

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CURTIS G. ELLIOTT,	§
	§
Defendant Below-	§ No. 270, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. Nos. 00-04-0555-
Plaintiff Below-	§ 0558
Appellee.	§

Submitted: July 12, 2001  
Decided: August 23, 2001

Before **HOLLAND, BERGER** and **STEELE**, Justices

**ORDER**

This 23<sup>rd</sup> day of August 2001, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Curtis G. Elliott, filed an appeal from an order of the Superior Court denying his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, State of Delaware, has moved to affirm the judgment of the Superior Court

on the ground that it is manifest on the face of the opening brief that the appeal is without merit.<sup>1</sup> We agree and AFFIRM.

(2) In this appeal, Elliott claims that: a) the Superior Court abused its discretion when it denied his second motion for postconviction relief on procedural grounds; and b) his counsel provided ineffective assistance by failing to conduct DNA testing on the weapon and an immigration status check on the victim and a witness, despite repeated requests from him, which caused him to enter an involuntary guilty plea. Elliott asks that he be permitted to withdraw his guilty plea.<sup>2</sup>

(3) In May 2000, Elliott was charged with Possession of a Deadly Weapon During the Commission of a Felony, Assault in the Second Degree, Possession of a Deadly Weapon by a Person Prohibited and Misdemeanor Theft. Elliott pleaded guilty to the charge of Assault in the Second Degree and the State dismissed the remaining charges. He was sentenced to 8 years

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<sup>1</sup>Supr. Ct. R. 25(a).

<sup>2</sup>On July 11, 2001, Elliott also filed a motion to “set aside or remand” his appeal so that he might file another Rule 61 motion in the Superior Court asking to withdraw his guilty plea on the basis of newly-discovered evidence. Our decision in the instant appeal does not prevent Elliott from pursuing such a motion in the Superior Court and we, therefore, deny the motion. On July 12, 2001, Elliott filed a motion to amend his appeal to include the contentions that his counsel was ineffective by failing to investigate the existence of exculpatory evidence, interview witnesses, conduct legal research and review records. To the extent these contentions were not already contained in Elliott’s opening brief, we grant the motion in the interest of justice.

incarceration at Level V, to be suspended after 4 years for decreasing levels of probation. Elliott did not file a direct appeal from his conviction or sentence. He filed several motions for modification of his sentence, all of which were denied, and one previous motion for postconviction relief, but did not appeal the Superior Court's denial of that motion. The instant appeal is from the denial of Elliott's second motion for postconviction relief.

(4) The Superior Court did not abuse its discretion by denying Elliott's second motion for postconviction relief on procedural grounds. When reviewing a motion under Rule 61, the Superior Court was required to first determine that the motion satisfied the procedural requirements of the rule before it addressed any substantive issues.<sup>3</sup> Elliott's first postconviction motion claimed that his counsel was ineffective by failing to respond to his requests for a different judge for the sentencing hearing, the judge had a conflict of interest and the State engaged in malicious prosecution. His second postconviction motion claimed that his counsel was ineffective by failing to respond to his requests for DNA testing on the weapon and an immigration status check on the victim and a witness. To the extent Elliott's motion included claims that were made in his first postconviction motion, such claims

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<sup>3</sup>*Bailey v. State*, Del. Supr., 588 A.2d 1121, 1127 (1991).

were procedurally barred as formerly adjudicated.<sup>4</sup> To the extent Elliott's motion included claims that were not made in his previous postconviction motion, the motion was procedurally barred as repetitive.<sup>5</sup>

(5) Elliott's claim that his counsel's ineffective assistance caused him to enter an involuntary guilty plea is without merit. In order to prevail on this claim, Elliott must show that, but for his counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial.<sup>6</sup> The record reflects that Elliott was aware prior to accepting the plea that his counsel had not conducted DNA testing on the weapon and had not done an immigration status check on the victim and a witness.<sup>7</sup> Despite that knowledge, however, he decided to plead guilty. Elliott has provided no evidence that, had those avenues been pursued, he would not have pleaded guilty and would have proceeded to trial. Elliott's conclusory contentions that his counsel was ineffective by failing to investigate the existence of exculpatory evidence, interview witnesses, conduct legal research and review records are also

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<sup>4</sup>Super. Ct. Crim. R. 61(i) (4).

<sup>5</sup>Super. Ct. Crim. R. 61(i) (2).

<sup>6</sup>*Albury v. State*, Del. Supr., 551 A.2d 53, 58 (1988) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

<sup>7</sup>Elliott wrote several letters to his counsel making these requests.

without merit since he has failed to show that any of these alleged errors resulted in prejudice to him.<sup>8</sup> Moreover, because Elliott’s ineffective assistance of counsel claim is without merit, it does not fall within the “interest of justice” exceptions to the procedural bars<sup>9</sup> or constitute a “miscarriage of justice.”<sup>10</sup>

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State’s motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Carolyn Berger  
Justice

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<sup>8</sup>Also, the Truth-in-Sentencing Guilty Plea Form and the transcript of the plea colloquy reflect that Elliott’s guilty plea was entered freely, voluntarily and with full knowledge of the consequences and that Elliott was satisfied with his counsel’s representation. Super. Ct. Crim. R. 11(d). In the absence of clear and convincing evidence to the contrary, Elliott is bound by those representations. *Somerville v. State*, Del. Supr., 703 A.2d 629, 632 (1997).

<sup>9</sup>Super. Ct. Crim. R. 61(i) (2) and (4).

<sup>10</sup>Super. Ct. Crim. R. 61(i) (5).