

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD F. ROTH, SR.,	§
	§ No. 184, 2013
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. 9901000322
	§
Plaintiff Below-	§
Appellee.	§

Submitted: October 14, 2013

Decided: October 31, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

**ORDER**

This 31<sup>st</sup> day of October 2013, upon consideration of the appellant’s opening brief filed pursuant to Supreme Court Rule 26(c), his attorney’s motion to withdraw, and the State’s response thereto, it appears to the Court that:

(1) In 2001, the defendant-appellant, Richard F. Roth, Sr., was found guilty by a Superior Court jury of one count of Felony Murder, four counts of Robbery in the First Degree and related conspiracy and weapon charges arising out of the armed robberies of several New Castle County, Delaware businesses. He was sentenced to life in prison on the felony murder conviction and to additional terms of incarceration in connection

with his twelve other convictions. Roth's convictions were affirmed by this Court on direct appeal.<sup>1</sup>

(2) In 2005, Roth filed a *pro se* motion for postconviction relief in the Superior Court. In 2006, counsel was appointed for Roth. Roth's counsel filed an amended opening brief asserting claims of ineffective assistance of counsel. That same year, Roth's two trial attorneys filed affidavits responding to those claims and the State filed an answer. In 2008, new counsel was appointed for Roth. Depositions of Roth's trial counsel and the prosecutor were taken later that year. An evidentiary hearing was held in 2009. Additional briefing ensued. On January 6, 2012, the Superior Court denied Roth's postconviction motion. The Superior Court re-issued its order on April 1, 2013 following this Court's remand, which permitted Roth to file a timely appeal.<sup>2</sup> This is Roth's appeal from the Superior Court's judgment.

(3) Roth's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims

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<sup>1</sup> *Roth v. State*, 2002 WL 432021 (Del. Mar. 11, 2002).

<sup>2</sup> *Roth v. State*, 2012 WL 5351204 (Del. Oct. 26, 2012).

that could arguably support the appeal; and b) the Court must conduct its own review of the record in order to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>3</sup>

(4) Roth's counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Roth's counsel informed Roth of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete record in the Rule 61 proceedings. Roth also was informed of his right to supplement his attorney's presentation. The record reflects that Roth did not respond to his attorney's request for points for this Court's consideration. However, defense counsel has submitted for this Court's consideration the three points originally raised in the postconviction proceedings in the Superior Court, a number of additional points addressed by the Superior Court in its order denying Roth's postconviction motion as well as points raised by Roth in conversations with defense counsel.

(5) The points so raised may fairly be summarized as follows: a) trial counsel provided ineffective assistance by 1) failing to prevent the jury

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<sup>3</sup> *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

from hearing statements of witnesses who called Roth a “safecracker” and mentioned that he was in jail, 2) failing to object to an erroneous jury instruction on accomplice liability and 3) stipulating to the admissibility of certain DNA evidence; and b) trial counsel further provided ineffective assistance by 1) failing to appeal the judge’s refusal to recuse himself, 2) refusing to object to a jury sequestration violation, 3) failing to object to the continued presence of a certain juror, 4) threatening Roth not to testify, 5) refusing to conduct the defense as Roth directed and 6) failing to obtain evidence of police perjury. Roth’s counsel also raises on Roth’s behalf various claims of misconduct on the part of the trial judge and the prosecutor.

(6) 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.<sup>4</sup> Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.<sup>5</sup> The

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<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>5</sup> *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.<sup>6</sup>

(7) In its order denying Roth's claims of ineffective assistance of counsel, the Superior Court acknowledged that Roth's trial counsel committed error by failing to listen to the taped statements of two witnesses prior to trial, relying instead on the transcriptions of the tapes. As a result, several comments characterizing Roth as a "safecracker" and as being in jail were played to the jury. Following the playing of the tapes, defense counsel moved for a mistrial. The judge denied the motion, but ordered the offending portions to be removed from the tapes prior to jury deliberations. Defense counsel informed the judge that they did not wish a curative instruction to be given.

(8) In spite of the acknowledged error on the part of Roth's counsel, the Superior Court determined that, in light of the overwhelming evidence against him, Roth had failed to demonstrate that his counsels' error resulted in any prejudice to him. The Superior Court also acknowledged that Roth's counsel arguably had committed another error by failing to raise the judge's denial of their mistrial motion as an issue on direct appeal. Again, however, the Superior Court determined that, without a demonstration of

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<sup>6</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

prejudice, any ineffectiveness claim on that ground was meritless. We agree with the Superior Court's analysis of those claims and conclude that they were properly denied.

(9) In the Superior Court proceedings, Roth also claimed that his counsel were ineffective for failing to object to the jury instruction on accomplice liability and for stipulating to the admissibility of DNA evidence. In its order, the Superior Court again determined that, because the jury instruction was, in fact, not erroneous and because whether or not to enter into a stipulation regarding evidence that would have been admissible in any case was for counsel to make, Roth had failed to demonstrate that his counsel had committed error and that, therefore, his ineffectiveness claims on those grounds were meritless. Again, we agree with the Superior Court's analysis of those claims and conclude that they were properly denied.

(10) Also submitted for this Court's consideration are claims that Roth's trial counsel committed error by failing to object to various rulings by the trial judge, failing to obtain certain evidence, failing to conduct the defense as Roth wished and threatening Roth not to testify. Finally, Roth's counsel submits claims of various forms of misconduct on the part of the trial judge and the prosecutor. In its order below, the Superior Court addressed each of these points individually and found each to be either

meritless or procedurally defaulted.<sup>7</sup> Once again, we conclude that the Superior Court properly denied those additional claims.

(11) This Court has reviewed the record carefully and has concluded that Roth's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Roth's counsel in this appeal has made a conscientious effort to examine the record and the law and has properly determined that Roth could not raise a meritorious claim in this appeal.

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

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>7</sup> Super. Ct. Crim. R. 61(i) (3).