 years at Level V (suspended after 3 years); 3years at Level IV Halfway House (suspended after 1 year); and 2 years at Level III. The first year of this sentence is a mandatory term of incarceration.

2. The current *pro se* Motion for New Trial was filed on March 27, 2006; and the current *pro se* Motion for Postconviction Relief was filed on April 25, 2006. Defendant argues that he is entitled to a new trial, and to postconviction relief, because his attorney failed to provide him with effective representation at trial. Defendant asserts ineffective assistance of counsel on four grounds: (i) failure to subpoena/cross-examine defense witnesses; (ii) failure to “object when I told her to” because one of the state witnesses was not duly sworn before taking the stand; (iii) presenting Defendant’s case to the judge and state attorney during side bars and during Judgment of Acquittal without Defendant being present during the proceedings; and (iv) depriving Defendant of his rights by not advising him of his rights, not informing Defendant what was next after the notice of appeal, and filing briefs with the Supreme Court before sending Defendant a copy. In his postconviction relief motion, Defendant argues two additional grounds: (v) illegal sentence of probation; and (vi) the trial court erred as a matter of law when it denied Defendant’s motion for judgment of acquittal.

3. 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.<sup>1</sup> In making a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.<sup>2</sup> Although the *Strickland* 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 ineffective claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”<sup>3</sup> 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.

4. Defendant’s grounds (i) and (iii) of ineffective assistance of counsel concern counsel’s trial strategy. Defense counsel’s tactical decisions during trial do not entitle Defendant to a new trial on the basis of ineffective assistance of counsel, absent showing of prejudice. Defendant makes no assertions regarding what might have happened if purported defense witnesses had been subpoenaed or if other enumerated witnesses had been cross-examined. Nor does Defendant specify any

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<sup>1</sup>*Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

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

<sup>3</sup>*Strickland*, 466 U.S. at 697.

prejudice that could have been prevented if counsel had presented the case in Defendant's presence, instead of arguing certain points at sidebar. There is no support for Defendant's assertions in the record.

5. The Court sees no reason to second-guess the strategic decisions of Defendant's counsel regarding: cross-examination; defense witness selection; or sidebar arguments. There is no evidence that Defendant's attorney's conduct fell below reasonable professional standards, or that the attorney's conduct caused Defendant actual prejudice. Defendant, therefore, has failed to carry his burden of showing ineffective assistance of counsel under *Strickland* on grounds (i) and (iii).

6. Ground (ii) of Defendant's assertion of ineffective assistance of counsel clearly is without merit. Defendant claims that counsel did not object when one of the material witnesses, David Phillips, was not duly sworn before testifying. The trial transcript for May 19, 2005, however, demonstrates that Sergeant David Phillips was duly sworn before he testified.

7. In ground (iv), Defendant asserts that counsel deprived Defendant of his rights by not keeping him informed of such rights, and of the appeals process. As examples of ineffectiveness, Defendant asserts that counsel: (a) did not advise him of his rights after the notice of appeal; and (b) filed briefs before providing Defendant with a copy. Defendant, however, does not mention what rights he was not apprised

of or how his case would have been affected. Defendant also does not allege how providing him with a copy of a brief before filing would have impacted the outcome of his case.

8. The two part *Strickland* test leads to a “strong presumption that the representation was professionally reasonable.”<sup>4</sup> Allegations of ineffective assistance must be concrete, and must find adequate support in the record.<sup>5</sup> According to the trial transcript for May 20, 2005, the Court addressed Defendant in open court, and asked: “Are you satisfied with your attorney’s representation of you?” Defendant replied: “Yes, I am.”

9. “It is settled Delaware law that allegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel.”<sup>6</sup> Because Defendant does not present the Court with any evidence that his counsel’s conduct fell below that of reasonable professional standards or that he was prejudiced as a

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<sup>4</sup>*Flamer v. State*, 585 A.2d 736, 753 (Del. Super. 1990).

<sup>5</sup>*See Dawson v. State*, 673 A.2d 1186, 1196 (Del. Super. 1996); *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>6</sup>*State v. Brittingham*, Del. Super., Cr. A. No. IN91-01-1009-R1, Barron, J., (Dec. 29, 1994)(ORDER) at 3 (citing *Younger v. State*, 580 A.2d at 556; *Jordan v. State*, Del. Supr., No. 270, 1994, Walsh, J. (Aug. 25, 1994)(ORDER)).

result of his attorney's conduct, his claim of ineffective assistance of counsel also must be denied as conclusory.<sup>7</sup>

10. Having found that Defendant failed to meet the *Strickland* test, the Court concludes that Defendant is not entitled to a new trial on the grounds of ineffective assistance of counsel.

11. Ground (v) of Defendant's postconviction relief motion (illegal sentence of probation) is wholly without merit. Defendant claims: "I was given 3 years of probation over the limit for my charge." The statutory range for Assault in Detention Facility: Bodily Emissions, Class D felony is zero to 8 years at Level V. Defendant was sentenced to 8 years at Level 5, the first year is a mandatory term, suspended after 3 years for 1 year at Level 4 Halfway House, followed by 2 years Level 3. Absent specifically enumerated public safety concerns, the period of probation for a violent felony is two years. The period of probation does not include the portion of the sentence designated to be served at Level 4.<sup>8</sup> Therefore, Defendant's probationary period is 2 years, consistent with statutory mandate and sentencing guidelines.

12. In Ground (vi) of his postconviction relief motion, Defendant claims that the trial court erred as a matter of law when it denied his motion for Judgment of

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<sup>7</sup>See *Walls v. State*, Del. Supr., No. 59, 1995, Holland, J. (Jan. 4, 1996)(ORDER) at 7.

<sup>8</sup>11 Del. C. § 4333(g)(2).

Acquittal, because the State failed to present sufficient evidence that Defendant struck Officer Shannon with bodily fluid.

13. On a motion for postconviction relief, the Court applies procedural standards before considering the merits of the substantive claims for relief.<sup>9</sup> Superior Court Criminal Rule 61(i)(3) provides:

- (3) Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
  - (A) Cause for relief from the procedural default and
  - (B) Prejudice from violation of the movant's rights.

This provision bars from consideration any claim, other than the claim of ineffective assistance of counsel, that was not raised in the proceedings unless the movant establishes both cause and actual prejudice.<sup>10</sup> Defendant presents no legal argument challenging the denial of his motion for acquittal. Further, Defendant has neither acknowledged nor complied with the cause and prejudice standard required to overcome the procedural default. Therefore, Defendant's ground (vi) is procedurally barred.

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<sup>9</sup>*Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>10</sup>*Younger v. State*, 580 A.2d 552, 554 (Del. 1990); *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

**THEREFORE**, Defendants' Motions for New Trial, and for Postconviction Relief are hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY'S OFFICE - CRIM. DIV.