

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL DURHAM,	§	
	§	No. 176, 2006
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in and
v.	§	for Kent County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0208019524A
Appellee.	§	

Submitted: June 28, 2006
Decided: September 28, 2006

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 28th day of September 2006, upon consideration of the appellant's opening brief and the appellee's motion to affirm, it appears to the Court that:

(1) The appellant, Michael Durham, 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 ground that it is manifest on the face of Durham's opening brief that the appeal is without merit.¹ We agree and affirm.

¹Del. Supr. Ct. R. 25(a) (2006).

(2) In 2003, a Superior Court jury convicted Durham of numerous felony offenses, including Possession of a Firearm During the Commission of a Felony and Attempted Robbery in the First Degree. Durham filed a motion for new trial. After an evidentiary hearing, the Superior Court denied the motion. At sentencing, the Superior Court declared Durham a habitual offender and sentenced him to life in prison.²

(3) On direct appeal, Durham argued that the Superior Court abused its discretion when denying the motion for new trial. This Court held otherwise and affirmed the Superior Court's judgment.³

(4) In May 2005, Durham filed a motion for postconviction relief. The Superior Court referred Durham's motion to a Commissioner for proposed findings and recommendations.⁴ The Commissioner directed that the State file a memorandum in response to the postconviction motion and that Durham's trial counsel file an affidavit in response to allegations of ineffective assistance of counsel. Durham filed a reply to each of those submissions.

²Del. Code Ann. tit. 11, § 4214(a) (2001) (amended 2004).

³*Durham v. State*, 867 A.2d 176 (Del. 2005).

⁴Del. Code Ann. tit. 10, § 512(b)(1)b (1999); Del. Super. Ct. Crim. R. 62(a)(5) (2006).

(5) By report and recommendations dated November 30, 2005, the Commissioner found that Durham had failed to establish that he was prejudiced as a result of the alleged ineffectiveness of his counsel.⁵ The Commissioner recommended that the Superior Court deny Durham's postconviction motion as procedurally barred pursuant to Rule 61(i)(3) and (4).⁶

(6) Durham filed extensive written objections to the Commissioner's findings and recommendations. The Superior Court considered the objections and reviewed the Commissioner's report *de novo*, as required.⁷ Ultimately, however, the Superior Court adopted the Commissioner's report and recommendations and denied Durham's motion for postconviction relief.⁸

(7) In his opening brief on appeal, Durham argues, as he did in his postconviction motion: (i) ineffective assistance of counsel, (ii) prosecutorial misconduct,⁹ and (iii) abuse of discretion in denial of new trial motion.¹⁰

⁵*See Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (holding that a defendant claiming ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness and was prejudicial).

⁶*See* Del. Super. Ct. Crim. R. 61(i)(3) (2006) (barring postconviction claim not previously raised, absent cause for relief and prejudice; (i)(4) (barring formerly adjudicated postconviction claim unless reconsideration is warranted in the interest of justice).

⁷Del. Super. Ct. Crim. R. 62(a)(5)(iv) (2006).

⁸*Id.*

⁹Durham claims that the prosecutor (i) arranged for the Department of Correction transportation officer to place Durham in the same courthouse holding cell as a defense

Durham also argues that the Superior Court abused its discretion when it decided his postconviction motion without conducting an evidentiary hearing.

(8) Notwithstanding his arguments to the contrary, Durham has not demonstrated on appeal that reconsideration of the Superior Court's denial of his motion for new trial is warranted in the interest of justice under Rule 61(i)(4). Nor has Durham demonstrated that his claims of prosecutorial misconduct should be considered under the exception to the procedural bar of Rule 61(i)(3) that is found in Rule 61(i)(5).¹¹ Finally, to the extent Durham has argued ineffective assistance of counsel, we agree with the Superior Court that Durham has not demonstrated that any claimed error on the part of his counsel resulted in prejudice to him.

(9) Having thus carefully considered the parties' submissions on appeal 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

witness and (ii) solicited perjured testimony from a prosecution witness.

¹⁰To the extent Durham has not argued on appeal other claims that he raised in his postconviction motion, those claims are deemed waived. *See Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citing *Murphy v. State*, 632 A.2d 1150, 1152-53 (Del. 1993)).

¹¹*See* Del. Super. Ct. Crim. R 61(i)(5) (2006) (providing 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).

dated March 14, 2006, that adopted the Commissioner's well-reasoned report and recommendations dated November 30, 2005. The Superior Court did not abuse its discretion when it decided Durham's postconviction motion without an evidentiary hearing.¹²

(10) It is manifest on the face of Durham'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, 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/ Jack B. Jacobs
Justice

¹²See Del. Super. Ct. Crim. R. 61(d)(4) (2006) (providing that the Superior Court may summarily dismiss a postconviction motion if it "plainly appears from the motion and the record of prior proceedings" that the defendant is not entitled to relief).