

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS J. OWENS,	§
	§
Defendant Below-	§ No. 428, 2009
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0607003633
Plaintiff Below-	§
Appellee.	§

Submitted: September 18, 2009

Decided: November 23, 2009

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

ORDER

This 23rd day of November 2009, 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, Thomas Owens, filed this appeal from the Superior Court's denial of his motion for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Owens' opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that a Superior Court jury found Owens guilty in February 2007 of one count each of continuous sexual abuse of a

child, endangering the welfare of a child, sexual solicitation of a child, and attempted sexual exploitation of a child. The crimes involved two different minor victims. The Superior Court sentenced Owens to four years at Level V incarceration to be followed by decreasing levels of supervision. This Court affirmed Owens' convictions and sentence on direct appeal.¹ Owens filed a motion for sentence modification, which the Superior Court denied on January 14, 2009.

(3) Thereafter, Owens filed his first motion for postconviction relief, alleging that his trial counsel was ineffective because: (i) counsel was absent during critical stages of the proceedings; and (ii) counsel failed to explore one of the victim's bias by questioning her about whether she fabricated the allegations against Owens and another man in order to be returned to Delaware from New Jersey (where she had been sent to live with an aunt). Owens also alleged that the Superior Court erred at trial by limiting witness cross-examination in a way that violated his constitutional rights. After obtaining trial counsel's affidavit in response to Owens' allegations, the Superior Court denied postconviction relief. This appeal followed.

¹ *Owens v. State*, 2008 WL 4659801 (Del. Oct. 22, 2008).

(4) Owens advances two arguments in his opening brief on appeal. First, he contends that his trial counsel was ineffective. Second, he contends that the trial court erred in excluding reliable evidence that one of the victims had fabricated her claims of abuse.

(5) This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.² To prevail on a claim of ineffective assistance of counsel, a defendant must establish that (i) his trial counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, the outcome of the proceedings would have been different.³ The defendant must set forth and substantiate concrete allegations of actual prejudice.⁴ Moreover, there is a "strong presumption" that counsel's representation was professionally reasonable.⁵

(6) Owens contends that his trial counsel was ineffective for failing to object to the admission at trial of pornographic images found on his home computer. Owens also alleges that counsel was ineffective for failing to cross-examine one of the victims about her motivation to lie. Neither of

² *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

³ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁵ *Strickland v. Washington*, 466 U.S. at 689.

these contentions is factually supported by the record. Defense counsel did object to the admission of the computer images. The Superior Court overruled counsel's objection, and we affirmed that ruling on Owens' direct appeal.⁶ Moreover, the record reflects that defense counsel cross-examined the victim about her desire to return to Delaware as a possible motivation for fabricating allegations against Owens. Counsel also argued this point in his closing to the jury. Accordingly, we reject these claims of ineffectiveness.

(7) To the extent Owens' argues that counsel was ineffective for failing to cross-examine the victim about allegedly false allegations of abuse she made against a New Jersey man, the record reflects that the criminal charges against the New Jersey man, a convicted sex offender, were still pending trial at the time of Owens' trial. Defense counsel stated in his affidavit in response to Owens' postconviction motion that, because he had no way to prove the allegations false, he concluded that the evidence was irrelevant at Owens' trial. The Superior Court found counsel's decision not to pursue this irrelevant line of questioning to be appropriate and entirely reasonable. We agree. Accordingly, we reject this claim.

(8) Furthermore, Owens' claim that his counsel was ineffective for failing to obtain the victim's therapy records during discovery was not

⁶ See *Owens v. State*, 2008 WL 4659801, at *2.

presented in the postconviction motion Owens filed in the Superior Court. We will not review this claim in the first instance on appeal.⁷

(9) Owens' final claim is that the Superior Court erred in limiting defense counsel's cross-examination of the victim regarding her claims of abuse by the New Jersey man. This claim, however, is not supported by the record. The Superior Court never ruled on the admissibility of this evidence at trial because defense counsel never sought to introduce it. We already have held that defense counsel's decision in this regard was appropriate and reasonable.

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

BY THE COURT:

/s/ Carolyn Berger
Justice

⁷ See Del. Supr. Ct. R. 8.