

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS F. KANE,	§	
	§	No. 448, 2015
Defendant Below-	§	
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	
	§	Cr. ID 0612001862
Plaintiff Below-	§	
Appellee.	§	

Submitted: January 27, 2016  
Decided: March 17, 2016

Before **STRINE**, Chief Justice; **HOLLAND** and **SEITZ**, Justices.

**ORDER**

This 17th day of March 2016, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record on appeal, it appears to the Court that:

- (1) The appellant, Thomas Kane, filed this appeal from the Superior Court's judgment denying his motions for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Kane's opening brief that his appeal is without merit. We agree and affirm.
- (2) The record reflects that Kane was arrested in December 2006 and charged with capital murder in the stabbing death of his wife. The crime was witnessed by the parties' nine-year-old son. Kane was arrested in possession of

two bloody knives and a screwdriver while fleeing the scene. He confessed to the crime. He pled guilty but mentally ill on February 29, 2008 to one count each of Murder in the First Degree, Burglary in the First Degree, Endangering the Welfare of a Child, and Criminal Contempt of a Protection from Abuse Order. In exchange for his plea, the State dismissed ten other criminal charges, including murder and weapon offenses, and agreed to recommend a life sentence instead of seeking the death penalty. The Superior Court immediately sentenced Kane to life imprisonment plus an additional term of twenty-seven years on all four convictions. Kane did not file a direct appeal.

(3) On May 22, 2012,<sup>1</sup> more than four years after his convictions became final, Kane filed a motion for postconviction relief, raising the following six claims: (i) his guilty plea was coerced by his counsel and the prosecutor; (ii) his counsel had a conflict of interest; (iii) his counsel was ineffective for failing to challenge the voluntariness of his confession; (iv) his counsel was ineffective for failing to obtain another competency evaluation; (v) his counsel was ineffective for failing to object to the prosecutor's inflammatory statements at sentencing; and (vi) the trial court erred by failing to examine "all" of the reports before accepting Kane's plea of guilty but mentally ill.

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<sup>1</sup> Kane first filed his motion on April 17, 2012, but he was directed to refile his motion in compliance with the Superior Court rules.

(4) After receiving defense counsel’s affidavit, the State’s response, and Kane’s reply thereto, the Superior Court Commissioner issued a report on June 12, 2013, recommending that Kane’s motion be denied as procedurally barred under Superior Court Criminal Rule 61(i)(1)<sup>2</sup> and (i)(3)<sup>3</sup> and because Kane failed to overcome these procedural hurdles under Rule 61(i)(5).<sup>4</sup> Kane sought review of the Commissioner’s report and filed a motion requesting the appointment of counsel, which the Superior Court granted on June 26, 2013. On October 7, 2014, Kane’s appointed counsel filed a motion to withdraw under Rule 61(e)(2), asserting that counsel could not ethically advocate any claim on Kane’s behalf.<sup>5</sup> The Superior Court gave Kane 30 days to respond to counsel’s motion to withdraw. Kane responded by filing a motion to amend his Rule 61 petition.

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<sup>2</sup> Rule 61(i)(1), in relevant part, requires a motion for postconviction relief to be filed within one year after a conviction becomes final.

<sup>3</sup> Rule 61(i)(3) bars any claim that was not raised in the proceedings leading to the judgment of conviction unless the defendant can establish cause for failing to raise the claim earlier and prejudice from a violation of the defendant’s rights.

<sup>4</sup> Under the version of Rule 61(i)(5) that was in effect when Kane filed his motion, the procedural bars of Rule 61(i)(1), (2), and (3) did “not apply to a claim that the court lacked jurisdiction or to 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 proceedings leading to the judgment of conviction.” Del. Super. Ct. Crim. R. 61(i)(5) (2012).

<sup>5</sup> The Superior Court granted counsel’s motion to withdraw on November 18, 2014.

(5) The Superior Court initially granted Kane's motion to amend his Rule 61 petition, and Kane filed his additional claims in December 2014.<sup>6</sup> Later, however, in its final order rejecting Kane's postconviction claims, the Superior Court determined that, in light of the Commissioner's June 2013 report and recommendation, Kane's motion to amend his Rule 61 petition had been improvidently granted and should have been denied. Rather than vacating its order granting Kane's motion to amend, the Superior Court treated the claims raised in conjunction with the motion to amend as Kane's second Rule 61 petition and applied the procedural bars of Rule 61 that were in effect at the time Kane filed his additional claims.

(6) As to the claims raised in Kane's May 2012 motion, the Superior Court adopted the Commissioner's report and recommendation dated June 12, 2013<sup>7</sup> and concluded that Kane's motion was both procedurally barred and without merit. As to the claims raised in his December 2014 amended petition, which the Superior Court treated as Kane's second Rule 61 motion, the Superior Court

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<sup>6</sup> Kane raised four claims in his December 2014 filing. He argued that: (i) his counsel was ineffective because he failed to argue for a lesser sentence; (ii) his counsel was ineffective for failing to inform him of his right to appeal; (iii) his counsel was ineffective for failing to have a third competency evaluation done before allowing Kane to plead guilty; and (iv) the trial court erred in failing to order a third psychological evaluation.

<sup>7</sup> The Superior Court's July 23, 2015 order mistakenly identified the Commissioner's report as being dated October 15, 2013.

concluded that Kane's claims were untimely under Rule 61(i)(1) and failed to satisfy the requirements of Rule 61(i)(2).<sup>8</sup> This appeal followed.

(7) Kane raises two issues in his opening brief on appeal. First, he argues that the Superior Court erred in treating the amendment to his first Rule 61 motion as his second Rule 61 motion. Second, Kane contends that the Superior Court abused its discretion in summarily rejecting his postconviction claims because Kane raised a significant issue regarding his competency to enter a guilty plea in 2008.<sup>9</sup> The State filed a motion to affirm, asserting that there is no merit to any of Kane's postconviction claims because the record in this case reflects that Kane entered his 2008 plea knowingly, intelligently, and voluntarily.

(8) After careful consideration of the parties' respective arguments on appeal, we conclude that the Superior Court's judgment should be affirmed. We find no abuse of the Superior Court's discretion in denying, *nunc pro tunc*, Kane's October 2014 motion to amend the Rule 61 petition that he filed in May 2012 and in treating the claims raised in conjunction with his motion to amend as his second

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<sup>8</sup> On June 4, 2014, the Superior Court amended several subsections of Rule 61. Rule 61(i)(2)(i) was amended to provide that “[n]o second or subsequent motion is permitted under this Rule unless that second or subsequent motion satisfies the pleading requirements of subparagraphs (2)(i) or 2(ii) of subdivision (d) of this rule.” Rule 61(d)(2) provides that a “second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted *after a trial and* the motion either pleads that new evidence exists of the movant’s innocence in fact or that a new retroactive rule of constitutional law render the movant’s conviction invalid. Super. Ct. Crim. R. 61(d)(2) (2014) (emphasis added).

<sup>9</sup> To the extent Kane raised additional claims in the Superior Court proceedings, his failure to include those claims in his opening brief constitutes a waiver on appeal. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

Rule 61 motion. Rule 61(b)(6) provides in part that a postconviction “motion may be amended as a matter of course at any time before a response is filed....”<sup>10</sup> In this case, defense counsel’s affidavit and the State’s response to Kane’s first motion were filed in 2012. The motion was fully briefed and the Commissioner issued a report recommending denial of the motion on June 12, 2013. Under these circumstances, we find no abuse of the Superior Court’s discretion in denying, *nunc pro tunc*, Kane’s motion to amend his Rule 61 petition, which was filed more than two years after the State’s response and two years after the Commissioner’s report and recommendation, and in applying the procedural bars applicable under Rule 61(d)(2) to a second or subsequent Rule 61 petition.<sup>11</sup>

(9) Furthermore, we find no error of law or abuse of discretion in the Superior Court’s judgment adopting the Commissioner’s report and recommendation dated June 12, 2013. Kane’s postconviction claims alleging ineffective assistance of counsel were untimely and procedurally barred under Rule 61(i)(1) and Rule 61(i)(3). Kane failed to overcome these procedural hurdles by establishing a miscarriage of justice under Rule 61(i)(5) because, as the Commissioner properly noted, the record in this case reflects that Kane was

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<sup>10</sup> Del. Super. Ct. Crim. R. 61(b)(6) (2014).

<sup>11</sup> See *Turnage v. State*, 2015 WL 6746644 (Del. Nov. 4, 2015) (holding in part that the defendant’s Rule 61 motion, which was filed after the rule was amended on June 4, 2014, was subject to the new procedural bars).

competent to enter his guilty plea and that his guilty plea was entered, knowingly, intelligently, and voluntarily.<sup>12</sup>

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

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice

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<sup>12</sup> *Sample v. State*, 2010 WL 3636191 (Del. Sept. 20, 2010).