

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TERRELL L. DAVIS,	§
	§
Defendant Below-	§ No. 111, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. 97-05-0972 and
Plaintiff Below-	§ -0973
Appellee.	§

Submitted: July 28, 2000
Decided: September 28, 2000

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

ORDER

This 28th day of September 2000, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Terrell Davis, filed this appeal from an order of the Superior Court denying his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In 1997 Davis was convicted by a Superior Court jury of delivery of cocaine¹ and delivery of a controlled substance within 300 feet of a park.² Davis

¹16 Del. C. §4751.

²16 Del. C. § 4768.

was sentenced to a mandatory minimum 15 year imprisonment term at Level V followed by six years at decreasing levels of supervision. His convictions and sentences were affirmed by this Court on direct appeal.³ The Superior Court summarily denied Davis's first petition for postconviction relief. Davis raises the following issues on appeal from the Superior Court's decision: (i) there was insufficient evidence to sustain two separate counts of delivery; (ii) the Superior Court imposed an illegal sentence; (iii) his trial counsel was ineffective; and (iv) the Superior Court abused its discretion by failing to hold an evidentiary hearing regarding his claims.

(3) 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 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

³*Davis v. State*, Del. Supr., No. 427, 1997, Veasey, C.J. (July 15, 1998) (ORDER).

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

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

can establish cause for the procedural default *and* prejudice from a violation of the petitioner's rights.⁶

(4) Davis's first two claims, challenging the sufficiency of the evidence and the legality of his sentence, could have been, but were not, raised in the proceedings leading to the judgment of conviction. Davis offers no reason why these issues were not raised either to the trial court in the first instance or to this Court on appeal. Moreover, Davis cannot establish prejudice. It is clear from the record that the evidence presented at trial was sufficient to prove both charges against him beyond a reasonable doubt. It also is clear, given Davis's prior convictions for delivery under 16 Del. C. § 4751, that the 15 year minimum mandatory sentence Davis received for the present delivery of cocaine conviction was required by statute, 16 Del. C. § 4763(a)(3). Accordingly, both of these claims are barred under Rule 61(i)(3).

(5) Davis next asserts that his trial counsel was ineffective for failing to obtain an accurate physical measurement to rebut the State's charge that Davis had delivered drugs within 300 feet of a park or recreation area. Davis argues that he would have been acquitted of this charge if his attorney had provided evidence

⁶The procedural bar of Rule 61(i)(3) is inapplicable, however, if there is a claim that the lower court lacked jurisdiction or there is a colorable claim that there was a miscarriage of justice because of a constitutional violation. Super. Ct. Crim. R. 61(i)(5).

regarding the actual distance from the park to the location of the alleged drug transaction. To prevail on a claim of ineffective assistance of counsel, Davis must establish: (a) that defense counsel's representation fell below an objective standard of reasonableness; and (b) that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the case would have been different.⁷ There is a strong presumption that counsel's conduct was professionally reasonable.⁸

(6) In this case, the arresting officer testified that the location where she had purchased drugs from Davis had been measured many times during prior drug investigations. Moreover, Davis contended at trial that he did not commit the crimes and that the police misidentified him. Given Davis's defense strategy and the evidence provided by the State about the distance of the transaction from the park, we do not find defense counsel's failure to dispute the 300 foot measurement to be objectively unreasonable. Accordingly, this claim must fail.

(7) Finally, we find Davis's claim that the Superior Court should have held an evidentiary hearing on his postconviction motion to be without merit. Whether an evidentiary hearing is desirable on a motion for postconviction relief

⁷*Outten v. State*, 720 A.2d at 551-52 (citing the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

⁸*Albury v. State*, Del. Supr., 551 A.2d 53, 59 (1988).

is within the discretion of the Superior Court.⁹ In this case, the Superior Court properly determined that Davis's claims were either procedurally barred or without merit on the face of the record. There was, thus, no abuse of discretion in deciding that an evidentiary hearing was unnecessary, and summary disposition of the matter was appropriate.¹⁰

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice

⁹Super. Ct. Crim. R. 61(h)(1).

¹⁰*Maxion v. State*, Del.Supr., 686 A.2d 148, 151 (1996).