

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BILLY G. JOHNSON,	§
	§
Defendant Below-	§ No. 206, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0611012659
Plaintiff Below-	§
Appellee.	§

Submitted: July 22, 2010
Decided: September 21, 2010

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

ORDER

This 21st day of September 2010, 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, Billy Johnson, 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 Johnson's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that a Superior Court jury convicted Johnson in September 2008 of one count each of possession with intent to

deliver cocaine and second degree conspiracy. The Superior Court sentenced Johnson as a habitual offender to a total period of seven years at Level V incarceration to be suspended after serving five years for two years at Level III probation. This Court affirmed his convictions and sentence on direct appeal.¹ Thereafter, Johnson filed two motions for correction of sentence arguing that his sentence was illegal because he had never been charged with possession with intent to deliver.² The Superior Court denied both motions on September 3, 2009, finding that possession with intent to deliver cocaine and delivery of cocaine are violations of the same statute, and thus his sentence is not illegal.³ Johnson did not appeal that ruling.

(3) Instead, he filed his first motion for postconviction relief on September 25, 2009, asserting various claims of ineffective assistance of counsel. After trial counsel responded to Johnson's allegations, Johnson filed four subsequent amendments to his postconviction petition to include the following claims: (i) the indictment was insufficient because it did not set forth accomplice liability as the State's theory of his case; (ii) the

¹ *Johnson v. State*, 2009 WL 2006881 (Del. July 13, 2009).

² The indictment charged Johnson with delivery of cocaine in violation of 16 Del. C. § 4751.

³ *See* Del. C. Ann. tit. 16, § 4751(a) (2003), which provides, in part, that "any person who manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance...classified in Schedule I or II which is a narcotic drug is guilty of a class C felony...."

evidence presented against him at trial was insufficient to convict him; (iii) the evidence was insufficient to support a finding of his status as a habitual offender; and (iv) the indictment did not reflect the charge for which he was convicted. The Superior Court denied his motion. This appeal followed.

(4) Johnson raises only two issues in his opening brief on appeal.⁴ First, he contends that he was convicted of a charge for which he was not indicted. Second, he argues that his conviction should be reversed because he was denied access to “the original grand jury indictment as well as the amended grand jury indictment and the grand jury testimony to support both.”

(5) Before we address the substantive merits of Johnson’s claims on appeal, this Court must first consider the procedural requirements of Superior Court Criminal Rule 61.⁵ Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred unless the movant can establish cause for the procedural default and prejudice. Johnson did not assert his challenges to

⁴ To the extent that Johnson presented other claims to the Superior Court, his failure to address those claims in his opening brief constitutes a waiver of the claims on appeal. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

the indictment at trial or on direct appeal. Accordingly, these claims are procedurally barred.

(5) Moreover, we agree with the Superior Court's conclusion that Johnson's claims have no merit. The record reflects that only one indictment was issued in Johnson's case, despite his contention to the contrary. He was indicted for delivery of cocaine in violation of 16 Del. C. § 4751(a) and was found guilty of that charge. To the extent that Johnson's sentencing order refers to Johnson's conviction in the shorthand as "PWITDW NSI CS (COCAINE)," that reference has no impact on Johnson's case. Section 4751(a) makes it a class C felony for any person to manufacture, deliver, or possess with intent to manufacture or deliver a Schedule I or II narcotic. Johnson was indicted for delivery of a schedule II narcotic and was found guilty of such. Johnson's contention that he was convicted and sentenced for a crime for which he was not indicted is simply wrong.

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

BY THE COURT:

Carolyn Berger
Justice