IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| LELAND McCLUSKEY, | § | |
| | § | No. 1, 2001 |
| Defendant Below, | § | |
| Appellant, | § | Court Below—Superior Court |
| | § | of the State of Delaware, |
| v. | § | in and for Sussex County |
| | § | Cr.A. No. IS96-03-0134, 0135 |
| STATE OF DELAWARE, | § | |
| | § | Def. ID No. 9602012146 |
| Plaintiff Below, | § | |
| Appellee. | § | |

Submitted: June 5, 2001
Decided: July 27, 2001

Before **VEASEY,** Chief Justice, **WALSH and HOLLAND,** Justices.

O R D E R

This 27th day of July 2001, upon consideration of the appellant's opening brief and the State of Delaware's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Leland McCluskey, has appealed from the Superior Court's denial of his motion for postconviction relief pursuant to 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 McCluskey's opening brief that the appeal is without merit. We agree and affirm.

(2) McCluskey was indicted on charges of Criminal Solicitation in the First Degree and Attempted Murder in the First Degree. A jury trial was held in the Superior Court beginning on July 22, 1996. At the close of the State's case, and again at the close of the defense evidence, McCluskey moved for a judgment of acquittal on the Attempted Murder charge. The Superior Court denied the motions. On July 24, 1996, the jury found McCluskey guilty as charged. McCluskey then filed a motion for judgment of acquittal or, in the alternative, for a new trial. By letter dated August 1, 1996, the Superior Court denied McCluskey's motion. On direct appeal, McCluskey alleged that there was insufficient evidence to support the Attempted Murder conviction. This Court affirmed the Superior Court's judgment.[1]

(3) In August 2000, McCluskey filed a *pro se* motion for postconviction relief. McCluskey's motion, as supplemented, alleged numerous overlapping grounds for relief that, collectively, alleged the following six cognizable claims: (i) that the police made a promise of leniency

[1] *McCluskey v. State*, Del. Supr., No. 422, 1996, Berger, J., 1997 WL (Oct. 7, 1997) (ORDER).

to a State's witness in exchange for the witness' testimony against McCluskey; (ii) that the victim's presence in the courtroom during portions of the trial testimony prejudiced the jury against McCluskey; (iii) that, for various reasons, tapes and transcripts of conversations between McCluskey and others should not have been admitted into evidence or presented to the jury; (iv) that McCluskey was incompetent at the time he committed the crimes, was coerced into committing the crimes, and was incompetent during trial; (v) prosecutorial misconduct; and (vi) ineffective assistance of counsel. By well-reasoned decision dated November 29, 2000, the Superior Court denied McCluskey's postconviction motion. This appeal followed.

(4) In his opening brief on appeal, McCluskey raises the following two claims that he raised in his postconviction motion: (i) that the Superior Court erred in denying a pretrial defense request for a neurological examination of McCluskey, who has epilepsy; and (ii) that a defense witness' post-trial written statement, allegedly establishing that McCluskey was coerced into committing the crimes, proves that the conviction and sentence were based upon a "material misapprehension of fact." To the extent

McCluskey has not briefed his other postconviction claims, those claims are deemed waived and abandoned on appeal.[2]

(5) When reviewing the Superior Court's denial of a postconviction motion pursuant to Rule 61, this Court first must consider the procedural requirements of the rule before addressing any substantive issues.[3] Rule 61(i)(3) bars from consideration any ground for relief that was not raised in the proceedings leading to the conviction unless the petitioner can establish: (i) cause for failing to timely raise the claim, and (ii) actual prejudice from failing to raise the claim. Rule 61(i)(4) bars any ground for relief that was formerly adjudicated, unless reconsideration of the claim is warranted in the interest of justice.

(6) McCluskey did not claim on direct appeal that the Superior Court erred when it denied his pretrial request for a neurological examination. Consequently, that claim is barred under Rule 61(i)(3), as McCluskey has not alleged "cause" for his failure to raise the claim nor has he demonstrated "prejudice" as a result of the alleged error. Moreover, McCluskey has not

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[2] *Murphy v. State*, Del. Supr., 632 A.2d 1150, 1152 (1993).

[3] *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990).

presented any reason why reconsideration of the Superior Court's denial of his request is warranted in the interest of justice. Consequently, the claim is also barred as previously adjudicated under Rule 61(i)(4). McCluskey has not presented any information that establishes that he was incompetent either at the time of trial or when he committed the crimes.[4]

(7) McCluskey did not raise the claim on direct appeal that he was coerced into committing the crimes for which he was convicted. McCluskey

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[4]Indeed, the record establishes to the contrary. By order of the Superior Court, McCluskey underwent a psychiatric evaluation in March 1996, after his arrest in February 1996. In a written report filed with the Superior Court on April 1, 1996 (approximately three months prior to trial), the examining psychiatrist reached the following conclusions: McCluskey, at the time of the examination (i) was not suffering from any mental illness or defect; (ii) was able to comprehend and appreciate the nature of the information and penalties to which he would be subjected if found guilty; (iii) was able to assist his attorney in the preparation of his case and understood court proceedings; (iv) was not suffering from any mental illness defect or condition on or about February 22, 1996, when the crimes were allegedly committed; (v) did not lack capacity to appreciate the wrongfulness of his conduct; (vi) did not lack sufficient willpower to choose whether he would commit the crime or refrain from doing it; and (vii) did have the capacity and control to conform

has neither alleged "cause" for his failure to raise the claim nor has he demonstrated "prejudice" as a result of the alleged violation. Consequently, that claim is barred pursuant to Rule 61(i)(3).

(8) In support of his claim that he was coerced into committing the crimes for which he was convicted, McCluskey submits a written statement, dated August 11, 1998 (ten months after the case was affirmed on direct appeal), from a defense witness, who testified at trial that he overheard McCluskey's side of a phone call. The statement appears to add to the witness' recollection about what McCluskey said during the phone call. The Superior Court refused to consider the witness' statement, because it was unsworn and purported to add to the witness' trial testimony. Moreover, this Court does not agree, as McCluskey seems to contend, that the statement proves, or even suggests, that he was coerced into committing the crimes for which he was convicted.

(9) In this case, the Superior Court's denial of McCluskey's motion for postconviction relief was appropriate. It is manifest on the face of McCluskey's opening brief that the appeal is without merit. The issues raised

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his conduct to the requirements of the law.

are clearly controlled by settled Delaware law, and to the extent the issues on appeal implicate the exercise of judicial discretion, there was no abuse of discretion.

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