

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID No. 1604003093
)
 KENNETH R. SWANSON,)
)
 Defendant.)
)

Submitted: January 23, 2018
Decided: January 29, 2018

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

John S. Taylor, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Kenneth R. Swanson, *pro se*.

PARKER, Commissioner

This 29th day of January 2018, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. In November 2016, a Superior Court jury found Defendant Kenneth R. Swanson guilty of Drug Dealing and related offenses. The Superior Court sentenced him as a habitual offender to a total unsuspended sentence of five years plus sixty days at Level V incarceration followed by probation.
2. Swanson filed a direct appeal to the Delaware Supreme Court. On August 21, 2017, the Delaware Supreme Court determined that the appeal was without merit and affirmed the judgment of the Superior Court.¹

DEFENDANT'S RULE 61 MOTION

3. On September 15, 2017, Swanson filed the subject motion for postconviction relief. Swanson raised two claims of ineffective assistance of counsel: 1) that his counsel was ineffective for not introducing certain evidence at trial; and 2) that his counsel was ineffective for not filing a motion to suppress.
4. Before making a recommendation, the record was enlarged and Swanson's counsel was directed to submit an Affidavit responding to Swanson's ineffective assistance of counsel claims. Swanson was afforded an opportunity to submit a reply thereto.²
5. 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

¹ *Swanson v. State*, 2017 WL 3598103 (Del.).

² Super.Ct.Crim.R. 61(g).

prejudiced the defense.³ 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.⁴

6. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.⁵ 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.⁶ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.⁷

7. In Swanson's Rule 61 postconviction relief motion, he contends that his trial counsel was ineffective for failing to introduce footage of the incident captured by "Downtown Visions" security cameras. Swanson's trial counsel, in his Affidavit in response to Swanson's Rule 61 motion, explains that he elected not to introduce this evidence at trial for strategic reasons given that counsel found the evidence to be inculpatory and not exculpatory.⁸

8. Swanson's trial counsel's representation in his Affidavit is consistent with his representation made at the time of trial. At trial, counsel brought to the court's attention that Swanson wanted counsel to introduce the footage of the incident captured by Downtown Visions, that they reviewed the footage together, and that counsel determined

³ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

⁴ *Id.* at 687-88, 694.

⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁶ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

⁷ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

⁸ See, Superior Court Docket No. 38- Affidavit of Defense Counsel, at pg. 4.

that the footage would be harmful to Swanson's case. Counsel therefore made the strategic decision that since the footage would be more harmful than helpful, it would not be introduced at trial.⁹

9. Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that counsel's conduct was reasonable and constituted sound trial strategy.¹⁰ Swanson must make concrete allegations of ineffective assistance and substantiate the claims. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.¹¹ Swanson has not established how showing the footage of the incident would have been more helpful to his defense than harmful. Swanson failed to establish that his counsel's strategic decision was deficient in any respect. Swanson has not substantiated this claim. This claim is without merit.

10. Swanson also contends that his trial counsel was ineffective by not filing a motion to suppress. At trial, defense counsel represented to the court that he did not file a suppression motion because he had no good faith basis to do so.¹² Similarly, in his Affidavit in response to Swanson's Rule 61 motion, defense counsel again reiterated that he did not file a suppression motion because there was no good faith basis to do so.¹³

11. In his Affidavit in response to Swanson's Rule 61 motion, counsel further explained that the arresting officers had a sufficient reasonable articulable suspicion to conduct a

⁹ See, November 16, 2016 Trial Transcript, at pgs. 6-10.

¹⁰ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998); *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

¹¹ *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).

¹² November 16, 2016 Trial Transcript, at pgs. 6-10.

¹³ See, Superior Court Docket No. 38- Affidavit of Defense Counsel, at pg. 4-5

motor vehicle stop on the vehicle that Swanson was operating because the registration was suspended on that vehicle.¹⁴ Furthermore, the arresting officers had sufficient probable cause to search the vehicle following Swanson's arrest because he fled from the officers.¹⁵

12. Indeed, at the time of the motor vehicle stop, Swanson sped off running through stop signs and red lights and crashed into a car. Swanson then continued to drive until he lost control of the vehicle and crashed ending up against a fence of the Latin American Community Center.¹⁶ After crashing, Swanson fled on foot.¹⁷ Swanson hid in the backyard of a residence. The police officers chased him down and arrested him.¹⁸ When they got back to the car, the police officers looked in the car and saw the 740 bags of heroin packaged for sale in plain view.¹⁹

13. An ineffective assistance of counsel claim based on the failure to file a suppression motion is without merit if trial counsel lacked a legal or factual basis to do so.²⁰ If the underlying basis for a suppression motion is believed to be meritless, an attorney cannot be faulted for not asserting it.²¹ Swanson has not substantiated his claim that there was any good faith basis to support a suppression motion. Swanson has failed to establish that counsel's decision not to file a suppression motion was deficient in any respect or that he suffered any prejudice as a result thereof. Counsel cannot be found deficient for failing to file a motion which has no legal or factual basis. This claim is without merit.

¹⁴ Superior Court Docket No. 38- Affidavit of Defense Counsel, at pg. 4-5; November 15, 2016 Trial Transcript, at pgs. 26-27, 68-70.

¹⁵ *Id.*

¹⁶ November 15, 2016 Trial Transcript, at pgs. 28-30, 71-72.

¹⁷ November 15, 2016 Trial Transcript, at pgs. 30-31, 72-75.

¹⁸ November 15, 2016 Trial Transcript, at pgs. 30-32, 72-75, 99-102.

¹⁹ November 15, 2016 Trial Transcript, at pgs. 32-33.

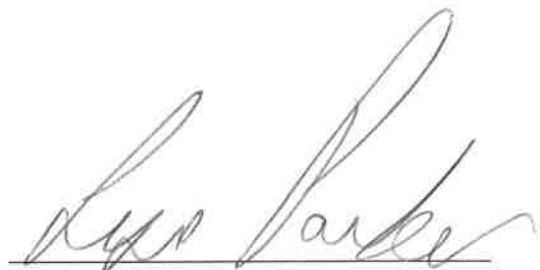
²⁰ *State v. Exum*, 2002 WL 100576, at *2 (Del.Super.), *affirmed*, 2002 WL 2017230, at *1 (Del.).

²¹ See *McAllister v. State*, 2010 WL 3398949, *2 (Del. 2010).

14. Swanson has failed to make any concrete allegations of actual prejudice and substantiate them. Swanson 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. Swanson's ineffective assistance of counsel claims are without merit.

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
Andrew J. Meyer, Esquire