

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTIN H. SMITH,	§	
	§	No. 32, 2001
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County in PS99-
	§	10-0255.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 9910007159

Submitted: May 25, 2001

Decided: June 26, 2001

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

**ORDER**

This 26<sup>th</sup> day of June 2001, upon consideration of the appellant's opening brief and the appellee's motion to affirm<sup>1</sup> pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) In November 1999, Martin H. Smith was indicted for Possession with Intent to Deliver Cocaine, Conspiracy in the Second Degree, Possession of Drug Paraphernalia and Resisting Arrest. On February 25, 2000, Smith pleaded guilty, pursuant to Superior Court Criminal Rule 11(e)(1)(c), to two

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<sup>1</sup>The Court has not considered the appellant's response to the motion to affirm that was filed on June 5, 2001. The response was not requested by the Court and, therefore, shall be stricken as a nonconforming document. *See* Supr. Ct. R. 25, 34.

charges: Possession with Intent to Deliver Cocaine and Conspiracy in the Second Degree. The remaining charges were *nolle prossed*. The Superior Court ordered a presentence investigation, as provided in the plea agreement. At the time the presentence investigation was ordered, it was the understanding of the parties and the Superior Court that Smith was not subject to mandatory jail time.<sup>2</sup>

(2) During the course of its investigation, the presentence office discovered that Smith had a prior drug conviction in Maryland for Distribution of Cocaine. As a result of the prior drug conviction, Smith faced an enhanced sentence on the drug offense to which he pleaded guilty in this case.<sup>3</sup> In view of the substantial mandatory jail time that Smith faced in this case as a result of the prior Maryland drug conviction, the Superior Court, on March 17, 2000, allowed Smith to withdraw his guilty plea.

(3) On June 22, 2000, Smith entered into a second plea agreement. Smith pleaded guilty, pursuant to Superior Court Criminal Rule 11(e)(1)(c), to Possession of Cocaine (a lesser-included offense of Possession with Intent

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<sup>2</sup>See Guilty Plea Hr'g Tr., Feb. 25, 2000.

<sup>3</sup>See 16 Del. C. § 4763(a) (providing for additional penalties when a defendant has previously been convicted of a drug offense).

to Deliver Cocaine) and to the other three charges in the original indictment. Smith was immediately sentenced, in accordance with the plea agreement, to seven years at Level V.

(4) On August 31, 2000, Smith filed his first motion for postconviction relief. Smith alleged that the prior Maryland drug charge had, in fact, been dropped, and that he did not have a Maryland drug conviction. Smith requested that the Superior Court allow him to accept “the first plea that was offered,”<sup>4</sup> *i.e.*, the February 2000 guilty plea that was withdrawn in March 2000. By order dated October 11, 2000, the Superior Court denied relief.

(5) On December 7, 2000, Smith filed a second motion for postconviction relief. Smith again alleged that his sentence was “predicated on a second nonexistent drug conviction.” Again, Smith argued that he should be resentenced in accordance with his first plea agreement. By order dated December 19, 2000, the Superior Court denied relief as factually

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<sup>4</sup>It appears that the first plea agreement provided for an agreed-upon sentence of six years at Level V, or, in the alternative, a presentence investigation. It is clear from the plea hearing transcript that Smith opted for a presentence investigation.

incorrect and as procedurally defaulted under Superior Court Criminal Rule 61(i)(3) and (4). This appeal followed.

(6) In his opening brief on appeal, Smith does not argue, as he did in his first and second postconviction motions, that he does not have a prior Maryland drug conviction. Instead, Smith argues that his second guilty plea was involuntary and that his counsel was ineffective.

(7) Because Smith has chosen not to brief his Maryland drug conviction claim, that claim is deemed waived and abandoned and will not be considered on appeal.<sup>5</sup> Smith's claims of involuntary guilty plea and ineffective assistance of counsel, on the other hand, were not raised in the Superior Court. We review them now only for plain error.<sup>6</sup>

(8) Smith has failed to demonstrate any plain error in the entry and acceptance of his second guilty plea. Smith's claim that his guilty plea was involuntary is contradicted by the Truth-in-Sentencing Guilty Plea Form. Smith's claim that his counsel promised him that he would receive a sentence only of probation is contradicted by the plea agreement, which states that

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<sup>5</sup>*Somerville v. State*, Del. Supr., 703 A.2d 629, 631 (1997).

<sup>6</sup>Supr. Ct. R. 8; *Trump v. State*, Del. Supr., 753 A.2d . 963, 971 (2000) (citing *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986)).

Smith would be sentenced to a total of seven years at Level V. In the absence of clear and convincing evidence to the contrary, Smith is bound by the terms of the written plea agreement and his answers on the Truth-in-Sentencing Guilty Plea Form.<sup>7</sup>

(9) It is manifest on the face of Smith's opening brief 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.

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/Joseph T. Walsh  
Justice

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<sup>7</sup>*Somerville v. State*, 703 A.2d at 632.