

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IDYLL ALLISON,	§
	§ No. 66, 2010
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0512013537
	§
Plaintiff Below-	§
Appellee.	§

Submitted: August 6, 2010
Decided: September 24, 2010

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

ORDER

This 24th day of September 2010, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Idyll Allison, filed an appeal from the Superior Court's January 29, 2010 order adopting the June 5, 2009 report of the Superior Court Commissioner, which recommended that Allison's first motion for postconviction relief pursuant to Superior Court Criminal Rule 61 be denied.¹ We find no merit to the appeal. Accordingly, we affirm.

(2) The record reflects that, in January 2006, Allison was indicted on charges of Robbery in the First Degree, Possession of a Firearm During

¹ Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

the Commission of a Felony, Conspiracy in the Second Degree, Wearing a Disguise, and Possession of a Deadly Weapon By a Person Prohibited. The charges stemmed from the December 19, 2005 armed robbery of the Audio Works store in Newark, Delaware, by two masked men. Allison was tried, with a co-defendant, in July 2006. The jury found Allison guilty of the conspiracy charge and one of the weapon charges and was hung on the remaining charges. In September 2006, Allison again was tried before a jury, this time without the co-defendant, and was found guilty of the robbery charge and the other weapon charge. He was sentenced as a habitual offender to a life term, plus a term of years at Level V. This Court affirmed Allison's convictions on direct appeal.²

(3) In February 2009, Allison filed his first motion for postconviction relief alleging ineffective assistance of counsel. Before making a recommendation, the Commissioner enlarged the record by directing Allison's trial counsel to submit an affidavit responding to Allison's claims and directing the State to file a response.³

(4) In this appeal from the Superior Court's denial of his first postconviction motion, Allison claims that his trial counsel provided ineffective assistance by failing to a) move for judgment of acquittal at the

² *Allison v. State*, Del. Supr., No. 653, 2006, Berger, J. (Jan. 31, 2008).

³ Super. Ct. Crim. R. 61(g)(1) and (2).

close of the State's case; b) call his co-conspirators to testify at his second trial; c) request a jury instruction on a lesser-included offense; and d) object to the prosecutor's opening statement. To the extent that Allison fails to present other grounds in support of his appeal that were raised below, those grounds are deemed to be waived and will not be addressed by this Court.⁴

(5) In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.⁵ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."⁶ The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.⁷

(6) Allison's first claim is that his counsel was ineffective for failing to move for judgment of acquittal at the close of the State's case on the ground of insufficiency of the evidence. Allison contends that the

⁴ *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his postconviction motion filed in the Superior Court, Allison also claimed that his attorney was ineffective for not objecting to the State's failure to proceed on a theory of accomplice liability.

⁵ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁶ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

⁷ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

motion was warranted because the testimony of one of the witnesses at his second trial was inconsistent with the testimony presented at his first trial and there was no physical evidence connecting him to the crime. The record reflects that the State presented sufficient evidence at trial to support Allison's convictions. Although Allison claimed not to be present at the time of the robbery, a witness observed Allison walk away from the store with his co-defendant after the robbery and get into the back seat of a waiting red Plymouth Neon being driven by a third man. When the police arrested the robbers, Allison was seated in the back of the getaway car. Because there was sufficient evidence presented at trial to convict Allison,⁸ his counsel can not be faulted for not moving for judgment of acquittal on the basis of insufficiency of the evidence. We conclude, therefore, that Allison's first claim is without merit.

(7) Allison's second claim is that his attorney was ineffective for not calling his co-conspirators to testify at his second trial. The record reflects that, prior to Allison's first trial, the driver of the getaway car pleaded guilty to second degree conspiracy in exchange for testifying against Allison and his co-defendant. At his first trial, Allison was identified as one

⁸ *Word v. State*, 801 A.2d 927, 929 n.7 (Del. 2002) (In reviewing a claim of insufficiency of the evidence, the Court will uphold a conviction as long as any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find the defendant guilty beyond a reasonable doubt.)

of the robbers by both of his co-conspirators. In his affidavit, Allison's counsel stated that, in light of the co-conspirators' previous testimony, he deemed it imprudent to call them to testify at Allison's second trial. Because that decision was well within the scope of reasonable trial strategy, Allison can not demonstrate ineffectiveness on the part of his counsel.⁹ We conclude, therefore, that Allison's second claim also is without merit.

(8) Allison's third claim is that his counsel was ineffective for failing to request that the jury be instructed on the elements of second degree robbery as a lesser-included offense of first degree robbery. In order to be entitled to an instruction on a lesser-included offense, a defendant must demonstrate the existence of "some evidence that would allow the jury to rationally acquit the defendant on the greater charge and convict on the lesser charge."¹⁰ As reflected in Allison's counsel's affidavit, Allison's defense at trial was that he was not present at the robbery at all. Because an instruction on the lesser charge would have been entirely inconsistent with that defense, there is no basis for Allison's claim that his counsel was ineffective for not requesting such an instruction. We conclude, therefore, that Allison's third claim also is without merit.

⁹ *Strickland v. Washington*, 466 U.S. at 689.

¹⁰ *Henry v. State*, 805 A.2d 860, 864 (Del. 2002) (citing *United States v. Humphrey*, 208 F3d 1190, 1206 (10th Cir. 2000)).

(9) Allison's fourth, and final, claim is that his counsel was ineffective for not objecting to the prosecutor's opening statement in which he stated that both robbers wore masks. However, there was no dispute that the robbers wore masks and the evidence adduced at trial fully supported that statement. As such, Allison's counsel cannot be faulted for not objecting to it. We conclude, therefore, that Allison's fourth claim likewise is without merit.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice