

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT L. SMITH,	§
	§
Defendant Below-	§ No. 326, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID 0304017352
Plaintiff Below-	§
Appellee.	§

Submitted: August 15, 2008

Decided: November 10, 2008

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

ORDER

This 10th day of November 2008, upon consideration of the appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, Robert Smith, filed this appeal from the Superior Court's denial of his first 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 Smith's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that a Superior Court jury convicted Smith in April 2004 of first degree assault, second degree assault, and possession

of a deadly weapon during the commission of a felony. He was acquitted of five other charges, including two counts of attempted murder, and pled guilty to a severed charge of possession of a deadly weapon by a person prohibited. The Superior Court sentenced Smith on all four charges on August 25, 2004. Smith did not file a direct appeal.

(3) Instead, on August 29, 2006, Smith filed a motion for postconviction relief alleging that his trial counsel was ineffective for failing to file a direct appeal. Defense counsel filed an affidavit in response to Smith's motion, stating that, although Smith had been informed of his right to appeal, he had not expressed his desire for counsel to file a notice of appeal on his behalf.¹ The Superior Court Commissioner held an evidentiary hearing on Smith's motion on May 1, 2007. After post-hearing memoranda, the Commissioner issued her report, which found defense counsel's testimony that Smith did not request to take an appeal to be credible. Accordingly, the Commissioner recommended that Smith's motion for postconviction relief be denied. The Superior Court judge conducted a de novo review and concluded that the record supported the conclusion that Smith's motion should be denied. This appeal followed.

¹ See Del. Supr. Ct. R. 26(a)(ii) (2008) (trial counsel has a continuing obligation to file a notice of appeal on behalf of a criminal defendant if the client desires to take an appeal).

(4) After careful consideration of appellant's opening brief and the State's motion to affirm, we find it manifest that the judgment of the Superior Court should be affirmed. We find no abuse of the Superior Court's discretion in denying Smith's claim of ineffective assistance of counsel because there was credible evidence to support the conclusion that Smith did not want his attorney to file an appeal in 2004.² Accordingly, as counsel committed no error in failing to file an appeal on Smith's behalf, there is no basis to reach the merits of Smith's claim that the indictment against him was defective.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

² See *Erb v. State*, 332 A.2d 137, 139 (Del. 1974) (holding that trial counsel, whether appointed or privately retained, "has a duty to docket an appeal if the client wants to appeal.").