

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EVERETT E. SMITH,	§
	§
Defendant Below-	§ No. 420, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0604020997
Plaintiff Below-	§
Appellee.	§

Submitted: September 18, 2008

Decided: November 26, 2008

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

ORDER

This 26th day of November 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, Everett Smith, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. The State of Delaware has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Smith's opening brief that the appeal is without merit. We agree and affirm. However, we remand the matter to the Superior Court to correct a clerical error contained in the sentencing order.

(2) The record reflects that Smith was indicted in 2006 on a charge of first degree assault and several related offenses. His first trial ended in a mistrial in February 2007. His second trial also ended in a mistrial. In June 2007, Smith ultimately pled guilty but mentally ill to one count of second degree assault. In exchange, the State agreed not to seek habitual offender status for Smith. The Superior Court sentenced Smith to eight years at Level V incarceration to be suspended after serving five years for probation.

(3) In July 2008, Smith filed a motion for postconviction relief. Smith argued that the prosecutor had violated the plea agreement and that defense counsel had provided ineffective assistance. The basis for both of Smith's arguments is that he agreed to plead guilty to second degree assault, as reflected in his plea agreement, but the Superior Court sentenced him for first degree assault. The Superior Court denied Smith's motion, among other reasons, because it was clear that Smith's conviction was for second degree assault. This appeal followed.

(4) We agree with the Superior Court's conclusion that Smith's argument has no basis in fact because, as the record reflects, Smith pled guilty but mentally ill and was sentenced for second degree assault. Nonetheless, the written sentencing order reflects that Smith was sentenced for first degree assault. Accordingly, while we affirm the Superior Court's

denial of postconviction relief, we remand this matter to the Superior Court in order to correct the clerical error reflected in the sentencing order.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. This matter is hereby REMANDED to the Superior Court for correction of the clerical error in its sentencing order dated June 29, 2007. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice