

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)	ID. No. 1410004532
)	In and for Kent County
v.)	
)	RK14-10-0281-01
MICHAEL E. LAMBERT,)	RK14-01-0283-01
)	PFBPP PABPP (F)
Defendant.)	

COMMISSIONER'S REPORT AND RECOMMENDATION

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

Lindsay A. Taylor, Esquire, Deputy Attorney General, Department of Justice,
Dover, Delaware, for the State of Delaware.

Benjamin S. Gifford, IV, Esquire, Wilmington, Delaware, for Defendant.

FREUD, Commissioner
June 27, 2019

The defendant, Michael E. Lambert ("Lambert") was found guilty, following a partial stipulated Bench trial on December 1, 2015, of one count of Possession of a Firearm, 11 *Del. C.* § 1448 and one count of Possession of Firearm Ammunition by a Person Prohibited, 11 *Del. C.* § 1448. A presentence investigation was ordered by the Court. The State filed a motion to declare Lambert a Habitual Offender which the Court granted. On January 27, 2016, Lambert was sentenced to sixteen years incarceration, pursuant to 11 *Del. C.* § 4214 habitual offender status, fifteen of which

were minimum mandatory followed by probation.

Lambert, through counsel, appealed his conviction to the Delaware Supreme Court. The issue on appeal was the denial by this Court of Lambert's motion to suppress evidence seized as a result of a search warrant that Lambert alleged was initiated before all the requirements of the search warrant were accomplished.¹

The Delaware Supreme Court, on October 7, 2016, affirmed Lambert's conviction. On February 9, 2017, Lambert filed a *pro se* motion for postconviction relief in which he raised multiple grounds for relief including ineffective assistance of counsel. Lambert also filed an accompanying motion for appointment of counsel which the Court granted. Next, Appointed Counsel filed an Amended Motion for Postconviction Relief. The pending amended motion alleges ineffective assistance of Trial Counsel.

FACTS

Following are the facts as set forth by this Court in its opinion on Lambert's Motion to Suppress:

On October 6, 2014, Detective Golace of the Anne Arundel County Police Department (MD) contacted Sergeant Lance Skinner ("Sergeant Skinner") of the Delaware State Police was asked to contact in reference to a drug related shooting and robbery in Maryland. Detective Golace advised Sergeant Skinner that during the previous day, a drug dealer was robbed at gun point in that jurisdiction by an unknown black male and white female. During the course

¹ *Lambert v. State*, 149 A.3d 227 (Table). 2016 WL 5874837 (Del.).

of the robbery, the victim was shot. Detective Golace informed Sergeant Skinner that the male suspect, while fleeing the scene of the robbery, robbed a woman at gun point stealing her blue 2004 Volvo four door S80 with Maryland registration. The shooting victim did not know the gunman's name but believed he lived in Delaware and provided the police with the gunman's description and contact number, all of which were relayed by Detective Golace to Sergeant Skinner.

Sergeant Skinner forwarded the number to members of the Delaware State Police who ran a DELJIS inquiry linking the number to a woman by the name of Angelica Harris with a listed address of 1022 School Street, Houston, Delaware. The investigation also revealed the address was listed as a residence by the Defendant.^{FN 1} At that point, the Delaware State Police sent a photograph of the Defendant to the officers in Maryland who confirmed the picture appeared to match the description provided by both victims.^{FN 2}

The following day on October 7, 2014 at approximately 7:30 a.m., Sergeant Skinner drove past the address in question and observed a blue Volvo with Maryland registration that matched the one reported stolen. While the vehicle's plate was partially obscured from the roadway, officer Skinner could observe the first three characters of the registration, which matched the first three characters from the stolen vehicle. At that point, Sergeant Skinner alerted relevant members of the Delaware State Police, including Detective Sean O'Leary ("Detective O'Leary") who mobilized a Special Operations Response Team ("SORT").^{FN 3} Sergeant Skinner also contacted Detective Jason Vernon ("Detective Vernon") at Delaware

State Police Troop 3 and instructed him to submit a search warrant application and affidavit based on the aforementioned information. In the meantime, Sergeant Skinner continued to monitor the property as other surveillance units arrived and members of SORT team staged at the nearby Milford Police Department.

According to Detective Vernon, a search warrant application and an affidavit were completed and faxed to the Justice of the Peace Court No. 2 sometime between 10 a.m. and 10:10 a.m. At the suppression hearing, Detective Vernon explained his warrant application practice, as a matter of course, and testified that he followed this process in the instant case. He testified that his practice, in relevant order, included (1) typing the affidavit and application, and the probable cause affidavit, and then (2) faxing it to Justice of the Peace Court No. 2. Thereafter, by video phone he (3) swears to the warrant, and then the Judge (4) approves the warrant and returns it to Detective Vernon by fax, who (5) then signs the application, and then refaxes it to the Judge.

Shortly after Detective Vernon's original fax and before he appeared by video before the Judge, a male occupant exited the residence. Surveillance teams then observed the man reentering the building before exiting a second time with a black bag. The Police then took the individual into custody. The apprehended individual informed the officers that the Defendant was inside the residence. By that time, an armored SORT van had pulled into the driveway. A loudspeaker was used to order the remaining occupants out of the residence. A short time later, the Defendant and an adult and minor female exited through the front door and were detained by the police.^{FN 4}

At that point, the initial search warrant had yet to issue. Detective Vernon then drafted a second warrant application and affidavit seeking to search the residence for additional items based upon the new information supplied by the occupant with the black bag . According to his testimony, the second warrant application and affidavit was faxed to the Justice of the Peace Court shortly after 10:20 a.m. At that point, the officers remained in place, awaiting permission to search the residence pending the results of the search warrant applications. The Judge at Justice of Peace Court No. 2 reviewed both warrant applications and Detective Vernon appeared via video conference to swear to them. Thereafter Detective Vernon testified that the Judge said both warrants were approved and the officers were free to execute the search. Detective Vernon then **immediately** contacted officers at the scene by phone and the search of the residence¹ began. The search occurred at either 10:39 or 10:40 a.m. It uncovered a loaded firearm and the keys to the stolen Volvo parked to the rear of the residence. At some point shortly **after** the search commenced, Detective Vernon then signed the application and faxed the now complete application package back to the Justice of the Peace Court No. 2.

The warrants at issue in this case have a variety of different time stamps.^{FN 5} The only consistent time stamp, found at the bottom of each page of both warrants, has fax markings of 10:50 a.m. The first warrant has time stamps from a fax machine across the top of the pages with times of 10:08 a.m., 10:09 a.m., 10:24 a.m. and 10:31 a.m. The warrant also has an official Court time stamp on the first two pages

of 10:46 a.m. The second warrant was clocked in at Justice of the Peace Court No. 2 at 10:45 a.m. The first two pages of the second warrant also appear to be physically marked with a time of 10:45a.m. No testimony was provided indicating at what point in the application/issuance process Justice of the Peach Court No. 2 personnel clocked in the warrants and applications. There was also no testimony authenticating the accuracy of the various fax reference times on the documents.²

^{FN 1} Sergeant Skinner testified that the Defendant's criminal history was forwarded to him and that he was also familiar with the Defendant— and what he described as a propensity for violence— from his time as an undercover drug officer in Sussex County.

^{FN 2} At that point a photograph lineup had not been performed because one of the victims was still being hospitalized for the gunshot wound.

^{FN 3} One of SORT's duties is to execute high risk search warrants, which, officers testified appeared necessary given the circumstances of the investigation and the criminal history of the suspected defendant.

^{FN 4} Members of SORT team, prior to the issuance of the warrant then performed a quick precautionary sweep of the residence to secure the scene and ensure no other occupants remained in the residence. Detective O'Leary testified that the residence was not searched at that time. The SORT team found no other occupants inside the

² *State v. Lambert*, 149 A.3d 227 (Table), 2015 WL 3897810, at *1-2 (Del. Super) (emphasis in original).

residence and exited. Once outside, an officer positioned himself at the threshold of the front entrance to ensure no one entered the residence. Detectives O’Leary and Daddio testified that an unknown, but noticeable amount of time passed while they stood at the front entrance waiting for the approval of the search warrant. The Defendant’s motion to suppress does not challenge this initial precautionary sweep of the residence and the warrants in question do not rely on any information or evidence obtained during it. Therefore, the Court need not address the matter.

^{FN5} As discussed in greater detail below, at the suppression hearing, the Defendant argued that the only logical interpretation of the time stamps proves that the officers testimony involving the chronological events leading up to the search cannot be true (*i.e.*, the officers searched the residence before the warrant issued).

Additionally, after his arrest and following *Miranda* warning, Lambert correctly told the police the type of gun seized and where it was located. He also voluntarily and unequivocally stated that the gun was his.³

LAMBERT’S CONTENTIONS

In Lambert’s amended motion for postconviction relief, he raises the following ground for relief:

Trial Counsel failed to subject the Prosecution’s case to meaningful adversarial testing at trial by waiving the opening statement, cross-examination of all witnesses and

³ I viewed the video tape of Lambert’s confession that was entered into evidence during his Bench trial.

closing arguments thus entitling Mr. Lambert to relief under *United States v. Cronic*.

DISCUSSION

Under Delaware law, the Court must first determine whether Lambert has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.⁴ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.⁵ Lambert's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Lambert's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.⁶ The bars to relief are inapplicable to a jurisdictional challenge or "to a claim that satisfies the pleading requirements of subparagraph (2)(i) or (2)(ii) of subdivision (d) of Rule 61."⁷ To meet the requirements of Rule 61(d)(2) a defendant must plead with particularity that new evidence exists that creates a strong inference that the movant

⁴ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

⁵ Super. Ct. Crim. R. 61(i)(1).

⁶ Super. Ct. Crim. R. 61(i)(3).

⁷ Super. Ct. Crim. R. 61(i)(5).

is actually innocent in fact of the acts underlying the charges of which he was convicted⁸ or that he pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United State or Delaware Supreme courts, applies to the defendant's case rendering the conviction invalid.⁹ Lambert's motion pleads neither requirement of Rule 61(d)(2).

Lambert's ground for relief is premised on allegations of ineffective assistance of counsel. Therefore Lambert has alleged sufficient cause for not having asserted these grounds for relief at trial and on direct appeal. Lambert' ineffective assistance of counsel claims are not 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 Lambert, 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."¹⁰ 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 the 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;' [i]neffective assistance of

⁸ Super. Ct. Crim. R. 61(d)(2)(i).

⁹ Super. Ct. Crim. R. 61(d)(2)(ii).

¹⁰ *State v. Gattis*, 1995 WL 790961 (Del. Super.).

counsel then is cause for a procedural default.¹¹

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 must engage in the two part analysis enunciated in *Strickland v. Washington*¹² and adopted by the Delaware Supreme Court in *Albury v. State*.¹³

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.¹⁴ Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.¹⁵ 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.¹⁶

Generally, a claim for ineffective assistance of counsel fails unless both prongs

¹¹ *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

¹² 466 U.S. 668 (1984).

¹³ 551 A.2d 53, 58 (Del. 1988).

¹⁴ *Strickland*, 466 U.S. at 687; see *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

¹⁵ *Id.*

¹⁶ See e.g., *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *Boughner v. State*, 1995 WL 466465 at *1 (Del. Supr.)).

of the test have been established.¹⁷ 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."¹⁸ In other words, if the Court finds 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.¹⁹ Furthermore, Lambert 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."²⁰

Lambert claims that because his attorney did not make opening or closing statements, nor cross-examine the two witnesses presented by the State during the partially stipulated Bench trial that he was ineffective and did not "subject the State's case to meaningful adversarial testing at trial." Consequently, Lambert argues based upon his interpretation of *United States v. Cronin*²¹ that counsel's actions are *per se* ineffective and the Court need not even look at the prejudice prong of the *Strickland* analysis. Lambert's argument is certainly novel. Looking at the facts of this case and

¹⁷ *Strickland*, 466 U.S. at 687.

¹⁸ *Id.* at 697.

¹⁹ *State v. Gattis*, 1995 WL 790961 (Del. Super.).

²⁰ *Strickland*, 466 U.S. at 689; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

²¹ 466 U.S. 648 (1984).

using Lambert's logic, he would have the court rule that in a case where a defendant admits, on video, clearly and without any coercion that he did in fact possess a firearm and in fact told the officer the caliber of the firearm without the police stating what kind of firearm they found, and where the defendant stipulated after a lengthy colloquy with the Court to the fact that he was a person prohibited and that the weapon found during the search was in fact a firearm and clearly there was absolutely zero possible prejudice that could conceivably come from a lack of opening or closing statements or cross-examination under the clear facts of this case that somehow the Court should ignore this and proclaim that *ipso facto* Lambert is entitled to a new trial which would be a waste of time and resources and result in the same finding of guilt. This is clearly an absurd outcome.

Superior Court Criminal Rule 61(i)(3) is clear that any ground for relief not asserted in the proceeding leading to the judgment of conviction is barred unless the defendant demonstrates **both** cause **and** prejudice. In this case Lambert alleges the cause is the ineffectiveness of his counsel however he makes absolutely zero attempt to demonstrate any possible prejudice. His self-serving claims that he intended for counsel to contest whether or not he possessed the firearm is suspect at best. Trial Counsel's affidavit clearly states that he discussed his strategy with Lambert. Counsel's strategy to vigorously challenge the only possible chink in the State's iron clad case by filing the suppression motion and have a Bench trial stipulating to two of the three elements of the offense in order to preserve the right to appeal the denial of the suppression motion was certainly reasonable given the extremely strong case the State had against Lambert. I note that anyone who viewed Lambert's confession,

as I have, would conclude that Lambert voluntarily without any coercion clearly confessed that he was the owner of the seized firearm.

Trial Counsel viewed the video and in fact the record reflects that the video was redacted at Lambert's Trial Counsel's request to exclude Lambert's discussion with the officer concerning his confession to the related charges of Assault and Robbery in Maryland. Clearly, Trial Counsel made the well informed and sensible decision not to waste the Court's time with further questioning or argument but to focus on testing the State's case vis-a-vis the search warrant issues. I conclude that in no way does Trial Counsel' handling of Lambert's case rise to the level of ineffective assistance of counsel given the facts of the case. Additionally, I conclude that Trial Counsel's strategy did not prejudice Lambert in any way. Lambert also claims that his refusal to take a plea agreement somehow bolsters his self-serving claim that he wished his Trial Counsel to contest that he was the owner of the firearm. This argument is specious since had Lambert pled guilty he would have lost his right to contest the search warrant and thus his only possible hope.

Lambert pins his hopes on this court concluding that any decision, no matter the reasoning behind it, to stipulate to key facts and not make fruitless argument or cross-examination is automatically ineffective and a denial of the right to counsel, no matter the facts. I do find that *United States v. Cronin*²² compels such a result nor do I find the case law cited by Lambert, in an attempt to piece together his argument, compelling. Not one of the cases cited by Lambert are analogous to the facts and circumstances of this case. In each case cited there were various and sundry issues

²² 466 U.S. 648 (1984).

that could have changed the outcome for those defendants.²³

In *Loper v. State*²⁴ the court noted that in order to presume prejudice under the second prong of *Cronic* (that the defense failed to subject the State's case to meaningful adversarial testing), a defendant must allege a defect effecting the entire case and "the attorney's failure must be complete."²⁵ Clearly, Lambert's Trial Counsel's representation was not a complete failure despite Lambert's tortured attempts at trying to fit it into that box. As noted Lambert's attorney's representation was reasonable given the facts of the case and there was simply no breakdown of representation giving rise to a presumption of prejudice. As noted in *Loper* "if there is no 'structural defect' in the adversarial process that is "so inherently prejudicial to the adversarial process and a fair trial" prejudice is not presumed under the second scenario of *Cronic* and the two prong test of *Strickland* applies instead.²⁶

In Lambert's case Trial Counsel's strategy not to make opening and closing

²³ Lambert argues that *Cooke v. State*, 977 A.2d 803 (Del. 2009) is on par with his situation. He is mistaken. In *Cooke* trial counsel chose a strategy that was clearly in conflict with Cooke's wishes. Additionally, the case was a complex death penalty case and certainly not in any way factually analogous to Lambert's case. Lambert cites to *Martin v. Ross*, 744 F.2d 1245 (6th Cir 1984) to show a case where an attorney failed to participate at trial. Unlike Lambert's case the attorney in *Martin* had pinned all his pre-trial hopes on getting his client into a diversion program and consequently was totally unprepared for trial and chose to essentially boycott the trial after the court denied his request to continue the trial because he was unprepared. Unlike the clear and extremely strong case against Lambert the case against the defendant in *Martin* was much more suspect and there was very clear prejudice resulting from counsel's boycott.

²⁴ *State v. Loper*, 2016 WL 3621547, at * 6 (Del. Super. Ct. June 27, 2016).

²⁵ *Id.* at *6 citing to *Sahin v. State*, 72 A.3d 111, at 115 (Del. 2013)

²⁶ *Id.* at *6.

statements or cross examine the witnesses in no way effected the outcome of the trial. Lambert's argument in his reply brief that the State cited no authority for its argument is faulty logic. It is likely that the State cites no authority because of the simple fact that there never has been a case with facts similar to Lambert's where a defendant alleged an argument similar to Lambert's, simply because such an argument would be fruitless. In this case the lack of case law highlights the strained argument made by Lambert. I note also that Lambert has not provided the Court with any authority with similar facts to his case. He has merely provided one case with a similarity on one point but not all and another case with a similarity on another part cobbling together what could be called a "Frankenstein" argument where he stitches together various and sundry pieces to make an untenable whole.

In conclusion, the law and common sense compel me to find that under the facts of this case that Lambert's Trial Counsel was not ineffective and did in fact subject the State's case to the only meaningful testing possible, i.e. challenging the search warrant, and that Lambert cannot demonstrate prejudice. Were this Court to follow Lambert's request and grant a new trial on the basis of counsel's action solely at trial, and thereby looking at the trial in a vacuum separate from the entire case, as Lambert calls for, the result of a new trial would be the same for Lambert, a conviction and the same sentence, and would thus be a waste of judicial resources.

CONCLUSION

After reviewing the record in this case, it is clear that Lambert has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). A review of his counsel's affidavit clearly shows that counsel represented Lambert in a competent

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fashion and was not ineffective. Additionally, Lambert has failed to demonstrate any concrete prejudice. Consequently, I recommend that Lambert's motion be denied as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice.

/s/ Andrea M. Freud
Commissioner

AMF/dsc
cc: Prothonotary