

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE, )  
 )  
 ) Plaintiff, )  
 )  
 )  
 v. ) Cr. ID No. 1405005615  
 )  
 ) RAHEEM D. HARRIS, )  
 )  
 ) Defendant. )  
 )

Submitted: August 8, 2017  
Decided: November 14, 2017

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT  
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE DENIED.**

Mark A. Denney, Jr., Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, Attorney for the State.

John F. Kirk, IV, Esquire, Gonser and Gonser, P.A., Attorney for Defendant Raheem  
Harris.

PARKER, Commissioner

This 14th day of November 2017, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

**BACKGROUND AND PROCEDURAL HISTORY**

1. On July 7, 2014, Defendant Raheem D. Harris was indicted on one count of Possession of a Firearm by a Person Prohibited ("PFBPP").
2. The matter was tried before a Superior Court jury on November 12, 2014. The parties stipulated that Harris was a person prohibited from possessing a firearm or deadly weapon.<sup>1</sup> On November 12, 2014, following the trial, Harris was found guilty of PFBPP.
3. On December 12, 2014, Harris was sentenced to ten years of Level V incarceration, suspended after five years, followed by decreasing levels of supervision.
4. Harris filed a direct appeal to the Delaware Supreme Court. On July 8, 2015, the Delaware Supreme Court affirmed the conviction and sentence of the Superior Court.<sup>2</sup>

**FACTS**

5. The testimony at trial established that, around 6:00 a.m. on May 8, 2014, the Wilmington Police Department executed a search warrant for an apartment in the City of Wilmington.<sup>3</sup> The apartment was leased by Harris' girlfriend, who lived there with her young son. Harris did not live in the apartment. He lived in the apartment across the hall with his mother. The target of the officers' search warrant was Harris' cousin, Jamir. When the officers executed the warrant, the only occupants of the apartment were Harris, his girlfriend, and her son.<sup>4</sup>

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<sup>1</sup> See, Superior Court Docket No. 12.

<sup>2</sup> *Harris v. State*, 2015 WL 4164837 (Del.).

<sup>3</sup> *Harris v. State*, 2015 WL 4164837, \*1 (Del.).

<sup>4</sup> *Harris v. State*, 2015 WL 4164837, \*1 (Del.).

6. After the officers entered the apartment, Harris and his girlfriend were placed in custody and seated in the living room while the officers conducted the search.<sup>5</sup> During the search, the officers found a loaded 9mm firearm under the mattress where the two had been sleeping.<sup>6</sup> An officer read Harris his *Miranda* rights. Harris told the officer that the gun was his, but then invoked his right to remain silent and did not answer any other questions.<sup>7</sup> The gun was processed but no fingerprints or DNA was recovered. Harris was charged with one count of PFPBB. The parties stipulated that he was a person prohibited from possessing a firearm. Harris did not testify at trial. The jury found him guilty.<sup>8</sup>

### **DEFENDANT'S RULE 61 MOTION**

7. On August 11, 2015, Harris filed the subject motion for postconviction relief. A briefing schedule was entered. Trial counsel submitted an Affidavit responding to Harris' ineffective assistance of counsel claims and the State filed a response to Defendant's motion.

8. Thereafter, Harris filed a motion requesting the appointment of counsel.<sup>9</sup> The motion was granted.<sup>10</sup> On or about December 7, 2016, counsel was appointed. A supplemental briefing schedule was entered. Harris' Rule 61 counsel filed an amended motion for postconviction relief and the State filed a supplemental response thereto.

9. On August 8, 2017, this motion was assigned to the undersigned Commissioner.

10. In the subject motion, Harris raised three ineffective assistance of counsel claims. Harris claimed that: 1) defense counsel was ineffective for not filing a motion to suppress

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<sup>5</sup> *Harris v. State*, 2015 WL 4164837, \*1 (Del.).

<sup>6</sup> *Harris v. State*, 2015 WL 4164837, \*1 (Del.).

<sup>7</sup> *Harris v. State*, 2015 WL 4164837, \*1 (Del.).

<sup>8</sup> *Harris v. State*, 2015 WL 4164837, \*1 (Del.).

<sup>9</sup> Superior Court Docket No. 33.

<sup>10</sup> Superior Court Docket No. 35.

the inculpatory statement made by him at the time of the arrest; 2) defense counsel was ineffective for not exploring on cross-examination of the arresting officer the timing of the *Miranda* warnings given to Mr. Harris prior to making the inculpatory statement; and 3) defense counsel was ineffective for not exploring the issue of Mr. Harris' location as it related to the proximity of the recovered firearm.

11. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.<sup>11</sup> The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.<sup>12</sup>

12. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>13</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.<sup>14</sup> Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>15</sup>

13. In *Harrington v. Richter*,<sup>16</sup> the United States Supreme Court explained the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In

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<sup>11</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>12</sup> *Id.* at 687-88, 694.

<sup>13</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>14</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>15</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>16</sup> *Harrington v. Richter*, 131 S.Ct. 770 (2011).

*Harrington*, the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.<sup>17</sup> The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.<sup>18</sup>

14. Counsel's representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.<sup>19</sup>

15. Turning now to the subject case, Harris was charged with PFBPP. In order to establish this claim, the State needed to prove that: 1) Harris was a person prohibited, and 2) he was in possession of a firearm.<sup>20</sup> As to the first element of this claim, it was undisputed that Harris was a person prohibited and the parties so stipulated at trial. As to the second element, Harris admitted at the time of his arrest that the firearm was his. This case was not a close call. Harris' admission that the firearm was his established the remaining element that needed to be satisfied to support a conviction.

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<sup>17</sup> *Id.*, at \* 791.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 787-88.

<sup>20</sup> November 12, 2014 Trial Transcript, at pgs. 51-52.

16. In his Rule 61 postconviction relief motion, Harris contends that his trial counsel was ineffective for failing to file a suppression motion to exclude the statement made by him at the time of his arrest that the firearm was his (Claim One); and that his counsel was also ineffective for failing to explore on cross-examination of the arresting officer the timing of the *Miranda* warnings given to Harris at the time of his arrest (Claim Two).

17. The arresting officer testified on direct examination that when executing the search warrant a loaded 9 mm firearm was found under the mattress of the bed where Harris and his girlfriend had been sleeping. The arresting officer read Harris his *Miranda* rights. Harris then told the officer that the gun was his. When the officer tried to obtain more detailed information about the firearm, Harris invoked his right to remain silent and did not answer any other questions.<sup>21</sup>

18. The record further reflects that on cross-examination, the arresting officer reaffirmed his testimony. On cross-examination, the arresting officer reaffirmed that he advised Harris of his *Miranda* rights. That Harris stated he understood his rights. That Harris was then asked about the firearm. That Harris admitted the firearm was his. That Harris then stated that he did not wish to speak anymore and invoked his right to remain silent.<sup>22</sup>

19. The timing of the *Miranda* warnings was testified to by the arresting officer on direct examination and reiterated on cross-examination. There is nothing in the record to suggest that the arrest officer's testimony would have differed in any respect no matter how many times trial counsel chose to belabor this point. It does not appear that any additional examination on this point would have benefited Harris to any extent.

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<sup>21</sup> November 12, 2014 Trial Transcript, at pg. 19.

<sup>22</sup> November 12, 2014 Trial Transcript, at pgs. 22.

20. In defense counsel's Affidavit in response to Harris' Rule 61 motion, defense counsel states that he did not file a suppression motion or otherwise attempt to develop any alleged *Miranda* violation, because based on his conversations with Harris about the circumstances and facts giving rise to this charge, counsel did not believe there was any good faith basis to do so.<sup>23</sup>

21. Contrary to Harris' present contention that he was not given his *Miranda* warnings prior to claiming ownership of the firearm, that does not appear to be Harris' contention at the time of the incident. As trial counsel represents in his Affidavit, based on trial counsel's discussions with Harris about the facts and circumstances leading to the charge, counsel had no good faith basis to believe that Harris was not given *Miranda* warnings before he admitted that the firearm was his to the arresting officer.

22. Moreover, on direct appeal, Harris contended that his post-*Miranda* statement should have been suppressed because it was not recorded. The Delaware Supreme Court already held on Harris' direct appeal that there was no basis to suppress Harris' statement based on the fact that it was not recorded.<sup>24</sup>

23. An ineffective assistance of counsel claim based on the failure to file a suppression motion and/or develop testimony on cross-examination is without merit if trial counsel lacked a legal or factual basis to do so.<sup>25</sup> If the underlying basis for a suppression motion is believed to be meritless, an attorney cannot be faulted for not asserting it.<sup>26</sup> Conclusory,

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<sup>23</sup> Superior Court Docket No. 32- Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.

<sup>24</sup> *Harris v. State*, 2015 WL 4164837, \*2 (Del.).

<sup>25</sup> *State v. Exum*, 2002 WL 100576, at \*2 (Del.Super.), *affirmed*, 2002 WL 2017230, at \*1 (Del.).

<sup>26</sup> *See McAllister v. State*, 2010 WL 3398949, \*2 (Del. 2010).

unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>27</sup>

24. Defense counsel having determined that there was not a good faith basis to challenge the timing of the *Miranda* warnings and Harris' incriminating statement cannot be deemed ineffective for not having done so. Claims One and Two are without merit.

25. Harris' remaining claim is that defense counsel was ineffective for failing to explore the issue of Harris' location as it related to the proximity of the recovered firearm. In the State's opening statement, the prosecutor stated that the firearm was found under the mattress where Harris had been sleeping. According to Harris, he was standing in the hallway outside of the bedroom when the police first entered the apartment

26. Harris further contends that if trial counsel had properly cross-examined the arresting officer about Harris location in relation to the firearm, trial counsel would have been able to attempt to disprove the firearm was "directly under" Harris and therefore constructively possessing it. In closing argument, the prosecutor stated that the firearm was found "directly under" where Harris was sleeping and that assertion went uncontested.

27. In response to this claim, defense counsel in his Affidavit represents that he did object to the State's opening statement because counsel did not consider the statement as being a violation of Harris' trial rights.<sup>28</sup>

28. It is undisputed that the firearm was found under the mattress where Harris and his girlfriend had been sleeping moments before the police officers entered the apartment to execute a search warrant. Harris admitted the firearm was his.

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<sup>27</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, \*2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

<sup>28</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.



29. Whether the prosecutor said Harris was sleeping on the bed at the time the firearm was found under the mattress rather than that he had been sleeping on the bed moments before but had gotten up at the time the police officers entered the apartment, or whether the firearm was directly under the mattress where Harris was sleeping, or the firearm was more in the middle, or more to the other side, appears to be of little consequence and does not appear that it would have had any effect on the outcome of the trial. Harris admitted the firearm was his.

30. The decision as to whether or not to call a witness and how to examine and/or cross-examine witnesses who are called are tactical decisions.<sup>29</sup> Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>30</sup> Defendant has failed to overcome this strong presumption.

31. Harris has failed to show how establishing exactly where the firearm was found under the mattress in relation to where he was sleeping in that bed would have bolstered his defense in any way. He confessed that the firearm was his. Harris has failed to establish that counsel's trial decisions were deficient in any respect or that he suffered any prejudice as a result thereof. This claim is without merit.

32. Defendant has failed to make any concrete allegations of actual prejudice and substantiate them. Defendant has failed to meet his burden to establish that defense counsel's conduct was deficient in any regard and he has failed to establish actual prejudice as a result of any alleged deficiency. Defendant's ineffective assistance of counsel claims are without merit.

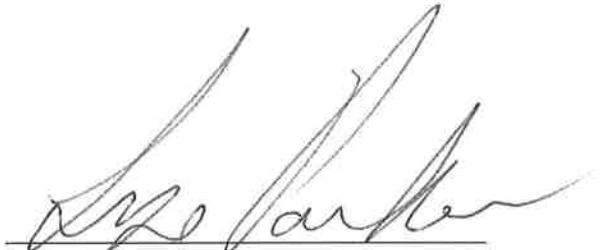
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<sup>29</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

<sup>30</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**



Commissioner Lynne M. Parker

cc: Prothonotary  
Ralph D. Wilkinson, IV, Esquire