

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARID L. CUBBAGE,	§	
	§	No. 168, 2005
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in IS02-02-
	§	0611, 0612 & 0613; IS02-03-
STATE OF DELAWARE,	§	0268.
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0202007080

Submitted: August 23, 2005

Decided: September 20, 2005

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

ORDER

This 20th day of September 2005, upon consideration of the appellant's opening brief, the State's motion to affirm, the appellant's response to the motion to affirm, the State's reply to the appellant's response¹ and the Superior Court record, it appears to the Court that:

(1) The appellant, Jarid L. Cubbage, has filed an appeal from the Superior Court's denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The appellee, State of Delaware, has moved to affirm the judgment of the Superior Court on the

¹ The Court permitted the appellant to file the response to the motion to affirm. See Supr. Ct. R. 25(a) (providing that there shall be no response to the motion to affirm unless requested by the Court).

ground that it is manifest on the face of Cubbage's opening brief that the appeal is without merit.² We agree and affirm.

(2) Following a jury trial in the Superior Court, Cubbage was convicted of Robbery in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Conspiracy in the Second Degree and Wearing a Disguise During the Commission of a Felony. The Superior Court sentenced Cubbage to eight years at Level V followed by decreasing levels of supervision.

(3) On direct appeal, Cubbage argued that the Superior Court erred when denying his motion for judgment of acquittal. This Court concluded that Cubbage's arguments were without merit and affirmed the Superior Court's judgment.³

(4) In April 2004, Cubbage filed a motion for postconviction relief. Cubbage alleged that (a) he was denied due process when the State failed to disclose alleged notes or a detailed summary of a co-defendant's oral statement; (b) he was denied due process when the State introduced irrelevant and prejudicial evidence; (c) his confrontation rights were violated when the Superior Court limited cross-examination of a co-defendant; and (d) the prosecutor improperly cross-examined him on his post-arrest silence.

² Del. Supr. Ct. R. 25(a).

³ *Cubbage v. State*, 2003 WL 21488129 (Del. Supr.).

In related claims, Cubbage alleged that his defense counsel was ineffective when he failed to (a) file for discovery, (b) obtain the criminal record of a co-defendant for impeachment purposes, (c) file a motion for return of property, (d) object to inadmissible evidence, e) impeach a detective's trial testimony, and (f) raise the State's alleged discovery violation and alleged *Doyle* violation on direct appeal.⁴

(5) The Superior Court directed that defense counsel file an affidavit in response to Cubbage's allegations of ineffective assistance of counsel.⁵ Cubbage then filed a reply to defense counsel's affidavit.

(6) The Superior Court referred Cubbage's postconviction motion to a Commissioner for proposed findings of fact and recommendations.⁶ In a thoughtful and thorough twenty-four page report dated March 15, 2005, the Commissioner addressed each of Cubbage's claims before recommending to the Superior Court that the postconviction motion should be denied. The Commissioner concluded that, as to each claim, Cubbage

⁴See *Capano v. State*, 781 A.2d 556, 648 (Del. 2001) (discussing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) holding that Due Process Clause of Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings)).

⁵ See *Horne v. State*, ___ A.2d ___, 2005 WL 1949967 at *2 (Del. Supr.) (concluding that the Superior Court should obtain trial counsel's affidavit in response to a first postconviction motion that raises ineffective assistance of counsel).

⁶ Del. Code Ann. tit. 10, § 512(b)(1)b; Super. Ct. Crim. R. 62(a)(5).

failed to overcome the procedural bar of Rule 61(i)(3).⁷ Where Cubbage raised a related claim of ineffective assistance of counsel, the Commissioner concluded that Cubbage failed to establish that he was prejudiced as a result of his counsel's alleged ineffectiveness.⁸

(7) Cubbage filed extensive written objections to the Commissioner's report and recommendation. Following its de novo determination of Cubbage's objections, the Superior Court, by order dated April 14, 2005, adopted the Commissioner's findings and recommendation and denied Cubbage's motion for postconviction relief.⁹ This appeal followed.

(8) We have carefully considered Cubbage's appellate claims as set forth in the opening brief, as well as the State's motion to affirm and the Superior Court record. We conclude that the judgment of the Superior Court should be affirmed on the basis of the Superior Court's order dated April 14, 2005, that adopted the Commissioner's well-reasoned report and recommendation dated March 15, 2005. We agree that Cubbage's claims,

⁷ Rule 61(i)(3) provides that any ground for relief that was not previously raised is procedurally barred unless the defendant demonstrates "cause for relief from the procedural default" and "prejudice" stemming from the alleged grievance.

⁸ To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the outcome of the case would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁹ Super. Ct. Crim. R. 62(a)(5)(iv).

none of which were raised in his direct appeal, do not meet the cause and prejudice standard of Rule 61(i)(3), nor do they qualify for the exception to the Rule 61(i)(3) procedural bar that is found in Rule 61(i)(5).¹⁰ Moreover, to the extent that Cubbage alleged ineffective assistance of counsel, we agree that Cubbage has not demonstrated that any claimed error on the part of his counsel resulted in prejudice to him.

(9) It is manifest on the face of Cubbage's opening brief that this appeal is without merit. The issues raised on appeal are clearly controlled by settled principles of law, and there was no error of law in the Superior Court. To the extent the appeal presents issues of judicial discretion, clearly there was no abuse of discretion.

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

BY THE COURT:

/s/ Randy J. Holland
Justice

¹⁰ Rule 61(i)(5) provides in pertinent part that the procedural bar in Rule 61(i)(3) shall not apply to a colorable claim that there was 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.