IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTONIO LEE TAYLOR, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	No. 220, 1999 Court Below: Superior Court of the State of Delaware, in and for Kent County in Cr.A. Nos. IK94-06-0047R1 through 0052R1. Def. ID No. 9404018838

Submitted: December 17, 1999
Decided: February 23, 2000

Before **VEASEY**, Chief Justice, **WALSH**, and **BERGER**, Justices.

O R D E R

This 23rd day of February 2000, upon consideration of the appellant's opening brief and appendix and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) Following a jury trial in the Superior Court, the defendant-appellant, Antonio Lee Taylor ("Taylor"), was convicted of two counts of First Degree Murder (intentional murder and felony murder), two counts of Possession of a Deadly Weapon During the Commission of a Felony, one count of Second Degree Burglary, and one count of Violation of Conditions

of Bond. Taylor was sentenced on June 2, 1995, to life in prison for the murder convictions plus 33 additional years for the other convictions. Taylor's convictions and sentence were affirmed on appeal.[1]

(2) In May 1998, Taylor filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). Taylor's motion raised the following three claims: (i) "misconduct" of arresting officer; (ii) "perjury" by a prosecution witness; and (iii) ineffective assistance of counsel for failing to ask questions "that should have been asked" and for failing to object to a prosecution witness. By report dated March 4, 1999, a Superior Court Commissioner recommended that Taylor's motion be dismissed as procedurally barred under Rule 61(i)(3).

(3) On appeal to the Superior Court judge from the Commissioner's report and recommendation, Taylor raised three more allegations of ineffective assistance of counsel, i.e., that counsel: (i) failed to object to the absence of a separate jury instruction on Manslaughter; (ii) failed to object to the testimony of a prosecution witness; and (iii) failed to object to the jury instruction on "extreme emotional distress." By order dated April 28, 1999,

[1] *Taylor v. State*, Del. Supr., 685 A. 2d 349 (1996) .

the Superior Court adopted the Commissioner's recommendation as to Taylor's first three postconviction claims, found that Taylor's additional three allegations of ineffective assistance of counsel were procedurally barred pursuant to Rule 61(i)(3), and dismissed Taylor's motion. This appeal followed. By order dated August 11, 1999, the Superior Court denied Taylor's request for a free copy of the trial transcript.

(4) In his opening brief on appeal, Taylor claims that the Superior Court's denial of Taylor's request for transcript at State expense was an abuse of discretion. The Superior Court denied Taylor's request for free transcript on the bases that an evidentiary hearing was not conducted under Rule 61, a trial transcript was unnecessary to decide the motion for postconviction relief, a copy of the transcript was previously provided to Taylor's trial counsel, and the original trial transcript was already a part of the record.

(5) The provision of a free trial transcript for the preparation of a post-trial motion is not a constitutional right.[2] The Superior Court did not abuse its discretion in denying Taylor's request for a free transcript.

[2] *U.S. v. MacCollum*, 426 U.S. 317 (1976).

(6) We note that Taylor's opening brief on appeal raises one claim that Taylor did not raise in his postconviction motion. Taylor alleges that there was insufficient evidence to find that he committed murder during "immediate flight" from the predicate felony of Second Degree Burglary.[3] We decline to consider this claim, as it was not presented to the Superior Court. Claims not fairly presented in the trial court are not considered by this Court unless the interests of justice require otherwise.[4] We conclude that the interests of justice do not require us to address the allegation.

(7) In his opening brief on appeal, Taylor raises only one of the six claims that he presented to the Superior Court, i.e., that trial counsel was ineffective for failing to object to the Superior Court's jury instruction on "extreme emotional distress." Specifically, Taylor alleges that his counsel failed to recognize that the Superior Court's definition of "preponderance of the evidence,"[5] within that jury instruction, was "misleading" and violated

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[3] Under 11 *Del. C.* § 636(a)(2), a defendant may be convicted of First Degree Felony Murder if, "[i]n the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person."

[4] Supr. Ct. R. 8.

[5] Under the provisions of 11 *Del. C.* § 641, a finding of "extreme emotional distress" is a mitigating circumstance which reduces the crime of First Degree Murder to the crime of Manslaughter. The fact that the defendant acted under the influence of

Taylor's right of due process. To the extent Taylor has not argued the other five claims that were raised in his postconviction motion, those claims are deemed waived and abandoned and will not be addressed by this Court.[6]

(8) When reviewing a motion for postconviction relief under Rule 61, this Court must first consider the procedural requirements of the rule before giving consideration to the merits of the underlying claim.[7] Because trial counsel did not object to the "extreme emotional distress" jury instruction and did not raise the issue on direct appeal, Rule 61(i)(3) procedurally bars the claim on postconviction relief unless Taylor can establish: (i) cause for the procedural default; and (ii) actual prejudice from the failure to assert the claim. If "counsel's failure to pursue a reasonably available claim is so egregious as to constitute ineffective assistance under the Sixth Amendment," that failure may be cause to excuse the procedural default under Rule 61(i)(3).[8] "Attorney error which falls short of ineffective assistance of

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"extreme emotional distress" must be proved by the defendant by a "preponderance of the evidence."

[6] *Murphy v. State*, Del. Supr., 632 A.2d 1150, 1152 (1993).

[7] *See Flamer v. State*, Del. Supr., 585 A.2d 736, 747 (1990).

[8] *Id.* at 758.

counsel[,]" however, "does not constitute cause for relief from a procedural default."[9]

(9) The phrase "preponderance of the evidence" has been defined to mean the side on which "the greater weight of the evidence" is found.[10] In this case, it is clear that the Superior Court's definition of "preponderance of the evidence," as found within the Court's jury instruction on "extreme emotional distress," was legally sufficient.[11] Trial counsel can not be faulted

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[9] *Id.*

[10] *See Reynolds v. Reynolds,* Del. Supr., 237 A.2d 708, 711 (1967).

[11] In its jury instruction on "extreme emotional distress," the Superior Court explained "preponderance of the evidence" as follows:

> Now, to establish something by a preponderance of the evidence means to prove that something is more likely so than not so. The phrase `preponderance of the evidence' does not mean the side with the greater number of witnesses as opposed to the side with lesser number of witnesses.
>
> The side upon which you find the greatest strength or greatest weight of the evidence is the side upon which the preponderance of the evidence exists. In order for the defendant to have sustained his burden of proof, the evidence must do more than merely balance the scale; it must tip the scale to some extent at least in the defendant's favor.
>
> Now, if after a careful and conscientious consideration of all the evidence relating to the issue of extreme emotional distress, you are satisfied by the preponderance of the evidence that the defendant has established both elements as I have described them for you, then you should only

for failing to object to the instructions or to raise the issue on appeal. Consequently, Taylor has failed to show cause to excuse the procedural default under Rule 61(i)(3).

(10) It is manifest on the face of Taylor's opening brief that the appeal is without merit. The issues raised are clearly controlled by settled Delaware law, and to the extent the issues on appeal implicate the exercise of judicial discretion, 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/ Carolyn Berger
Justice

> consider the offense of manslaughter under Count 1. The use of extreme emotional distress is not applicable to the charge of felony murder under Count 2 of the indictment.
>
> If you are not satisfied that the accused has proven both elements of the mitigating circumstance of extreme emotional distress by a preponderance of the evidence, then you may only consider the offense of murder in the first degree under Count 1, or the lesser-included offense of murder in the second degree as I have previously explained those offenses to you.
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> Tr. at J-117, 118 (May 8, 1995)