

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|---|---------------------------------|
| HENRY JOHNSON, | § | |
| | § | No. 326, 2010 |
| Defendant Below, | § | |
| Appellant, | § | Court Below—Superior Court |
| | § | of the State of Delaware in and |
| v. | § | for New Castle County |
| | § | |
| STATE OF DELAWARE, | § | |
| | § | |
| Plaintiff Below, | § | Cr. ID No. 0904000046 |
| Appellee. | § | |

Submitted: July 29, 2010
Decided: October 4, 2010

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

ORDER

This 4th day of October 2010, upon consideration of the appellant's opening brief, the appellee's motion to affirm and the Superior Court record, it appears to the Court that:

(1) The appellant, Henry Johnson, filed this appeal from the Superior Court's May 18, 2010 denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The appellee, State of Delaware, has moved to affirm the Superior Court judgment on the ground

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

(2) In May 2009, Johnson was indicted on thirteen offenses including Robbery in the First Degree, two counts of Aggravated Menacing, three counts of Possession of a Deadly Weapon During the Commission of a Felony and three counts of Attempted Robbery in the First Degree. On October 27, 2009, Johnson pled guilty to one count of Attempted Robbery in the First Degree and one count of Possession of a Weapon During the Commission of a Felony ("PDWDCF"). Johnson was sentenced to ten years at Level V suspended after five years minimum mandatory, for Level IV work release and probation. A *nolle prosequi* was entered on the remaining charges.

(3) On January 25, 2010, Johnson filed a motion for modification of sentence. Johnson asked the Superior Court to suspend three of his mandatory five years and order his placement in the New Vision drug rehabilitation program. By order dated January 29, 2010, the Superior Court denied Johnson's motion on the basis that the five-year sentence was mandatory and could not be reduced or suspended, and that the sentence was appropriate.

¹ Del. Supr. Ct. R. 25(a).

(4) On March 11, 2010, Johnson filed a motion for postconviction relief. Johnson alleged that his guilty plea was unknowing and involuntary due to the ineffective assistance of his defense counsel. Johnson also expressed remorse for his crimes and stated that he has a job waiting for him when he is released from prison.

(5) The Superior Court referred Johnson's postconviction motion to a Commissioner for proposed findings and recommendations. The Commissioner, in turn, directed that Johnson's defense counsel file an affidavit responding to the allegations of ineffectiveness. In a sworn particularized affidavit filed on April 22, 2010, defense counsel denied the allegations that he had tricked Johnson into pleading guilty and had not fully explained the charges or the penalties that Johnson possibly faced.

(6) By report dated May 4, 2010, the Commissioner recommended that Johnson's postconviction motion should be denied. The Commissioner found that Johnson's remorse and job prospect were "facts in mitigation of his sentence," which is "mandatory and cannot be reduced or suspended." The Commissioner also found, based upon defense counsel's affidavit, which the Commissioner found credible, and the transcribed plea colloquy

and guilty plea forms in the record, that Johnson had failed to establish his claim of ineffective assistance of counsel.²

(7) Following *de novo* review, the Superior Court issued an order dated May 18, 2010 that adopted the Commissioner’s report and recommendation and denied Johnson’s motion for postconviction relief. This appeal followed.

(8) In his opening brief on appeal, Johnson continues to argue his claim of ineffective assistance of counsel. The Court notes Johnson’s emphasis of a previously undeveloped claim that he is “innocent” of PDWDCF and therefore should not have been charged with Robbery in the First Degree.

(9) The Court has carefully considered the parties’ positions on appeal and the Superior Court record. It is manifest that the denial of postconviction relief should be affirmed on the basis of the Superior Court’s May 18, 2010 order that adopted the Commissioner’s May 4, 2010 report and recommendation.

(10) There is no support in the record for Johnson’s allegations that his defense counsel tricked him into pleading guilty or was otherwise

² “In the context of a guilty plea challenge, [a defendant must demonstrate] `that there is a reasonable probability that, but for counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.’” *Albury v. State*, 551 A.2d 53, 60 (Del. 1988) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

ineffective. During the plea colloquy, Johnson admitted that he was guilty of both Attempted Robbery in the First Degree and PDWDCF. In the absence of clear and convincing evidence to the contrary, Johnson is now bound by those representations.³

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

³ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).