IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANGEL ARBOLAY,	§	
	§	
Defendant Below,	§	No. 425, 2023
Appellant,	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	
STATE OF DELAWARE,	§	Cr. ID No. 1810013334A (N)
	§	
Appellee.	§	
	§	

Submitted: May 10, 2024
Decided: July 12, 2024

Before **TRAYNOR**, **LEGROW**, and **GRIFFITHS**, Justices.

ORDER

(1) The appellant, Angel Arbolay, has appealed the Superior Court's denial of his motion for postconviction relief under Superior Court Criminal Rule 61. After careful consideration of the parties' briefs and the record, we affirm the Superior Court's judgment.

(2) Following a bench trial, the Superior Court convicted Arbolay of various drug- and firearm-related offenses. The charges arose after a probation officer searched a motel room of which Arbolay was the sole occupant at the time of the search and found a loaded handgun, 373.126 grams of marijuana, .9 grams of

cocaine, drug paraphernalia, and other items. This Court affirmed Arbolay's conviction on direct appeal.[1]

(3) Arbolay then filed a timely motion for postconviction relief. The Superior Court granted Arbolay's motion for appointment of postconviction counsel. Arbolay's postconviction counsel later moved to withdraw, indicating that he had not identified any grounds for postconviction relief that he could advocate ethically. After further briefing from Arbolay, the Superior Court denied the motion for postconviction relief and granted postconviction counsel's motion to withdraw.

(4) On appeal to this Court, Arbolay asserts two claims of ineffective assistance of counsel.[2] He argues that his trial counsel provided ineffective assistance by (i) conceding during opening argument that Arbolay was drunk, high, "being an idiot," and screaming out of the motel room when the officers encountered him;[3] and (ii) not seeking suppression of the evidence obtained from the search of the motel room.

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[1] *See Arbolay v. State*, 262 A.3d 1034, 2021 WL 5232345 (Del. Sept. 14, 2021) (TABLE) (summarizing the evidence presented at trial and affirming convictions and sentence, with exception of remand for purpose of merging sentences for drug dealing marijuana and aggravated possession of marijuana).

[2] Arbolay has waived review of other arguments that he presented to the Superior Court but did not address in his opening brief on appeal. *See Harris v. State*, 2014 WL 3883433, at *2 (Del. July 29, 2014) ("An appellant must state the merits of an argument in his opening brief or that argument will be waived." (citing Del. Supr. Ct. R. 14(b)(vi)(A)(3))).

[3] Appendix to Answering Brief at B78.

(5) This Court reviews the Superior Court's denial of a motion for postconviction relief for abuse of discretion.[4] We review legal or constitutional questions, including claims of ineffective assistance of counsel, *de novo*.[5] The Court considers the procedural requirements of Rule 61 before addressing any substantive issues.[6] Ineffective assistance claims raised in a timely first postconviction proceeding generally are not procedurally barred.[7] Arbolay's claims are not procedurally barred, except to the extent discussed below.

(6) Under the "well-worn standards"[8] established in *Strickland v. Washington*, to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (i) his defense counsel's representation fell below an objective standard of reasonableness, and (ii) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.[9] Although not insurmountable, there is a strong presumption that counsel's representation was professionally reasonable.[10] A defendant must make

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[4] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013).
[5] *Id.*
[6] *Bradley v. State*, 135 A.3d 748, 756–57 (Del. 2016).
[7] *Cephas v. State*, 277 A.3d 936, 2022 WL 1552149, at *2 (Del. May 17, 2022) (TABLE) (citing *Green v. State*, 238 A.3d 160, 175 (Del. 2020)).
[8] *Ploof*, 75 A.3d at 820.
[9] *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).
[10] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988).

concrete allegations of actual prejudice to substantiate a claim of ineffective assistance of counsel.[11]

(7) Arbolay contends that his trial counsel was ineffective because he stated during opening argument that Arbolay was drunk, high, "being an idiot," and drawing attention to himself when the officers encountered him at the motel. Arbolay asserts that counsel's statements effectively conceded guilt and deprived Arbolay of his right to present an innocence-based defense.

(8) The Superior Court held that Arbolay did not demonstrate that he suffered prejudice from counsel's statements because he did not overcome the presumption that the judge who presided over the bench trial based his verdict only on the admissible evidence.[12] Arbolay seems to argue that prejudice should be presumed under *United States v. Cronic*.[13] "Under *Cronic* prejudice is presumed in three circumstances: (1) if there is a complete denial of counsel; or (2) if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; or (3) if counsel is asked to provide assistance in circumstances where competent counsel likely could not."[14] We conclude that Arbolay's challenge to his counsel's

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[11] *Bradley*, 135 A.3d at 760.

[12] *State v. Arbolay*, 2023 WL 7342134, at *4-5 (Del. Super. Ct. Nov. 7, 2023).

[13] 466 U.S. 648 (1984). *See Urquhart v. State*, 203 A.3d 719, 726 (Del. 2019) ("In *Cronic*, the Supreme Court recognized that, when the accused is completely denied counsel at a critical stage of the judicial proceedings, the accused is excused from demonstrating prejudice under *Strickland*.").

[14] *Sahin v. State*, 72 A.3d 111, 114 (Del. 2013) (citing *Cooke v. State*, 977 A.2d 803, 848 (Del. 2009))..

opening argument is subject to the *Strickland* standard, not *Cronic*, because it does not assert that counsel completely failed to test the prosecution's case but rather alleges deficiencies of the "'same ilk as other specific attorney errors [that courts] have held subject to *Strickland*'s performance and prejudice components.'"[15] After the remark that Arbolay challenges, his trial counsel (i) argued that the State would not be able to prove that the gun and drugs belonged to Arbolay or that Arbolay was engaged in drug dealing; (ii) previewed the defense's alternative theory about why Arbolay's DNA was found on the gun and to whom the gun and drugs belonged; (iii) presented several witnesses and Arbolay's testimony in support of the defense theory; and (iv) effectively cross-examined the State's witnesses, including the DNA expert. In short, defense counsel did not completely fail to test the prosecution's case, and *Strickland* therefore applies.

(9) We agree with the Superior Court's holding that Arbolay has not established prejudice as required under *Strickland*. Specifically, Arbolay has not demonstrated that there is a reasonable probability that, but for counsel's challenged statement during opening argument, the result of the proceeding would have been

[15] *Cooke v. State*, 977 A.3d 803, 849 (Del. 2009) (quoting *Bell v. Cone*, 535 U.S. 685, 697–98 (2002)); *see also Bell*, 535 U.S. at 697 (holding that *Strickland*, not *Cronic*, applied to defendant's claim that his counsel failed to call witnesses, present available mitigating evidence, or make a closing argument during the penalty phase of a capital trial, because the claim was "not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points" and, "[f]or purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind").

different. The trial judge, as the trier of fact during a bench trial, is presumed to have based his verdict solely on the admissible evidence.[16] The trial judge heard testimony from the arresting officers that their attention was drawn to Arbolay's room because they heard a man screaming through an open window; the court also heard Arbolay's testimony that he was not yelling out of an open window and was simply sitting on the bed, texting on his phone, when the first officer spoke to him from outside the room.[17] When explaining the court's verdict, the trial judge stated that the law enforcement officers credibly testified that they heard Arbolay screaming and that he seemed high or intoxicated.[18] Arbolay has not demonstrated prejudice from counsel's statement.[19]

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[16] *See Burke v. State*, 692 A.2d 411, 1997 WL 139813, at *2 (Del. Mar. 19, 1997) (TABLE) (affirming manslaughter conviction and stating that, in an appeal from a conviction following a bench trial, the judge sitting as the trier of fact is presumed to have reached the verdict based only on the admissible evidence before the court and to have disregarded that which is inadmissible); *see also Kurzmann v. State*, 903 A.2d 702, 709, 711–13 (Del. 2006) (rejecting appellant's claims of prosecutorial misconduct, and holding that appellant failed to overcome the presumption that the judge who presided over violation of probation proceeding based his decision "only on the admissible evidence before him and disregarded the allegedly inadmissible and improper prosecutorial statements").

[17] Appendix to Answering Brief at B209. Somewhat inconsistently with his own testimony that he was sitting on the bed when he noticed the officers outside the window, Arbolay also testified that he was in the bathroom when the officers first made contact. *Id.* at B224. Arbolay also explicitly took issue with counsel's statements that Arbolay was intoxicated and "being dumb" and questioned why counsel had said those things. *Id.* Arbolay clearly disputed the officers' version of events, and it was for the judge as trier of fact to assess the credibility of the witnesses and resolve any conflicts. *See Knight v. State*, 690 A.2d 929, 932 (Del. 1996) ("It is well-settled that the trier of fact is the sole judge of the credibility of the witnesses and responsible for resolving conflicts in the testimony." (internal quotation omitted)).

[18] Appendix to Answering Brief at B235.

[19] Arbolay seems to argue that the result of the trial would have been different if his counsel had attempted to show that the officers were motivated by ill-will toward Arbolay as a result of their prior negative interactions with him, including as defendants in a federal civil-rights action that

(10) Nor did counsel's statement concede Arbolay's guilt, as Arbolay contends. Arbolay was not on trial for his conduct before the police made contact with him but for having the drugs and firearm that the officers found in the room. Counsel's opening argument was consistent with the defense strategy of attempting to show that multiple people had been in the motel room, which was not registered to Arbolay, and that the drugs and gun found in the room were not Arbolay's.

(11) Next, Arbolay argues that his counsel provided ineffective assistance by not seeking suppression of evidence obtained from the search of the motel room. The Superior Court held that this claim is procedurally barred as formerly adjudicated.[20] In *Green v. State*, we explained that, although ineffective-assistance claims asserted in a timely first postconviction proceeding generally are not procedurally barred, there "are times . . . when our prior rejection of a substantive appellate claim will render a follow-on ineffective-assistance claim futile."[21] "For

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Arbolay filed against them. But Arbolay testified that he was on probation; he had previously had numerous encounters with the officers and was afraid of them; the officers had previously arrived at his friend's house "without warrants, kicked in the doors, and assaulted" Arbolay, causing him to receive seven stitches; he believed they might have unlawfully installed a GPS tracking device on his car; and the officers were "always harassing [him] and stalking [him]" and had generated false reports against him. *Id.* at B209, B215, B221. One of the other witnesses called by the defense also testified that police officers had acted aggressively toward, and injured, Arbolay several months before the night of Arbolay's arrest at the motel room. *Id.* at B189. We cannot discern how additional or different action by counsel concerning Arbolay's previous interactions with the officers would have changed the outcome of the trial.

[20] *State v. Arbolay*, 2023 WL 7342134, at *5 (Del. Super. Ct. Nov. 7, 2023). *See* Del. Super. Ct. R. Crim. Proc. 61(i)(4) ("Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred.").

[21] *Green v. State*, 238 A.3d 160, 176 (Del. 2020).

instance, if on direct appeal we were to reject a claim that the trier of fact considered inadmissible evidence, a claim in postconviction relief proceedings that trial counsel was ineffective for not objecting to the evidence would be futile and might rightly be considered formerly adjudicated."[22]

(12) On direct appeal, Arbolay challenged the search of the motel room. Reviewing the claim for plain error because Arbolay did not file a motion to suppress in the Superior Court, the Court concluded that the search was a procedurally compliant administrative search supported by reasonable articulable suspicion of criminal activity.[23] In this appeal, Arbolay has not argued that the result would have been different had trial counsel filed a motion to suppress, thereby preserving the issue for appellate review under a more exacting standard. We therefore find no reversible error as to the Superior Court's determination that Arbolay's ineffective-assistance claim relating to the search of the motel room was procedurally barred as formerly adjudicated.

[22] *Id.*

[23] *Arbolay v. State*, 2021 WL 5232345, at *3–4 (Del. Sept. 14, 2021).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Abigail M. LeGrow
Justice