

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARLOS ORTIZ, JR.,	§
	§
Defendant Below-	§ No. 205, 2007
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0208005710
Plaintiff Below-	§
Appellee.	§

Submitted: September 24, 2007
Decided: December 20, 2007

Before **BERGER, JACOBS, and RIDGELY**, Justices.

ORDER

This 20th day of December 2007, upon consideration of the appellant’s opening brief, the State’s motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, Carlos Ortiz, filed this appeal from the Superior Court’s order denying his motion for postconviction relief. The State of Delaware has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Ortiz’s opening brief that the appeal is without merit. We agree and affirm.

(2) The record reflects that a Superior Court jury convicted Ortiz in 2003 of two counts of first degree rape, possession of a deadly weapon, and numerous related offenses resulting from Ortiz's attack on his estranged wife in her home while the couple's three children were present. The Superior Court sentenced him to 84 years at Level V incarceration, to be suspended after serving 68 years for decreasing levels of supervision. This Court affirmed his convictions and sentence on direct appeal.¹ Ortiz filed his first motion for postconviction relief in the Superior Court in November 2005. Ortiz raised four issues in the original motion: (i) his trial counsel was ineffective; (ii) the trial court improperly admitted statements made by his children to the investigating officer; (iii) the trial court improperly commented on the evidence; and (iv) the prosecution failed to disclose exculpatory evidence. The Superior Court denied all of Johnson's claims. This appeal followed.

(3) In his opening brief on appeal, Ortiz again argues that his trial counsel was ineffective, the trial court improperly admitted evidence of his children's statements to police, and the prosecution failed to disclose exculpatory evidence. We will not consider any other issues raised below

¹ *Ortiz v. State*, 2004 WL 77860 (Del. Jan. 15, 2004).

that were not briefed on appeal, including several claims of ineffectiveness that were argued to the Superior Court but not briefed here.²

(4) The only claim of ineffectiveness raised in Ortiz's opening brief is a claim that his counsel failed to communicate with him before trial regarding statements made by his sons to an investigator from the Division of Family Services (DFS). To prevail on a claim of ineffective assistance of counsel, a petitioner is required to establish: (a) that defense counsel's representation fell below an objective standard of reasonableness; and (b) that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the case would have been different.³ There is a strong presumption that counsel's conduct was professionally reasonable.⁴

(5) In this case, the Superior Court noted that DFS had conducted two child neglect investigations of the Ortiz family. The first investigation took place before Ortiz attacked his wife. The second investigation was prompted by a hot-line telephone call reporting that Ortiz had broken into his wife's home and raped her while the children were present. The Superior Court noted that neither the prosecutor nor defense counsel was

² *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (holding that claims not briefed on appeal are deemed waived).

³ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

⁴ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988).

aware of the DFS neglect investigations until trial was underway when the investigating detective made reference to them on the witness stand. The Superior Court then stopped the trial and ordered the State to obtain copies of the DFS records and produce them to defense counsel. The trial court also ordered the State to make the DFS investigator available as a witness for defense counsel's examination.

(6) As ordered, the DFS investigator appeared at trial the next day. Defense counsel cross-examined her and elicited testimony regarding statements made by Ortiz's sons reflecting that Ortiz did not have a gun during the attack. These statements were consistent with statements made by one of the boys in a letter that had been provided to defense counsel long before trial. In fact, defense counsel was able to use the statements in the son's letter to challenge his credibility during cross-examination. Under these circumstances, even if we assume that counsel had erred in failing to discover the DFS investigations before trial, we find no resulting prejudice because the statements to the investigator did not include any information that was unknown to defense counsel and, thus, did not affect the outcome of the trial.⁵

⁵ See *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

(7) Ortiz's next claim is that the trial court erred in admitting into evidence statements his children made to the investigating detective. Ortiz raised this issue on direct appeal, however, and this Court rejected it.⁶ The Superior Court properly concluded that this previously-adjudicated claim was procedurally barred and that Ortiz had not established that reconsideration of the claim was warranted in the interest of justice.⁷

(8) Ortiz's final claim is that the prosecutor withheld exculpatory evidence by failing to provide the DFS interviews until after trial began. Although disclosure of the reports was late, the Superior Court concluded that the prosecutor had been unaware of the reports before trial. Once the existence of the reports was known, the trial court delayed continuation of the trial until defense counsel had an opportunity to review the reports and then was given the opportunity to question the DFS investigator about them. As we have held, the delayed disclosure of these reports did not result in any prejudice to Ortiz.⁸ Accordingly, this claim fails.

⁶ *Ortiz v. State*, 2004 WL 77860 (Del. Jan. 15, 2004).

⁷ Del. Super. Ct. Crim. R. 61(i)(4) (2007).

⁸ *See Lilly v. State*, 649 A.2d 1055, 1058 (Del. 1994).

NOW, THEREFORE, IT IS ORDERED, that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice