

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD COLE,	§
	§
Defendant Below-	§ No. 668, 2007
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0309013358
Plaintiff Below-	§
Appellee.	§

Submitted: February 11, 2008

Decided: April 30, 2008

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

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

(1) The appellant, Donald Cole, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Cole's opening brief that his appeal is without merit. We agree and, accordingly, affirm the Superior Court's judgment.

(2) The record reflects that a Superior Court jury convicted Cole in 2004 of two counts of first degree felony murder, two counts of second

degree murder (as lesser included offenses to the charged offenses of intentional first degree murder), first degree burglary, related firearm offenses, and conspiracy. This Court affirmed Cole's convictions on appeal.¹ Shortly thereafter, Cole filed a petition for postconviction relief, which the Superior Court denied. This appeal followed.

(3) Cole enumerates four issues in his opening brief on appeal. All four claims, however, are interrelated. The gist of Cole's argument is that his trial counsel was ineffective for failing to argue that the evidence was insufficient at trial to establish the crime of burglary and, consequently, the crime of first degree felony murder. Cole contends that the evidence at trial did not prove that he broke into the victims' home with the intent to steal money and drugs from them. To the contrary, Cole makes the surprising argument that the evidence at trial established that he broke into the victims' home with the sole intent to murder them.

(4) This Court reviews the Superior Court's denial of a motion for postconviction relief for abuse of discretion.² To prove his claims of ineffective assistance of counsel, Cole was required to establish: (a) that his defense counsel's representation fell below an objective standard of

¹ *Cole v. State*, 922 A.2d 364 (Del. 2007).

² *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

reasonableness; and (b) that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the case would have been different.³ There is a strong presumption that counsel's conduct was professionally reasonable.⁴

(5) Contrary to Cole's assertion, the record at trial clearly established that Cole and his codefendants broke into the victims' home with the intent to steal money and drugs. One of Cole's coconspirators, Travonian Norton, testified against Cole at trial and stated that Cole and his codefendant, Larry Johnson, chose the victims' home because they believed that a drug dealer lived there and that the house would have both drugs and money. The drug dealer, however, had moved. When the three intruders broke into the home, the victims were awakened by their sons' shouting. The evidence at trial established that Cole was the primary shooter, firing six times, killing both victims. Based on this evidence, the jury acquitted Cole of first degree intentional murder, instead finding him guilty of two counts of second degree murder, and two counts of felony murder, as well as the related charges.

³ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

⁴ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988).

(6) Clearly, if defense counsel had argued to the jury that Cole's sole intent in breaking into the home was to commit murder, the outcome of the case would have been much worse for Cole because the jury would have convicted him of the more serious crimes of first degree intentional murder. Under the circumstances, defense counsel's strategy clearly was reasonable and resulted in the jury's acquittal of Cole on the intentional murder charges. Accordingly, we find that the Superior Court did not abuse its discretion in denying Cole's motion for postconviction relief.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice