IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TSCHAKA FORTT,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 02-1593-GMS
	)	
THOMAS CARROLL, Warden,	)	
	)	
Respondent.	)	

Tschaka Fortt. *Pro se* petitioner.

Elizabeth R. McFarlan, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware. Attorney for respondents.

MEMORANDUM OPINION

March 17, 2005
Wilmington, Delaware

/s/ Gregory M. Sleet

Sleet, District Judge

I. INTRODUCTION

Petitioner Tschaka Fortt is a Delaware inmate at the Delaware Correctional Center in Smyrna, Delaware. He has filed the pending petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 1.) For the reasons that follow, the court will dismiss his petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

As detailed by the Delaware Supreme Court on direct appeal, the facts leading to Fortt's arrest and conviction are as follows:

> In October 199[7], the New Castle County Police Department conducted an investigation into distribution of cocaine in the course of which they encountered the [petitioner], Tschaka Fortt. A search of Fortt revealed that he had $1,640 in his front pants pocket, which Fortt claimed to have saved from his employment. Fortt was advised of his *Miranda* rights and initially denied selling illegal drugs. Then, after hearing the police discuss the securing of a search warrant for his apartment, he asked the police whether it would be possible to go to the apartment with the police, show them the "stuff" and simply flush it down the toilet. The police indicated this was not acceptable. Ultimately, the police secured a search warrant for Fortt's apartment and discovered six large bags and three smaller bags of cocaine in the freezer section of the refrigerator. The total weight of the cocaine was 11.03 grams. . . The police also seized scales and packing materials. Fortt later told police he had been selling an ounce of cocaine each week to finance his college education. In the apartment police also found a bill for electric service for 143 Chestnut Crossing Drive, Unit I, listing Fortt as the customer.

Fortt v. State, 766 A.2d 475, 476 (Del. 2000).

In July 1999, a Delaware Superior Court jury convicted Fortt of trafficking in cocaine (16 Del. C. Ann. § 4753A(a)(2)(a)), possession with intent to deliver cocaine (16 Del. C. Ann. § 4751(a)), maintaining a dwelling for keeping controlled substances (16 Del. C. Ann. § 4755(a)(5)), and possession of drug paraphernalia (16 Del. C. Ann. § 4771). The Delaware Supreme Court affirmed Fortt's convictions and sentences on direct appeal. *Fortt v. State*,

No.543, 1999 (Del. Dec. 19, 2000).

In June 2001, Fortt filed a motion for state post-conviction relief under Superior Court Criminal Rule 61, asserting several claims that his counsel provided ineffective assistance. The Superior Court denied Fortt's Rule 61 motion in part and reserved decision regarding Forrt's claim that trial counsel was ineffective for not filing a pre-trial suppression motion. The Superior Court appointed new counsel for the limited purpose of considering this issue and, on March 11, 2002, denied Fortt's Rule 61 motion as to all issues. Fortt appealed, and the Delaware Supreme Court affirmed the Superior Court's judgment. *Fortt v. State*, 804 A.2d 1066, 2002 WL 1836703 (Del. Aug. 8, 2002).

Fortt filed a second Rule 61 motion in June 2002, which the Superior Court denied. *State v. Fortt*, 2002 WL 32071650 (Del. Super. Ct. Sept. 9, 2002). He appealed, but voluntarily dismissed his appeal on October 24, 2002.

On October 31, 2002, Fortt filed in this court a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting two claims of ineffective assistance of counsel. (D.I. 1.) The State ask the court to dismiss Fortt's claims because they do not warrant federal habeas relief under § 2254(d)(1). (D.I. 9.)

III. GOVERNING LEGAL PRINCIPLES

A. The Antiterrorism and Effective Death Penalty Act of 1996

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)(internal citations and quotation marks omitted). Pursuant to AEDPA, a federal court may

consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA increases the deference federal courts must give to state court decisions, primarily by imposing procedural requirements and standards for analyzing the merits of a habeas petition. *See Woodford,* 538 U.S. at 206. Generally, AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

B. Exhaustion

Absent exceptional circumstances, a federal court cannot grant federal habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-44 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). AEDPA states, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(I) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is based on principles of comity, requiring a petitioner to give "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 844-45; *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000). A petitioner "shall not be deemed to have exhausted remedies available . . . if he has the right under the law of the state

to raise, by any available procedure, the question presented." 28 U.S.C. § 2254©). Generally, a petitioner must demonstrate that the habeas claim was "fairly presented" to the state's highest court, either on direct appeal or in a post-conviction proceeding. *See Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)(citations omitted); *Coverdale v. Snyder*, 2000 WL 1897290, at *2 (D. Del. Dec. 22, 2000).

C. Standard of Review Under AEDPA

Once a federal court determines that a claim is exhausted and the state court adjudicated the federal claim on the merits, then the federal habeas court can only grant habeas relief when the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1), (2); *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). A claim is considered to have been "adjudicated on the merits" for the purposes of 28 U.S.C. § 2254(d)(1) if the state court "decision finally resolv[es] the parties claims, with *res judicata* effect, [and] is based on the substance of the claim advanced, rather than on a procedural, or other ground." *Rompilla v. Horn*, 355 F.3d 233, 247 (3d Cir. 2004)(internal citations omitted).

AEDPA also requires a federal court to presume that a state court's determinations of factual issues are correct. 28 U.S.C. § 2254(e)(1). A petitioner can only rebut this presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (stating that the clear and convincing standard in § 2254(e)(1) applies

to factual issues, whereas the unreasonable application standard of § 2254(d)(2) applies to factual decisions). This presumption of correctness applies to both explicit and implicit findings of fact. *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000).

IV. DISCUSSION

Fortt asserts two claims in his habeas petition: (1) his trial counsel, Raymond Radulski, provided ineffective assistance by failing to file a pre-trial motion to suppress all evidence seized from his residence; and (2) counsel was ineffective because he "failed to argue the facts and circumstances of the case accurately." (D.I. 1, at ¶¶ 12A, 12B.) Although Fortt's first claim is based on an underlying Fourth Amendment violation that generally would not present a proper claim for federal habeas review, an ineffective assistance claim based on counsel's alleged failure to raise a Fourth Amendment violation is cognizable on federal habeas review. *Kimmelman v. Morrison*, 477 U.S. 365, 377-82 (1986)(holding that a claim alleging ineffective assistance of counsel for failing to litigate a Fourth Amendment claim is cognizable on federal habeas review). As such, both of Fortt's ineffective assistance claims are cognizable in this federal habeas proceeding.

The State correctly acknowledges that Fortt exhausted state remedies by presenting these claims first to the Delaware Superior Court in his Rule 61 motion and then to the Delaware Supreme Court in his post-conviction appeal. *See Fortt v. State*, 804 A.2d 1066 (Del. 2002). After initially reviewing Fortt's claim, the Superior Court issued an interim order denying his claim regarding counsel's ineffective assistance during Fortt's trial. However, the state court concluded that it was unclear as to whether Fortt's initial detention was reasonable and whether trial counsel's decision not to file a motion to suppress met either or both of *Strickland*'s

standards. The Superior Court appointed an independent criminal defense attorney, Anthony Figliola, to determine whether there was any reasonable likelihood that Fortt could establish a violation of either *Strickland* prong. Figliola filed a letter to the court, stating:

> Based upon the information contained in the file, I believe the search of the vehicle [operated by Fortt] to have been improper, however, no evidence was seized during the vehicle search, thus nothing to suppress. The subsequent search of [Fortt's] apartment appears to have been subsequent to the approval of Mr. Fortt . . .
>
> In short, though it may have been prudent to file a Suppression Motion, I cannot on the record in front of me determine or charge that it was ineffective <u>not</u> to have filed a Suppression Motion.

Thereafter, the Superior Court issued a final order, stating:

> In summary, it is not established that a reasonably effective attorney would have filed a motion to suppress on Fortt's behalf. In the court's estimation, many local defense attorneys would have filed a motion, but not others . . .
>
> And of course, once he told the police that there were drugs in his apartment, the police had more than enough evidence to procure a search warrant.
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> *Fortt*, 2002 WL 387224, at *1 (Del. Super. Ct. Mar. 11, 2002).

The Delaware Supreme Court affirmed the Superior Court's decision "on the basis of, and for the reasons set forth in, the decision of the Superior Court," which constitutes an adjudication on the merits. *Id.*; *see Rompilla v. Horn*, 355 F.3d 233, 247-8 (3d Cir. 2004)(noting that "a state court may render an adjudication or decision on the merits of a federal claim without any discussion whatsoever"). As such, this court must apply the deferential standard of review contained in § 2254(d)(1) and determine whether the Delaware Supreme Court's decision either was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1); *Williams,* 529 U.S. 362; *Werts v. Vaughn*, 228 F.3d 178 (3d Cir. 2000).

The "clearly established Federal law" which governs ineffective assistance of counsel claims is the standard enunciated by *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. *See Wiggins v. Smith*, 539 U.S. 510 (2003). To prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate both that: 1) counsel's performance fell below an objective standard of reasonableness; and 2) counsel's deficient performance actually prejudiced the petitioner's case; in other words, there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88, 692-94; *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002). When evaluating counsel's performance, however, a court should not "focus[] solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

A. Trial counsel's failure to file a pre-trial motion to suppress does not warrant federal habeas relief under § 2254(d)(1)

Fortt's first claim asserts that Radulski provided ineffective assistance by failing to file a pre-trial motion to suppress all evidence seized from his apartment after a pre-textual, and therefore illegal, traffic stop. The court's first step is to determine whether the Delaware Supreme Court's denial of this claim was "contrary to" *Strickland*.

A state court's decision is "contrary to . . . clearly established Federal law" if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court] cases," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [it]." *Williams*, 529 U.S. at 405. When a "run-of-the-mill state-court decision applie[s] the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case," the decision is not "contrary to" that precedent. *See id.* at 406.

Here, the Delaware Superior Court denied Forrt's claim after expressly analyzing the merits pursuant to the two-pronged *Strickland* test. *State v. Fortt*, ID No. 9710005008 (Del. Super. Ct. Dec. 12, 2001)(interim order); *State v. Fortt*, 2002 WL 387224 (Del. Super. Ct. Mar. 11, 2002)(final order). The Delaware Supreme Court affirmed that decision "on the basis of, and for the reasons set forth in, the decision of the Superior Court." *Fortt*, 2002 WL 1836703, at *1. Accordingly, the court concludes that the state court's denial of this claim was not "contrary to" *Strickland*.

The court must next determine whether the state courts' rejection of Fortt's ineffectiveness claim involved an "unreasonable application of" *Strickland*. *See* 28 U.S.C. 2254(d)(1). "The unreasonable application test is an objective one – a federal court may not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly." *Jacobs v. Horn*, 395 F.3d 92, 100 (3d Cir. Jan. 29, 2005)(citing *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003)). This analysis requires the court to objectively evaluate the state court decision on the merits and determine whether the state court reasonably applied the *Strickland* standard to the facts of Fortt's case. *See Williams*, 529 U.S. at 412-13; *Matteo*, 171 F.3d at 891. Yet, as stated by the Supreme Court, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. Thus, the court will proceed to the prejudice inquiry.[1]

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[1]A petitioner satisfies the performance prong of *Strickland* by "identify[ing] the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. An attorney "has a duty to make reasonable

To demonstrate prejudice in the context of an attorney's failure to file a suppression motion, a petitioner must demonstrate that the underlying Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). The

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investigations or to make a reasonable decision that makes particular investigations unnecessary." *Kimmelman*, 477 U.S. at 385 (citations omitted). In order to measure an attorney's performance, the court must "eliminate the distorting effects of hindsight, . . . reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 688-89. Although not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable." *Id*.

Here, the Superior Court could not determine whether Fortt would have benefitted from a suppression motion and appointed Figliola as independent counsel to review the circumstances surrounding Fortt's initial detention. *Fortt*, 2002 WL 387224, at *1. Figliola concluded that "though it may have been prudent to file a Suppression Motion, I cannot on the record in front of me determine or charge that it was ineffective not to have filed a Suppression Motion." The Superior Court ultimately decided that Radulski's performance was not deficient because "many local defense attorneys would have filed a motion, but not others . . ." *Fortt*, 2002 WL 387224, at *1.

The state record does not contain a copy of Radulski's affidavit in response to Fortt's allegation, and the court cannot discern how Figliola and the Superior Court reached their conclusions regarding *Strickland*'s performance prong. Indeed, the performance inquiry is not "whether Fortt would have benefitted from a suppression motion," but rather, whether Radulski's failure to file a suppression motion was a strategic decision made after reasonable investigation into the facts of the detention. *See Kimmelman*, 477 U.S. at 384-85 (finding counsel's failure to file a timely suppression motion unreasonable under *Strickland* where counsel did not make a strategic decision against filing such a motion, but rather, his failure to file the motion was due to the fact that he did not request pre-trial discovery and thus was unaware of the search); *Strickland*, 466 U.S. at 690-91 ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). As such, the court cannot determine whether the Superior Court (and, in turn, the Delaware Supreme Court) reasonably applied *Strickland* in finding that Radulski's failure to file a suppression motion did not fall below an objective standard of reasonableness. Nevertheless, as discussed *infra* at 11-20, Fortt's failure to satisfy the prejudice prong of *Strickland* obviates the need to discuss this issue further.

underlying Fourth Amendment claim here is Fortt's contention that he was detained for a traffic offense, which was only a pretext to allow the police officers sufficient time to procure a search warrant. According to Fortt, any evidence seized from his apartment after this allegedly illegal detention should have been suppressed.

In Delaware, a motion to suppress evidence resulting from an allegedly illegal warrantless search or seizure will be granted if the search or seizure did not comply with protections granted under the federal and state constitutions and Delaware statutory law. *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001); *State v. Stumbers*, 2005 WL 406334, at *2 (Del. Super. Ct. Feb. 18, 2005). The Fourth Amendment of the United States Constitution, the Delaware Constitution, and the Delaware detention statute[2] protect individuals against unreasonable searches and seizures by the Government, and this protection "extend[s] to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Jones v. State*, 745 A.2d 856 (Del. 1999); U.S. const. Amend. VI; Del. Const.

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[2]Section 1902 of the Delaware Code Annotated provides:

> (a) A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination.
>
> (b) Any person so questioned who fails to give identification or explain the person's actions to the satisfaction of the officer may be detained and further questioned and investigated.
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> ©) The total period of detention provided for by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

Art. I, § 6; 11 Del. C. Ann. § 1902. As such, if a police officer "stop[s] and briefly detain[s] a person for investigative purposes" without a warrant, the detention will not violate the federal or state constitutions so long as the police officer "has a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1 (1968); *Harris v. State*, 806 A.2d 119, 126-28 (Del. 2002).

Reasonable articulable suspicion of criminal activity has been defined as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry*, 392 U.S. at 21; *Harris*, 806 A.2d at 125-27. "In evaluating whether a particular stop was justified, courts must look at the totality of the circumstances surrounding the stop." *U.S. v. Bonner*, 363 F.3d 213, 217 (3d Cir. 2004)(citing *Sokolow*, 490 U.S. at 8); *Harris*, 806 A.2d at 125-27. "[T]he totality of the circumstances 'process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" *Harris*, 806 A.2d at 126 (quoting *Arvizu*, 534 U.S. at 273).

When analyzing the reasonableness of a warrantless search or seizure, the first "and perhaps . . . most critical issue" is determining when the seizure occurred. *Jones*, 745 A.2d at 861. The United States Supreme Court has held that a seizure "requires either physical force . . . or, where that is absent, submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). The Delaware Supreme Court, however, has refused to adopt this restrictive definition for a seizure, instead finding a seizure when the police acted in such a way that "a reasonable person would have believed he or she was not free to ignore the police presence." *Jones*, 745 A.2d at 868-69. The focus is on the officer's actions and a reasonable

person's view of those actions, and a seizure can occur even if the officer does not use force. *Id*. The court will apply Delaware's standard for finding a seizure because the underlying issue in determining prejudice under *Strickland* is whether a Delaware court would have granted a motion to suppress on the basis of Fortt's facts.

Here, on October 7, 1997 (the day in question), a confidential informant ("CI") told the police that Fortt, his girlfriend Michelle Collazo,[3] and a white male later identified as Brian Boone, left the Chestnut Crossing Apartments in a silver Isuzu Trooper to get cocaine in Philadelphia. The CI reported the Isuzu Trooper's registration number, and it turned out to be registered to Brian Boone. The CI also described the clothes Fortt and his girlfriend were wearing, and stated that Fortt lived in Apartment 1 of Building 143 of the Chestnut Crossing Apartments.

The CI's information corroborated information the police had previously received from an anonymous caller on August 27, 1997. The anonymous caller told the police that Fortt was distributing crack cocaine from his Chestnut Crossing apartment. The caller gave a full description of Fortt, his apartment, his car, the amount of cocaine he sold per week, and that Fortt hid the cocaine in his refrigerator.

After receiving the CI's tip, the police set up surveillance in the parking lot of Fortt's apartment complex. The CI contacted police again, giving a description of Fortt's vehicle parked elsewhere at the complex. The police located the car, ran a registration check, and discovered that the car was registered to Fortt. At 8:25 p.m., the Isuzu Trooper entered the

[3]Various documents in the state court record refer to Fortt's girlfriend as Corrozo, and others refer to her as Collazo. The court will refer to her as Collazo.

parking lot where Fortt's car was parked. Fortt was driving the Isuzu and Collazo was a passenger. Brian Boone and another individual were driving a U-Haul accompanying Fortt.

Once Fortt and his acquaintances exited the vehicles, the police approached all four individuals and detained them. The detained individuals identified themselves as Tschaka Fortt, Michelle Collazo (Fortt's girlfriend), Brian Boone (owner of Isuzu Trooper), and Melvin Earl. The officers advised them that they were conducting a drug investigation, and then searched all four of them.

The state concedes that the police seized Fortt when they initially detained him in the parking lot. (D.I. 9, at 6; D.I. 11, Probable Cause Sheet, State's App. in *Fortt v. State*, No.156, 2002 at B-6, ¶ 9). Considering the "totality of circumstances," the court finds that the police did have a reasonable and articulable suspicion to detain Fortt.[4] The CI's tip corroborated the

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[4]Fortt's habeas petition asserts that the police ordered him and his acquaintances "to the ground at gunpoint then handcuffed, searched and detained them all the while questioning them . . . The companions were later released, but the petitioner, without incident, was placed in a patrol car and driven to his apartment building and detained further until a search warrant could be secured for his residence." (D.I. 1.) If Fortt's description were accurate, the court would have to analyze whether his detention was an investigatory stop justified by a reasonable and articulable suspicion of criminal activity, or more akin to a warrantless arrest justified by probable cause that Fortt committed a crime. *See Florida v. Royer*, 460 U.S. 491, 499 (1983); *Quarles v.State*, 696 A.2d 1334, 1337 (Del. 1997) . However, the state court opinions do not describe Fortt's detention as he does, thereby making an implicit factual determination that the detention did not occur at gunpoint or involve the use of handcuffs. This implicit determination is supported by the state's answer to Fortt's § 2254 petition which describes Fortt's detention as occurring in the parking lot of his apartment, and never mentions handcuffs or placement in a patrol car. (D.I. 9 at 6.) Further support is found in the transcript of Fortt's trial which states that, after overhearing the police discuss a search warrant for his apartment, Fortt approached the detective two times attempting to make a deal to flush the drugs down the toilet. (D.I. 11, *State v. Fortt* Trial Transcript dated July 15, 1999 at p. 98). Fortt could not approach the police if he was in a patrol car. Consequently, Fortt has not provided clear and convincing evidence rebutting the presumption that the state courts' implicit factual determinations are correct. 28 U.S.C. § 2254(e)(1); *Miller-El*, 537 U.S. at 341; *Campbell*, 209 F.3d at 286.

anonymous caller's information from August 27, 1997, and also provided the police with predictive information that they corroborated with independent police surveillance. *See Purnell v. State,* 832 A.2d 714, 720 (finding informant's information reliable because he/she had provided reliable information in the past); *Hubbard v. State*, 782 A.2d 264 (table), 2001 WL 1089664, at *4 (Del. 2001)(discussing factors for determining whether a corroborated informant's tip provided probable cause for a warrant); *Adams v. Williams*, 407 U.S. 143, 146 (1972)(reliability of informant's tip). The information provided by the CI and the caller contained sufficient indicia of reliability to support a reasonable suspicion that Fortt was involved in criminal activity, thus, his initial detention was legal. *See Flonnery v. State*, 805 A.2d 854, 859 (Del. 2001)(citing *Florida v. JL*, 529 U.S. 266, 271 (2000) and *Alabama v. White*, 496 U.S. 325 (1990))(discussing reliability of anonymous tip); *Hubbard*, 2001 WL 1089664, at **4; *State v. Giles*, 2002 WL 1316388, *4 (Del. Super. Ct. May 31, 2002)("The information provided by the CI in this case provided 'the necessary indicia of reliability that would suggest that the [CI] had inside knowledge of illegal conduct sufficient to provide the police with the reasonable suspicion required before detaining the suspect.'")(quoting *Flonnory v. State*, 805 A.2d. 854, 859 (Del. 2001)).

When the police searched Fortt, they discovered a roll of money containing $1640 in his front pants pocket.[5] At approximately 8:40 p.m., the police advised Fortt of his *Miranda* rights,

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[5]Fortt does not challenge either the search or the money found. Even if he did challenge the search and seizure of the money, the information given by the anonymous caller and the CI gave police a reasonable suspicion that Fortt was a drug dealer and might be armed. Thus, a search of Fortt's person to ensure officer safety was reasonable in this situation. *See Terry*, 392 U.S. at 27; *Hicks v. State*, 631 A.2d 6, 7 (Del. 1993); *Minnesota v. Dickerson*, 508 U.S. 366, 373, 375-76 (1993)(officer's may lawfully seize contraband they incidentally discover during a plain touch *Terry* frisk).

and he stated that he understood his rights and wished to make a statement. Fortt said that he had saved the $1640 from working. He also stated that they had just returned from Philadelphia because they had picked up Collazo's furniture. Fortt said that he did not have any drugs, but admitted that he had sold drugs in the past to pay for school.

Meanwhile, the police were also questioning Fortt's acquaintances. Brian Boone, the Isuzu's owner, gave consent for the police to search the Isuzu, which did not turn up any drugs.[6] The police *Mirandized* Boone, who stated he understood his rights and wanted to make a statement. He admitted that on the previous day, October 6, 1997, he purchased $100 worth of cocaine from Fortt. Boone also stated that when he called Fortt about drugs, they used the code word "onions" instead of the word "cocaine."

The police *Mirandized* Michele Collazo, who also stated that she understood her rights. She then suffered an asthma attack and was taken to the hospital, where the police resumed their interview. Collazo said that Fortt had a large sum of money in his residence, that he received numerous pages at odd hours of the night, and that she often overheard him asking subjects over the phone how many "onions" they wanted.

The police released Boone and Collazo once they finished questioning them. Fortt,

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[6]Appointed counsel Figliola concluded that the search of the car was improper. However, because the search did not uncover anything, Figliola determined that there was nothing to suppress, and Radulski's failure to file a suppression motion on this basis did not violate *Strickland*. The court also notes that Boone actually gave his consent for the search after waiving his *Miranda* rights, thus, the search was not improper. *See Florida v. Jimeno*, 500 U.S. 248, 250-51 (1990)("[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so")(citation omitted). Nevertheless, Fortt does not challenge the search of Boone's car, only his own detention and the seizure of evidence from his apartment. Accordingly, the court refrains from addressing this issue because it is not relevant to Fortt's claim.

however, was still detained, and he appears to believe that his continued detention was based on a traffic violation. He argues that the police ostensibly held him for this offense only as a pre-text so that they could obtain a warrant to search his apartment. Fortt contends that this "sham" detention rendered all subsequently seized evidence inadmissible.

A lawful investigatory detention may, of course, become an illegal detention if it lasts longer or becomes more intrusive than necessary to complete the investigation for which the stop was made. *See U.S. v. Sharpe*, 470 U.S. 675, 685-86 (1985)(recognizing that an investigative stop cannot continue indefinitely but refusing to put a rigid time limitation on such stops); *Hicks v. State*, 631 A.2d 6, 12 (Del. 1993). Fortt does not challenge his continued detention on either of these grounds, but rather, he argues that the police detained him for a traffic violation in order to give them time to obtain a search warrant for his apartment. Although not clearly stated, it appears that Fortt is actually challenging his continued detention on this ground, not his initial detention.

Fortt does not identify the allegedly pre-textual traffic offense, but the record reveals two possibilities. Several factual submissions in the state court record indicate that the Isuzu Trooper Fortt was driving had one burned-out headlight. Driving a vehicle without a functioning headlight violates 21 Del. C. Ann. § 4331. Fortt , however, was never charged with this offense. Instead, he was charged with driving without a valid license, in violation of 21 Del. C. Ann. § 701(a), which was subsequently *nolle prossed*.

Regardless of the actual underlying offense, Fortt's argument is without merit. First, the record disputes Fortt's contention that the police continued to detain him because of a traffic

violation.[7] Second, in this case, Fortt's continued detention was based upon a reasonable and articulable suspicion that had nothing to do with the officers' subjective intentions or either traffic violation.[8] *See Caldwell*, 780 A.2d at 1046-47 ("any investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion"). Here, Boone told the police that he bought drugs from Fortt the previous day.

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[7]The court has found only one reference about detaining Fortt for a traffic violation in an unidentified document. (D.I. 11, App. to Appellant's Op. Br. in *Fortt v. State*, No.156, 2002, at A8).

[8]Under both the federal and Delaware constitutions, and Delaware statutory law, police have the discretion to make custodial arrests for traffic violations. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Caldwell v. State*, 780 A.2d 1037, 1051 n. 33 (Del. 2001); 21 Del. C. Ann. § 701(a)(1)(police may arrest a person without a warrant for violating title 21 of the Del. C. Ann. in their presence); *United States v. Thompson*, 420 F.2d 536 (3d Cir. 1970)(Delaware police officers have authority to make warrantless arrests of individuals driving without a valid license). However, in Delaware, if "the officer's conduct during the traffic stop was [not] sufficiently related to the underlying [traffic] violation," then "any investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion." *Caldwell*, 780 A.2d at 1046-47. In contrast, the United States Supreme Court has held that a police officer's subjective intention is irrelevant to the validity of a Fourth Amendment traffic stop, provided that the traffic stop is objectively justified by probable cause to believe that the traffic violation occurred. *Whren v. United States,* 517 U.S. 806, 810-13 (1996); *Devenpeck v. Alford*, 125 S.Ct. 588, 594 (2004)(rejecting the rule that "the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of the arrest").

Here, Fortt does not dispute that he actually committed both traffic violations: he drove a car with a non-functioning headlight and he drove without a valid license. Consequently, under a federal constitutional analysis, Fortt's continued detention would be justified on this basis alone. Yet as previously explained, there is no clear indication that the police actually detained Fortt for committing either of the traffic violations. Pursuant to Delaware precedent, Fortt's further detention must be justified by a reasonable and articulable suspicion. *See Caldwell*, 780 A.2d at 1046-47. Considering that the underlying issue in this prejudice analysis is whether a Delaware court would have granted a motion to suppress, the court will apply the stricter Delaware standard in determining the legality of Fortt's continued detention.

Boone also stated that Fortt used the code name "onions" to refer to drugs. Collazo's independent statement described Fortt's numerous phone calls and "onion" sales. Although at this point in his detention Fortt denied any drug activity, the $1640 found in his pocket, when viewed through the eyes of an experienced police officer, provided an additional reason to believe Fortt was selling drugs.[9] *See Cortez*, 449 U.S. at 417-18 (1981)(finding that the "totality of circumstances" standard must take into account a trained law enforcement officer's inferences and deductions about the evidence); *Caldwell*, 780 A.2d at 1051. In short, Fortt's continued detention was justified by independent reasonable and articulable facts indicating his involvement in criminal activity.

Finally, during this continued legal detention, Fortt admitted that he had drugs in his apartment. He even attempted to make a deal with the police that he would show them the drugs if they would just "flush" them down the toilet. This voluntary admission, made after waiving his *Miranda* rights, not only provided the police with a reasonable and articulable suspicion to continue Fortt's detention, it also provided them with probable cause to further his detention and obtain a search warrant.[10] *See, Michigan v. Summers*, 452 U.S. 692, 702 (1981)("In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant," courts should consider the "law enforcement interest in preventing

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[9]Once the police seized the money, they hid it in the laundry room of an apartment building in the Chestnut Crossing complex. A K-9 unit found the concealed money, indicating that the money was possibly tainted with an illegal controlled substance.

[10]Probable cause requires reasonably reliable information that would lead a prudent person to believe that the suspect had committed or was likely to commit a crime. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Lopez v. State*, 861 A.2d 1245, 1248 (Del. 2004)("the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, that is particularized with respect to the person to be arrested").

flight" and "the interest in minimizing the risk of harm to officers"); *Bunting v. State,* 860 A.2d 809 (table), 2004 WL 2297395, **2 (Del. Oct. 5, 2004)(police officers developed probable cause during a legal investigatory stop); *see also Leveto v. Lapina*, 258 F.3d 156, 171 (3d Cir. 2001)(detention for some length of time might be reasonable if the agents are investigating a type of crime often accompanied by violence (e.g., a narcotics crime)) .

Fortt's detention did not violate the Fourth Amendment or Delaware law and his argument that the police illegally seized evidence from his apartment is thereby meritless. Thus, he cannot satisfy the prejudice prong of *Strickland* because raising a pre-trial motion on these grounds would have failed. Accordingly, the court concludes that the Delaware Supreme Court did not unreasonably apply *Strickland* in denying Fortt's first ineffective assistance of counsel claim.

B. Fortt's second ineffective assistance of counsel claim

Fortt's second ineffective assistance of counsel claim alleges that his counsel failed to argue the facts and circumstances of his case accurately, "causing petitioner's Rule 61 motion for post-conviction relief to be denied and subsequent appeal to be affirmed." (D.I. 1, at ¶ 12(B). Fortt appears to be dissatisfied with Figliola's performance during his Rule 61 proceeding and his post-conviction appeal.[11] The court will dismiss this claim because an attorney's alleged ineffectiveness during state collateral post-conviction proceedings does not provide a basis for federal habeas relief. 28 U.S.C. § 2254(i)("The ineffectiveness or incompetence of counsel

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[11]Although Anthony Figliola was appointed to research the suppression issue during Fortt's Rule 61 proceeding, it does not appear that Figliola actually represented Fortt during the second stage of that proceeding. Nevertheless, Figliola did represent Fortt during his appeal regarding the Rule 61 decision.

during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254").

To the extent this claim pertains to Radulski's performance at trial, Fortt's brief, unsupported, and conclusory statement is insufficient to establish ineffective assistance of counsel under *Strickland*. *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991). Thus, under either interpretation, Fortt's second ineffective assistance of counsel claim does not warrant federal habeas relief.

V. CERTIFICATE OF APPEALABILITY

When a district court issues a final order denying a § 2254 petition, the court must also decide whether to issue a certificate of appealability. *See* Third Circuit Local Appellate Rule 22.2. A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)

The court concludes that Fortt's habeas claims do not warrant federal habeas relief. Reasonable jurists would not find this conclusion to be unreasonable. Consequently, the court declines to issue a certificate of appealability.

VI. CONCLUSION

For the reasons stated, Fortt's petition for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TSCHAKA FORTT, Petitioner, v. THOMAS CARROLL, Warden, Respondent.	)))))))))	Civ. A. No. 02-1593-GMS

ORDER

For the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. Tschaka Fortt's petition for the writ of habeas corpus, filed pursuant to 28 U.S.C § 2254, is DISMISSED, and the relief requested therein is DENIED. (D.I. 1.)

2. The court declines to issue a certificate of appealability.

Dated: March 17, 2005

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE