

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID G. McCRAY,	§
	§ No. 100, 2001
Defendant Below,	§
Appellant,	§ Court Below—Superior Court
	§ of the State of Delaware, in
v.	§ and for Sussex County in
	§ IS96-06-0218.
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§ Def. ID No. 9606002576

Submitted: April 12, 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, David G. McCray, has appealed from the Superior Court's denial of his motion for a new trial. 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 McCray's opening brief that the appeal is without merit. We agree and affirm.

(2) On July 15, 1996, McCray was indicted for the offenses of Unlawful Sexual Intercourse in the First Degree and Continuous Sexual Abuse of a Child. In November 1996, after a two-day trial, a Superior Court jury convicted McCray of Unlawful Sexual Intercourse in the First Degree. The State *nolle prossed* the charge of Continuous Sexual Abuse of a Child. McCray was sentenced to 25 years at Level V imprisonment suspended after 15 years for work release and probation.

(3) On direct appeal, McCray's counsel filed a brief pursuant to Supreme Court Rule 26(c). McCray did not raise any issues for this Court's consideration. By Order dated October 27, 1997, this Court affirmed McCray's conviction and sentence.¹

(4) On December 27, 2000, McCray filed a *pro se* motion for a new trial in the Superior Court. McCray claimed that newly discovered evidence mandated a new trial. By order dated January 29, 2001, the Superior Court denied relief, holding that the motion was untimely and thus procedurally barred under Superior Court Criminal Rule 33. This appeal followed.

¹*McCray v. State*, Del. Supr., No. 44, 1997, Holland, J., 1997 WL 683284 (Oct. 27, 1997 (ORDER)).

(5) In his opening brief on appeal, McCray appears to raise three issues: (i) insufficient evidence; (ii) ineffective assistance of counsel; and (iii) “prejudice.” None of these appellate claims was fairly presented to the Superior Court in McCray’s new trial motion, and we will not consider them here for the first time on appeal.²

(6) It appears from the record that McCray’s newly discovered evidence consists of copies of two undated letters. The first letter appears to be from the minor complaining witness to McCray. The second letter appears to be from the minor complaining witness to a third party. The second letter is accompanied by a copy of an envelope that is postmarked December 31, 1996. Both letters state that McCray did not commit the crime.

(7) Rule 33 provides that “[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two

²Del. Supr. Ct. R. 8; *Jenkins v. State*, Del. Supr., 305 A.2d 610, 613 (1973).

years after final judgment.”³ “The time limits of Rule 33 are generally jurisdictional and mandatory.”⁴

(8) McCray’s conviction became final on November 13, 1997, when this Court issued its mandate following McCray’s direct appeal.⁵ McCray did not file his motion for new trial until December 27, 2000. McCray has not provided this Court, nor did he provide the Superior Court, with a reason why he filed his motion for a new trial more than three years after his conviction became final.

(9) Moreover, McCray’s newly discovered evidence consists solely of post-trial child witness recantations in the form of unverified letters. A motion for a new trial on the basis of a witness’ recantation “is generally viewed with suspicion, and a denial of such a motion will not be reversed on appeal unless there has been an abuse of discretion by the Trial Court.”⁶ We

³*Cf. Downes v. State*, Del. Supr., ___ A.2d ___ (2001), No. 401, 1999, *per curiam*, 2001 WL 323847 (March, 30, 2001) (providing that defendant could seek postconviction relief on basis of newly discovered evidence within three years after his conviction became final, even though relief on that ground would have been time-barred had it been asserted in motion for new trial).

⁴*Maxion v. State*, Del. Supr., 686 A.2d 148, 151 (1996) (quoting *State v. Halko*, Del. Super., 193 A.2d 817, 820 (1963), *aff’d*, 204 A.2d 628 (1964).

⁵*Jackson v. State*, Del. Supr., 654 A.2d 829, 832-33 (1995).

⁶*Blankenship v. State*, Del. Supr., 447 A.2d 428, 433-34 (1982).

find that the Superior Court properly exercised its discretion in denying McCray's untimely motion for a new trial.

(10) It is manifest on the face of McCray's opening brief that this appeal is without merit. The issues on appeal 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 hereby AFFIRMED.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice