

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALPHONSO NICKERSON,	§
	§
Petitioner Below-	§ No. 35, 2000
Appellant,	§
	§
v.	§ Court Below— Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ C.A. No. 99M-12-019
Respondent Below-	§
Appellee.	§

Submitted: March 1, 2000  
Decided: March 27, 2000

Before **WALSH, HOLLAND, and HARTNETT**, Justices

**ORDER**

This 27<sup>th</sup> day of March 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 petitioner-appellant, Alphonso Nickerson, filed this appeal from an order of the Superior Court denying his petition for a writ of habeas corpus. The State of Delaware, respondent-appellee, has moved to affirm the judgment of the Superior Court on the ground that it is

manifest on the face of Nickerson's opening brief that the appeal is without merit. We agree and AFFIRM.<sup>1</sup>

(2) Nickerson was found guilty by a jury of aggravated menacing, possession of a deadly weapon during the commission of a felony, assault in the third degree and criminal trespass in the first degree. He was sentenced to a period of imprisonment. On direct appeal, this Court affirmed Nickerson's convictions and sentences.<sup>2</sup>

(3) In this appeal, Nickerson claims that he was subjected to double jeopardy when the State charged him by indictment with offenses with which he had already been charged by information. He further claims that the State illegally charged him in the indictment with a more serious offense than had been listed in the information. Nickerson, finally, claims that his trial counsel was ineffective because he did not object to this double jeopardy violation.

(4) On June 5, 1997, the State filed an information charging Nickerson with aggravated menacing, possession of a deadly weapon during the commission of a felony, assault in the third degree and burglary

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<sup>1</sup>Nickerson's "Response to State's Motion to Affirm" is hereby stricken as a non-conforming document. Supr. Ct. R. 25(a); Supr. Ct. R. 34.

<sup>2</sup>*Nickerson v. State*, Del. Supr., No. 132, 1998, Walsh, J., 1999 WL 485433 (Mar. 11, 1999) (ORDER).

in the first degree. On July 8, 1997, prior to the dismissal of these charges, the State indicted Nickerson on charges of aggravated menacing, possession of a deadly weapon during the commission of a felony, assault in the second degree and burglary in the first degree. The State nolle prossed the four charges listed in the information in open court on August 20, 1997, and thereafter proceeded with the prosecution of the four charges listed in the indictment. Nickerson was tried on the four charges listed in the indictment.<sup>3</sup>

(5) In Delaware, the writ of habeas corpus provides relief on a very limited basis.<sup>4</sup> Habeas corpus only provides “an opportunity for one illegally confined or incarcerated to obtain judicial review of the jurisdiction of the court ordering the commitment.”<sup>5</sup> “Habeas corpus relief is not available to ‘[p]ersons committed or detained on a charge of treason or felony, the species whereof is plainly and fully set forth in the commitment.’”<sup>6</sup>

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<sup>3</sup>The jury found him guilty of the lesser-included offenses of assault in the third degree and criminal trespass in the first degree, in addition to aggravated menacing and possession of a deadly weapon during the commission of a felony.

<sup>4</sup>*Hall v. Carr*, Del. Supr., 692 A.2d 888, 891 (1997).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* (quoting 10 Del. C. §6902(1)).

(6) In this case, the Superior Court had subject matter jurisdiction over the four offenses charged in the indictment.<sup>7</sup> Moreover, Nickerson does not contend that his March 2, 1998 commitment is irregular on its face.<sup>8</sup> As such, Nickerson is not entitled to habeas corpus relief. Even if Nickerson's claims were properly before us, they are without merit. Jeopardy does not attach until a defendant has been put to trial before a trier of fact.<sup>9</sup> Nickerson was not placed in jeopardy twice for the same offenses because the four charges in the initial information were all nolle prossed prior to his trial.<sup>10</sup> Furthermore, the State had discretion to dismiss the information and charge Nickerson with a more serious crime in the indictment.<sup>11</sup> Because there was no double jeopardy violation or abuse of discretion by the State, Nickerson's counsel had no grounds for objection.

(7) It is manifest on the face of Nickerson's opening brief that the appeal is without merit. The issues presented in the appeal are clearly

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<sup>7</sup>10 Del. C. § 541; 11 Del. C. § 2701(c); Del. Const. Art. IV, § 7.

<sup>8</sup>*Maxion v. State*, Del. Supr., 686 A.2d 148, 151 (1996).

<sup>9</sup>*Serfass v. United States*, 420 U.S. 377, 388 (1975).

<sup>10</sup>*Id.*

<sup>11</sup>Super. Ct. Crim. R. 7 and 48(a).

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, pursuant to Supreme Court Rule 25(a), that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

Randy J. Holland  
Justice