IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

State of Delaware,	)	
	)	
Plaintiff,	)	
	)	**ID.: 1608006981**
v.	)	
	)	
Tyrone Anderson,	)	
	)	
Defendants.	)	

Submitted: March 1, 2021
Decided: April 12, 2021

ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF PER RULE 61 – DENIED

OPINION AND ORDER

Barzilai Axelrod, Esquire & William H. Leonard, Esquire, Deputy Attorney General, Department of Justice, Carvel State Office Building, 820 N. French Street, 7th floor, Wilmington, Delaware, *Attorneys for the State*.

Edward Gill, Law Offices of Edward C. Gill P.A., 16 N. Bedford St, Georgetown, Delaware, *Attorney for Defendant*

Patrick J. Collins, Esquire and Kimberly A. Price, Esquire, Collins & Associates, 8 East 13th Street, Wilmington, Delaware, *Attorneys for Defendant*

Jones, J.

I. INTRODUCTION

On September 19, 2019, Defendant Tyrone Anderson filed a Motion for Postconviction Relief pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 Motion.") Defendant filed his Rule 61 motion *pro se*. Defendant later filed an amended Rule 61 motion (the "Amended Rule 61 Motion") with the assistance of an attorney. The Amended Rule 61 Motion contained different grounds for relief from Defendant's original Rule 61 Motion (the "Amended Rule 61 Motion.") This Opinion will address both Defendant's Amended Rule 61 Motion and his original Rule 61 Motion. For the following reasons, both motions are **DENIED** in full.

II. BACKGROUND AND PROCEDURAL HISTORY

Defendant was found guilty and convicted of a number of criminal offenses following a Superior Court jury trial in November of 2017 based upon a series of drug-dealing related incidents which took place in the spring and summer of 2016.

The State offered Defendant a plea deal based on his charges, but Anderson rejected the plea deal and chose to proceed with trial instead. Defendant was represented by attorney Brian J. Chapman ("Trial Counsel") prior to and during his trial.

The evidence which the State presented at trial established that New Castle County Police Detective John Mancuso ("Det. Mancuso") was part of an undercover investigation into a drug dealing operation involving Defendant during the Spring and Summer of 2016. On four separate occasions during this period, Det. Mancuso

contacted Defendant both directly and through an informant and arranged to meet Defendant for the purpose of exchanging money for illegal drugs. All of these meetings were captured on audio recordings, and two of the meetings were videotaped by officers conducting surveillance. Over the course of these meetings, Det. Mancuso bought over 1,100 bags of heroin from Defendant.

The jury ultimately returned a guilty verdict against Anderson based on this and other evidence presented at trial. In total, Defendant was convicted of four counts of Drug Dealing (both Tier 1 and Tier 2), four counts of Aggravated Possession of Heroin, One count of Attempted Possession of Heroin (as a lesser included offense), and one count of Second Degree Conspiracy. Defendant's counts for Aggravated Possession of Heroin were merged with the counts for Drug Dealing at the time of sentencing.

As a result of these convictions, Anderson was sentenced in January of 2018 to 59 years of Level V incarceration, to be suspended after 29 years for decreasing levels of supervision. Anderson appealed his conviction to the Supreme Court of Delaware. Anderson's Trial Counsel filed a no-merit brief with the Supreme Court in August of 2018. The Supreme Court found no merit to Defendant's appeal and entered an Order finalizing his convictions and sentence on December 4, 2018.[1]

After the Supreme Court rejected Anderson's appeal, Anderson filed a Motion for Postconviction Relief pursuant to Delaware Superior Court Criminal Rule 61 in

[1] *See Anderson v. State*, 198 A.3d 271 (Del. 2018).

September of 2019 ("Rule 61 Motion".) In his Rule 61 Motion, Defendant asserted ten grounds for relief. Simultaneously, Defendant also requested appointment of counsel to assist with his postconviction relief efforts under Rule 61(e)(2). The Court appointed Patrick J. Collins to represent Defendant, and also gave Defendant leave to amend his original Rule 61 Motion. Collins ultimately "found no meritorious claims for postconviction relief" in Defendant's case and submitted a Motion to Withdraw as Anderson's postconviction counsel in June of 2020. Edward C. Gill, Esq. filed his entry as substitute counsel for Defendant, and filed an Amended Motion for Postconviction Relief ("Amended Rule 61 Motion") on December 11, 2020.

Both the Rule 61 Motion and the Amended Rule 61 Motion claim that Defendant is entitled to relief on the basis that his Trial Counsel provided him with ineffective assistance in the course of his representation, in violation of Defendant's rights under the Sixth Amendment of the United States Constitution. The Court requested an affidavit (the "Affidavit") from Trial Counsel responding to the specific allegations raised in the instant Motions, and providing Trial Counsel's perspective on the decisions he made during the course of his representation of Defendant which Defendant alleges represent ineffective assistance of counsel. Trial Counsel filed this Affidavit on January 15, 2021.

On February 16, 2021, the State filed a joint Response to Defendant's original and Amended Rule 61 Motions (the "Response.") Defendant filed a final Reply Brief ("Reply") addressing the State's Response on March 1, 2021. [2]

This ruling will first address the arguments contained in the Amended Rule 61 Motion, and then address the arguments contained in the original Rule 61 Motion.

III. PROCEDURAL BARS UNDER RULE 61(i)

Before addressing the substance of the arguments contained in Defendant's instant Motions, I will first address whether any procedural bars to relief contained in Rule 61 apply to either of the Motions.

First, a motion for postconviction relief under Rule 61 is untimely if it is filed more than one year after a conviction is finalized. In this case, Anderson's initial Rule 61 Motion was filed within this time frame, and the Court granted Anderson leave to amend his Motion after he was appointed an attorney to assist his postconviction relief efforts. This bar does not apply.

Next, second or subsequent Rule 61 motions are not permitted and will be summarily denied unless certain limited exceptions apply. The Rule 61 Motion and

[2] Anderson's current post-conviction relief counsel has also submitted a supplemental Reply Brief which claims that Trial Counsel's Affidavit represents an impermissible "expert opinion." The Reply Brief describes the Affidavit as constituting Trial Counsel's own professional opinion about whether he provided ineffective assistance of counsel to Anderson. This is incorrect. This Court requested Trial Counsel's Affidavit to help in its determination as to whether Trial Counsel provided Defendant with ineffective assistance by creating a more complete record of the basis for the decisions of Trial Counsel identified in Defendant's instant Rule 61 Motions. It is this Court's role to determine whether the conduct of Defendant's previous attorneys amounted to ineffective assistance of counsel, not Trial Counsel's role. The Court did not request Trial Counsel's Affidavit in order to obtain his professional opinion on whether his assistance was ineffective, and the Affidavit does not represent expert opinion testimony, nor is it cited in this manner by the State.

the Amended Motion represent Defendant's first such motion, and this bar to relief does not apply.

Third, grounds for relief "not asserted in the proceedings leading to the judgment of conviction" are barred unless the moving party can show "cause for relief" and "prejudice from [the] violation."[3] Defendant has asserted several such grounds for relief, which are noted below. These grounds for relief are barred.

Fourth, grounds for relief which were previously adjudicated are barred. Defendant previously asserted several of the grounds for relief contained in his Rule 61 Motion, which are noted below. These arguments are procedurally barred.[4]

Finally, procedural bars to relief do not apply to claims that the Court lacked proper jurisdiction over the case, to claims that plead with particularity that new evidence exists which creates a strong inference that a defendant is actually innocent, or that a new and retroactively applicable rule of Constitutional law renders a conviction invalid. Defendant makes no such claims in either of the instant motions.

IV. STANDARD FOR AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

All of the grounds for relief articulated in the Rule 61 Motion and Amended Rule 61 Motion are presented as ineffective assistance of counsel claims.[5]

[3] Rule 63(i)(3)

[4] Defendant has characterized many of his grounds for relief as ineffective assistance of counsel claims. Claims of ineffective assistance of counsel can only be raised on a motion for postconviction relief. Accordingly, these claims are not procedurally barred. *See State v. Belfield* (Del. Super. Mar. 9, 2021).

[5] The State's response to the Rule 61 and Amended Rule 61 Motions contains an argument that both of the Motions should be denied since they do not contain the express language of *Strickland* and therefore do not plainly state claims for relief on grounds that Defendant received ineffective assistance of counsel. This argument is not persuasive. It is not necessary for a filing to contain the exact language or "magic words" of a leading case so long as the Court can infer the legal standard that the party wishes to invoke. The language of both Motions repeatedly states that "defendant was not afforded the effective assistance of counsel" and contains other similar language. The Motions also clearly

Accordingly, before I address the substance of Defendant's claims, it will be helpful to review the standard for pleading an ineffective assistance of counsel claim under Delaware law.

The framework governing ineffective assistance of counsel claims was most famously articulated by the Supreme Court of the United States in *Strickland v. Washington* (1984). Under *Strickland,* in order to establish that a defendant received ineffective assistance of counsel, a defendant is required to demonstrate that both: (1) defense counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[6] If a defendant cannot prove both prongs of this standard, then the ineffective assistance of counsel claim will fail as a matter of law. Mere allegations of ineffectiveness will not suffice to meet this standard. Instead, a defendant must make and substantiate concrete allegations of actual prejudice.[7] A defendant pleading an ineffective assistance of counsel claim must also overcome the strong presumption that their counsel's performance fell within the wide range of reasonable professional assistance.[8] This includes a strong presumption that defense counsel's conduct constituted sound trial strategy.[9] Furthermore, "[a]n error by counsel, even if

describe the reasons why Defendant believes that Trial Counsel's conduct prejudiced his case. While the substance of these arguments is not persuasive, the arguments contained in the Motions make it clear that Defendant seeks relief on the basis of ineffective assistance of counsel, even if they do not explicitly invoke *Strickland*.

[6] *See Strickland v. Washington*, 466 U.S. 668, 694 (1984)

[7] *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. Nov. 8, 2003) (*overruled on other grounds*).

[8] *See Strickland*, 466 U.S. at 689

[9] *Id.; Flamer v. State*, 585 A.2d 736, 753-54 (Del. Dec. 21, 1990).

professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment" and "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."[10] Accordingly the Supreme Court of the United States had stated that "surmounting Strickland's high bar is never an easy task."[11]

With these principles in mind, I now turn to the arguments contained in Defendant's original Rule 61 Motion.

V. DEFENDANT'S AMENDED RULE 61 MOTION

The Court granted Defendant leave to amend his original Rule 61 Motion after Defendant retained an attorney to assist his postconviction efforts. In December 2020, Defendant's postconviction attorney filed an Amended Rule 61 Motion.

The Amended Rule 61 Motion raises four principle grounds for relief, all of which are presented as ineffective assistance of counsel claims. These grounds are:

I. Trial Counsel failed to object or move to modify an overbroad protective order which protected the identities of certain witnesses in the case.

II. Trial Counsel failed to object to a statement by Det. Mancuso which Defendant claims constituted hearsay, a violation of the Confrontation Clause, and a violation of Delaware Rule of Evidence 404(b).

[10] *Strickland* at 691; 697.
[11] *Harrington v. Richter*, 562 U.S. 86, 105 (2011)

III. Trial Counsel failed to request a *Flowers* hearing to determine the identity of a confidential informant whom the police used in their investigation.

IV. Trial Counsel failed to request a *Deberry* hearing or request an instruction that the jury should draw an adverse inference against the State based on approximately 10-15 second of missing sound in an audio recording of a drug deal involving Defendant.

I address these arguments in turn below. None of these arguments provides a valid basis for relief under Rule 61, and as a result the Amended Rule 61 Motion is **DENIED** in full.

First, Defendant seeks relief under Rule 61 on the grounds that that Trial Counsel rendered ineffective assistance by failing to object to an allegedly over-broad protective order entered in his case. On November 4, 2016, the Court entered an order ("Protective Order") in this case which stated that "the attorneys for the Defendants [including Anderson]. . . shall not disclose directly or indirectly, the identifying information to any third party, including but not limited to [Anderson], his family or associates, without leave of the Court" and that "the Attorney for the Defendant. . . shall not use the identifying information [provided by the State] to contact or attempt to contact the witnesses, directly or indirectly, without leave of Court."[12]

[12] Def's. Am. R. 61 Mot., Ex A (Order Dated 11-04-2016.)

The Amended Rule 61 Motion claims that Defendant's counsel "[failed] to object to or move to modify [the] overbroad [P]rotective [O]rder." The Amended Rule 61 Motion raises three alleged problems with the Protective Order:

a. Anderson was not able to defend himself at trial because he was not given access to the information subject to the Order.

b. The Order prevented both Anderson and his Trial Counsel from obtaining witness statements prior to their live testimony at trial.

c. The Order deprived Anderson of the ability to effectively weigh his options during plea bargain negotiations because Anderson was "not informed as to what he was facing."

I address these arguments in turn below. As an initial matter, Trial Counsel's decision not to object to the protective order as a tactical matter is within a defense attorney's discretion and does not arise to the level of ineffective assistance of counsel.[13]

The first problem with the Protective Order, according to Defendant, is that the Order "prevented defense counsel from sharing basically any information with the [Anderson]. . . None of the circumstances were allowed to be disclosed to [Anderson] at any point in the process until the day of trial."[14] In Defendant's

[13] See *Cooke*, 977 A.2d 803, 842-46 (Del. Jul. 21, 2009) (citing *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511-12 (2018)) ("the authority to manage the day-to-day conduct of the defense strategy, including. . . which witnesses to call [or decline to call], and what defenses to develop" is within the strategic discretion of trial counsel.)
[14] Def's. Am. Mot. At 1.

estimation, this prevented Defendant from being able to "defend[] himself against the charges [he faced at trial.]"

It is unclear whether this is intended to be a claim that Anderson suffered from ineffective assistance of counsel subject to *Strickland* analysis, or if it is a claim of plain error. Either way, however, the record indicates that this is not a valid claim for relief pursuant to Rule 61.

The State was obligated to provide Anderson's Trial Counsel – rather than Anderson himself – with access to the materials subject to the Protective Order. In a criminal case where a defendant is represented by an attorney, it is the attorney rather than the defendant who is ultimately responsible for trying the case and presenting a defense against the State's charges. For this reason, it is Trial Counsel rather than Defendant who must be given access to the materials necessary to prepare a defense.[15]

Although Trial Counsel was not obligated to provide Anderson with access to these materials,[16] the record reflects that Trial Counsel did in fact provide Anderson with access to discovery materials he received from the State. Anderson's Trial Counsel has submitted an Affidavit in this litigation indicating that "Trial Counsel was given the necessary leeway to speak with Tyrone Anderson about the specifics

[15] *See State v. Winn*, 2004 WL 3030023, at *3 (Del. Super. Dec. 23, 2004), *aff'd*, 2005 WL 3357513 (Del. Dec. 8, 2005) (simply because trial counsel and not the defendant reviewed the tape before trial does not rise to a discovery violation. "Again counsel, not the defendant, is given the responsibility of trying the case…")
[16] *State v. Lewis*, 2018 WL 5843464, at *6 (Del. Super. Nov. 5, 2018) ("There is no obligation of counsel to provide material given in [criminal] discovery to the defendant. While it is good practice, there is no constitutional requirement to do so.")

of [drug dealing] transactions with Detective Mancuso" and that "in advance of trial [Trial Counsel] provided [] Anderson with the capacity to listen to [audio recordings of] the transactions so that he was aware of the evidence to be presented [against him] at trial."[17]

Second, the Amended Rule 61 Motion claims that the Order deprived both Anderson and his Trial Counsel of the opportunity to "contact any of the witnesses to either confirm or deny the State's version of events" prior to trial.[18]

This claim is not accurate. The Protective Order entered in Defendant's case afforded Trial Counsel the opportunity to obtain witness and other information that the defense otherwise would not have been entitled to prior to trial. The State provided the defense with police reports of the witnesses through discovery, even though such reports are beyond the scope of the State's obligations under Rule 16.

Furthermore, Anderson cannot claim that any non-disclosure of witnesses was material to the outcome of his trial, because the state relied on video and audio recordings (rather than witness testimony) of drug sales between Anderson and Det. Mancuso while Det. Mancuso was undercover, as well as physical evidence obtained via search warrants and text messages between Det. Mancuso and Anderson. As such, Anderson cannot claim that any witness information he may have been denied was material to the verdict in his case.

[17] 2nd PCR Aff., Ground One, p. 4.
[18] Am. R. 61 Mot., at 1.

Defendant's final claim with respect to the Protective Order is that the Order prevented him from being able to evaluate the State's evidence against him and therefore to evaluate the State's plea offer in an informed manner.

This argument is unpersuasive. The record reflects that Defendant both signed a rejection of the State's plea offer and engaged in a colloquy with the presiding trial court judge wherein Defendant indicated that he fully understood the State's plea deal, that he was choosing to reject the State's plea deal, and that he understood the consequences of choosing to reject the deal:

> **Mr. Chapman:** Your Honor, that's all correct. I received a plea offer, it's a slightly amended plea offer last night. And I spoke about it with my client this morning down in lockup, we reviewed a substantial amount of the evidence the State has and at that point he does not wish to accept the plea and wants to proceed to trial.
>
> **The Court:** You say at this point; is there any hesitancy on your client's part?
>
> **Mr. Chapman:** I can ask him.
> (Discussion held off the record.)
>
> **Mr. Chapman:** No, Your Honor.
>
> **[The Court:]** All right. Mr. Anderson, please stand. Did you hear the plea agreement that was read into the record by the Deputy Attorney General?
>
> **The Defendant:** Yes. Your Honor.
>
> **The Court:** Does that set forth your understanding as to how this case would be resolved?
>
> **The Defendant:** Yes, Your Honor.

> **The Court:** Do you understand that your decision to reject the plea, which is your complete right, you have a constitutional right to go to trial, is a final act, you would be no longer able to say that you really did want to accept the plea offer, but was somehow prevented from doing so. Do you understand that?
>
> **The Defendant:** Yes, Your Honor.
>
> **The Court:** Do you have any further questions of Mr. Chapman about this?
>
> **The Defendant:** No, Your Honor.
>
> **The Court**: Do you wish to discuss this with him any further, whether or not to accept the plea?
>
> **The Defendant:** No, Your Honor.
>
> **The Court:** All right. I think a record has been made of the defendant's decision not to accept the plea. [19]

"A defendant's statements to the Court during a plea colloquy are presumed to be truthful, and pose a formidable barrier [to relief] in any subsequent collateral proceedings."[20] Defendant had the opportunity to reject the State's plea offer on the grounds that the Protective Order in this case rendered him unable to make a fully informed decision with respect to the offer. Defendant chose not to do so. In his colloquy with the presiding judge, Defendant further affirmed that he understood that his rejection of the plea deal would mean that he would "no longer able to say that [he] really did want to accept the plea offer, but was somehow prevented from doing so."

[19] *Tr.* 11/07/17, at 2-7 (Defendant plea rejection colloquy).
[20] *State v. Rodgers*, 2019 WL 2153312, at *2 (Del. Super. May 15, 2019)(internal quotations and citations omitted.)

Nothing in the record – including the Defendant's exchange with the judge indicating his rejection of the plea deal – indicates that Defendant believed that he was unable to evaluate the State's offer in an informed manner because he did not know the State's evidence against him. Defendant cannot make this argument *post facto* simply because he received an unfavorable outcome at trial.[21]

Next, Defendant's Amended Rule 61 Motion seeks relief on the basis of Trial Counsel's failure to object to a statement made by Det. Mancuso at trial which allegedly constituted hearsay, impermissible testimony of prior bad acts under Delaware Rule of Evidence 404(b), and a violation of the Confrontation Clauses of the Delaware and United States Constitutions.[22]

These alleged violations are based on direct testimony which Det. Mancuso provided on the second day of trial. During his direct examination, Det. Mancuso provided background on how he was introduced to Anderson before describing the drug deals which ultimately formed the basis for the charges against Anderson. When asked about the first drug deal for which Defendant was charged, the following exchange occurred:

> **Q**: Okay. Drawing your attention to deal number 1, I believe you said that was April the 19th?
> **[Det. Mancuso]**: Yes.
>
> **Q**: 2016?
> **A**: Yes.

[21] *Tr*. 11/07/17 at 7 (Defendant indicates that he understands rejecting the State's plea offer means that he will "no longer [be] able to say that [he] rally did not want to accept the [] offer, but was somehow prevented from doing so.")
[22] Def's. Am. PCR. Mot at 2.

> **Q**: Okay. How does that deal occur?
> **A**: What happens is that I was introduced to this gentlemen as – I was introduced to the defendant as a person who is selling heroin via a third party.[23]

The Amended Rule 61 Motion claims that Det. Mancuso's statement above "was clearly prejudicial hearsay and had an out of Court speaker making a statement for the truth of the matter asserted that the defendant was a person who was committing the very crimes he was charged with [sic]."

The allegations made by Defendant with respect to Det. Mancuso's statement are unpersuasive. First, Det. Mancuso's statement did not constitute hearsay. The classic definition of hearsay is a statement made by a party other than the declarant offered for the truth of the matter asserted. In this case, Det. Mancuso's statement was not offered for the truth of the matter asserted. Instead, it was merely to provide background to the jury on how the drug deals took place. Trial Counsel correctly described this statement as a "background question to provide the jury how Detective Mancuso was able to begin his direct interactions with [] Anderson back on April 19, 2016."[24] In other words, Det. Mancuso's statement describes the circumstances he was introduced to Anderson (that Anderson was introduced to him as a drug dealer) and was not offered to prove that Anderson was in fact a drug dealer.

Second, Det. Mancuso's statement does not constitute impermissible evidence of prior bad acts under Delaware Rule of Evidence 404(b). Rule 404(b) provides

[23] Def's. Ex. C. (Nov. 18, 2017 Tr., p. 6.)
[24] 2nd PCR Aff., 5.

that "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Det. Mancuso's remark was not offered to show that Anderson acted in accordance with his alleged character. Instead, it was offered to provide background on how Det. Mancuso was introduced to Anderson – the two were introduced by a confidential informant who stated that Anderson was a drug dealer during the introduction.

Even assuming for the sake of argument that Det. Mancuso's testimony was improperly admitted without a curative instruction (it was not), his testimony would represent a harmless error.[25] The strength of the other evidence offered at trial – including Det. Mancuso's testimony as to his personal participation in the drug deal, the audio and video surveillance of the deal, and the seized drugs that were tested – were clearly sufficient to substantiate the offenses for which Defendant was convicted. Anderson's conviction did not depend on the confidential informant's claim that Anderson was a drug dealer. It depended on the recorded evidence of the multiple drug transactions which took place after Det. Mancuso and Anderson were introduced to one another, the contraband recovered pursuant to search warrants, and the text messages between Mancuso and Anderson arranging an additional drug deal. On these grounds, Defendant cannot meet the *Strickland* standard that the outcome

[25] *See Ashley v. State*, 85 A.3d 81, 86–87 (Del. Feb. 11, 2014); *Kanda v. State*, 2012 WL 4862590, at *2 (Del. Oct. 12, 2012) (unobjected to hearsay evidence examined for plain error on direct appeal was found to be harmless and the strength of other evidence supported conviction)

of his case would have been different if Det. Mancuso's statement had not been admitted.

Finally, Det. Mancuso's statement did not represent a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Det. Mancuso only made his remark in order to provide background on how he established conduct with Anderson, and the substance of the charges against Anderson were based on drug deals which Anderson and Det. Mancuso participated in *after* this introduction took place. Further, the defense was afforded the opportunity to cross-examine Det. Mancuso after he presented his testimony. In other words, Defendant had the opportunity to cross-examine the witness against him in question, and thus no Confrontation Clause violation occurred on these grounds.

The Amended Rule 61 Motion next argues that Anderson's Trial Counsel was ineffective for failing to request a hearing on the identity of a confidential informant ("CI") involved in his case under *Flowers v. State*, 316 A.2d 564 (Del. Super. 1973). According to the Amended Rule 61 Motion, the CI in this case was "allegedly directly involved in some of the drug transactions" which resulted in several of Anderson's charges.[26] Specifically, Defendant alleges that the CI "set up the transactions [which ultimately resulted in Anderson's charges] and negotiated the alleged price for the drugs."[27] Defendant also claims that the CI "was present in the

[26] Def.'s Am. PCR Mot. At 2.
[27] *Id.*

car with the undercover police officer [Det. Mancuso] when some of the transactions occurred and was a direct witness to everything that occurred."[28]

According to the Amended Rule 61 Motion, the "identity of the [CI] would have materially aided the defense [because] defense counsel would have been able to explore discrepancies between the testimony of [the CI] as to the [CI's] involvement in the crime and receiving consideration for the State in exchange for his or her involvement."[29] Defendant contends that Trial Counsel's decision not to request a *Flowers* hearing in order to request the identity of the CI amounts to ineffective assistance of counsel "in that it undercut a major attack that could have been made by the defense upon the State's case under the theory that [Trial Counsel] used to defend the case."[30]

This contention is incorrect because the Amended Rule 61 Motion has failed to establish that the CI would have materially aided Anderson's defense. There are four situations in which *Flowers* claims may arise: (1) where the informer is used merely to establish probable cause for a search; (2) where the informer witnessed the criminal act; (3) where the informer participated in, but was not a party to the illegal transaction; and (4) where the informer was an actual party to the illegal transaction.[31] The identity of a confidential informant is generally privileged in the first scenario and must be disclosed in the fourth scenario. In the second and third

[28] *Id.*
[29] *Id.*, at 3.
[30] *Id.*
[31] *State v. Flowers*, 316 A.2d 564, 567 (Del. Super. Ct. Apr. 16, 1973).

scenarios, "disclosure of the informer's identity is required only if the trial judge determines that the informer's testimony is material to the defense."[32] In order for a defendant to establish the exception, they must "show, beyond mere speculation, that the confidential informant may be able to give testimony that would materially aid the defense."[33]

In this case, Anderson contends that the CI would not have been able to provide testimony that would materially aid Anderson's defense because the CI "set up" the drug transactions at issue and participated in price negotiations. However, the CI was not directly involved in the drug purchases in this case. Det. Mancuso – rather than the CI – actually purchased the drugs from Defendant while undercover on four separate occasions in addition to an attempted fifth occasion. Det. Mancuso testified that he purchased drugs on these occasions from Defendant, and that the CI did not act as an intermediary during the actual drug-purchase transactions.[34]

The CI was present at two drug purchase transactions which took place on April 19 and June 24, 2016 but was not present or otherwise involved in the two additional drug transactions or the attempted fifth transaction. The State presented audio surveillance for all four completed drug deals, helicopter video surveillance

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[32] *Id*.
[33] *Id*.
[34] Tr. 11/07/17 at 151 (Det. Mancuso Direct "Q. Okay. During the course of investigation, did there come a time when you conducted a series of *direct* purchases of heroin? **A. Yes.** Q. Okay. Who did you purchase the heroin from? **A. Tyrone Anderson** . . . Q. It is that defendant of the four purchases that you ultimately conducted? **A. Yes.**") (emphasis added); *Id*. at A201 (*Tr*. 11/08/17, at 5) (Det. Mancuso Direct "Q. So how many deals did you directly finish in this case? **A. I conducted four direct purchases; meaning I bought drugs specifically from the defendant four different times.** Q. Okay. What were those dates? **A. April 19th, 2016, June 24th, 2016, July 1, 2016, July 26, 2016.**").

of the April 19, 2016, deal, and additional pole camera video surveillance of the July 26, 2016, deal. The State also presented testimony of NCCPD Det. Michelle Burrus, an undercover detective that was part of the surveillance team in place for the April 19, 2016, and June 26, 2016, deals, whom also identified Anderson as having conducted those transactions.

In light of the direct and recorded evidence presented by the State at trial, Anderson has failed to establish beyond the level of mere speculation that the CI would have materially aided his defense. Accordingly, Defendant has failed to meet his burden to show that he would have been entitled to a *Flowers* hearing on this basis.

Finally, Defendant's Amended PCR Motion alleges that Defendant's counsel was ineffective for failing to request a hearing and a missing evidence instruction to the jury pursuant to *Deberry v. State*, 457 A.2d 744 (Del. 1983). This claim is based on another instance of testimony provided by Det. Mancuso during his direct examination. During his direct examination, Det. Mancuso testified about an alleged drug sale between himself and Defendant which occurred on July 20, 2016. Det. Mancuso used an audio recording device during this transaction, but testified that the recording device malfunctioned briefly during the drug sale. Defendant claimed that about 10 to 15 seconds of the recording of his transaction were missing. Det. Mancuso went on to orally describe the transaction during the missing portion of the recording.

Defendant claims that his counsel was ineffective because he did not "object[] and did not seek a missing evidence instruction pursuant to *Deberry*." In Defendant's view, this "prejudiced the Defendant since if a *Deberry* hearing was held the Court would have provided the jury with an instruction which indicated that due to the failure of the State to preserve this evidence properly the jury should infer that the evidence was favorable to the Defendant."[35]

Defendant's assertion that he would have succeeded on a *Deberry* hearing and received a favorable jury instruction is incorrect. It is true that "[o]nce it is established that the State must bear responsibility for the loss of material evidence, an appropriate jury instruction is required as a matter of due process under the Delaware Constitution."[36] However, the existence of missing evidence does not automatically entitle a criminal defendant to an adverse jury instruction against the State. Delaware Courts have repeatedly held that malfunctioning audio or video equipment does not automatically entitle a defendant to a *Deberry* instruction.[37] Instead, the State's obligation is to preserve and disclose the evidence in its

[35] Def.'s Am. PCR Mot. At 3.
[36] *Lolly v. State*, 611 A.2d 956, 961 (Del. 1992).
[37] *See King v. State*, 2015 WL 5168249, at *3 (Del. Aug. 26, 2015) (photographs that did not exist due to a camera malfunction were not subject to disclosure under *Brady* or Superior Court Criminal Rule 16, and do not meet the prerequisite for relief under *Lolly*); *Brown v. State*, 2017 WL 3573788, at *1 n. 1 (Del. Aug. 17, 2017) (malfunction of officer's microphone that caused video to record without audio or the administration of Standard Field Sobriety Tests outside full view of camera, does not support a *Deberry* instruction; the State preserved and disclosed the video evidence in its possession); *State v. Lowman*, 2018 WL 5309809, at *6 (Del. Super. Oct. 24, 2018) (reviewing an IAC claim for trial counsel not objecting to detective's testimony or admission into evidence of defendant's confession when recorded interview was inaudible. The Court held: "[h]owever, the recording, despite its quality, is still available. This is distinguishable from a case where the recording has been destroyed or lost; rather, this is a case where technology malfunctioned. . . [the detective] supplemented the recorded interview with a written police report. There is no evidentiary objection to prevent the investigating officer from testifying as to the statements made by [the defendant] during the course of a voluntary interview. This claim is without merit.").

possession in the form or quality in which the evidence was captured. Defendant has not alleged that the audio recording of the July 20, 2016 drug sale is missing because of negligent preservation efforts (much less bad faith) by the State. Nor has Defendant alleged any flaw in Det. Mancuso's description of the July 20 drug sale that renders his testimony about what transpired during the 10-15 second of missing audio as an unreliable substitute.

Defendant has not demonstrated that he would have been entitled to a *Deberry* instruction based on the brief portion of missing audio, much less that his counsel was ineffective for failing to request a *Deberry* hearing on this basis.

In sum, Defendant's Amended Rule 61 Motion does not contain any grounds for relief, and as such it is **DENIED** in full. I now turn to the arguments contained in Defendant's original *pro se* Rule 61 Motion.

VI. DEFENDANT'S RULE 61 MOTION

Defendant's original Rule 61 Motion contains ten grounds for relief, all presented as ineffective assistance of counsel claims. Several of these grounds were also contained in the Amended Rule 61 Motion.

First, Defendant argues that his Trial Counsel rendered ineffective assistance for failing to obtain a *Flowers* hearing to obtain the identity of the State's Confidential Informant. This argument is substantively identical to the *Flowers* argument raised in Defendant's Amended Rule 61 Motion, and for the reasons

described above, it does not provide a basis for Defendant to receive relief under Rule 61.

Second, Defendant asserts that his "rights against unlawful search and seizure [were] violated when his ineffective counsel failed to challenge the veracity of the search warrant." While the Motion does not specify which of the multiple warrants in his case he sought to challenge, subsequent filings clarify that Anderson sought to challenge a search warrant directed at 414 Kiamensi Road in Wilmington, Delaware, where police seized multiple cellular phones used to effectuate drug sales, including the phone which defendant used to communicate with Det. Mancuso.[38]

Defendant's claim with respect to the warrant for 414 Kiamensi Road – whether viewed as a substantive Fourth Amendment claim or as an ineffective assistance of counsel claim based on Trial Counsel's failure to object – is not a valid basis for relief. First, this claim was not asserted in the proceedings leading to judgment of conviction. Trial Counsel did not raise this claim at trial, and Anderson did not assert this claim in his direct appeal to the Supreme Court of Delaware.

[38] *Tr.* 11/08/17, at 129-33 (Det. Burrus discussing the location of Anderson's cellular phone in 414 Kiamensi Road). It initially appeared that this portion of Defendant's motion may have also represented an objection to a warrant directed at 203 Clyde Street in Wilmington, Delaware, where police seized a stash of heroin. Post-conviction relief Counsel determined that "Trial counsel was not ineffective for not moving to suppress the evidence since Mr. Anderson likely did not have standing to contest the legality of the search at 203 Clyde Street." Post-conviction relief Counsel further determined that "even if Mr. Anderson had standing to file a motion to suppress, the four corners of the affidavit establish probable cause to search 203 Clyde Street." As such, to the extent that Defendant's Motion referenced the warrant for 203 Clyde Street, his argument is unpersuasive, and Defendant cannot obtain Rule 61 relief on this basis.

Defendant is therefore barred from raising this claim for the first time now under Rule 61(i)(3).

Defendant's warrant claim also fails on substantive grounds. Trial Counsel reviewed the affidavits of probable cause "for each and every search warrant provided by the State of Delaware through the discovery process" and determined that "there was not an ethical way to challenge the probable cause established within the four-corners of the search warrant" and that "Defendant did not have standing to contest the search warrant."[39] Anderson's motion indicates that he "was never involved with any transactions at the home, did not reside or own [414 Kiamensi Road.]"[40] Since he neither owned nor resided at 414 Kiamensi Road, Anderson lacked standing to object to a search warrant for that property. Further, the warrant for 414 Kiamensi was based on sufficient probable cause, as it detailed multiple drug transactions involving Anderson at the Kiamensi Road address.[41] Accordingly, Defendant is not entitled to relief under Rule 61 on this basis.

Third, Anderson argues Trial Counsel should have challenged the chain of custody regarding one of the bags that contained drugs, which was presented as evidence at trial. Anderson raised this issue on direct appeal to the Supreme Court, which ruled that the state had sufficiently established a chain of custody for the bag and denied the claim. Accordingly, Anderson's cannot claim that he was prejudiced

[39] Aff. At 2.
[40] Mot. At 1.
[41] State's Reply, Ex. A ("Search Warrant for 414 Kiamensi Road")

by Trial Counsel's decision not to object under *Strickland*, as the State sufficiently established a chain of custody and the objection would have been overruled. Additionally, this claim is procedurally barred under Rule 61 as it was previously adjudicated and found meritless by the Supreme Court.

Fourth, Anderson argues that his rights under the Confrontation Clause of the Delaware and United States Constitutions were violated because the detective who extracted his cellular phone data – New Castle County Police Officer Det. Cooper – was not available to appear at trial. Anderson also argues that Trial Counsel was ineffective for failing to request a continuance on this basis.

Det. Cooper's unavailability was discussed prior to trial and Trial Counsel consented to the D.R.E. 901(a) authentication component of the State's foundational requirements for the cellular phone data in question. The parties agreed that Det. Mancuso would be able to lay the foundation for this evidence.[42] Anderson's Trial Counsel "did not believe there was any foundational issues that would in any way be beneficial to the Defendant" and that "the content of the information on the Defendant's cell phone was so extremely unfavorable to his Defense that Trial Counsel wanted to minimize the amount of time and testimony presented to the jury in regards to the Defendant's cell phones." Trial Counsel's tactical decision not to object represented a strategic decision within his discretion, and Anderson has failed to show prejudice resulting from this decision under *Strickland*.[43]

[42] (*Tr*. 11/08/17, at 15-16) (Pre-trial matters raised to the Court).
[43] See *Cooke*, 977 A.2d at 842-46

Fifth, Anderson argues that he was denied effective assistance of counsel because Trial Counsel failed to request *voir dire* after one of the jurors entered the courtroom during a recess. Anderson claims that "evidence and counselors were in the courtroom" at this time, and the juror "may have seen or heard evidence that could have influenced the jury during deliberation."[44]

Anderson raised this argument on direct appeal to the Delaware Supreme Court, which rejected it.[45] This claim is therefore procedurally barred under Rule 61(i)(4) as previously adjudicated. Substantively, Anderson's Trial Counsel was present during this incident and confirmed that nothing related to the case was being discussed when the juror entered the courtroom. Anderson only raises speculation that the juror in question "may" have heard prejudicial information and provides no description of what that information may have been or how it might have prejudiced his case. This fails to demonstrate the prejudice required to succeed on an ineffective assistance of counsel claim under *Strickland*. Accordingly, Trial Counsel did not render ineffective assistance based on this incident, and Anderson cannot use it as a basis to receive relief under Rule 61.

Sixth, Anderson argues that he received ineffective assistance of counsel because Trial Counsel advised Anderson not to testify on his own behalf at trial. According to Anderson, Trial Counsel advised him not to testify for tactical reasons

[44] Mot. At 2.
[45] *Anderson*, 2018 WL 6344697, at *2.

and believed as a strategic matter that Anderson would be more likely to receive a favorable outcome by not providing live testimony.[46]

After the State rested its case, the presiding judge held a colloquy with Anderson regarding his right to testify on his own behalf. The Court explained to Anderson that while his attorney could provide him with strategic advice about whether or not to testify on his own behalf, the ultimate decision was his alone as the Defendant. Anderson acknowledged that he did not wish to testify on his own behalf. Anderson's Trial Counsel was furthermore not ineffective for advising Anderson not to testify on his own behalf as a strategic matter. The Court explained to Anderson that Trial Counsel's strategic advice was not binding, and that he could choose to testify on his own behalf if he wished to do so. Having made his decision at trial, Anderson cannot now receive relief.

Seventh, Anderson's Motion states that Trial Counsel was ineffective for failing to raise a *Deberry* claim based on a gap in the audio recording of the July 20, 2016 drug purchase transaction. This argument is substantively identical to the *Deberry* argument raised in the Amended Rule 61 Motion, and Anderson is not entitled to relief under Rule 61 on this basis for the reasons described *supra*.

Eighth, Anderson argues that he received ineffective assistance of counsel during his sentencing. According to Anderson, counsel "only briefly spoke with defendant immediately before sentencing and sought no continuance." Anderson

[46] Def's. Mot. At 2.

claims that counsel was unprepared for sentencing, and that he may have received a more favorable sentence if counsel has prepared a strategy beforehand.

Anderson declined to raise this claim through a Rule 35 motion after his sentence was issued. Accordingly, it was not raised prior to entry of judgement of conviction and is procedurally barred by Rule 61(i)(3). Additionally, the Court asked Anderson if he wished to speak on his own behalf prior to sentencing. The following exchange between the Court and Anderson occurred at sentencing on January 12, 2018:

> **The Court**: Mr. Anderson, is there anything you wish to say? If you don't, I won't hold it against you, because you've indicated you want to take an appeal. Is there anything you wish to say?
>
> **The Defendant**: No, Your Honor.[47]

Accordingly, Anderson's claim is procedurally barred and substantively unpersuasive, and he cannot receive relief under Rule 61 on this basis.

Ninth, Anderson claims his Trial Counsel was ineffective for failing to present expert voice analysis at trial. According to Anderson, expert testimony of this nature "would have indicated a probable exclusion of the defendant as [an] unidentified voice on [an audio]tape" presented as evidence of Anderson's participation in a drug deal at trial.[48] The audiotape in question is a recording of a drug deal that was presented by the State as an exhibit at trial. Det. Mancuso testified that the two

[47] *Tr*. 01/12/18, at 21 (Sentencing transcript).
[48] Def.'s Mot. At 4.

voices on the recording belonged to himself and Anderson.[49] Anderson suggests that a voice authentication expert could have verified that the voice of the drug dealer captured on the recording was not in fact Anderson's voice, and that Trial Counsel was therefore ineffective for failing to call such a witness.

Delaware Rule of Evidence 901(b)(5) provides that a witness can provide voice identification "based upon hearing the voice at any time under circumstances that connect it with the alleged speaker" including "firsthand or through mechanical or electronic transmission or recording."[50] The Supreme Court of Delaware has interpreted D.R.E. 901 to permit opinion testimony about the identity of a speaker if the moving party can show that the witness has, at some point, heard the voice of the alleged speaker.[51] In this case, it is undisputed that Det. Mancuso encountered Anderson in-person and conducted drug purchase transactions with him on multiple occasions. Anderson orally communicated with Det. Mancuso during these transactions. This gives Det. Mancuso enough experience hearing Anderson's voice to identify him on the audio recording in question. Det. Mancuso's testimony was clearly admissible, and the decision not to call a witness to provide conflicting testimony was well within Trial Counsel's discretion.[52]

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[49] (*Tr*. 11/08/17, at 24) (Q. Whose voices are on that audio? [State's Ex. 9] **A. That's my [Det. Mancuso] voice and you can clearly hear the defendant's as well.**").
[50] D.R.E. 901(b)(5)
[51] *See Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982)
[52] See *Cooke*, 977 A.2d 803, 842-46 (Del. Jul. 21, 2009) (citing *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511-12 (2018)) ("the authority to manage the day-to-day conduct of the defense strategy, including. . . which witnesses to call [or decline to call], and what defenses to develop" is within the strategic discretion of trial counsel.)

Tenth**,** and finally, Anderson alleges that Trial Counsel was ineffective when counsel "failed to challenge the probable cause for the audio recording." Anderson claims that the recordings contained no "preamble" and again claims that his voice is not featured on the recordings. Anderson claims "if [Trial Counsel] would have investigated the admission of the audio recording, it would not have been admissible at trial."

The audio recordings of the drug transactions which the State presented at trial were admissible, and Anderson's argument invokes an inapplicable legal standard. The relevant standard for the admissibility of evidence in a criminal or civil trial is relevance, not probable cause.[53] Under Delaware Rule of Evidence 401, evidence is relevant when "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[54] All relevant evidence is presumptively admissible.

The audio recordings at issue – which purported to contain recordings of the actual drug sale transactions between Anderson and Det. Mancuso – were clearly relevant to the different drug deals for which Anderson was charged. It is unclear to the Court what issue Anderson takes with the "preamble" but it appears he is arguing that the audiotape recordings featured a preamble by Det. Mancuso to help identify the evidence for each drug transaction, including date of each transaction, the phone

[53] The concept of probable cause is inapplicable to the admissibility of the audio recording in question. Probable cause is the standard for police to obtain an arrest or search warrant pursuant to the Fourth Amendment, or for a grand jury to issue an indictment in a criminal case. Probable cause is a concept in criminal procedure and is not a relevant standard for the admissibility of evidence.
[54] D.R.E. 401

number he was calling, and the agreed upon quantity and price of drugs involved in each transaction. The fact that the recordings contained such preambles does not render them inadmissible.

Anderson's Rule 61 Motion provides no basis to believe that an objection to the admission of this evidence would have been successful and accordingly fails to show prejudice under *Strickland*. Anderson cannot obtain relief on these grounds.

VII. CONCLUSION

For the reasons stated above, Anderson has failed to show that he is entitled to the relief he seeks under Rule 61. Both the Motion and the Amended Motion are **DENIED** in full.

IT IS SO ORDERED.

/s/ Francis J. Jones, Jr.
Francis J. Jones, Jr.

Original to Prothonotary
cc: Brian Chapman, Esquire.