

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff,)
)
 v.) Cr. ID No. 1602006156
)
 UNIQUE T. LOPER,)
)
 Defendant.)
)

Submitted: April 2, 2018
Decided: May 7, 2018

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

Periann Doko, Esquire, Deputy Attorney General, Department of Justice, Wilmington,
Delaware, Attorney for the State.

Unique T. Loper, James T. Vaughn Correctional Center, *pro se*.

PARKER, Commissioner

This 7th day of May 2018, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. In September 2016, a Superior Court jury found Defendant Unique T. Loper guilty of one count each of Carrying a Concealed Deadly Weapon ("CCDW"), Possession of a Firearm by a Person Prohibited, and Possession of Ammunition by a Person Prohibited. The Superior Court declared Loper to be a habitual offender for the CCDW conviction. Loper was sentenced to a total period of thirty-one years at Level V incarceration, to be suspended after serving eighteen years in prison, for decreasing levels of supervision.
2. Loper filed a direct appeal to the Delaware Supreme Court. On August 18, 2017, the Delaware Supreme Court determined that the appeal was without merit and affirmed the judgment of the Superior Court.¹

FACTS

3. As noted by the Delaware Supreme Court on direct appeal, the trial record fairly reflects that, on January 31, 2016, a fight broke out at Famous Tim's Tavern in Wilmington, Delaware. Ryan Dill, a bartender who was working that evening testified that he noticed several groups of individuals arguing near the bar. The argument escalated into a fist fight.²
4. Dill saw a short, black man attempt to pull something from his waistband. Several bar patrons yelled that the man had a gun. As the fight moved to the bar entrance, Dill saw the man extend his arm with a gun in his hand. Other patrons wrestled the man with the gun to the ground, punching and kicking him. Someone pulled a fire extinguisher from the

¹ *Loper v. State*, 2017 WL 3612092 (Del.).

² *Loper v. State*, 2017 WL 3612092, *1 (Del.).

wall and struck the man with it. Someone else dragged the man, who appeared to be unconscious, outside the door of the bar. Dill then heard a single gunshot.³

5. Wilmington police officers arrived on the scene. A single, spent .40 caliber shell casing was found outside the front door of the bar.⁴

6. Several days after the incident, police collected four blood samples from inside the bar's entrance. DNA testing positively matched one of the samples to Loper. Loper later gave a statement to police, which was played for the jury at trial, admitting that he brought a .40 caliber gun to the bar. Loper did not testify or present any other evidence at trial. The jury convicted him of all counts.⁵

DEFENDANT'S RULE 61 MOTION

7. On November 29, 2017, Loper filed the subject motion for postconviction relief. Loper raised three claims of ineffective assistance of counsel: 1) that his counsel was ineffective for never meeting with Loper to "make a defense" and "put on a defense" at trial; 2) that his counsel was ineffective for not filing a motion to suppress his confessions; and 3) that his counsel was ineffective for not filing a motion to suppress the evidence.

8. Before making a recommendation, the record was enlarged and Loper's counsel was directed to submit an Affidavit responding to Loper's ineffective assistance of counsel claims. Loper was afforded an opportunity to submit a reply thereto.⁶

9. Loper filed a letter with the court on April 3, 2018, the due date for his reply, alleging that he was improperly declared a habitual offender because all three of the

³ *Loper v. State*, 2017 WL 3612092, *1 (Del.).

⁴ *Loper v. State*, 2017 WL 3612092, *1 (Del.).

⁵ *Loper v. State*, 2017 WL 3612092, *1 (Del.).

⁶ Super.Ct.Crim.R. 61(g).

felonies upon which his predicate felonies were based were not violent felonies.⁷ Loper's letter will be treated as his reply and his claim expressed in that letter will be addressed herein.

10. 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.⁸ 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.⁹

11. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹⁰ 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.¹¹ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.¹²

12. In Loper's Rule 61 postconviction relief motion, he contends that his trial counsel was ineffective for failing to meet with Loper to "make a defense" and then to "put on a defense" at trial. Loper's trial counsel, in his Affidavit in response to Loper's Rule 61 motion, advises that, prior to trial, Loper was provided with all discovery materials

⁷ See, Superior Court Docket No. 56.

⁸ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

⁹ *Id.* at 687-88, 694.

¹⁰ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹¹ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

¹² *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

supplied by the State.¹³ There were two case reviews, one on May 16, 2016 and another on August 22, 2016. At the August 22, 2016 Case Review, Loper rejected the State's plea offer. It is counsel's practice that at any plea rejection event, and not for the first time, counsel would have discussed the State's evidence likely to be presented at trial, any possible defenses, and the likely outcome of the trial.¹⁴ The discussion would include possible sentencing ranges including any minimum mandatory sentences should a defendant be convicted.¹⁵

13. In the subject action, Loper admitted to the police after his arrest that he was present at the crime scene but could not remember anything after he was assaulted.¹⁶ Loper also admitted to purchasing a firearm days earlier and said it was taken from him during the incident, after he had passed out.¹⁷ Any possible discussion with Loper about possible defenses that involved his recollection after the assault would have been fruitless. Additionally, the DNA report placed Loper at the crime scene.¹⁸

14. From discovery and at trial, the State's witness, Mr. Dill, the bartender, testified that he saw a gun in Loper's waistband. This was offered to support elements of the charges that Loper possessed a firearm.¹⁹

15. Loper's trial counsel cross-examined Mr. Dill as to inconsistencies in his testimony and emphasized those inconsistencies at closing.²⁰ In light of the evidence in this case,

¹³ Superior Court Docket No. 53- Affidavit of Trial Counsel, at pgs. 2-4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ September 7, 2016 Trial Transcript, at pgs. 48-63.

²⁰ September 7, 2016 Trial Transcript, at pgs. 57-63; September 8, 2016 Trial Transcript, at pgs. 22-25.

trial counsel represents that trying to establish reasonable doubt regarding Loper's possession of the firearm was the only viable defense.²¹

16. Indeed, on direct appeal, the Delaware Supreme Court noted that although the bartender was unable to identify Loper as the man with the gun, his blood was found at the scene, as was a shell casing establishing that a .40 caliber gun had been fired.²² More importantly, Loper admitted to the police that he had a .40 caliber gun at the bar on the night in question.²³ The Delaware Supreme Court concluded that the State's evidence was sufficient to prove beyond a reasonable doubt that Loper was guilty of CCDW and of Possession of a Firearm and Ammunition by a Person Prohibited.²⁴

17. Loper 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.²⁵ Loper's counsel did the best he could with the facts presented herein. Loper admitted that he had a gun at the bar on the night at issue. Loper has not elaborated on what defenses he believed were available to him which could have, but were not, asserted at trial. Loper has not substantiated this claim in any respect. This claim is without merit.

18. Loper also contends that his trial counsel was ineffective by not filing a motion to suppress his confession(s) (Count Two), and not filing a motion to suppress the evidence (Count Three). In his Affidavit in response to Loper's Rule 61 motion, defense counsel

²¹ Superior Court Docket No. 53- Affidavit of Trial Counsel, at pgs. 2-4.

²² *Loper v. State*, 2017 WL 3612092, *2 (Del.).

²³ *Loper v. State*, 2017 WL 3612092, *2 (Del.).

²⁴ *Loper v. State*, 2017 WL 3612092, *2 (Del.).

²⁵ *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).

represented that he did not file a suppression motion because there was no good faith basis to do so.²⁶

19. In his Affidavit in response to Loper's Rule 61 motion, counsel further explained that Loper's recorded confession/statement reflected that he waived his Miranda rights before speaking.²⁷ As to the failure to file a motion to suppress the evidence, counsel is at a loss as to what evidence he claims should have been suppressed, and the factual and legal grounds warranting such a claim.²⁸ Moreover, Loper has not set forth the basis for his conclusory claim that a suppression motion should have been filed. Trial counsel was not able to identify any legal issue of merit that warranted a suppression of any of the State's evidence.²⁹ Likewise, Loper has not identified the basis of any such claim.

20. 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.³⁰ If the underlying basis for a suppression motion is believed to be meritless, an attorney cannot be faulted for not asserting it.³¹ Loper has not substantiated his claim that there was any good faith basis to support a suppression motion. Loper 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. Loper's claims are without merit.

21. Finally, Loper contends that he was improperly declared a habitual offender because his predicate felonies were not violent felonies. This claim is without merit. There

²⁶ Superior Court Docket No. 53- Affidavit of Trial Counsel, at pgs. 4-5

²⁷ Superior Court Docket No. 53- Affidavit of Trial Counsel, at pgs. 4-5.

²⁸ Superior Court Docket No. 53- Affidavit of Trial Counsel, at pgs. 4-5.

²⁹ Superior Court Docket No. 53- Affidavit of Trial Counsel, at pgs. 4-5.

³⁰ *State v. Exum*, 2002 WL 100576, at *2 (Del.Super.), *affirmed*, 2002 WL 2017230, at *1 (Del.).

³¹ *See McAllister v. State*, 2010 WL 3398949, *2 (Del. 2010).

was no requirement under the habitual offender statute in effect at the time of Loper's conviction and sentencing that the predicate felonies were to be deemed violent felonies in order for Loper to be properly declared a habitual offender under 11 *Del. C.* § 4214(b).³²

22. Specifically, to be sentenced as a habitual offender under 11 *Del. C.* § 4214(b), a person must have been convicted three times of a felony (there is no requirement that those predicate felonies be classified as violent felonies) and then subsequently convicted of a violent felony.³³

23. In the subject action, the habitual offender petition filed by the State reveals that Loper was convicted of three prior felonies: 1) Possession of a Controlled Substance with Intent to Deliver in 2006; 2) Possession of Cocaine Within 300 Feet of a Park in 2008; and 3) Drug Dealing in 2014. These three previous felony convictions constitute the predicate felonies required by 11 *Del. C.* § 4214(b).

24. After the three predicate felony convictions, Loper was convicted in the subject action of CCDW in 2016. A CCDW conviction is classified as a violent felony conviction.³⁴ Consequently, Loper was convicted of three prior felonies, and thereafter the subject violent felony, making him eligible for habitual offender status under 11 *Del. C.* § 4214(b). Loper was properly declared a habitual offender under 11 *Del. C.* § 4214(b). Loper's claim that he was not eligible to be sentenced as a habitual offender because all three of his predicate felony convictions did not constitute violent felonies is without merit.

25. Loper has failed to make any concrete allegations of actual prejudice and substantiate them. Loper has failed to meet his burden to establish that defense counsel's conduct was

³² 11 *Del. C.* § 4214(b), effective July 19, 2016.


³³ See, 11 *Del. C.* § 4214(b), effective July 19, 2016.

³⁴ See, 11 *Del. C.* § 4201(c).

deficient in any regard and he has failed to establish actual prejudice as a result of any alleged deficiency. Loper'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
Timothy J. Weiler, Esquire