

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALVIN ALLEN,	§
	§
Defendant Below-	§ No. 441, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0802010603
Plaintiff Below-	§
Appellee.	§

Submitted: April 15, 2011
Decided: June 20, 2011

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

ORDER

This 20th day of June 2011, after considering the parties' briefs and the record below, it appears to the Court that:

(1) The appellant, Calvin Allen, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. We find no merit to the issues Allen raises on appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that a Superior Court jury convicted Allen in 2008 of three counts of delivery of cocaine. The Superior Court sentenced Allen to a total period of thirty-two years at Level V incarceration, to be suspended after serving eleven years for decreasing levels of supervision.

This Court affirmed Allen’s convictions and sentence on direct appeal.¹ In June 2009, Allen filed his first motion for postconviction relief. He argued that his trial counsel had been ineffective for failing to determine, during the plea negotiation process, that Allen was not eligible for sentencing as a habitual offender. Allen also argued that his trial counsel was ineffective for failing to file a pretrial discovery motion and for failing to move to suppress the photograph used in the out-of-court identification of Allen by a confidential informant. The Superior Court denied Allen’s motion, finding no merit to Allen’s first claim of ineffective assistance and rejecting his other claims as procedurally barred. This appeal followed.

(3) Allen enumerates three issues in his opening brief on appeal. He first contends that the Superior Court erred as a matter of law when it summarily denied his motion without expanding the record to include his trial counsel’s affidavit and without holding a hearing. Allen also argues that the Superior Court erred as a matter of law in rejecting each of his claims of ineffective assistance of counsel.

(4) This Court has ruled that, when a defendant raises a claim of ineffective assistance of counsel in his first motion for postconviction relief, the “preferable practice” is to obtain counsel’s affidavit in response to the

¹ *Allen v. State*, 2009 WL 1658182 (Del. June 15, 2009).

claim before resolving it.² However, trial counsel's affidavit is not required in every such situation. When the record is adequate to resolve the claim without counsel's affidavit or an evidentiary hearing, summary dismissal is appropriate.³ This is such a case.

(5) First, we agree with the Superior Court's conclusion that counsel did not err in failing to discover during the plea negotiation stage that Allen was not eligible to be sentenced to life imprisonment as a habitual offender. It is undisputed that Allen's computerized DELJIS criminal record contained erroneous information reflecting that Allen had a prior conviction for trafficking in cocaine when, in fact, Allen had pled guilty to a lesser included offense of possession of cocaine.⁴ The Superior Court found that it was not error for defense counsel to reasonably rely upon the DELJIS computerized record, particularly when Allen gave counsel no reason to believe that the record was inaccurate. We agree.

(6) Allen's second claim of ineffective assistance asserted that his trial counsel was ineffective for failing to object at trial to the State's single photo identification process. To establish this claim, Allen had to show: (a) counsel's representation fell below an objective standard of reasonableness;

² *Horne v. State*, 887 A.2d 973, 975 (Del. 2005).

³ *Comeger v. State*, 2009 WL 2426135 (Del. Aug. 10, 2009).

⁴ The error in Allen's DELJIS record was not discovered until after Allen's trial when the prosecutor obtained the certified records of Allen's prior sentencing orders to include with the State's habitual offender motion.

and (b) there is a reasonable probability that, but for counsel's unprofessional error, the outcome of the proceeding would have been different.⁵ As the Superior Court noted in this case, Allen challenged the single photo identification process on appeal, and this Court found no plain error with respect to the Superior Court's admission of the photograph at trial.⁶ A plain error analysis on direct appeal requires a determination about whether the alleged error affected a defendant's substantial rights and the trial's outcome.⁷ Thus, in rejecting Allen's claim on appeal, this Court implicitly held that, even assuming admission of the photograph was error, it had no effect on the outcome of Allen's trial. Accordingly, even if we assume that trial counsel erred in failing to object to the photograph's admission, Allen could not establish prejudice under *Strickland* given this Court's ruling on Allen's direct appeal.

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

BY THE COURT:

/s/ Randy J. Holland
Justice

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

⁶ *Allen v. State*, 2009 WL 1658182, *3 (Del. June 15, 2009).

⁷ *Keyser v. State*, 893 A.2d 956, 959 (Del. 2006).