

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|--------------------------------|
| DONALD E. COLE, | § |
| | § No. 467, 2007 |
| Defendant Below- | § |
| Appellant, | § |
| | § Court Below—Superior Court |
| v. | § of the State of Delaware |
| | § in and for New Castle County |
| STATE OF DELAWARE, | § Cr. ID No. 0110006694A |
| | § |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: April 11, 2008
Decided: May 29, 2008

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

ORDER

This 29th day of May 2008, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Donald E. Cole, filed an appeal from the Superior Court’s August 20, 2007 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. For the reasons that follow, we conclude that this matter must be REMANDED to the Superior Court for further proceedings in accordance with this Order.

(2) In January 2003, Cole pleaded guilty to one count of Attempted Murder in the First Degree, one count of Assault in the First Degree, and two counts of Possession of a Firearm During the Commission of a Felony.

He was sentenced to a total of 25 years of Level V incarceration, to be suspended after 22 years for decreasing levels of supervision. Cole did not file an appeal from his convictions and sentences.

(3) In this appeal from the Superior Court's denial of his first postconviction motion, Cole claims that the Superior Court abused its discretion by denying his motion for postconviction relief before his appointed counsel was able to consult with him. He also claims that a) his former counsel provided ineffective assistance by failing to inform the Superior Court that he wanted to withdraw his guilty plea and by failing to file a motion for a competency hearing, b) his guilty plea was coerced, and c) the prosecution engaged in misconduct by withholding exculpatory evidence.

(4) The record reflects that Cole entered his guilty pleas during the course of trial in January 2003. He was sentenced in March 2003. In February 2006, Cole filed his first motion for postconviction relief under Rule 61. He also filed a motion for the appointment of counsel, which the Superior Court granted. Thereafter, conflict counsel acknowledged his appointment to represent Cole on his Rule 61 claims, including his claims of ineffective assistance against the public defender who had represented him at trial and during plea negotiations.

(5) In August 2006, further briefing on Cole's postconviction motion was stayed by the Superior Court pending resolution of his appeal from a related murder conviction.¹ On August 14, 2006, Cole wrote to the Superior Court complaining that he had never been contacted by his appointed counsel and requesting the Superior Court to order his counsel to contact him promptly. On May 22, 2007, following the issuance of a final order in the related matter,² the Superior Court lifted the stay. The public defender who had represented Cole at trial filed an affidavit in response to Cole's claims of ineffective assistance and the State, in turn, filed its response.

(6) The Superior Court docket reflects that, on August 6, 2007, the Superior Court appointed a second conflict counsel to represent Cole. It appears that this was necessary because Cole, acting pro se, had filed ineffectiveness claims against his first conflict counsel in the related murder case. On August 20, 2007, the Superior Court issued its order denying Cole's motion for postconviction relief. Cole then filed a pro se appeal in this Court. On September 4, 2007, Cole's second conflict counsel wrote a letter to the Superior Court requesting that the proceedings be reopened on the ground that the Superior Court had issued its decision before he had had

¹ Super. Ct. Cr. ID No. 0309013358

² *Cole v. State*, 922 A.2d 364 (Del. 2007).

an opportunity to contact Cole. The Superior Court wrote to counsel informing him that, because Cole had already filed a pro se appeal to the Supreme Court, it was deprived of jurisdiction to address his request.

(7) Under the unusual circumstances presented in this case, and in the interest of justice, we conclude that this matter should be remanded to the Superior Court so that Cole's second conflict counsel may have the opportunity to represent Cole's interests in connection with his postconviction motion. We are mindful that Cole's own actions in filing pro se ineffectiveness claims in a related case and, most recently, a pro se appeal in the instant case have led to the situation in which he now finds himself. However, the Superior Court clearly believed that his postconviction motion merited the appointment of counsel and we conclude that Cole should not be deprived of that legal representation because of apparently inadvertent procedural errors on his part.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED to the Superior Court for further proceedings in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice