

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROGER THOMAS,	§
	§
Defendant Below-	§ No. 85, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. No. S98-07-0071
Plaintiff Below-	§
Appellee.	§

Submitted: August 2, 2000
Decided: September 1, 2000

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This first day of September 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 appellant, Roger Thomas, filed this appeal from an order of the Superior Court denying his motion for postconviction relief pursuant to Superior Court Rule 61.¹ The State of Delaware has moved to affirm

¹The Superior Court sua sponte granted Thomas additional time to supplement his postconviction motion. Thomas then requested more time, which the Superior Court allowed, but Thomas failed to timely supplement his motion. Following the denial of Thomas' motion, Thomas wrote a letter to the Superior Court and attached two supplemental affidavits. The Superior Court ruled that the submission came too late and denied what it deemed to be Thomas' attempt at reargument.

the judgment of the Superior Court on the ground that it is manifest on the face of Thomas' opening brief that the appeal is without merit.² We agree and AFFIRM.

(2) In this appeal, Thomas claims that: first, his counsel provided ineffective assistance by permitting him to enter a plea prior to receiving the DNA test results that proved his innocence and, second, his plea was coerced because he would not have entered the plea had he known the results of the DNA testing. To the extent Thomas has not argued other grounds to support his appeal that were previously raised, those grounds are deemed waived and will not be addressed by this Court.³

(3) In August 1998, Thomas was charged by information with four counts of unlawful sexual intercourse in the first degree, kidnaping in the second degree, assault in the third degree, terroristic threatening and criminal trespass in the first degree. In April 1999, Thomas entered a Robinson plea⁴ to one count of unlawful sexual intercourse in the second degree in exchange for dismissal of the remaining counts. He was

²Supr. Ct. R. 25(a).

³*Murphy v. State*, Del. Supr., 632 A.2d 1150, 1152 (1993). Thomas also argued in the Superior Court that defense counsel and the State suppressed evidence favorable to his case.

⁴Pursuant to Del. Super. Crim. R. 11(e) (1) (C).

sentenced to 15 years incarceration at Level V, with credit for time served, to be suspended after 10 years for the remainder of the sentence at Level II probation. He was also assigned to Sex Offender Tier Level III. Thomas did not file a direct appeal of his conviction or sentence. In July 1999, Thomas filed a motion for reduction of sentence claiming that he would not have entered the plea had he known the DNA test results. The motion was denied by the Superior Court and no appeal was taken.

(4) In order to prevail on his claim of ineffective assistance of counsel, Thomas 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.⁵ Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."⁶

(5) There is no merit to Thomas' claim that his counsel provided ineffective representation by permitting him to enter a plea prior to

⁵*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁶*Flamer v. State*, Del. Supr., 585 A.2d 736, 753 (1990).

receiving the DNA test results.⁷ The record reflects that Thomas' plea hearing took place on April 1, 1999. Prior to the hearing, Thomas was shown a videotape of his interview with the police.⁸ During the interview, Thomas admitted that fellatio occurred with the victim. In a previous meeting with the prosecutor and defense counsel, Thomas was told that the State would amend the information to reflect that the act of fellatio constituted the charge of unlawful sexual intercourse in the second degree. Prior to Thomas' plea colloquy, the State so amended the information on the record. Also prior to the plea colloquy, the State proffered in detail the expected testimony of the victim, which reflected that the charge of unlawful sexual intercourse consisted of acts of fellatio and cunnilingus.

(6) The DNA report, which stated merely that no spermatozoa were found in the samples taken from the victim, was not exculpatory with respect to this amended charge. Moreover, the report stated that the DNA profile of blood found on the victim's pants and head was inconsistent with

⁷The record reflects that, on January 21, 1999, Thomas' counsel objected to proceeding with the trial without the DNA report and, on that basis, the Superior Court granted a continuance. The record also reflects that the prosecutor sent the DNA report to defense counsel on February 3, 1999, almost two months before Thomas entered his plea, and that a copy of the report was filed in the Sussex County Prothonotary's Office on that same date. However, there is nothing in the record indicating that Thomas' counsel actually shared the DNA results with him prior to his plea. For purposes of this Order, we accept Thomas' argument that he was not aware of the DNA test results prior to entering his plea.

⁸Thomas' counsel unsuccessfully moved to suppress the videotaped interview.

the DNA profile of the victim and consistent with the DNA profile of Thomas. These findings did not eliminate Thomas as the perpetrator of the crime with which he was charged. Even assuming that Thomas was not told of the results of the DNA testing by his counsel prior to entering his plea, the record reflects that, at the time Thomas entered his plea, he was aware of all facts relevant to his decision whether to enter a plea to the amended charge or proceed to trial. Thus, Thomas has failed to demonstrate error on the part of his counsel that resulted in prejudice to him.

(7) Thomas' claim that his plea was coerced is also without merit. At the time his plea was entered, Thomas had viewed the videotape of his interview with the police, discussed the interview with the prosecutor and his counsel, discussed the consequences of the videotaped interview with his counsel and heard the State's proffer of the expected testimony of the victim should the case proceed to trial. Thomas, thus, understood the nature of the amended charge against him. The transcript of the plea colloquy as well as the signed plea agreement indicate that Thomas also understood the nature and consequences of his plea. There is no suggestion in the record of any coercion. In the absence of clear and

convincing evidence to the contrary, Thomas is bound by his answers on the plea form and by his testimony prior to the acceptance of the plea.⁹

(8) It is manifest on the face of Thomas' 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.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the motion to affirm is GRANTED. The judgment of the Superior Court is hereby AFFIRMED.

BY THE COURT:
/s/ Randy J. Holland
Justice

⁹*Somerville v. State*, Del. Supr., 703 A.2d 629, 631 (1997). The untimely-filed affidavits do not constitute such clear and convincing evidence and, as such, the Superior Court was correct in refusing to consider them.