

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH M. SMITH,	§
	§
Defendant Below-	§ No. 381, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. IN98-01-1102
Plaintiff Below-	§
Appellee.	§

Submitted: October 19, 2000

Decided: December 20, 2000

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

**ORDER**

This 20<sup>th</sup> day of December 2000, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Kenneth M. Smith, appeals from a July 14, 2000 order of the Superior Court denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The State of Delaware has moved to affirm the judgment of the Superior Court

on the ground that it is manifest on the face of Smith's opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

(2) In this appeal, Smith claims that: 1) his constitutional right of confrontation was violated during his trial; 2) there was insufficient evidence to support his conviction; 3) the jury instructions improperly enhanced the charge against him; 4) there was prosecutorial misconduct; 5) he was improperly sentenced as an habitual offender; 6) defense counsel's closing argument was improper and prejudicial; and 7) he was afforded ineffective assistance of counsel when he was sentenced as an habitual offender.

(3) On June 3, 1998, Smith was convicted by a Superior Court jury of one count of robbery in the first degree. Smith was sentenced as an habitual offender to life in prison.<sup>2</sup> Smith's conviction and sentence were affirmed by this Court on direct appeal.<sup>3</sup>

(4) When reviewing a motion under Rule 61, this Court must first determine that the motion satisfies the procedural requirements of the rule

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<sup>1</sup>Supr. Ct. R. 25(a).

<sup>2</sup>11 Del. C. § 4214(b).

<sup>3</sup>*Smith v. State*, Del. Supr., No. 392, 1998, Berger, J., 1999 WL 734717 (Sept. 7, 1999) (ORDER).

before addressing any substantive issues.<sup>4</sup> Smith's claims of a violation of the right of confrontation, insufficient evidence to support his conviction, prosecutorial misconduct, improper sentencing as an habitual offender and an improper and prejudicial closing argument by defense counsel are all procedurally barred because they were not raised on direct appeal.<sup>5</sup>

Moreover, Smith has not shown cause for relief from the procedural default or prejudice from a violation of his rights,<sup>6</sup> and there is no colorable claim of a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.<sup>7</sup>

(5) Smith's claim that the jury instructions improperly enhanced the charge against him was resolved against him on direct appeal and, thus, is procedurally barred unless reconsideration of the claim is warranted in the interest of justice.<sup>8</sup> We have reviewed in detail the record in this case and conclude that there is no basis for reconsideration of this claim.

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<sup>4</sup>*Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991).

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

<sup>6</sup>Super. Ct. Crim. R. 61(i) (3) (A), (B).

<sup>7</sup>Super. Ct. Crim. R. 61(i) (5).

<sup>8</sup>Super. Ct. Crim. R. 61(i) (4).

(6) In order to prevail on his final claim of ineffective assistance of counsel, Smith must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>9</sup> Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."<sup>10</sup> Our review of the record in this case does not reveal any alleged errors by Smith's counsel that contributed to the Superior Court's decision to sentence him as a habitual offender.

(7) It is manifest on the face of Smith's opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

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

<sup>10</sup>*Flamer v. State*, Del. Supr., 585 A.2d 736, 753 (1990).

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED.

The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

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Justice

oc: Clerk of the Court  
c: Hon. Norman A. Barron  
Kenneth M. Smith  
Loren C. Meyers  
Court's Distribution List