

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN T. BURTON, JR.,	§
	§ No. 683, 2010
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0410003743
Plaintiff Below-	§
Appellee.	§

Submitted: July 8, 2011
Decided: September 15, 2011

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

ORDER

This 15th day of September 2011, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Marvin Burton, filed this appeal from a decision of the Superior Court, following a remand from this Court, denying his motion for postconviction relief. We find no merit to the issue Burton raises on appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that a Superior Court jury convicted Burton in August 2005 of first degree rape, second degree rape, and second degree unlawful sexual contact. The victim was Burton's daughter, who was eleven years old at the time of Burton's criminal conduct. The Superior Court

sentenced Burton as a habitual offender to two life sentences plus two additional years. This Court affirmed his convictions and sentence on direct appeal.¹ Almost a year later, Burton filed his first motion for postconviction relief, which the Superior Court denied. On appeal, Burton retained counsel, who filed three new affidavits that had not previously been presented to or considered by the Superior Court. We remanded the matter for further proceedings limited to Burton's ineffective assistance of counsel claim and did not retain jurisdiction.² On remand, the Superior Court held an evidentiary hearing. Following the hearing, the Superior Court again denied Burton's motion for postconviction relief. This appeal followed.

(3) Burton, who again is acting pro se in this appeal, filed his opening brief raising a single claim of ineffective assistance counsel. Burton contends that his trial counsel was ineffective for failing to interview certain witnesses and subpoena their testimony for trial. Burton argues that these witnesses would have testified that the victim was no longer living in her grandparents' house in August 2004, which contradicted the victim's testimony about when and where Burton's sexual assaults had occurred. Burton asserts that, if this testimony had been presented to the jury, he would have been acquitted of the criminal charges against him.

¹ *Burton v. State*, 2006 WL 2434914 (Del. Aug. 21, 2006).

² *Burton v. State*, 2009 WL 537194 (Del. Mar. 4, 2009).

(4) On appeal, this Court reviews an ineffective assistance of counsel claim to determine: (i) whether counsel's representation fell below an objective standard of reasonableness; and (ii) whether, but for counsel's unprofessional errors, the outcome of the proceedings would have been different.³ In reviewing an ineffective assistance of counsel claim, a defendant is required to set forth and substantiate concrete allegations of actual prejudice⁴ in order to overcome the "strong presumption" that counsel's representation was professionally reasonable.⁵ This Court will review the Superior Court's rulings of law *de novo* but will uphold any findings of facts supported by competent evidence unless those findings are clearly erroneous.⁶

(5) Following remand, the Superior Court held an evidentiary hearing during which multiple witnesses testified, including Burton's trial counsel. Trial counsel specifically denied Burton's allegation that he had failed to interview any of Burton's list of potential witnesses prior to trial. Counsel stated that he believed Burton's witnesses were intended to support Burton's defense that the witness was making up the allegations to get back at Burton after he informed the child's mother about her sexual activity with

³ *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁵ *Strickland v. Washington*, 466 U.S. at 689.

⁶ *MacDonald v. State*, 778 A.2d 1064, 1071 (Del. 2001).

boys. Counsel stated that he interviewed the witnesses prior to trial and none of the witnesses informed counsel that the victim had not lived in her grandparents' house during the time period alleged in the indictment. Counsel testified under oath at the postconviction hearing that both Burton and his mother had told him that the victim had lived in Burton's mother's house during the relevant time period and that no other witness had offered information in their pretrial interviews to contradict this fact.

(6) After considering all of the testimony offered at the evidentiary hearing on Burton's motion for postconviction relief, the Superior Court concluded that Burton's contention that his defense counsel had failed to interview witnesses and present evidence to show that the victim was living elsewhere during the relevant time period simply was not credible. The Superior Court found defense counsel's testimony, that neither Burton nor any of his identified witnesses had informed counsel prior to trial that the victim was not living in her grandmother's house, to be more credible. The trial court did not accord any weight to these same witnesses' affidavits, which were all submitted well after Burton's trial.

(7) Burton does not raise any specific challenge to the Superior Court's factual findings on remand in his opening brief on appeal. Under the circumstances, we find the Superior Court's factual findings to be

supported by competent evidence and not clearly erroneous.⁷ Accordingly, we find no error in the Superior Court's conclusion that Burton's claim of ineffective assistance of counsel lacked merit.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

⁷ *Marine v. State*, 607 A.2d 1185, 1194 (Del. 1992).