

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERVIN C. OLIVER,	§	
	§	No. 255, 2001
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County in
	§	Cr.A. No. 98-11-0251.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 9809019830

Submitted: August 8, 2001

Decided: October 16, 2001

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

**ORDER**

This 16<sup>th</sup> day of October 2001, upon consideration of the appellant's opening brief and the State of Delaware's motion to affirm, it appears to the Court that:

(1) The appellant, Ervin C. Oliver, has appealed from the Superior Court's denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The State of Delaware has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of Oliver's opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

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<sup>1</sup>Supr. Ct. R. 25(a).

(2) In November 1998, Oliver was indicted on one count each of Unlawful Sexual Intercourse in the First Degree, two counts of Unlawful Imprisonment in the Second Degree, and two counts of Offensive Touching. On January 29, 1999, Oliver entered a *Robinson* plea in the Superior Court, pursuant to Superior Court Criminal Rule 11(e)(1)(c), to the lesser included offense of Unlawful Sexual Intercourse in the Third Degree.<sup>2</sup> The Superior Court ordered a presentence investigation, as provided in the plea agreement, and later sentenced Oliver to ten years at Level V imprisonment, suspended after five years, for five years of Level III probation.

(3) In April 2001, Oliver filed a *pro se* motion for postconviction relief. By order dated April 27, 2001, the Superior Court denied Oliver's postconviction motion. This appeal followed.

(4) In his opening brief on appeal, Oliver alleges that his guilty plea was involuntary due to ineffective assistance of counsel. Oliver alleges that his counsel failed to advise him of the "specifics of the plea," leaving Oliver "in a state of

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<sup>2</sup>*Robinson v. State*, Del. Supr., 291 A.2d 279 (1972) (permitting Superior Court to accept guilty plea where guilt of offense is not admitted).

confusion and uncertainty.” Moreover, Oliver alleges that his counsel failed to advise him that the guilty plea agreement contained a waiver of the right to appeal.

(5) In the context of a guilty plea, a successful claim of ineffective assistance of counsel is one that demonstrates that (i) “counsel’s representation fell below an objective standard of reasonableness,” and (ii) “counsel’s actions were so prejudicial that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial.”<sup>3</sup> The burden of proving ineffective assistance of counsel is on the defendant.<sup>4</sup>

(6) Oliver’s allegation, that his guilty plea was involuntary due to ineffective assistance of counsel, is contradicted by the Truth-in-Sentencing Guilty Plea Form and by Oliver’s statements at the plea colloquy. In both, Oliver represented to the Superior Court that he voluntarily entered his plea and was satisfied with his counsel’s representation. Moreover, Oliver acknowledged that he understood he was waiving his right “to appeal to a higher court,” and he indicated that he understood he was facing a statutory penalty of up to ten years at Level V.<sup>5</sup> In the absence of

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<sup>3</sup>*Somerville v. State*, Del. Supr., 703 A.2d 629, 631 (1997) (citations omitted).

<sup>4</sup>*MacDonald v. State*, Del. Supr., \_\_A.2d\_\_, No. 220, 2000, Walsh, J., 2001 WL 849750 (July 27, 2001) rehr’g denied (Aug. 20, 2001).

<sup>5</sup>Third degree unlawful sexual intercourse is a Class C felony that carries a sentence of up to ten years. *See* former 11 *Del. C.* § 773 (third degree unlawful sexual intercourse); 11 *Del. C.*

clear and convincing evidence to the contrary, Oliver is bound by his answers on the guilty plea form, and by his sworn testimony prior to the acceptance of his guilty plea.<sup>6</sup> Oliver has not sustained his burden of demonstrating that his counsel rendered ineffective assistance of counsel.

(7) Oliver claims that the Superior Court erred when it imposed a sentence outside of the Truth-in-Sentencing guidelines. The Court agrees with the Superior Court that Oliver's claim is procedurally barred pursuant to Rule 61(i)(3).<sup>7</sup> Moreover, the claim is without merit. A defendant has no right to appeal a statutorily authorized sentence on the basis that it does not conform to Truth-in-Sentencing guidelines.<sup>8</sup>

(8) Oliver appears to claim that his indictment was "unlawful" because he had previously executed a waiver of indictment. The Court agrees with the Superior Court that Oliver's claim is procedurally barred pursuant to Rule 61(i)(3). A waiver of indictment does not entitle a defendant to prosecution by information. Rather, a

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§ 4205(b) (defining felony sentences).

<sup>6</sup>*Somerville v. State*, 703 A.2d at 632.

<sup>7</sup>Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is barred, unless the petitioner can establish cause for the procedural default and prejudice from the violation of the petitioner's rights.

<sup>8</sup>*Mayes v. State*, Del. Supr., 604 A.2d 839, 846 (1992).

waiver of indictment gives the prosecution the option of charging by information, which the prosecution initially did in this case.<sup>9</sup> If Oliver is claiming that the original information charging him with Third Degree Unlawful Sexual Intercourse precluded the grand jury from later indicting him for First Degree Unlawful Sexual Intercourse, his claim is unavailing. The original information in this case was properly superseded by the indictment.<sup>10</sup> To the extent Oliver is challenging some other defect in the indictment, his guilty plea operated as a waiver of such claim.<sup>11</sup>

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<sup>9</sup>See Super. Ct. Crim. R. 7(b) (providing that an offense may be prosecuted by information if the defendant waives prosecution by indictment).

<sup>10</sup>See *Albury v. State*, Del. Supr., 551 A.2d 53 (1988) (providing that prosecutor generally has discretion to decide whether to bring a charge before the grand jury); see also *Evans v. Redman*, Del. Supr., No. 4, 1987, Horsey, J., 1987 WL 37253 (Apr. 28, 1987) (ORDER) (holding that a subsequent indictment on criminal charges cures any defect in the original complaint, warrant, or preliminary hearing); see also *United States v. McKay*, 11<sup>th</sup> Cir., 30 F.3d 1418, 1420 (1994) (providing that a superseding indictment has the same effect as dismissing an original indictment).

<sup>11</sup>*Downer v. State*, Del. Supr., 543 A.2d 309 (1988).

(9) We have carefully considered each of Oliver's postconviction claims and find that the judgment of the Superior Court should be affirmed. It is manifest on the face of Oliver'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/ Myron T. Steele  
Justice