

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RORY BROKENBROUGH,	§
	§ No. 322, 2012
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. 0308021468
	§
Plaintiff Below-	§
Appellee.	§

Submitted: August 20, 2012

Decided: October 10, 2012

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

ORDER

This 10th day of October 2012, 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, Rory Brokenbrough, filed an appeal from the Superior Court’s May 18, 2012 order adopting the February 23, 2012 report of the Superior Court Commissioner, which recommended that Brokenbrough’s second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 be denied.¹ The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court’s judgment on

¹ Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

the ground that it is manifest on the face of the opening brief that the appeal is without merit.² We agree and affirm.

(2) The record before us reflects that, in April 2005, Brokenbrough was found guilty by a Superior Court jury of Assault in the First Degree, Assault in the Third Degree, Attempted Robbery in the First Degree and Conspiracy in the Third Degree. He was sentenced to a total of 52 years of Level V incarceration, to be suspended after 35 years for decreasing levels of supervision. Brokenbrough's convictions were affirmed by this Court on direct appeal.³ The Superior Court's denial of Brokenbrough's previous motion for postconviction relief also was affirmed by this Court.⁴

(3) In this appeal, Brokenbrough claims that there was insufficient evidence presented by the State supporting his convictions of first degree assault and first degree attempted robbery⁵ and that the indictment and jury instructions incorrectly interpreted the felony assault statute.⁶ Therefore, Brokenbrough argues, it was an abuse of discretion for the Superior Court

² Supr. Ct. R. 25(a).

³ *Brokenbrough v. State*, Del. Supr., No. 432, 2005, Ridgely, J. (Apr. 11, 2006).

⁴ *Brokenbrough v. State*, Del. Supr., Nos. 614, 2007 and 262, 2008, Ridgely, J. (Nov. 25, 2008).

⁵ While Brokenbrough characterizes his claim as one of "actual innocence," the substance of the claim reflects that it is more properly treated as a claim of insufficiency of the evidence.

⁶ Del. Code Ann. tit. 11, §613(a) (4).

not to apply Rule 61(i) (5)'s "miscarriage of justice" exception to the time and procedural bars to reach the merits of his claims.

(4) The Superior Court is required to first ascertain whether any of the procedural bars of Rule 61 apply prior to considering the merits of a defendant's postconviction claims.⁷ In this case, Brokenbrough's conviction became final in April 2006. His latest postconviction motion, which was filed in September 2011, clearly is time-barred pursuant to Rule 61(i) (1). Brokenbrough's motion also is procedurally barred pursuant to Rules 61(i) (2) and (3) because his claim of insufficiency of the evidence was not asserted either in his first postconviction motion or in the proceedings leading to the judgment of conviction. Brokenbrough's claim that the indictment and jury instructions were defective was previously asserted in his first postconviction motion and, therefore, is procedurally barred under Rule 61(i) (4).

(5) Brokenbrough argues that the time and procedural bars should not apply pursuant to Rule 61(i) (5)'s "miscarriage of justice" exception. However, the record before us does not reflect any basis for applying the exception. There is no evidence that Brokenbrough's convictions were

⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

supported by insufficient evidence,⁸ no evidence of any defect in the indictment,⁹ and no evidence of error on the part of the Superior Court in its instructions to the jury.¹⁰ Thus, Brokenbrough's attempt to cast his claims as cognizable under Rule 61(i) (5) fails. We, therefore, conclude that the judgment of the Superior Court must be affirmed.

(6) 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

⁸ *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991) (on a claim of insufficiency of the evidence, this Court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt).

⁹ *Mayo v. State*, 458 A.2d 26, 27 (Del. 1983) (an indictment should be a plain, concise and definite written statement of the essential facts constituting the offenses charged, as required by Superior Court Criminal Rule 7(c)).

¹⁰ *Green v. St. Francis Hospital, Inc.*, 791 A.2d 731, 741 (Del. 2002) (a jury instruction should be reasonably informative, not misleading and not undermine the jury's ability to intelligently perform its duty).