

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARLOS ORTIZ,	§
	§ No. 539, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0208005710
	§
Plaintiff Below-	§
Appellee.	§

Submitted: December 12, 2012

Decided: February 5, 2013

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

ORDER

This 5th day of February 2013, 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, Carlos Ortiz, filed an appeal from the Superior Court’s August 30, 2012 order denying his fifth motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) The record before us reflects that, in May 2003, Ortiz was found guilty by a Superior Court jury of two counts of Rape in the First Degree, three counts of Endangering the Welfare of a Child, six counts of Possession of a Firearm During the Commission of a Felony and one count each of Attempted Rape in the First Degree, Kidnapping in the First Degree, Burglary in the First Degree, Aggravated Menacing, Terroristic Threatening and Possession of a Deadly Weapon by a Person Prohibited. He was sentenced to a total of eighty-four years of Level V incarceration, to be suspended after sixty-eight years for decreasing levels of supervision. Ortiz's convictions were affirmed by this Court on direct appeal.²

(3) Since that time, Ortiz has filed four postconviction motions in the Superior Court. The Superior Court denied all four motions. Ortiz appealed the Superior Court's denial of his first three motions. In all three cases, this Court affirmed.³

(4) In this appeal from the Superior Court's denial of his fifth postconviction motion, Ortiz claims that a) his constitutional rights were

¹ Supr. Ct. R. 25(a).

² *Ortiz v. State*, 2004 WL 77860 (Del. Jan. 15, 2004).

³ *Ortiz v. State*, 2007 WL 4462942 (Del. Dec. 20, 2007); *Ortiz v. State*, 2010 WL 925859 (Del. Mar. 15, 2010); *Ortiz v. State*, 2010 WL 3719885 (Del. Sept. 23, 2010).

violated as the result of perjured testimony at trial; b) his constitutional rights were violated because the court interpreter was the mother of a police officer who testified on behalf of the State; c) the State improperly failed to present a medical report regarding the victim's injuries; d) the police improperly interviewed his children regarding the events in question; e) his trial counsel provided ineffective assistance by failing to request *Jencks* material; f) his trial counsel provided ineffective assistance by failing to properly investigate the case and provide him with prior statements of witnesses; g) a juror, who worked for the victim's employer and who may have had prior knowledge of the case, was never properly investigated; and h) the prosecution engaged in misconduct and subjected him to a vindictive prosecution.

(5) We have reviewed the record in this case carefully. The record reflects that Ortiz filed his fifth postconviction motion in the Superior Court on October 25, 2010. The only claims made in the motion were claims of ineffective assistance on the part of Ortiz's trial counsel. On November 3, 2010, the Superior Court judge requested that Ortiz's trial counsel file an affidavit responding to the allegations of ineffective assistance.⁴ Ortiz's trial

⁴ Super. Ct. Crim. R. 61(g) (1) and (2).

counsel filed his affidavit on November 9, 2010. Ortiz responded to the affidavit on November 29, 2010.

(6) Based upon the response received, the Superior Court wrote to Ortiz on March 9, 2011, notifying him that his allegations were too vague and conclusory to be considered and that, if the motion were not supplemented within thirty days, it would be dismissed. Ortiz then filed a motion for an extension of time in which to supplement his motion, which the Superior Court granted. On September 21, 2011, Ortiz filed his supplemental motion for postconviction relief, which contained all of the claims he has raised in the instant appeal. Following the filing of that motion, the Superior Court requested both defense counsel and the State to respond to the allegations.

(7) Defense counsel again responded to Ortiz's allegations of ineffective assistance and the State responded in detail to Ortiz's claims of constitutional violations, attaching copies of the trial transcript to support its arguments. On December 14, 2011, the Superior Court afforded Ortiz the opportunity to respond to the affidavits submitted by defense counsel and the State. On December 28, 2011, the Superior Court granted Ortiz's request for an extension of time in which to respond. On February 21, 2012, the Superior Court granted Ortiz's second request for an extension of time in

which to respond. On May 21, 2012, Ortiz filed his supplemental motion for postconviction relief, which the Superior Court denied on August 30, 2012.

(8) When considering a Rule 61 postconviction motion, the Superior Court must apply the procedural requirements of Rule 61 prior to considering the merits of the motion.⁵ In this case, the Superior Court determined that Ortiz's motion was time-barred under Rule 61(i) (1) and that the procedural bars applied to those claims that could have been, but were not, asserted either in a prior postconviction motion, as required by Rule 61(i) (2), or in the proceedings leading to the judgment of conviction, as required by Rule 61(i) (3). Although the Superior Court's order does not so state, our review of the record indicates that Ortiz also asserted his claims of ineffective assistance of counsel in previous Rule 61 proceedings, which, as formerly adjudicated, were subject to the procedural bar of Rule 61(i) (4).

(9) The Superior Court's order states that Ortiz's postconviction motion contained no argument that Rule 61's time and procedural bars were inapplicable to his claims because of a miscarriage of justice due to a constitutional violation under Rule 61(i) (5). The Superior Court, nevertheless, considered Ortiz's constitutional claims on their merits in order to determine whether there was a manifest injustice due to a constitutional

⁵ *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

violation under Rule 61(i) (5) that would permit Ortiz to avoid Rule 61's time and procedural bars.

(10) After reviewing counsel's affidavits, and in particular the State's detailed refutation of Ortiz's claims of constitutional violations, the Superior Court concluded the following; a) Ortiz's claim of perjured testimony was based solely on expected discrepancies in witness testimony and, therefore, was meritless; b) the claim of impropriety involving the court interpreter was meritless because the jury had no knowledge of the relationship between her and the officer, she was not present when the officer testified and defense counsel had been duly notified of her relationship to the officer and had no objection to the limited role she played at trial; c) the claim of impropriety on the part of the State for failing to produce a medical report was meritless because the report was, in fact, provided to the defense; d) the claim that a juror worked at the victim's workplace was explored in detail in *voir dire*, where it was established that the juror knew nothing of the victim or the allegations against the defendant; and e) the claim of a vindictive prosecution had no factual basis. We have reviewed the parties' submissions carefully and conclude that the Superior Court properly found that there were no constitutional infirmities in the trial

proceedings enabling Ortiz to avoid the time and procedural bars pursuant to Rule 61(i) (5).

(11) It is manifest on the face of the 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, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice