

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DURELL T. DUPREE,	§
	§ No. 205, 2013
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0209007645
	§
Plaintiff Below-	§
Appellee.	§

Submitted: June 10, 2013

Decided: June 28, 2013

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 28th day of June 2013, 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, Durell T. Dupree, filed an appeal from the Superior Court’s February 7, 2013 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that this appeal is without merit.¹ We agree and affirm.

(2) The record before us reflects that, in July 2003, Dupree was found guilty by a Superior Court jury of one count of Attempted Robbery in the First Degree, two counts of Assault in the First Degree, three counts of Assault in the Second Degree, five counts of Possession of a Firearm During the Commission of a Felony and four counts of Attempted Aggravated Menacing. The Superior Court found Dupree guilty of one count of Possession of a Deadly Weapon By a Person Prohibited. He was sentenced to a total of fifteen years at Level V. Dupree's convictions were affirmed by this Court on direct appeal.²

(3) In 2011 and 2012, Dupree filed a series of motions for sentence modification, all of which were unsuccessful. On October 5, 2012, Dupree filed his first motion for postconviction relief. The Superior Court denied Dupree's motion as untimely pursuant to Rule 61(i) (1). This appeal followed.

(4) In his appeal, Dupree claims that a) he was deprived of a fair trial because the prosecutor improperly stated in his opening statement that Dupree was the shooter whereas he had been charged as an accomplice; b)

¹ Supr. Ct. R. 25(a).

² *Dupree v. State*, 2004 WL 2154288 (Del. Sept. 23, 2004).

the State violated his right to confront his accuser when it failed to call one of the victims as a witness; and c) his counsel provided ineffective assistance by failing to move to dismiss the charges against him based on the State's improper conduct.

(5) The mandate in this case was issued in October 2004. Therefore, Dupree had until October 2007 to file his motion for postconviction relief.³ Dupree's motion was not filed until October 2012. Under Rule 61(i) (1), an untimely motion may be considered where the movant asserts a retroactively applicable right that has been newly-recognized. Because none of Dupree's claims of improper conduct on the part of the State is premised on any such right, they are time-barred and the Superior Court properly so found.

(6) Dupree's attempt to avoid the time bar by asserting a claim of ineffective assistance of counsel under Rule 61(i) (5) is unavailing because his underlying claims of improper conduct on the part of the State are meritless. As for Dupree's first claim, this Court has held that a defendant was not deprived of a fair trial based upon improper comments by the prosecutor where the case was not close, the comment did not go to a central

³ Super. Ct. Crim. R. 61(i) (1). The rule has since been amended to shorten the time period from three years to one year.

element of the case and the judge took steps to mitigate the error.⁴ In this case, it was clear from the beginning of the trial until its conclusion that Dupree had been charged, and was being tried, as an accomplice, not a principal. Moreover, the judge instructed the jury that remarks made by the prosecutor in his opening statement were not evidence. As such, the record does not support Dupree's claim that he was deprived of his right to a fair trial.

(7) As for Dupree's second claim, the confrontation clause only guarantees a defendant the right to cross-examine an adverse witness at trial, but does not require the State to call any particular individual to testify as a witness.⁵ Because the State did not need to, and therefore did not, call the victim to testify in order to prove its case against Dupree, there was no violation of Dupree's right to confront his accuser.

(8) Moreover, in the absence of any merit to Dupree's underlying claims of improper conduct on the part of the State, his derivative claim of ineffective assistance on the part of his counsel for not moving to dismiss the

⁴ *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

⁵ *Gordon v. State*, 1990 WL 168256 (Del. 1990) (citing *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)).

charges against him on the ground of the State's allegedly improper conduct also must fail⁶ and the Superior Court properly so found.

(9) 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, 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/ Carolyn Berger
Justice

⁶ *Monroe v. State*, 2009 WL 189158 (Del. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984), holding that an ineffective assistance of counsel claim requires the defendant to demonstrate that his counsel's conduct fell below an objective standard of reasonableness and was prejudicial to the outcome of the proceedings).