

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEFPHON E. BOWEN,	§
	§ No. 354, 2007
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0505011529
	§
Plaintiff Below-	§
Appellee.	§

Submitted: December 7, 2007

Decided: January 29, 2008

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices

**ORDER**

This 29th day of January 2008, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Stephon E. Bowen, filed an appeal from the Superior Court's June 22, 2007, order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we affirm.

(2) In October 2005, Bowen pleaded guilty to Maintaining a Vehicle for Keeping Controlled Substances. He was sentenced to three years at Level V, to be suspended for eighteen months of probation. On February 10, 2006, Bowen was found to have committed a violation of

probation (“VOP”). His probation was revoked and he was re-sentenced to probation. After a second VOP hearing on June 16, 2006, Bowen again was found to have committed a VOP and again his probation was revoked. This time, he was sentenced to three years at Level V, to be followed by six months of probation.

(3) In this appeal, Bowen claims that a) his counsel provided ineffective assistance at the original sentencing hearing and the VOP hearing by failing to present mitigating evidence of his mental health status; b) the Superior Court judge abused his discretion when he imposed the VOP sentence without the benefit of a presentence investigation; and c) the judge erred by relying upon impermissible factors in imposing Bowen’s sentence.

(4) The record reflects that the VOP hearing took place on June 16, 2006. Bowen was represented by counsel. Through counsel, Bowen admitted that he had violated his probation by failing to keep several appointments with his probation officer, violating his curfew, and failing to properly report contact with the police. Also, a courthouse security officer testified that he had confiscated a switchblade from Bowen as he entered the courthouse on April 4, 2006. The judge further noted that, since Bowen’s last VOP, he had led police on a high-speed chase in Delaware after stealing some beer in Maryland. Bowen had the opportunity to address the judge

directly prior to sentencing, but never mentioned that he had any mental health problems.

(5) Bowen’s first claim is that his counsel provided ineffective assistance at his original sentencing hearing and at the VOP hearing. In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel’s representation fell below an objective standard of reasonableness and that, but for his counsel’s professional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>1</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a “strong presumption that the representation was professionally reasonable.”<sup>2</sup> The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.<sup>3</sup>

(6) Our review of the VOP hearing transcript reveals no factual basis for Bowen’s ineffectiveness claim. Bowen’s postconviction motion filed in the Superior Court alleges only that his counsel should have raised his “mental health history” at the time of sentencing. He did not raise any specific mental health problem that might have affected the sentence

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>2</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

<sup>3</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

imposed by the Superior Court. As such, Bowen has failed to make any concrete allegations of error on the part of his counsel resulting in prejudice to him. We, thus, conclude that Bowen's first claim is without merit.<sup>4</sup>

(7) Bowen's second claim is that the Superior Court judge abused his discretion by imposing the VOP sentence without the benefit of a presentence investigation. Because Bowen failed to file a direct appeal from his VOP sentence, this claim is procedurally defaulted unless he can demonstrate cause for relief and prejudice as the result of the violation of his rights.<sup>5</sup>

(8) Bowen has not demonstrated that he was entitled to a presentence report in connection with his VOP sentence. Even assuming that he was, he has failed to demonstrate that the lack of a presentence report had a negative impact on his sentence. As noted by the State, if the VOP sentencing had been delayed for a presentence investigation, Bowen's guilty plea to additional criminal charges in July 2006, which qualified him for habitual offender status, would have been included in the report.<sup>6</sup> As such,

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<sup>4</sup> We decline to address Bowen's claim that his counsel provided ineffective assistance at his original sentencing hearing. Bowen's failure to provide the Court with the transcript of the hearing precludes our appellate review of the claim. *Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987); *Slater v. State*, 606 A.2d 1334, 1337 (Del. 1992).

<sup>5</sup> Super. Ct. Crim. R. 61(i)(3)(A) and (B).

<sup>6</sup> At that time, Bowen pleaded guilty to Possession of a Deadly Weapon by a Person Prohibited, Reckless Endangerment, Possession of Marijuana, Offensive Touching, and Driving Under the Influence of Alcohol.

Bowen has failed to demonstrate any prejudice. We, therefore, conclude that Bowen's second claim is without merit.

(9) Bowen's third, and final, claim is that the Superior Court erred by relying upon impermissible factors in imposing sentence. Bowen contends that the judge should not have considered the testimony about the switchblade and should not have made note that Bowen was alleged to have stolen some beer in Maryland and led police on a car chase from Maryland into Delaware, because he had not been convicted of those charges. Again, because Bowen failed to file a direct appeal from his VOP sentence, his claim is procedurally defaulted unless he can demonstrate cause for relief and prejudice resulting from a violation of his rights.<sup>7</sup>

(10) Bowen's claim fails because, under Delaware law, a sentencing court has broad discretion to consider information beyond the conduct for which the defendant was convicted.<sup>8</sup> Bowen does not allege, much less demonstrate, that any of the information considered by the judge was unreliable or false. In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied

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<sup>7</sup> Super. Ct. Crim. R. 61(i)(3)(A) and (B).

<sup>8</sup> *Mayer v. State*, 604 A.2d 839, 842 (Del. 1992).

on impermissible factors or exhibited a closed mind.<sup>9</sup> In the absence of any such evidence, we conclude that Bowen's third claim is also without merit.

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

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>9</sup> *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).