

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD D. McCANE,	§	
	§	No. 43, 2001
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County in Cr.A.
	§	Nos. IS97-11-0516 through
STATE OF DELAWARE,	§	0518.
	§	
Plaintiff Below,	§	Def. ID No. 9711007448
Appellee.	§	

Submitted: July 23, 2001
Decided: August 3, 2001

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

ORDER

This third day of August 2001, upon consideration of the appellant's opening brief, the State of Delaware's motion to affirm, the appellant's amendment to his opening brief, and the State of Delaware's amended motion to affirm,¹ it appears to the Court that:

(1) The appellant, Richard D. McCane, has appealed from the Superior Court's denial of his motion for postconviction relief pursuant to

¹ The Court has not considered the appellant's unsolicited "Response to Opinion of Attorney General for Motion to Affirm Court's Decision to Deny Appeal" that was filed on July 11, 2001. *See* Supr. Ct. R. 25(a)(iii) (providing that "[t]here shall be no briefing, argument or response to the motion [to affirm], unless requested by the Court").

Superior Court Criminal Rule 61 (“Rule 61”). The State of Delaware has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of McCane’s opening brief that the appeal is without merit.² We agree and affirm.

(2) In 1997, McCane was indicted on two counts of Unlawful Sexual Intercourse in the First Degree and one count of Continuous Sexual Abuse of a Child. A jury trial was held in the Superior Court beginning on June 8, 1998. During the trial, the prosecution inadvertently played a portion of an audiotape that was supposed to have been redacted.³ McCane moved for a mistrial. The Superior Court reserved decision on the motion for a mistrial but offered to issue a curative instruction to the jury, which defense counsel declined. The jury found McCane guilty as charged.

(3) At sentencing in July 1998,⁴ McCane renewed his motion for a mistrial and moved for a new trial based upon post-verdict statements made by two members of the jury to the prosecutor and the chief investigating

² Supr. Ct. R. 25(a).

³ In the redacted portion of the tape, a child witness, who was a relative of the seven-year-old victim, stated that the victim “just about never lies.”

⁴ McCane was sentenced to a total of 50 years at Level V, suspended after 33 years, for one year at Level IV, followed by 14 years at Level III.

officer.⁵ The Superior Court denied McCane's motions, and McCane appealed. On appeal, the Supreme Court affirmed the judgment of the Superior Court.⁶

(4) In April 2000, McCane filed a *pro se* motion for postconviction relief. McCane alleged the following ten claims: (i) the State's prosecution did not take place within the applicable statute of limitations period; (ii) the Superior Court abused its discretion⁷; (iii) the State violated McCane's constitutional rights when the prosecutor played the portion of the audiotape that should have been redacted; (iv) the victim committed perjury; (v) the Superior Court should have issued jury instructions on lesser-included offenses; (vi) police misconduct; (vii) prosecutorial misconduct; (viii) insufficient evidence; (ix) newly discovered evidence; and (x) ineffective assistance of counsel.

(5) By report dated June 6, 2000, a Superior Court Commissioner recommended that McCane's postconviction motion should be denied as

⁵ It appears that two jurors approached the chief investigating officer the afternoon after the verdict was rendered and commented that they had an unfavorable view of McCane because he had not testified at trial. H'rg Tr. on 7/17/98 at 3. The same two jurors the following day approached the prosecutor to say that they thought defense counsel had been too "harsh" with the victim during cross-examination. *Id.* at 7-8.

⁶ *McCane v. State*, Del. Supr., No. 343, 1998, Hartnett, J., 1999 WL 486601 (April 19, 1999) (ORDER).

without merit and and/or procedurally barred under Rule 61(i)(3) and (4).⁸

By order dated October 10, 2000, the Superior Court adopted the Commissioner's report and denied McCane's postconviction motion. This appeal followed.

(6) In his opening brief on appeal, McCane raises all of his postconviction claims. In his supplemental opening brief, McCane raises one new claim *i.e.*, double jeopardy.⁹

(7) We have carefully considered each of McCane's postconviction claims and find that the judgment of the Superior Court should be affirmed on the basis of, and for the reasons set forth in, the Commissioner's report and recommendation dated June 6, 2000, as adopted by the Superior Court in its order dated October 10, 2000. The Superior Court properly denied McCane's postconviction claims as

⁷ Specifically, McCane argues that the Superior Court abused its discretion when it denied the motions for mistrial and new trial, and when the court allegedly failed to rule on a motion for bill of particulars.

⁸ Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is barred, unless the petitioner can establish cause for the procedural default and prejudice from the violation of the petitioner's rights. Under Rule 61(i)(5), the procedural bar of Rule 61(i)(3) does not apply if there is a claim that the trial court lacked jurisdiction or there is a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability integrity or fairness of the trial. Rule 61(i)(4) provides that any ground for relief that was formerly adjudicated is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

procedurally barred and/or as without merit. Moreover, we agree with the Superior Court that McCane's claims do not warrant reconsideration¹⁰ or application of the exception to the procedural bar.¹¹

(8) We have considered McCane's new claim, *i.e.*, his double jeopardy claim, for plain error¹² and find that the claim is procedurally barred. McCane establishes neither cause nor prejudice to excuse the failure to previously raise the double jeopardy claim.¹³ Moreover, McCane has not demonstrated that a double jeopardy violation resulted in a manifest injustice.¹⁴ The offense of Continuous Sexual Abuse of a Child is not the same as, or a lesser-included offense of, Unlawful Sexual Intercourse in the First Degree, as McCane seems to argue.¹⁵

(9) It is manifest on the face of McCane's opening brief, as amended, that this appeal is without merit. 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.

⁹ McCane also repeats or expands upon aspects of his statute of limitations and insufficient evidence claims.

¹⁰ Rule 61(i)(4).

¹¹ Rule 61(i)(3), (i)(5).

¹² Supr. Ct. R. 8.

¹³ Rule 61(i)(3).

¹⁴ Rule 61(i)(5).

¹⁵ 11 *Del. C.* § 775(a)(4), 11 *Del. C.* § 778.

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

BY THE COURT:

/s/ Randy J. Holland
Justice