

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HOWARD L. DAVIS,	§
	§ No. 476, 2000
Defendant Below,	§
Appellant,	§ Court Below—Superior Court of the
	§ State of Delaware in and for Kent
v.	§ County in IK96-10-0247-R1.
	§
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§ Def. ID No. 9610008845

Submitted: April 5, 2001

Decided: May 24, 2001

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

ORDER

This 24th day of May 2001, 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 appellant, Howard L. Davis, has appealed from the Superior Court's denial of Davis' motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The appellee, State of Delaware, has moved to

affirm the judgment of the Superior Court on the ground that it is manifest on the face of Davis' opening brief that the appeal is without merit.¹ We agree and affirm.

(2) In June 1997, after a three-day jury trial in the Superior Court, Davis was convicted of Assault in the Second Degree. After a hearing, the Superior Court declared Davis to be a habitual offender pursuant to 11 *Del. C.* § 4214(a) and sentenced him to 10 years in prison followed by probation.

(3) On direct appeal, Davis alleged that the Superior Court erred when it (i) denied Davis' motion for judgment of acquittal; (ii) admitted a highly prejudicial and inflammatory videotape; (iii) overruled Davis' objections to improper statements made by the prosecutor during closing argument; and (iv) instructed the jury with an *Allen* charge over Davis' objection. This Court concluded that Davis' arguments were without merit and affirmed the Superior Court's judgment.²

(4) In his motion for postconviction relief, Davis raised the same four claims that he had raised in his direct appeal. In addition, Davis claimed that his waiver of grand jury indictment was not knowing and voluntary, and that his trial counsel was ineffective. By report dated June 26, 2000, a Superior Court

¹Supr. Ct. R. 25(a).

²*Davis v. State*, Del. Supr., No. 119, 1998, Berger, J., 1999 WL 86055 (Jan. 20, 1999) (ORDER).

Commissioner recommended that Davis' postconviction motion be dismissed as procedurally barred under Rule 61(i)(3) and (4). By order dated September 12, 2000, the Superior Court adopted the Commissioner's report and denied Davis' motion for postconviction relief. This appeal followed.

(5) In his opening brief on appeal, Davis raises only one of the claims that he raised in his postconviction motion. Davis alleges that the Superior Court erred when it denied his motion for judgment of acquittal. To the extent Davis has failed to brief his other postconviction claims, those claims are deemed abandoned and will not be addressed by this Court.³

(6) We review the Superior Court's denial of a postconviction motion under Rule 61 for abuse of discretion.⁴ The Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.⁵ Davis claims that the evidence used to convict him was insufficient, and that the Superior Court erred when it denied his motion for judgment of acquittal. This claim was resolved against Davis on direct appeal. Consequently, the claim is procedurally barred unless

³*Somerville v. State*, Del. Supr., 703 A.2d 629, 631 (1997).

⁴*Outten v. State*, Del. Supr., 720 A.2d 547, 551 (1998).

⁵*Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990).

reconsideration of the claim is warranted in the interest of justice.⁶ We have reviewed the record in this case and conclude that there is no basis for reconsideration of Davis' claim.

(7) In his opening brief on appeal, Davis raises one new claim that he did not raise in his postconviction motion. Davis challenges the 10-year sentence imposed by the Superior Court for his Assault in the Second Degree conviction. Davis claims that the sentence is too harsh. Because Davis did not raise this claim in his postconviction motion, we will review the claim now only for plain error.⁷

(8) Davis was convicted of Assault in the Second Degree, which is a Class D felony.⁸ The maximum penalty for a Class D felony is eight years at Level V.⁹ Davis, however, was properly declared to be a habitual criminal pursuant to 11 *Del. C.* § 4214(a). Section 4214(a) explicitly grants the sentencing court the discretion to “impose a sentence of up to life imprisonment.” Accordingly, the Superior Court

⁶Super. Ct. Crim. R. 61(i)(4).

⁷Supr. Ct. R. 8. *See Trump v. State*, Del. Supr., 753 A.2d 963, 971 (2000) (citing *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986)) (providing that plain error is error that is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial”).

⁸11 *Del. C.* § 612.

⁹11 *Del. C.* § 4205(b)(4).

committed neither plain error nor an abuse of discretion when it sentenced Davis to 10 years in prison for Assault in the Second Degree.

(9) It is manifest on the face of Davis' opening brief that the 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, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice