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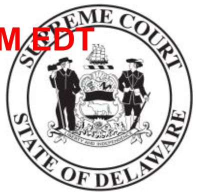

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IRA BROWN DEFENDANT BELOW APPELLANT v. STATE OF DELAWARE, APPELLEE.	No. 178, 2014

APPELLANT'S OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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Dated: July 9, 2014

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NATURE OF PROCEEDINGS

Ira Brown was charged with drug dealing, Tier V possession, maintaining a dwelling, and related charges. On April 24, 2012, he entered a guilty plea to the charge of drug dealing. Sentencing in that case was deferred until April 25, 2012, so that he could be sentenced, simultaneously with another case pending against him. During the sentencing hearing, but before the judge sentenced the defendant, Brown made a verbal motion to withdraw his guilty plea .(A-8) That motion was denied, without prejudice, and Court ruled that he could present the motion to the judge that took a plea the day before. (A-8) The judge then sentenced the defendant on both cases. He received 67 years in jail suspended after 22 years. Brown the formally filed a written motion to withdraw the guilty plea. On May 17, 2012, the Court denied the motion to withdraw the guilty plea. Brown then filed a motion for post conviction relief, which was denied. Subsequently, Brown filed an appeal with this Court and the undersigned was appointed to represent him. This is his opening brief.

SUMMARY OF ARGUMENT

Argument I

The defendant's due process rights were violated when it was not disclosed to him that there were security leaks, mismanagement, substantial discrepancies, irregularities, falsified entries and misconduct in the office of the Medical Examiner which purportedly did the lab tests on the drugs in this case.

Argument II

The Court erred when it denied the defendant's motion to withdraw his guilty plea. The defendant had not been sentenced at the time that he made his verbal motion to withdraw his guilty plea and therefore the motion to withdraw should have been considered under Superior Court Criminal Rule 32 rather than Superior Court Criminal Rule 61. Furthermore, his guilty plea was mistakenly made since he was not informed of the problems in the Medical Examiner's office prior to entering the guilty plea.

STATEMENT OF FACTS

On October 26, 2011, Brown was arrested and charged with drug dealing, aggravated possession of heroin, possession of drug paraphernalia, driving a vehicle while his license was suspended and maintaining a drug property. On April 24, 2012, he entered a guilty plea to the charge of drug dealing. Sentencing was deferred until April 25, 2012 so that Brown could be simultaneously sentenced with another case that was pending against him. During the sentencing hearing, but before the judge sentenced the defendant, Brown made an oral motion to withdraw his guilty plea. (A-7) The Court without much review, denied the motion without prejudice and ruled that Brown could present the motion to the judge who took the plea on April 24, 2012. (A-8) He then sentenced the defendant to 67 years in jail suspended after 22 years. On April 27, 2012, Brown, through counsel, filed a motion to withdraw his guilty plea. That motion was denied. He then filed a motion for post conviction relief which was denied. Subsequently, he took an appeal to this court.

Brown had been suspected of selling drugs by the Wilmington Police Department. In connection with their investigation they had a confidential informant make a "controlled buy" from Brown. They applied for and received a search warrant to search his residence. On the way to the residence, they

observed Brown driving a Chrysler Pacifica. They pulled the car over and observed a bag of marijuana in plain view. A pat down search of Brown revealed a key to the residence that they wanted to search. Subsequently, they searched the residence and found narcotics and drug related items. (Page 9, 10 decision 3/12/14)

After Brown's was a motion for post conviction relief had been denied, the Attorney General's Office learned that there were serious problems in the operation and management of the Office of the Chief Medical Examiner, whose function is to test drugs. Test results were falsified, drugs were stolen and unaccounted for, security was lax and employees were suspected of stealing drugs and interchanging the evidence. On June 5, 2012, the Department of Justice, supplemented the record in this case, indicating that one or more of the individuals involved in the chain of custody evidence in this particular case had been indicted in connection with the investigation. (A-11) Subsequently, a more comprehensive report was issued, which outlined the misconduct. (A-23) Among other things, the report noted:

1. That two employees were "dry labeling" the evidence indicating that the tests showed it was illegal drugs without actually testing the evidence; (A-52)
2. The evidence was being removed from the laboratory;
3. The security concerning the access to the drug evidence was lacking;

4. The security to the building was lacking;
5. The management and record keeping was lacking;
6. The evidence was lost, mis marked or intermingled with evidence from other cases;
7. Security videos were not maintained and in many cases the films taped over; (A-36)
8. Some employees had criminal backgrounds prior to obtaining their jobs at the Medical Examiner's Office; (A-34)
9. Entries in on the records were erroneous; (A-44)
10. There were no set guidelines for the retention of the evidence; (A-48)
11. Two employees have been indicted and charged with drug offenses and falsifying business records of the medical examiner; (A-50)

ARGUMENT I

Question Presented-Whether the defendant should be entitled to a new trial based upon newly discovered evidence?

Scope of Review-In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial, and could not have been discovered before by the exercise of due diligence; (3) that it is not merely cumulative or impeaching. State v. Hamilton, 406 A2d 879 (DE Super 1974)

Objection noted-none- This matter should be reviewed in the interest of justice pursuant to Supreme Court Rule 8 as the disclosure by the State about the problems in the Medical Examiner's office was made after the plea was entered.

MERITS OF ARGUMENT

Brown was indicted and charged with the sale and distribution of illegal drugs. Brown entered a guilty plea. After he was sentenced, the State notified the defendant that there were concerns about the drug evidence. In fact, one or more of the individuals involved in the chain of custody had been indicted for stealing

drugs and falsifying records of the Medical Examiner's Office. A copy of that letter is attached hereto. Subsequently, the State published a report detailing the conclusions of its investigation which found very significant deficiencies, improprieties and in fact, criminal conduct within the operation of the Office of the Chief Medical Examiner.

In order to warrant the granting of a new trial based upon a newly discovered evidence, it must appear:

> 1. That the evidence is such that it will probably change the result if a new trial is granted;
> 2. That it has been discovered since the trial and could not have been discovered before by the exercise of due diligence;
> 3. That it is not merely cumulative or impeaching.
> Hamilton, State v. Lynch, 128 A. 565 (DE Term 1925)

The State has supplemented the record in this case with a document that indicates that individuals involved in the testing of the alleged drugs in this case have been charged with tampering with the evidence and falsifying records.

The State published the results of an investigation of the Office of the Medical Examiner. A copy of which is attached hereto. It discloses many failures in the manner in which the office was operated and how the drugs were kept and/or tested. In particular, it found:

> 1. That two employees were "dry labeling" the evidence indicating that it was illegal drugs without actually testing the evidence; (A-52)
> 2. The evidence was being removed from the laboratory;

3. The security concerning the access to the drug evidence was lacking;
4. The security to the building was lacking;
5. The management and record keeping was lacking;
6. The evidence was lost, mis-marked or intermingled with evidence from other cases;
7. Security videos were not maintained, and many cases, the films taped over; (A-36)
8. Some employees had criminal backgrounds prior to obtaining their jobs at the Medical Examiner's Office; (A-39)
9. Entries in the records were erroneous; (A-44)
10. There was no standard or set period of time for the retention of the evidence; (A-48)
11. Two employees have been indicted and charged with drug offenses and falsifying business records of the medical examiner; (A-52)

Many of the deficiencies and discrepancies existed when this case was pending in the Superior Court. Therefore, the integrity and reliability of the evidence is unsound. At a minimum, it should have been provided to the defendant as "Brady material." This evidence, if disclosed to the defendant could have been used to cross examine witnesses concerning the chain of custody and the nature of the evidence and whether it was or was not illegal drugs. There was no way that the defense counsel could have obtained this information on their own or could have discovered this information by due diligence. The information is not merely cumulative or impeaching, but goes to the main issue of the case i.e. whether Brown had illegal drugs.

Therefore Brown's case should be dismissed or remanded to the Superior Court.

ARGUMENT II

Question Presented- Did the lower court err when it denied the defendant's motion to withdraw his guilty plea?

Scope of review- a decision to deny a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Insley, 141 A2d 619 (DE 1958)

Objection noted. (A-7)

MERITS OF ARGUMENT

Brown entered a guilty plea on April 24, 2012; however, sentencing was deferred until April 25, 2012 so that he could be sentenced simultaneously with another case against him. Prior to the Court imposing the sentence, Brown indicated to the court that he wanted to withdraw his guilty plea (A-7). The Court after a minimal inquiry into the matter, denied the Defendant's motion, without prejudice , and ruled that he could present the motion to the judge who took the plea. He then sentenced the defendant. Defense counsel, then filed a written motion to withdraw the guilty plea which was presented to the Court. The matter was referred to the original judge, who took the plea. After reviewing submissions from both sides, the Court ruled that the issue was controlled by Superior Court Rule 61 and denied the motion.

Brown contends that an incorrect standard was used by the Court because he

made a verbal motion to withdraw the plea before he was sentenced. Therefore, the motion should have been considered pursuant to Superior Court Criminal Rule 32 (d). Pursuant to same, the defendant would only have to prove that withdrawal of the plea was based upon a fair and just reason. This section contemplates a lower threshold of cause to permit withdrawal of a guilty plea then Superior Court Criminal Rule 61. Patterson v. State, 684 A2d 1234 (DE 1996)

The Court considered the merits of the defendant's motion and decided that the motion was without merit. Brown had indicated that he had difficulties with his counsel and that he wanted counsel to file a motion to suppress, which the attorney did not want to do. He also indicated he did not get along with his attorney. The Court in reviewing the matter, reviewed the defendant's colloquy when he entered the plea and determined that the plea was made voluntarily. Furthermore, the Court concluded that the defendant no longer had any issues with his counsel. In addition, the Court found that the withdrawal of the guilty plea, since it had been combined with another case would be burdensome on the court.

The defendant is entitled to his constitutional rights and a fair trial. The fact that it may be burdensome on the Court should be a secondary consideration.

Brown would further submit that his guilty plea was entered as a result of a misunderstanding or mistake. If he had been informed of the misconduct and

mismanagement in the Medical Examiner's office, he never would have entered a guilty plea. Where there is a mistake on behalf of the defendant, such as this, the withdraw of a guilty plea should be permitted. State v. Insley, 141 A2d . 619 (DE 1958), Smith v. State, 451 A2d 837 (DE 1982).

The defendant should have been able to withdraw his guilty plea and the Court's refusal to permit him to do so was an error. Therefore, the conviction should be reversed, and the matter remanded to the lower court.

CONCLUSION

For the foregoing reasons, the conviction should be reversed, and the matter remanded to the lower court.

LOWER COURT'S OPINION

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	:	
	:	
v.	:	Case No. 1110018439
	:	
IRA M. BROWN Defendant.	:	

ORDER

This **12th** day of **March, 2014**, upon consideration of Defendant's Motion for Postconviction Relief, Trial Counsel's Affidavit, the State's Response, and a careful, thorough, and *de novo* review of the record, said Motion for Postconviction Relief is **DENIED**. It appears that:

1. On November 21, 2011, Ira M. Brown ("Defendant") was indicted on the following charges: Drug Dealing, Aggravated Possession, Possession of Drug Paraphernalia, and Driving a Vehicle While License is Suspended or Revoked.[1]

2. On April 24, 2012, Defendant entered a guilty plea to the charge of Drug Dealing and the parties asked the Court to defer sentencing to April 25, 2012, the scheduled date for Defendant to be sentenced before Hon. Fred Silverman in Case Number 1012017349 and for which a Presentence Investigation and Report had been prepared. The Court deferred sentencing to April 25, 2012.

[1] A reindictment, with the same charges, was filed on March 12, 2012.

3. On April 25, 2012, Defendant was sentenced, in the instant case, to 25 years at Level 5 (the first two years are mandatory), suspended after 12 years at Level 5 for the balance to be served at Level 4 Work Release, suspended after 12 months for 18 months at Level 3. Hold at Level 3 until space is available at Level 4 Work Release.

4. As to Case Number 1012017349, the Court sentenced Defendant as follows: Trafficking, 25 years at Level 5 (the first three years are mandatory) with credit for 55 days previously served, suspended after 5 years at Level 5 for 20 years at Level 4 Work Release, suspended after 12 months Level 4 Work Release for 18 months at Level 3. Hold at Level 3 until space is available at Level 4 Work Release; Possession with Intent to Distribute, 5 years at Level 5 (this was an enhanced penalty conviction); Distribution within 300 Feet of a Park, 10 years at Level 5, suspended for 1 year at Level 3; Possession within 1,000 Feet of a School, 1 year at Level 5, suspended for 1 year at Level 3; Resisting Arrest, 1 year at Level 5, suspended for 1 year at Level 3; Possession of Marijuana, 6 months at Level 2; probation is concurrent to any probation now serving.

5. The Court also entered a note at the end of the Sentence Order, which stated, in pertinent part:

> Defendant's criminal history is shocking. Defendant was 9 when first arrested. Since then, he has been undeterred by the criminal justice system. He is "a" and "b" eligible. The only thing in his favor is he does not favor weapons or actual violence. But, Defendant is a drug

> dealer. He committed a serious drug felony while on bail for this. Only prison will stop Defendant.
>
> As to Criminal Action Number IN12-03-1067: Defendant committed this serious drug felony while on bail for serious drug felony. Defendant is a drug dealer. He is now "b" eligible. Defendant deserves at least 10 years in prison.

6. The facts of the case are that police executed a search warrant for 2521 Bowers Street on October 26, 2011. The police found 917 bags of heroin (some marked "Banshee"), black rubber bands, ammunition, a marijuana grinder, and Defendant's identification and paperwork addressed to Defendant in a locked bedroom.

7. The warrant was predicated on several factors: a tip from a past, proven, reliable informant ("CI") that "Nesi" (Defendant) was selling drugs out of 2521 Bowers Street, that Defendant drives a silver Chrysler, identification of Defendant, a police directed controlled drug buy (the drugs that were bought were marked "Banshee") in the same month as the tip, and the fact that Defendant was a known convicted drug dealer.

8. After the magistrate signed the search warrant application and immediately prior to the search, the police observed Defendant driving a silver Chrysler in the vicinity of 2521 Bowers Street. Aware that Defendant did not have a valid driver's license, the police stopped the vehicle.

9. The officers saw, in plain view in the vehicle, a green plant-like material (later identified as marijuana). Defendant was removed from the vehicle and Defendant had $906.00, a Wilmington Housing Authority ("WHA") house key, and other keys on him.

10. The WHA key opened the door to 2521 Bowers Street and one of the other keys found on Defendant opened the locked bedroom door.

11. On April 27, 2012, Defendant, through counsel, filed a Motion to Withdraw Guilty Plea pursuant to Superior Court Criminal Rule 32(d) and a Motion to Withdraw as Counsel. The grounds asserted were that he "felt pressured and threatened because [trial] counsel said that [he] would be convicted at trial[,] [trial] counsel refused to file motions on [his] behalf[,] and [he was] denied [his] constitutional due process rights."[2]

12. The request to withdraw a guilty plea is governed by Superior Court Criminal Rule 32(d) which states that a motion brought after the imposition of sentence "may be set aside only by motion under [Superior Court Criminal] Rule 61."[3] Such a motion, filed after sentencing, "constitutes a collateral attack on the

[2] Def.'s Mot. to Withdraw Guilty Plea and to Withdraw as Counsel, ¶ 9 (Apr. 27, 2012).

[3] Super. Ct. Crim. Rule 32(d) ("If a motion for withdrawal of a plea of guilty or nolo contendere is made before imposition or suspension of sentence or disposition without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 61").

conviction" and is "subject to the procedural requirements of . . . Rule 61."[4] Accordingly, the Motion to Withdraw Guilty Plea was denied on May 16, 2012. The Motion to Withdraw as Counsel was granted that same day (May 16, 2012).

13. Defendant did not file a direct appeal to the Delaware Supreme Court.

14. On April 24, 2013, Rule 61 Counsel filed a Rule 61 Motion for Postconviction Relief. He alleged that Trial Counsel was ineffective because he did not file a motion to challenge the search warrant.

15. Before considering the merits of any claims asserted in a motion for postconviction relief,[5] the Court must first determine if the motion is procedurally barred under Superior Court Criminal Rule 61, ("Rule 61").[6]

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[4] *Jamison v. State*, 2003 WL 21295908, *1 (Del. June 3, 2003).

[5] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[6] Superior Court Criminal Rule 61(i) provides, in pertinent part:

> (i) *Bars to Relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
> (2) Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.
> (3) Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
> (A) Cause for relief from the procedural default and
> (B) Prejudice from violation of the movant's rights.
> (4) Former Adjudication. 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, unless reconsideration of the claim is warranted in the interest of justice.
> (5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

16. In the instant case, Defendant's Motion was filed within one year after his judgment of conviction became final, it is not repetitive, and it was not formerly adjudicated. However, because a guilty plea is generally a waiver of claim[7], Defendant's Motion is barred unless, pursuant to Rule 61(i)(5), Defendant asserts lack of jurisdiction or states a colorable claim that there was a "miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceeding leading to the judgment of conviction."[8]

17. By asserting ineffectiveness of counsel, the postconviction court can consider the merits of a defendant's claim. A claim of ineffective assistance of counsel is "normally not subject to the procedural default rule"[9] because it alleges that counsel's substandard work prejudiced the defendant's case, prevented the defendant from having a fair trial, and weakened the defendant's appeal.

18. Nevertheless, in the instant case, an analysis of the law concerning attorney performance leads to the conclusion that Defendant's Trial Counsel did not fall below normal standards.

19. In order for Defendant to establish ineffective assistance of counsel, Defendant must show that Trial Counsel's alleged errors "were so grievous that his

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[7] *Maddox v. State*, 2012 WL 385600, *1 (Del. Feb. 6, 2012).

[8] Super. Ct. Crim. R. 61(i)(5).

[9] *State v. Gattis*, 1995 WL 790961, *3 (Del. Super. Dec. 28, 1995).

performance fell below an objective standard of reasonableness . . . [and] there is a reasonable degree of probability that but for counsel's unprofessional errors the outcome of the proceedings would have been different . . . ."[10]

20. The law is clear that there is a strong presumption that counsel's representation is competent and falls within the "wide range" of reasonable professional assistance.[11] Moreover, deference must be given to counsel's judgment in order to promote stability in the process.[12]

21. Furthermore, to overcome the strong presumption that counsel has acted competently, the defendant must demonstrate that "counsel failed to act reasonabl[y] considering all the circumstances"[13] and that the allegedly unreasonable performance prejudiced the defense. The question in this case is not whether counsel deviated from the best or most common practice but whether counsel's representation was inadequate under the prevailing professional norms.[14] Thus, the essential question is whether counsel made mistakes so crucial that

[10] *Id.* at *4 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). *See also Harrington v. Richter*, 131 S.Ct. 770, 778 (2011); *Premo v. Moore*, 131 S.Ct. 733, 736 (2011); *Scott v. State*, 7 A.3d 471, 475-76 (Del. 2010); *Duross v. State*, 494 A.2d 1265 (Del. 1985); *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003), *impliedly overruled on other grounds as recognized in Steckel v. State*, 882 A.2d 168, 171 (Del. 2005).

[11] *Premo*, 131 S.Ct. at 739.

[12] *Id.* at 736.

[13] *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011) (internal quotation marks omitted) (quoting *Strickland v. Washington*, 466 U.S. at 688).

[14] *Harrington*, 131 S.Ct. at 778.

counsel was not functioning at the level guaranteed by the Sixth Amendment[15] and deprived the defendant of a fair trial.

22. In the instant case, although Defendant alleges that his attorney was deficient when he failed to challenge the "sufficiency of probable cause to issue the search warrant,"[16] Defendant has failed to show that Trial Counsel fell below professional norms or failed to act reasonably under the circumstances.

23. Defendant posits that "the validity of the search warrant was the central issue in this case" and that defense counsel failed "to identify a deficiency in the search warrant application."[17] The Defendant, however, cites only one Delaware case to support his assertion, *State v. Ada*[18], which is factually distinguishable, involved searches of two different addresses, and the search most similar to the instance case was not suppressed.

24. Under the United States and Delaware Constitutions, a search warrant will issue only upon a showing of probable cause, which must be found within the four corners of the affidavit in support.[19] "The magistrate issuing the warrant must make a practical, common-sense decision whether, given all the circumstances set

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[15] *Ibid.*

[16] Def.'s R. 61 Mot., 2 (Apr. 24, 2013) (hereinafter "Rule 61 Mot. at ___"). Defendant's Rule 61 Motion is unpaginated.

[17] *Id.* at 6.

[18] *State v. Ada*, 2001 WL 660227 (Del. Super. June 8, 2001).

[19] *LeGrande v. State*, 947 A.2d 1103, 1107 (Del. 2008).

forth in the affidavit – including the veracity and the basis of knowledge of persons supplying hearsay information – there is a fair probability that contraband or evidence of a crime will be found in a particular place."[20] The informant's reliability, the details of the tip, and the police's independent surveillance and information to corroborate the tip are factors that the magistrate must consider.[21]

25. In the instant case, the search warrant states that during the month of October, 2011, a past, proven, reliable CI approached the police and said that "Nesi" (Defendant's nickname) drives a silver Chrysler and sells heroin out of 2521 Bowers Street, Wilmington (within Riverside Area). The CI also described Nesi and positively identified him from a photograph. During the last week of that same month, the CI made a controlled buy (police coordinated drug buy) from Defendant in front of the aforementioned address after Defendant exited the silver Chrysler vehicle. It was determined that the substance that Defendant sold (thirteen baggies secured with a black rubber band, and each stamped "Banshee") was heroin. Police also conducted a records check and found that Defendant was a drug dealer with prior drug convictions for Possession With Intent to Deliver a Controlled Substance (2003) and Maintaining a Vehicle for Keeping a Controlled

[20] *State v. Holden*, 60 A.3d 1110, 1114 (Del. 2013).

[21] *Id.*

Substance (2007). The search warrant was signed at 8:54 p.m. on October 26, 2011.

26. *State v. Ada*[22], cited by Defendant, involved suspected drug activity at two separate addresses. As to one of the addresses, the Court denied a motion to suppress where the police conducted a controlled buy at an apartment complex (after receiving a "concerned citizen" tip that the defendant was "possibly selling illegal drugs" from a particular apartment in that complex, conducting surveillance, and stopping recent drug purchasers when they exited the building in which the apartment was located).[23] The Court suppressed the search of a second location because the affidavit merely said that the defendant frequented that location and the police believed that he stored drugs there.

27. While waiting to execute the warrant in the instant case, the police observed the Defendant driving a vehicle a few blocks from the residence in the Riverside area. The police stopped Defendant at 9:00 p.m. and arrested him for driving on a suspended license. The police also saw marijuana in plain view and Defendant had departmental controlled buy money and keys (which opened the door to 2521 Bowers Street and fit the bedroom lock) on Defendant's person.

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[22] *State v. Ada*, 2001 WL 660227.

[23] *Id.* at *1.

28. Moreover, contrary to Defendant's assertion, Trial Counsel did not fail to identify or consider the sufficiency of the search warrant. Indeed, Trial Counsel discussed this issue several times on the record in open court with Defendant present. Each time, Trial Counsel explained that he had reviewed the search warrant but did not believe that a challenge would be fruitful. Hence, Defendant's assertion that there was a "probability that a motion to suppress would have been granted if raised by trial counsel"[24] curiously ignores the fact that the possibility of suppression motions was raised by Trial Counsel, considered by the Court three times, and rejected three times prior to Defendant entering a guilty plea. Furthermore, the issue was revisited (and rejected) when Defendant moved to withdraw his guilty plea.

29. In the State's June 28, 2013 Response to the Rule 61 Motion, the State sets forth the chronology of Trial Counsel's consideration of the possibility of Suppression Motions:

> The defendant first made his concerns with regard to this issue known to the Court at his final case review on April 16, 2012. Judge Herlihy conducted a lengthy inquiry into the defendant's concerns. The defendant stated that he wished to pursue both a motion to suppress and a motion for a *Flowers* hearing. Both defense counsel and counsel for the State put on the record the questions that defense counsel had concerning the stop of the defendant and the subsequent search of his residence. **Defense counsel stated that he lacked a good faith basis to file a motion to suppress, and the Court agreed with that assessment. Defense counsel likewise explained that he**

[24] Rule 61 Mot. at 11.

did not have a good faith basis to file a *Flowers* motion because the controlled buy in the case was done only as a basis for probable cause, and the Court again agreed. Then, on April 24, 2012 – the day of trial – Your Honor conducted a similar inquiry with the defendant, with the same result. Then, Defendant again made the same complaints to Judge Silverman at his sentencing on April 25, 2012, again with the same results.

On April 27, 2012, Defendant filed a Motion to Withdraw his guilty plea, citing the same concerns that he had voiced in Court previously. On May 16, 2012, Your Honor issued the Court's decision on that Motion, first finding that the Motion was an improper venue for pursuing the relief he sought, but also going a step further and finding that Defendant's contentions were "without merit." In so finding, Your Honor noted that "Defendant's claim is contradicted by the extended colloquy that occurred prior to his plea and during his plea."[25]

30. The State added that "the central issue"[26] here is the fact that Trial Counsel insisted on abiding by the Delaware Rules of Professional Conduct when he refused to file a frivolous motion. Ethical and professional behavior, the State reasoned, should not serve as a basis for a claim of ineffective assistance of counsel.

31. Additionally, the Court has reviewed Trial Counsel's affidavit filed pursuant to Superior Court Rule 61(g)(1) – (g)(2). Trial Counsel states that he reviewed discovery materials, including the search warrant, and found sufficient temporal proximity, CI reliability, and that the search was executed at the specific

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[25] State's Resp., 1 – 2 (June 28, 2013) (emphasis supplied).

[26] *Id.* at 2.

address named in the warrant. Trial Counsel felt that it would be unethical to file baseless motions.[27]

32. Based on the totality of the circumstances, Defendant did not have a meritorious suppression issue.[28] The search warrant contained a logical nexus between the items sought (drugs) and the place to be searched (Defendant's residence at 2521 Bowers Street, Wilmington).[29] There was reasonable cause to believe that drugs were located on the property targeted in the search warrant application.[30] A magistrate reviewed this information and signed the search warrant.

33. A magistrate may infer probable cause to search a drug dealer's residence if "the affidavit establishes a nexus between the dealer's home and the crime under investigation."[31] Factors that help to establish a nexus include the size of the drug dealing operation, the proximity of the defendant's residence to the location of the criminal activity, probable cause to arrest the defendant on drug

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[27] Trial Counsel's Aff., 2 – 3 (June 12, 2013).

[28] *State v. Holden*, 60 A.3d at 1114 ("A court reviewing the magistrate's determination has the duty of ensuring 'that the magistrate had a substantial basis for concluding that probable cause existed . . .' [and] the magistrate's decision reflects a proper analysis of the totality of the circumstances") (quoting *Illinois v. Gates*, 462 U.S. 213, 238 – 39 (1983)).

[29] *State v. Jones*, 28 A.3d 1046, 1057 (Del. 2011) ("The affidavit must set forth facts permitting an impartial judicial officer to *reasonably* conclude that the items sought would be found at the location. The determination of whether the facts in the affidavit demonstrate probable cause requires a *logical* nexus between the items being sought and the place to be searched").

[30] *Ibid.* (citing *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000)).

[31] *U.S. v. Stearn*, 597 F.3d 540 (3d Cir. 2010).

related charges, and an informant's tip that drugs would be found in the residence.[32] Indeed, "probable cause to search can be based on an accumulation of circumstantial evidence that together indicates a fair probability of the presence of contraband at the home of the arrested."[33] A "template of 'typical facts' is not the *sine qua non* for a finding of probable cause . . . . So long as the issuing magistrate had a substantial basis for concluding that probable cause existed, a reviewing court should not suppress the evidence seized pursuant to that warrant."[34]

34. In the instant case, the past proven reliable informant's tip that Defendant sold drugs from a specific house, verification of the Defendant's identity, a police orchestrated controlled buy of drugs sold by Defendant at the specific address, and the fact that Defendant was a known drug dealer point to the probability that drugs were at the specific location. As such, the magistrate had a substantial basis for concluding that probable cause existed.

35. Moreover, the cases cited by Defendant are distinguishable. *Eisenhauer v. State*[35] did not have the additional evidence of a controlled drug buy and *State v. Ada*[36] lacked objective evidence connecting Defendant to one

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[32] *Ibid. See also U.S. v. Burton*, 288 F.3d 91, 104 (3d Cir. 2002); *U.S. v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001).

[33] *U.S. v. Burton*, 288 F.3d at 103.

[34] *State v. Holden*, 60 A.3d at 1116.

[35] *Eisenhauer v. State (of Texas)*, 678 S.W.2d 947 (Tex. Crim. App. 1984).

[36] *State v. Ada*, 2001 WL 660227.

particular residence. Defendant's argument is further undermined by the fact that the Court in *State v. Ada* actually found a nexus where there was a controlled buy. As such, Trial Counsel's assessment that the search warrant was a "non-issue"[37] and that there was no basis for a *Flowers*[38] hearing to reveal the identity of the informant was not the result of an oversight or failure to consider or understand the law. Rather, as Trial Counsel explained at the time of Defendant's plea, it would have been unethical to file a frivolous motion.[39]

36. The Defendant has failed to show that Trial Counsel's evaluation of the facts was contrary to prevailing Delaware law or that there was a reasonable chance that a court would have suppressed the search based on Delaware law. Defendant has not shown that Trial Counsel was objectively unreasonable or that the outcome would have been different.

37. Accordingly, Defendant's Motion for Postconviction Relief is **DENIED.**

IT IS SO ORDERED.

The Honorable Diane Clarke Streett

Original to Prothonotary

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[37] Trial Counsel's Aff. at 3.

[38] *See Flowers v. State*, 316 A.2d 564 (Del. Super. 1973).

[39] Plea Tr., 9 – 10 (Apr. 16, 2012).