

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM M. SCOTT,	§	
	§	No. 545, 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. 9805012033
Appellee.	§	

Submitted: July 25, 2008
Decided: October 28, 2008

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

ORDER

This 28th day of October 2008, upon consideration of the briefs of the parties, it appears to the Court that:

(1) The appellant, William M. Scott, filed this appeal from the Superior Court’s denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). We have determined that there is no merit to the appeal. Accordingly, we affirm.

(2) In 1999, a Superior Court jury convicted Scott on charges of first degree felony murder and related robbery, conspiracy and burglary

offenses. Scott was sentenced to life in prison. This Court affirmed Scott's convictions on direct appeal.¹

(3) In 2004, Scott, with the assistance of new defense counsel, filed a motion for postconviction relief alleging ineffectiveness of Scott's prior trial counsel. Scott also alleged Confrontation Clause violations. After receiving responses from Scott's former trial counsel and the trial prosecutor, the Superior Court referred the postconviction motion to a Commissioner for a report and recommendation.²

(4) By report dated March 19, 2007, the Commissioner recommended that Scott's postconviction motion should be denied. Scott filed an appeal from the Commissioner's report.³ By order dated September 19, 2007, the Superior Court adopted the Commissioner's report and denied Scott's motion for postconviction relief.⁴ This appeal followed.

(5) When reviewing the denial of postconviction relief, the Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.⁵ We review the Superior Court's denial of a postconviction motion for abuse of discretion.⁶

¹ *Scott v. State*, 2001 WL 339627 (Del. Supr.).

² Del. Super. Ct. Crim. R. 62(a)(5).

³ Del. Super. Ct. Crim. R. 62(a)(5)(ii).

⁴ Del. Super. Ct. Crim. R. 62(a)(5)(iv). *State v. Scott*, 2007 WL 2759489 (Del. Super.).

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

⁶ *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

(6) Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is barred unless the petitioner can establish cause for the procedural default and prejudice from a violation of the petitioner's rights.⁷ Rule 61(i)(4) provides in pertinent part that "any ground for relief that was formerly adjudicated. . . is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice."⁸

(7) To prove his claim of ineffective assistance of counsel, Scott must establish that: (a) his former trial counsel's representation fell below an objective standard of reasonableness; and (b) but for counsel's unprofessional error, there is a reasonable probability that the outcome of the case would have been different.⁹ There is a strong presumption that counsel's conduct was professionally reasonable.¹⁰

(8) In this case, Scott contends that his former trial counsel were ineffective for not requesting an accomplice liability jury instruction for the charge of first degree robbery. The Superior Court concluded, and we agree, that Scott's defense counsel were not professionally deficient for not requesting an accomplice liability jury instruction.

⁷ Del. Super. Ct. Crim. R. 61(i)(3).

⁸ Del. Super. Ct. Crim. R. 61(i)(4).

⁹ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¹⁰ *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

(9) An accomplice liability instruction under title 11, section 274 is appropriate when an offense is divided into degrees based on the different culpable mental states of the participants.¹¹ However, the offenses of first degree robbery and second degree robbery require proof of the same mental state.¹² Accordingly, there is no basis for the jury instruction that Scott contends his counsel should have sought.¹³

(10) Scott contends that the Superior Court erred when it permitted the State to amend the indictment. Scott raised this claim on direct appeal without success. The claim is thus barred as formerly adjudicated, as we do not conclude that reconsideration of the claim is warranted in the interest of justice.¹⁴

¹¹ See Del. Code Ann. tit. 11, § 274 (2007) (providing in pertinent part that “[w]hen . . . 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person’s own culpable mental state. . .”).

¹² Compare Del. Code Ann. tit. 11, § 831 (providing that second degree robbery requires proof of intent) with Del. Code Ann. tit. 11, § 832 (e) (providing that first degree robbery requires proof of second degree robbery plus proof of one or more additional aggravating facts).

¹³ E.g., *Johnson v. State*, 2008 WL 1778241 (Del. Supr.) (citing *Richardson v. State*, 2007 WL 2111092 (Del. Supr.)).

¹⁴ Del. Super. Ct. Crim. R. 61(i)(4).

(11) Scott alleges a violation of his Sixth Amendment Confrontation Clause rights.¹⁵ Scott did not raise the claim on direct appeal.¹⁶

(12) In Scott's case, the witnesses against him testified at trial and were subject to cross-examination. Thus, we agree with the Superior Court that Scott's claim of a Confrontation Clause violation lacks merit and is also barred pursuant to Rule 61(i)(3), as he has shown neither cause for his failure to raise the claim on direct appeal nor prejudice.¹⁷ Furthermore, Scott has not established a colorable claim of a miscarriage of justice to warrant application of the exception in Rule 61(i)(5).¹⁸

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹⁵ See *Johnson v. State*, 878 A.2d 422, 428 (Del. 2005) (“[i]n all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him. . . .” (quoting U.S. Const. amend. VI)).

¹⁶ When considering the claim in this appeal, we implicitly granted Scott's motion for leave to amend his reply brief to include the confrontation clause argument that he inadvertently omitted from his opening brief.

¹⁷ See *Johnson v. State*, 878 A.2d 422, 428-29 (Del. 2005) (providing that “when a witness takes the stand at trial and is subject to cross-examination, the traditional protections afforded under the Confrontation Clause are satisfied.”).

¹⁸ See Del. Super. Ct. Crim. R. 61(i)(5) (providing in pertinent part that the bar to relief in Rule 61(i)(3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation).