IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH DICKINSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	**No. 484, 2012**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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

STATE OF DELAWARE'S ANSWERING BRIEF

MARIA KNOLL (ID No. 3425)
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: November 15, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

NATURE AND STAGE OF THE PROCEEDINGS

The Appellant, Joseph Dickinson ("Dickinson"), was arrested on January 13, 2009 and subsequently charged, by indictment, with one count of Attempted Robbery First Degree, one count of Burglary Second Degree, one count of Possession of a Firearm During the Commission of a Felony (PFDCF), four counts of Possession of a Firearm by a Person Prohibited (PFBPP), one count of Possession of a Weapon with an Obliterated Serial Number, one count of Possession of a Destructive Weapon, one count of Conspiracy Second Degree, and one count of Resisting Arrest (misdemeanor). DI 1, 2. After Superior Court severed the Possession of Weapon with Obliterated Serial Number and PFBPP counts, jury trial began on September 16, 2009. DI 33, 36. On September 18, 2009, Dickinson was convicted of Attempted Robbery First Degree, Burglary Second Degree, PFBPP, Possession of a Destructive Weapon and Conspiracy Second Degree.[1] DI 36. As to Attempted Robbery First Degree, Superior Court sentenced Dickinson as a habitual offender to life, pursuant to DEL. CODE ANN. tit. 11, § 4214(b). For his remaining convictions, Dickinson was sentenced to eight years of incarceration

[1] The State entered a *nolle prosequi* on the Resisting Arrest charge on September 17, 2009. DI 36.

suspended after six years for two years of probation. (A10-12). This Court affirmed his conviction on December 8, 2010.[2]

On December 6, 2011, Dickinson filed a timely motion for postconviction relief claiming ineffective assistance of counsel and due process violations because trial counsel failed to request an accomplice "level of liability" jury instruction.[3] After receiving an affidavit from trial counsel (B1-5), the Superior Court denied Dickinson's motion on August 17, 2012.[4]

Dickinson filed a timely appeal and opening brief. This is the State's Answering brief.

---

[2] *Dickinson v. State,* 8 A.3d 1166 (Del. Dec. 8, 2010).
[3] *State v. Dickinson*, 2012 WL 3573943, *1 (Del. Super. Ct. Aug. 17, 2012).
[4] *Id.*

SUMMARY OF THE ARGUMENTS

I. Arguments I and II are DENIED. As this Court has previously decided, trial counsel's failure to request an accomplice "level of liability" jury instruction pursuant to *Allen v. State*, in light of his "all-or-nothing" defense, was a strategic decision.[5] Dickinson fails to show that trial counsel's failure to request the instruction fell below an objective standard of reasonableness as required by *Strickland v. Washington*. Nor can he show prejudice. Because Dickinson provides no support for his claim of professional error on the part of his trial counsel or any basis for his claim of error on the part of the Superior Court in denying his postconviction motion, he does not warrant relief.

---

[5] *Dickinson*, 8 A.3d at 1169.

STATEMENT OF FACTS[6]

In January 2009, a confidential informant told Wilmington Police Detective Paul Ciber that Oscar Johnson was planning to commit a robbery. Because Johnson had not selected the location of the robbery, Ciber and other police officers rented a room at the Fairview Inn and set it up to look as if the occupant was a drug dealer. The informant called Johnson and told him a drug dealer was working out of that room and that the dealer had $25,000. Johnson told the informant to pick him up. Then Johnson called two friends, Charles Thomas and Joseph Dickinson, to join in the planned robbery. Johnson, the confidential informant, Thomas and Dickinson drove in two cars to Haynes Park, where they discussed the plan. Dickinson drove Johnson and Thomas to a salvage yard next to the Fairview Inn, and the confidential informant drove into the hotel parking lot. Dickinson positioned his car facing Route 13 and waited while Johnson and Thomas, carrying Dickinson's shotgun, put on ski masks and walked to the designated room. At about the time they realized there was nothing to take, the SWAT team arrived and threw a flash grenade. Dickinson saw the flash and tried to drive away, but was arrested at the scene. When the police

[6] These facts are taken verbatim from this Court's decision in *Dickinson,* 8 A.3d at 1167-68.

searched Dickinson's car, they found shotgun shells and the bag used to carry the shotgun.

Dickinson did not testify at trial. He argued that Thomas and Johnson were the ones who committed the crimes and that they testified against Dickinson in return for their pleas. Dickinson did not ask for an accomplice liability instruction. Instead, he asked for an instruction that accomplices' testimony should be viewed with extreme caution.

ARGUMENT

I. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DICKINSON'S MOTION FOR POSTCONVICTION RELIEF, AS DICKINSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS MERITLESS

QUESTION PRESENTED

Whether the Superior Court abused its discretion in denying Dickinson's motion for post-conviction relief after finding that counsel was not ineffective for failing to request an accomplice "level of liability" jury instruction?[7]

STANDARD AND SCOPE OF REVIEW

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion.[8] Questions of law are reviewed *de novo*.[9]

MERITS OF THE ARGUMENT

Dickinson claims that trial counsel's lack of knowledge regarding and failure to request an accomplice "level of liability" jury instruction fell below the objective standard of reasonableness required by *Strickland v. Washington*,[10] and thus amounted to ineffective assistance of counsel. Dickinson claims

---

[7] The State is addressing Dickinson's two arguments in one section because they are both disposed of by one question: Whether Dickinson should have requested and received lesser included offenses and jury instructions pursuant to *Allen v. State*, and DEL. CODE ANN. tit. 11, § 274. *Allen v. State*, 970 A.2d 203 (Del. 2009).

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

[9] *Gattis v. State*, 955 A.2d 1276, 1280-81 (Del. 2008).

[10] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

that trial counsel rendered ineffective assistance in this regard and "so infected the entire trial that the resulting conviction violates due process."[11]

In order to succeed in an ineffective assistance of counsel claim a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[12] There is a strong presumption that the legal representation was professionally reasonable.[13] As such, mere allegations will not suffice; instead, a defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.[14]

Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant established prejudice.[15] The first consideration in the "prejudice" analysis alone "requires more than a showing of theoretical possibility that the outcome was

---

[11] Op Brf. at 28.
[12] *Strickland*, 466 U.S. at 694.
[13] *Flamer v. State*, 585 A.2d 736, 753-44 (Del. 1990) (citations omitted).
[14] *Younger*, 580 A.2d at 556.
[15] *Strickland*, 466 U.S. at 697.

affected."[16] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[17] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[18]

In order to satisfy the first prong of the *Strickland* inquiry, a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[19] Dickinson has the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[20] Dickinson fails to satisfy both prongs of the *Strickland* analysis and thus, Superior Court properly denied his claim of ineffective assistance of counsel.

The State prosecuted Dickinson as an accomplice to a robbery pursuant to DEL. CODE. ANN. tit. 11, § 271. Both at his final case review and before his trial began, Dickinson explicitly rejected an offer to plead guilty to Attempted Robbery Second Degree, PFDCF, and Possession of a Destructive Weapon which included an acknowledgement that he was eligible to

---

[16] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).
[17] *Strickland*, 466 U.S. at 695.
[18] *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011)(*quoting Strickland*, 466 U.S. at 693).
[19] *Strickland*, 466 U.S. at 689 (citing *Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955)).
[20] *Richter*, 131 S.Ct at 787 (quoting *Strickland*, 466 A.2d at 687)).

be sentenced as an habitual offender pursuant to 11 Del.C. § 4214(b). As part of that plea offer, the State agreed to move to declare Mr. Dickinson an habitual offender pursuant to § 4214(a) thus avoiding a life sentence under § 4214(b), and to recommend no more than a total of ten years incarceration on all charges.[21] Dickinson twice rejected this plea and informed counsel and the Superior Court that he wished to proceed to trial.[22]

As this Court previously noted, at trial Dickinson took an "all-or-nothing" defense approach, arguing that he never left his car and alleging that he was only giving his co-defendants a ride to buy drugs.[23] Dickinson tried "to convince the jury that he was an innocent bystander, and not guilty of any level of offense."[24] In his affidavit, trial counsel averred that requesting an accomplice "level of liability" instruction would have resulted in Dickinson arguing "alternative inconsistent defense theories," thus "diluting a single defense theory and run[ning] the highly significant risk of any defense theory losing credibility in the eyes of the jury."[25]

---

[21] *Dickinson*, 2012 WL 3573943, at *1 and *8.
[22] *Dickinson*, 2012 WL 3573943, at *1; *See Attorney Affidavit* at ¶5. (B-2).
[23] *Dickinson*, 8 A.3d at 1168.
[24] *Id.*
[25] *See Attorney Affidavit* at ¶ 7 (B-3); *see also Chrichlow v. State*, 2012 WL 3089403, *2 (Del. July 30, 2012) (pursuing an accomplice "level of liability" jury instruction would have

Superior Court correctly determined that Dickinson failed to rebut the presumption that not requesting an accomplice level of liability instruction was reasonably professional trial conduct.[26] Trial counsel structured arguments consistent with Dickinson's desire to employ an "all-or-nothing" defense.[27] To that end, trial counsel requested and was granted a jury instruction pursuant to *Bland v. State*,[28] which effectively directed jurors to view accomplice testimony with "suspicion and great caution."[29] Trial counsel specifically did not request that the jury consider lesser-included offenses. By declining to request lesser-included offenses, trial counsel essentially considered and decided against an accomplice "level of liability" instruction.[30] Indeed, in his affidavit, trial counsel stressed that strategically, counsel was against requesting, and Dickinson did not request, that the jury consider lesser-included offenses.[31] Superior Court's properly determined that trial counsel reasonably declined to request a lesser included offense instruction to avoid diluting the credibility of the

---

undermined defendant's "all or nothing" approach and weakened his case).

[26] *Dickinson*, 2012 WL 3573943, at *7

[27] *Id.*

[28] 263 A.2d 286 (Del. 1970)

[29] *Id.*

[30] "[T]he 11 Del. C. § 274 accomplice level of liability instruction recognized in Allen "acts like a lesser-included offense instruction - it gives the jury a middle ground on which to find the defendant guilty." *Dickinson*, 8 A.3d at 1168.

[31] *See Attorney Affidavit* at ¶ 8. (B-3).

"all or nothing" defense."[32] The fact that trial counsel was admittedly unaware of the *Allen* decision and did not discuss it with Dickinson does not change the *Strickland* analysis applicable to Dickinson's claim.[33]

Trial counsel's representation was well within the bounds of reasonableness, "irrespective of whether strategic decisions resulted from counsel's lack of awareness of a recent court decision or deliberate trial strategy."[34] Dickinson's current dissatisfaction with counsel is nothing more than regret that his chosen defense did not succeed. Dickinson only speculates that had the jury received an accomplice "level of liability" instruction, it would have returned a different verdict.[35] Dickinson fails to substantiate a claim of ineffective assistance of counsel.

To the extent that Dickinson argues that the failure of trial counsel to request an accomplice "level of liability" instruction amounted to a violation of his constitutional rights to due process and a fair trial, he is mistaken.

---

[32] *Id.*

[33] Specific jury instructions are not held to be among a defendant's fundamental criminal trial rights, rather jury instructions fall within trial strategy which, so long as objectively reasonable, remain counsel's responsibility. *See Dickinson*, 2012 WL 3573943, at *7.

[34] *Id.* at *6.

[35] *Id.* at *8.

In *Chrichlow v. State*,[36] this Court ruled that in light of defendant's "all or nothing" defense, it was a professionally reasonable strategic decision, not ineffectiveness, for trial counsel to refrain from requesting an accomplice "level of liability" instruction.[37] Because the Court found no professional error, Chrichlow's accompanying constitutional claim was found to be meritless.[38] Similarly, as already discussed, Dickinson provides no support for his claim of professional error on the part of his trial counsel or any basis for his claim of error on the part of the Superior Court in denying his postconviction motion. Dickinson's claim is without merit.

---

[36] 2012 WL 3089403 (Del. July 20, 2012).
[37] *Id.* at *2.
[38] *Id.* at *2.

CONCLUSION

For the reasons and upon the authorities set forth herein, Dickinson's convictions should be affirmed.

/s/ Maria T. Knoll
Maria T. Knoll (ID No. 3425)
Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
Maria.knoll@state.de.us

DATE: November 15, 2012