

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM GREGORY,	§
	§ No. 352, 2010
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. 9811012362
	§
Plaintiff Below-	§
Appellee.	§

Submitted: August 17, 2010
Decided: September 20, 2010

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

ORDER

This 20th day of September 2010, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, William Gregory, filed an appeal from the Superior Court’s May 28, 2010 order denying his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) In February 2000, Gregory was found guilty by a Superior Court jury of Attempted Murder in the First Degree, Assault in the Second Degree, Conspiracy in the First Degree, and two weapon offenses. He was sentenced to a total of 30 years of Level V incarceration, to be followed by decreasing levels of supervision. This Court affirmed Gregory's convictions on direct appeal.² Gregory subsequently filed a motion for postconviction relief, which the Superior Court denied. This Court affirmed the Superior Court's decision.³

(3) In this appeal from the Superior Court's denial of his second postconviction motion, Gregory claims that a) the retroactive application of *Allen v. State*, 970 A.2d 203 (Del. 2009) required his jury to be instructed pursuant to Del. Code Ann. tit. 11, §§271 and 274, in conformity with the evidence presented at trial; b) the evidence was insufficient to support his convictions; and c) his counsel provided ineffective assistance by failing to properly investigate the charges and challenge the medical evidence.

¹ Supr. Ct. R. 25(a).

² *Gregory v. State*, Del. Supr., No. 278, 2000, Berger, J. (July 25, 2001).

³ *Gregory v. State*, Del. Supr., No. 600, 2005, Steele, C.J. (Oct. 17, 2006).

(4) Before addressing the substantive claims made in a motion for postconviction relief, the Superior Court must first consider the procedural requirements of Rule 61.⁴ Under Rule 61(i)(1), Gregory was required to file his motion within 3 years of the date his conviction became final. Gregory's conviction became final when this Court issued its mandate on Gregory's direct appeal in August 2001.⁵ As such, Gregory's second postconviction motion, filed in February 2010, was clearly untimely.

(5) Furthermore, each of Gregory's individual claims is either without merit or procedurally barred. His first claim, regarding the retroactive applicability of *Allen* to the jury instructions, is without merit.⁶ His second claim of insufficiency of the evidence is procedurally barred under both Rule 61(i)(2) and 61(i)(3) because it was raised neither in his prior postconviction motion nor in the proceedings leading to the judgment of conviction. Gregory's third claim of ineffective assistance of counsel is procedurally barred under Rule 61(i)(4) because it was formerly adjudicated in his first postconviction motion. Moreover, the record before us does not support a claim that the procedural bars can be avoided under Rule 61(i)(5) due to a miscarriage of justice.

⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁵ Super. Ct. Crim. R. 61(m)(2).

⁶ *Richardson v. State*, Del. Supr., No. 86, 2009, Ridgely, J. (July 12, 2010) (*en Banc*) (Because *Allen* does not constitute a "new rule" and is not "implicit in the concept of ordered liberty," it does not apply retroactively.)

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, 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