

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MONTY C. PEPPER,	§	
	§	No. 642, 2007
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Kent County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0401017318
Appellee.	§	

Submitted: February 1, 2008

Decided: April 30, 2008

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 30th day of April 2008, upon consideration of the appellant's opening brief, the appellee's motion to affirm and the Superior Court record, it appears to the Court that:

(1) The appellant, Monty C. Pepper, filed this appeal from the Superior Court's denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The appellee, State of Delaware, has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of Pepper's opening brief that the appeal is without merit. We agree and affirm.

(2) In August 2004, Pepper pled guilty to six sex offenses including one count of Rape in the Second Degree. As part of the plea agreement, the State agreed to recommend to the Superior Court that Pepper receive a prison sentence of no more than ten years, the minimum sentence for Rape in the Second Degree.¹ At the conclusion of the guilty plea hearing, the Superior Court scheduled Pepper's sentencing for a later date pending a presentence investigation and report.

(3) Prior to sentencing, defense counsel ("First Counsel") at Pepper's request filed a motion to withdraw the guilty plea and a motion to withdraw as counsel. The Superior Court appointed new counsel ("Second Counsel") to represent Pepper. On April 15, 2005, the Superior Court held a hearing on the motion to withdraw the guilty plea and denied the motion from the bench.²

(4) Second Counsel represented Pepper at sentencing that immediately followed the hearing on the motion to withdraw guilty plea. Before imposing sentence, the Superior Court heard from Second Counsel, Pepper, and the prosecutor.³ The Superior Court sentenced Pepper to a total of 39 years at Level Five suspended after 13½ years at Level V

¹ Del. Code Ann. tit. 11, § 772(c) (2007).

² Hr'g Tr. at 2-25 (April 15, 2005).

³ *Id.* at 25-31.

imprisonment followed by one year at a Level IV halfway house and 18 years of Level III probation.⁴

(5) Pepper filed his motion for postconviction relief in February 2006. The motion was referred to a Superior Court Commissioner for proposed findings and recommendations. By order dated March 12, 2007, the Commissioner recommended that the motion should be denied. On November 27, 2007, the Superior Court adopted the Commissioner's report and denied postconviction relief.

(6) On appeal, Pepper has briefed only five of the twenty claims that the Superior Court identified in the postconviction motion. To the extent Pepper has not briefed the other claims raised in the postconviction motion those claims are deemed waived and abandoned on appeal.⁵

(7) In his opening brief on appeal, Pepper contends that the Superior Court failed to give him an opportunity to comment on the presentence report. Pepper contends that the prosecutor failed to recommend to the Superior Court that Pepper should receive a prison sentence of no more than ten years at Level V. Finally, Pepper contends that

⁴ *Id.* at 31-35.

⁵ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citing *Murphy v. State*, 632 A.2d 1150, 1152-53 (Del. 1993)).

First Counsel was ineffective because she failed to adequately investigate his case.

(8) The Court has carefully considered the parties' positions on appeal and the Superior Court record, including First Counsel's affidavit in response to Pepper's allegations of ineffective assistance of counsel. It is manifest that the denial of postconviction relief should be affirmed on the basis of the Superior Court's November 27, 2007 decision that adopted the Commissioner's well-reasoned report and recommendation. There is no support for Pepper's allegations that "there is a reasonable probability that, but for [First Counsel's] errors, he would not have pleaded guilty and would have insisted on going to trial."⁶ Moreover, we agree with the Superior Court that Pepper's other claims of error are procedurally barred pursuant to Rule 61(i)(3) for Pepper's failure to allege cause or to demonstrate prejudice.⁷ The hearing transcript belies the merit of all of Pepper's claims,

⁶ *Albury v. State*, 551 A.2d 53, 60 (Del. 1988) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

⁷ See Del. Super. Ct. Crim. R. 61(i)(3) (providing that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is procedurally barred, unless the movant demonstrates "cause for relief from the procedural default" and "prejudice" arising from the alleged grievance).

and neither sentencing claim warrants application of the exception to the procedural bar.⁸

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁸ See Del. Super. Ct. Crim. R. 61(i)(5) (providing that the procedural bar of Rule 61(i)(3) 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).