

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK JOHNSON,	§
	§
Defendant Below-	§ No. 580, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. P83-07-1724R2
Plaintiff Below-	§
Appellee.	§

Submitted: December 6, 2002
Decided: January 30, 2003

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

O R D E R

This 30th day of January 2003, 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

(1) The defendant-appellant, Derrick Johnson, filed this appeal from the Superior Court's October 3, 2002 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, State of Delaware, has moved to affirm the judgment of the

¹We also have reviewed the record in this case.

Superior Court on the ground that it is manifest on the face of Johnson's opening brief that the appeal is without merit.² We agree and AFFIRM.

(2) In June 1984, Johnson entered a plea of guilty to Murder in the Second Degree and was sentenced to life imprisonment. Johnson moved for postconviction relief in October 1990 and in April 1995, claiming that the State had not honored its promise to transfer him to a Maryland correctional facility.³ The Superior Court denied both postconviction motions and this Court affirmed the Superior Court judgments.⁴ This is an appeal from Johnson's latest motion for postconviction relief.

(3) In his appeal, Johnson claims that he should be permitted to withdraw his guilty plea because he would not have signed the plea agreement had he known he would not be transferred to Maryland. Johnson also claims that the Superior Court abused its discretion in finding that his claim was time barred under SUPER. CT. CRIM. R. 61 rather than addressing whether there was a "manifest injustice" under SUPER. CT. CRIM. R. 32(d) and 52(b).

²SUPR. CT. R. 25(a).

³Johnson's 1984 plea agreement, which was signed by both Johnson and his attorney, contained the following language: "The State will make reasonable efforts to effect defendant's transfer to the State of Maryland, but defendant understands there are no guarantees of achieving this transfer."

⁴*Johnson v. State*, Del. Supr., No. 361, 1990, Horsey, J. (Feb. 1, 1991); *Johnson v. State*, Del. Supr., No. 196, 1995, Berger, J. (June 14, 1995).

(4) The record reflects that the Superior Court, the Attorney General's Office (the "A.G.'s Office") and the Department of Correction ("DOC") have attempted on numerous occasions to assist Johnson in his effort to be transferred to a Maryland facility. Johnson's request for a transfer was rejected by the State of Maryland in 1984, 1987 and 1992 because of his poor disciplinary record at the Delaware Correctional Center. In addition, Johnson could not be transferred between 1991 and 1994 because of Delaware's policy not to transfer inmates with pending federal habeas corpus petitions.

(5) In February 1994, the Superior Court became directly involved in assisting Johnson with his request for a transfer. Following Johnson's request for a copy of the transcript of his guilty plea, the Superior Court advised Johnson that, if he currently had a clean record, the Maryland authorities might reconsider a transfer. The Superior Court informed Johnson that it would forward his request for assistance in obtaining a transfer to the A.G.'s Office. The A.G.'s Office, in turn, asked DOC to request Johnson's transfer to Maryland, in spite of his continuing disciplinary problems, including a recent write-up in October 1994. The request for a transfer was rejected.

(6) In 1999, following another request from Johnson for help in obtaining a transfer, the Superior Court directed the A.G.'s Office to see that

another request for transfer was made. On September 21, 1999, the A.G.'s Office sent a letter to DOC asking DOC to again request that Maryland accept Johnson as a transfer inmate. DOC wrote to the Superior Court stating that it would comply with the request, but noted that it had made another transfer request in 1998, which had been rejected, and that another request so soon after that rejection would probably be unsuccessful. In its October 5, 1999 letter, the Superior Court agreed and, for that reason, no request for a transfer was made at that time.

(7) In 2002, the Superior Court again became involved in the issue of Johnson's transfer to Maryland and wrote to the A.G.'s Office. The A.G.'s Office asked DOC to request another transfer, which it did. On September 3, 2002, the A.G.'s Office wrote to the Superior Court to report that the Maryland authorities had again refused to accept Johnson. The letter from the Maryland authorities stated that, under current policy, Maryland would accept inmates from other jurisdictions only in protective custody cases where the inmate is a serious security concern.

(8) The Superior Court, the A.G.'s Office and DOC all have been involved in the effort to have Johnson transferred to Maryland for many years. At this point, all "reasonable efforts" to effect Johnson's transfer on the part of

the State have been exhausted.⁵ The plea agreement did not guarantee that Johnson would be transferred and reflects that, when Johnson signed the plea agreement, he was aware that the State's efforts might not be successful. Moreover, it appears that Johnson's own conduct has significantly hampered his efforts to be transferred. Johnson's claim that the State has not fulfilled its promise under the plea agreement is, thus, without merit. Moreover, Johnson's claim that the Superior Court improperly relied upon Rule 61 to deny his claim is also without merit, since his motion filed in the Superior Court clearly requested postconviction relief,⁶ clearly was time barred,⁷ and there was no evidence that a miscarriage of justice had occurred.⁸

(9) It is manifest on the face of Johnson's opening brief that the appeal is without merit because the issues presented on appeal are controlled by settled

⁵There may be a basis for a future request if the State of Maryland alters its policy concerning inmate transfers.

⁶Moreover, SUPER. CT. CRIM. R. 32(d) explicitly provides that a motion for withdrawal of a plea after the imposition of sentence will be governed by Rule 61. SUPER. CT. CRIM. R. 52(b) did not apply to Johnson's claim since there was no evidence of an error or defect that affected a substantial right.

⁷SUPER. CT. CRIM. R. 61(i) (1). Although the Superior Court did not so find, Johnson's claim was also barred as formerly adjudicated. SUPER. CT. CRIM. R. 61(i) (4).

⁸SUPER. CT. CRIM. R. 61(i) (5).

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