

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)	ID. No. 1209003136D
)	In and for Kent County
v.)	
)	RK12-12-0300-01
ORLANDO INGRAM,)	PFBPP PABPP (F)
)	
Defendant.)	

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Marie O. Graham, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Natalie S. Woloshin, Esquire, Woloshin, Lynch & Associates, P.A., Wilmington, Delaware for Defendant.

FREUD, Commissioner
June 21, 2018

The defendant, Orlando Ingram¹ (Ingram), was found guilty following a jury trial on May 6, 2014 of one count of Possession of a Firearm by a Person Prohibited (“PFBPP”), 11 *Del. C.* § 1448. On August 13, 2014, at sentencing Ingram was

¹ A/K/A Arlando Ingram.

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declared a habitual offender pursuant to 11 *Del. C.* § 4214(a) and received a total sentence of twenty-five years Level V incarceration (five of which were minimum mandatory) followed by one year probation.

A timely Notice of Appeal to the Delaware Supreme Court was filed. Ingram's counsel filed a brief and motion to withdraw pursuant to Supreme Court Rule 26(c). In the motion to withdraw, appellate counsel represented that he conducted a conscientious review of the record and concluded that no meritorious issues existed. By letter, counsel informed Ingram of the provisions of Rule 26(c) and attached a copy of the motion to withdraw and accompanying brief. Ingram was informed of his right to supplement his attorney's presentation. Ingram, *pro se*, raised three issues for appeal for the Supreme Court to consider, which the Supreme Court classified as follows:

(7) In his first point on appeal, Ingram claims that his 2014 conviction and sentencing for PFBPP subjected him to double jeopardy because his 2013 conviction and sentencing for Possession of a Firearm During the Commission of a Felony ("PFDCF").^{FN5} Ingram's claim is without merit.

(10) In his second point on appeal, Ingram contends that there was insufficient evidence for the jury to find him guilty of PFBPP. Ingram made the same claim in a motion for judgment of acquittal, which was denied at trial. When denying the motion, the Superior Court found that:

The evidence that's been submitted by the State indicates

that: Upon entry into a residence where Mr. Ingram was occupying, he was subdued by officers involved here. And there has been evidence to indicate that he made multiple attempts to reach for an item or object under a couch that's been later identified as a handgun.^{FN9}

(13) Having reviewed the trial court record, we conclude that the evidence was sufficient to support the jury's finding that Ingram was guilty of PFBPP. Two police officers testified that, when struggling with them in the living room of his sister's apartment on September 27, Ingram made repeated attempts to reach under the couch in an area where the police later discovered a loaded handgun.

(14) In his third point on appeal, Ingram contends that the evidence seized when he was arrested on September 27 should have been suppressed because his sister did not consent to the search of her apartment. Ingram concedes that he unsuccessfully raised the same claim during his 2013 trial and in his appeal from those convictions.²

^{FN5} The Double Jeopardy Clauses of the United States and Delaware Constitutions protect a criminal defendant against multiple punishments or successive prosecutions for the same offense. U.S. Const. amend. V; Del. Const. Art. 1, § 8. *See Evans v. State*, 445 A.2. 932, 933 (Del. 1982).

^{FN9} Trial Tr. At B-59 (May 6, 2014).

² *Ingram v. State*, 2015 WL 631581, at *1-2 (Del. 2015).

The Supreme Court granted the State's motion to affirm as to all of Ingram's claims.³ Next, *pro se*, Ingram filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 and a Motion for Appointment of Counsel which the Court granted. Subsequently, Natalie S. Woloshin, Esquire ("Appointed Counsel") was appointed to represent Ingram in his motion. She filed an amended motion for Postconviction relief alleging ineffective assistance of counsel on April 17, 2017 and requested an evidentiary hearing. My review of the facts and the law lead me to conclude that an evidentiary hearing is unnecessary in this case. Ingram's Trial Counsel and the State responded to the amended motion for postconviction relief and Appointed Counsel did not file a response.

FACTS

The following is a summary of the facts as noted by the Delaware Supreme Court in its opinion:

(1) On September 27, 2012, Dover police arrested the appellant, Orlando Ingram, in the living room of his sister's apartment in Dover, Delaware. The police had a warrant for Ingram's arrest because he was a suspect in the September 4 robbery of a Family dollar store in Dover. Ingram put up a fight when the police entered the apartment to arrest him. After Ingram was subdued and taken into custody, Ingram's sister gave the police written consent to search the apartment. During the search, the police discovered a loaded handgun under the living room couch.

³ *Ingram*, 2015 WL 631581, at *3.

(2) On December 3, 2012, Ingram was indicted on multiple offenses in connection with various robberies and attempted robberies in the Dover area in August and September 2012, including offenses arising from the September 4 robbery and Ingram's September 27 arrest. After a jury trial in November 2013, Ingram was convicted as charged of the September 4 robbery and September 27 arrest-related offenses, except for two counts of Possession of a Firearm by a Person Prohibited ("PFBPP"), which were severed before trial. By order dated December 30, 2014, this Court affirmed Ingram's November 2013 convictions.^{FN1}

(3) On May 5, 2014, Ingram went to trial on the two counts of PFBPP. One count, which was charged in connection with Ingram's September 27 arrest, was tried before a jury. The other count, which was charged in connection with the September 4 robbery, was tried before the trial judge but then *nolle prossed*.^{FN2}

(4) After a two-day trial, the jury found Ingram guilty of PFBPP. On August 13, 2014, the Superior Court declared Ingram a habitual offender and sentenced him to twenty-five years mandatory at Level V incarceration followed by one year at Level III probation. This is Ingram's direct appeal.⁴

^{FN1} See *Ingram v. State*, 2014 WL 7465977 (Del. Dec. 30, 2014)(affirming the Superior Court's judgment of convictions in *State v. Ingram*, Cr. ID No. 1209003136C)). The Court has taken judicial notice of the proceedings.

⁴ *Ingram*, 2015 WL 631581, at *1.

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^{FN2} See docket at 5, *State v. Ingram*, Cr. ID No. 1209003136E (May 7, 2014). The Court has taken judicial notice of the proceedings.

The following is the relevant direct testimony from Ingram's trial of Detective Christopher Bumgarner the first police officer to enter the Ingram's sister's apartment:

Q: When you made entry can you describe what happened?

A. Yes. When I made entry – it was an odd apartment in that – the front door opens, and it opens into a hallway. The hallway can go right or left. To the left was a kitchen, to the right was a living room. But when the door opens, it's blocked. The only way to go right, because of the swinging door, is to actually close the door behind you and then go right into the living room.

We knew that the subject to be arrested was inside the living room. So as I entered, I actually had to close the door, leaving the rest of the team of police officers behind me, and go right into the living room by myself.

Q. What are you wearing when you make entry?

A. I was wearing – it was black tactical gear. So it's black BDU pants; a black tactical vest that has, in white lettering across it, "police" on the front and "police" on the back I had my service pistol, and what we call a gun belt. I also had a radio. And due to the nature of the operation, I also had a long gun, which is a rifle, a tactical rifle.

Q. Once you made entry, describe what you observed.

A. As soon as I made entry, I had to close that door behind me. When I closed the door behind me, the defendant in this matter, Orlando Ingram, was standing there; and that was the individual that we had the arrest warrant for.

He began to turn towards me, saw me, and yelled. When he did that, my weapon was up. I yelled "police." He kind of let out kind of like a yell/scream-type thing, and his hands went for the front of my barrel of my rifle. When he did that, I instinctively pushed against him driving the barrel into him knocking him over.

At that point, he was then on the ground and on his back looking up at me as I was giving him commands: show me your hands; show me our hands. He started using his feet to scoot his back across the floor towards the couch that was behind him. And as he was doing this, he was reaching his right hand to try to get under that couch.

When I recognized that he was trying to get his right hand under the couch, I became concerned for my safety that he was possibly grabbing a weapon of some sort. I kicked him. I ordered him to show me his hands. He brought his hands back down and, then, started diving his hands underneath the couch again.

I kicked him again; the same thing: show me your hands. He would look at me and dive his hands underneath the couch. He was actually almost rolling onto his stomach to get underneath the couch, and his hand was disappearing under the couch. I would say this happened about three times, I believe, before the rest of the officers were able to

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get in the house. And to my memory, it seems like just multiple officers ended up in that house at the same time. And they dog piled – all of them jumped onto him to arrest him.

I couldn't get on the ground with him because I had this rifle, it just isn't practical. I'm trying to give him commands. They all just onto him and he, again, dives his hand underneath that couch and they start fighting with him to get his hands back.

At this point, there are multiple officers on him trying to get him into custody and trying to secure his hands that kept going underneath this couch.

I then realized that there was nobody watching us and didn't know if there was somebody else in the house. And I turned around and started looking down the hall where somebody could potentially come. Another officer teamed up with me and we started clearing the house, checking the house, making sure there was nobody else that was a threat to the house. By the time I came back, that group of officers had him in cuffs and were taking him outside.

Q. Do you see that individual in the courtroom today?

A. Yes, I do.

A. He is the defendant in the blue and black checkered shirt seated next to counsel.

Q. Now, once you switched your attention to clear the rest of the building, and come back to the living room, did you have occasion to be involved in checking for any evidence

or anything in that residence?

A. Yes. When I came back to the living room, they had him in handcuffs, they were getting him up. There were multiple officers in there. Officer Willson said –

Q. Okay. Without you saying what Officer Willson said – we’ll have him testify – if you can, just explain what you did in response to whatever he told you.

A. An officer made me aware.
Based on what I was made aware of, I looked under the couch to where the defendant had been reaching his hand underneath the couch in our confrontation. There was a handgun, a revolver, underneath the couch.⁵

The relevant cross examination testimony of Detective Bumgarner is as follows:

Q. Now, you testified pretty clearly. My client was on his back the entire time that you were interacting with him?

A. On his back. At one point, he started to roll over as he was reaching; but, for the majority, he was on his back.

Q. He was on his back. In fact, that’s what caused you concern, correct?

In your training, you prefer to have individuals who you are taking into custody to have them on their stomach, correct?

⁵ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 64 - 68.

A. What caused me concern was him reaching his hands underneath the couch which could not be explained at that point, and I couldn't see his hands.

One of the things that we teach in officer safety is visualization of the hands because if somebody is going to hurt you it has to be with their hands, most likely.

Q. You would agree that one of the concerns that you have is that you want someone you are taking into custody on their stomach so that you can better control their arms? For instance, if you are going to take someone into custody, you can place their arms behind their back, correct?

A. In general. But in this circumstance, because the hands were the first priority, that was my first priority.

Q. Now, my client remained on his back up to and including the time when other officers engaged him, correct?

A. I believe so.

Q. When your focus was somewhere else; you were focused on clearing the rest of the residence?

A. Yes. I remember, as they were basically jumping on him, he made one last kind of turn to get under the couch; but I don't think he ever fully got to his stomach.

After that, I turned my focus on the rest of the house; so I couldn't speak to anything else beyond that.

Q. So as far as you are concerned, he's on his back and reaching with his right hand?

A. With his right hand, yes.

Q. Now, he never grasped that gun; correct?

A. I don't know if underneath the couch he touch it or not. I can't – I didn't see his hands, so I can't speak to that.

Q. You certainly never saw him grab that gun?

A. I never saw the firearm until afterwards.⁶

The direct testimony of Officer John M. Willson of the Dover Police Department is as follows:

Q. Can you describe what was taking place when you first went in there?

A. Mr. Ingram was on the ground; his head was kind of toward like the television. There is a couch to the left of the television. His left hand was reaching underneath the couch. At that point, I grabbed his left arm and was trying to force it behind his back.

Q. At that time – how many other officers were there at that point?

A. I would believe there was probably seven or eight.

Q. What, if anything, did you see Officer Bumgarner doing?

⁶ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 78 - 81.

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A. Officer Bumgarner continued to clear the rest of the house to make sure that we could safely take him into custody and that there was no one else in the house.

Q. How were the other officers dressed?

A. We all had on police tactical vests, black vests, which says "police" across the front of it.

Q. Were commands being given to Orlando Ingram?

A. That's correct.

Q. Were you – who was responsible for giving the verbal commands?

A. At that point, we were all yelling to stop resisting, stop resisting.

Q. You were yourself doing that?

A. Yes, ma'am.

Q. Now, if you would, describe what he was doing that – each time you were yelling.

A. I was focused on his left arm which was reaching underneath of the couch. I had to forcibly take his arm to remove it from underneath the couch to try to get it behind his back. He was not willingly giving his arms up to be placed behind his back.

Q. Could you see under the couch at that point?

A. No, ma'am. I could not.

Q. Can you describe what kind of – what is your demeanor and the other officers in this type of interaction with this person on the ground?

A. If I can't see their hands, I don't know what they're reaching for at that point. At that point, it becomes very important to be able to see what his hands are doing to get them behind his back and in custody as soon as possible.

Q. Were there times when you couldn't see his hands?

A. That's correct.

Q. Do you know what the other officers were doing? You said you were focusing on one hand.

A. I was focused on the left side of him, yes, ma'am.

Q. When you were focused on his left side, which way was his body facing?

A. There was like a big screen TV to the inside of the room kind of catercorner. Right next to that was a couch where his head was pointed like in between the couch and the TV.

Q. When you say – which way was his face?

A. Facedown. He was laying on his stomach.⁷

⁷ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 86-88.

Q. Can you describe what that photo shows?

A. That's the room in which the defendant, Mr. Ingram, was at that's just to the right of the door when you come in.

Q. Where in this photograph would you have been, your body, placed in trying to explain where you're grabbing the left arm?

A. Does the touch screen work?

Ms. Graham: can we have the touch screen turned on, your honor?

A. If not, I can describe it.

Mr. Ingram's head was kind of between the couch and – well, facing the couch. It would be the right side of the couch and where the TV is. I was more where the rug is – where the rug is turned up to the left side.

Q. So you are where the -

A. About were the multi-colored rug is. That's where I was.

Q. And the part of the couch that you observed the defendant's hand going to was what part of the couch?

A. If you're facing the couch, just like the picture is, it was

the bottom right – next to the bottom right light post.⁸

Q. Now do you know how long this took, from the time Officer Bumgarner entered and the time that individual was detained?

A. Seconds.

Q. Seconds. But there was a lot of activity during those seconds?

A. Yes, ma'am. It's a very intense couple of seconds.⁹

Q. Officer Willson, in describing the moments between Office Bumgarner entering and the defendant being removed from the residence – if you could, just describe the actions of the defendant that made it intense.

A. The defendant was laying on the ground facedown with his left hand concealed underneath of the couch. At that point, I did not know what he was reaching for. Hands are very important to see.

Q. At the end – strike that.
When the evidence was being collected you saw the location of where the gun was located, correct?

⁸ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 89-90.

⁹ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 92.

A. Yes, ma'am.

Q. You were the one that was on – in the living room where the area rug is, correct?

A. Yes, ma'am.

Q. When you were not able to see the defendant's hand, were you able to see anything else under there, under the couch?

A. Not at that point, no.

Q. But there were times – would you say how many times his hand got away from your ability to control him?

A. I immediately grabbed his arm and steadied control of his arm – his left hand and arm area.

Q. Okay. But you had his arm, not his hand?

A. No, his arm. The arm/wrist area. I couldn't see his hand, it was underneath the couch.

Q. All right. Did that happen once or more than one time –

A. Just once.

Q. – that he got out of your control?

A. He was reaching for it; that's why I grabbed his hand, because it went under the couch. I grabbed it and maintained control at that point.

Q. All right. Do you see the defendant in the courtroom today?

A. Yes ma'am. Sitting to my left in the blue plaid shirt.¹⁰

Cross-examination of Officer Willson by Mr. Funk:

Q. You said it was mere seconds between Detective Bumgarner going in first and then your entry?

A. That's correct.

Q. Mere seconds. You enter; Mr. Ingram is facedown on his stomach, correct? Left hand and left arm?

A. Left hand.

Q. Left hand –

A. Left hand.

Q. – reaching under the couch?

A. That's correct.

Q. Not right hand?

A. Left hand.

Q. Left hand. You are certain of that?

A. Certain of that.

¹⁰ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 95-96.

Q. He was face down on his stomach?

A. That's correct.

Q. Not on his back. You are certain of that?

A. Certain.

Q. It was just mere seconds between entry of the first officer and your entry?

A. I didn't have a stopwatch; but it happens quickly, yes.

Q. When you made contact with my client, it was his left arm and left hand that you had to take control of; is that correct?

A. That's correct.

Q. And when you took control of that left hand and left arm, as he was facedown on his stomach, you then moved his arm behind his back for control purposes, correct?

A. I was attempting to at that point, yes.¹¹

Redirect by Ms. Graham:

Q. Do you know where Orlando Ingram was before you saw him facedown on the floor?

A. I do not.

¹¹ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 97-98.

Q. When you entered, you described that there were multiple officers; is that correct?

A. There was multiple officers, yes.

Q. Now, would you describe the defendant's actions as complying with the commands of the officers who are present?

A. He was not complying at all.¹²

Q. Was Orlando Ingram using – doing anything other than just laying on the floor?

A. His body was tensed up. He was not allowing us to effectively put him in custody, under arrest.

Q. You don't know where he was when Officer Bumgarner first made contact with him?

A. No ma'am. I do not.

Q. Now, your direction or your attention then was to the hand that was going under the couch?

A. That's correct, his left side.

Q. With regards to what any other officer was doing, did you focus on any of them at that moment?

¹² *Id.* at 100-101.

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A. No.

Q. Would you say how long was it after the – after it was determined that there was a gun under the couch?

A. Just after he was placed into custody.

Q. And what, if any, significance was that to you?

A. Knowing that he was reaching for a gun with his left hand which I had – was trying to gain control of.

Q. Had the individual – someone you're arresting – do you come in contact with people with guns when you are arresting them?

A. Yes.

Q. The severity of an offense to you when there is a gun involved becomes what?

A. More intense.¹³

Redirect of Detective Bumgarner:

Q. Were you present when the gun was collected as evidence?

A. Yes.

Q. What did you observe occur?

¹³ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 101-102.

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A. When they took the firearm out, they were attempting to render it safe, unload the firearm. The firearm is kind of unique in that, in most revolvers, there is a lever that allows the cylinder to come out. In this one, there wasn't. So I actually helped to try to determine how to unload the revolver and get the rounds out of it.

Q. There were rounds in there, inside?

A. There were rounds in there.

Q. Were they collected by the Dover Police Department?

A. Yes. They were collected.¹⁴

INGRAM'S CONTENTIONS

Next, Ingram's Appointed Counsel filed an Amended Motion for Postconviction Relief pursuant to Superior Court Rule 61. She raises the following ground for relief:

Ground one: Trial Counsel was ineffective by failing to provide Mr. Ingram with effective representation during the trial phase in violation of Mr. Ingram's Sixth, Eight, and Fourteenth Amendment rights under the United States Constitution, as well as his Delaware Constitutional rights under Article I, §§ 4, 7, and 11.

Specifically Appointed Counsel claimed Ingram's rights were violated as

¹⁴ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 6, 2014), tr. at B-49.

follows:

Trial counsel was ineffective for failing to present a DNA report that could not conclusively link Mr. Ingram to the gun and testimony that Mr. Ingram's fingerprints were not found on the recovered firearm, when that evidence was available to him.

DISCUSSION

Under Delaware law, this Court must first determine whether Ingram has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.¹⁵ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.¹⁶ Ingram's initial *pro se* motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply.

Ingram's ground for relief was not asserted in the proceedings leading to judgment of conviction therefore is barred unless he can demonstrate: (1) cause for the procedural fault and (2) prejudice from a violation of the movant's rights.¹⁷ All the bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim of miscarriage of justice stemming from a constitutional violation that "undermine[s] the fundamental legality, reliability, integrity or fairness of the proceedings leading

¹⁵ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

¹⁶ Super. Ct. Crim. R. 61(i)(1).

¹⁷ Super. Ct. Crim. R. 61(i)(3).

to the judgment of conviction.”¹⁸

Ingram’s claim is based on an allegation of ineffective assistance of counsel. This type of claim is not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Ingram, allege ineffective assistance of counsel in order to overcome the procedural default.

However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards.¹⁹ The United States Supreme Court has held that:

[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not “conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.” Ineffective assistance of counsel, then, is cause for a procedural default.²⁰

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant

¹⁸ Super. Ct. Crim. R. 61(i)(5).

¹⁹ See *State v. Gattis*, 1995 WL 790961, at *3 (Del. Super. Dec. 28, 1995), *aff’d*, 697 A.2d 1174 (Del. 1997).

²⁰ *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (second alteration in original) (citation omitted).

must engage in the two-part analysis enunciated in *Strickland v. Washington*²¹ and adopted by the Delaware Supreme Court in *Albury v. State*.²²

The *Strickland* test requires the movant to show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.²³ Second, under *Strickland*, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," that is, actual prejudice.²⁴ In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.²⁵

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.²⁶ However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."²⁷ "In other words, if the Court finds

²¹ 466 U.S. 668 (1984).

²² 551 A.2d 53, 58 (Del. 1988).

²³ *Strickland*, 466 U.S. at 687-88; see also *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

²⁴ *Strickland*, 466 U.S. at 694; see also *Dawson*, 673 A.2d at 1190.

²⁵ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

²⁶ *Strickland*, 466 U.S. at 687.

²⁷ *Id.* at 697.

that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.”²⁸ “Furthermore, the defendant must rebut a ‘strong presumption’ that trial counsel’s representation fell within the ‘wide range of reasonable professional assistance,’ and this Court must eliminate from its consideration the distorting effects of hindsight when viewing that representation.”²⁹

In the case at bar, Ingram raises one claim of ineffective assistance of counsel. He claims that his counsel was ineffective for not presenting the DNA report to the jury and the fact that no fingerprints could be recovered from the firearm. Ingram’s Trial Counsel, in his Affidavit denies he was ineffective. This argument has no merit. Ingram’s own brief cites his Trial Counsel’s argument to the jury that there would be no evidence of fingerprints or DNA presented in the case. Ingram claims “the only evidence is conflicting officer testimony” and that “Demonstrating that Mr. Ingram’s fingerprints were not on the gun and that there was no conclusive DNA result would have suggested the gun was not his.” This argument fails the *Strickland* test. “The record reflects that, midway through the first day of trial, Ingram stipulated that he was a person prohibited from possessing a firearm on September 27, 2012. As a result, the jury was required only to determine whether there was proof beyond a reasonable doubt that Ingram knowingly was in actual or constructive possession of

²⁸ *Gattis*, 1995 WL 790961, at *4.

²⁹ *Id.* (quoting *Strickland*, 466 U.S. at 689).

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the firearm on that date.³⁰ “The trial judge properly instructed the jury that actual possession required proof beyond a reasonable doubt that Ingram “knowingly had direct physical control over the firearm” and that constructive possession required proof beyond a reasonable doubt that Ingram “had both the power and the intention, at a given time, to exercise control over the firearm.”³¹

I find that the two officer’s testimony do is not conflicting. Officer Bumgarner, who entered first and alone, testified Ingram went for the officer’s outstretched rifle.³² Ingram was knocked down and backwards and was moving towards the couch.³³ Bumgarner could not see his hands and repeatedly made demands for Ingram to comply. Officer Bumgarner testified Ingram “was trying to get his right hand under the couch.”³⁴ Three times Ingram dove his hands under the couch.³⁵ Ingram was almost rolling over on his stomach according to officer Bumgarner. Ingram’s amended motion misreads the testimony by claiming officers Bumgarner and Willson contradicted each other. The complete reading of the trial transcript shows this claim to be incorrect.

Ingram was reaching under the couch refusing to comply with an officer

³⁰ *Ingram v. State*, 2015 WL631581, *2 (Del 2015).

³¹ *Id.* at fn. 12 citing *Accord Lum v. State*, 201 A.3d 970, 971 (Del. 2014).

³² *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 66:8.

³³ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 66.

³⁴ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 66:18-20.

³⁵ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 67.

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holding a rifle on him. When the other officers entered, they jumped on Ingram to attempt to arrest him and gain control of him. Officer Bumgarner testified he then turned his attention to clearing the rest of the house.³⁶ The other officers had Ingram handcuffed when Officer Bumgarner returned. Officer Willson testified that Ingram was on his stomach.³⁷ His testimony was he was facedown reaching with his left hand.³⁸

In this constructive possession case the intensity of Ingram's actions were highly relevant and probative to meeting the requirement that the State show his intention to gain power and intention to exercise control over the weapon. On direct appeal Ingram challenged the sufficiency of the evidence. The Delaware Supreme Court found that "Having reviewed the trial court record, we conclude that the evidence was sufficient to support the jury's finding that Ingram was guilty of PFBPP. Two police officers testified that, when struggling with them in the living room of his sister's apartment on September 27, Ingram made repeated attempts to reach under the couch in an area where the police later discovered a loaded handgun."³⁹

Even if Trial Counsel was arguably unprofessional and unreasonable in failing

³⁶ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 67:19-23 and 68:1-3.

³⁷ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 88.

³⁸ *State v. Ingram*, Del. Super., ID No. 1209003136D (May 5, 2014), tr. at 95.

³⁹ *Ingram v. State*, 2015 WL 631581, at *3.

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to present the lack of fingerprint and DNA evidence in this case there is not a reasonable probability that but for the alleged omission the result of the trial would have been different.

CONCLUSION

In reviewing the record in this case, it is clear that Ingram has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). Consequently, I recommend that Ingram's amended postconviction motion be denied as procedurally barred by Rule 61(i) for failure to prove cause and prejudice, and as meritless.

/s/ Andrea M. Freud

Commissioner

AMF/dsc
oc: Prothonotary