IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEROY COOK,	§	
	§	No. 155, 2000
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in
v.	§	and for New Castle County
	§	Cr.A.No. IN96-05-0374.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 9604001462

Submitted: July 10, 2000
Decided: August 14, 2000

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

O R D E R

This 14th day of August 2000, upon consideration of the appellant's opening brief and the State of Delaware's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Leroy Cook, has appealed from the Superior Court's denial of Cook's 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 Cook's opening brief that the appeal is without merit. We agree and affirm.

(2) After a two-day jury trial in the Superior Court, Cook was convicted of Robbery in the Second Degree. Cook was sentenced to five years at Level V, suspended after two years and six months, for two years and six months at a Level IV halfway house, suspended after six months, for two years of probation.

(3) The robbery occurred around midnight on March 31, 1996. While purchasing a loaf of bread at the Super Giant grocery store in Wilmington, a customer pushed a checkout cashier out of the way and grabbed money out of the cash register drawer. A store security guard saw the crime and struggled with the fleeing robber outside of the store before the robber escaped in a white car. As the robber drove off, the security guard managed to strike the robber in the head or nose with a nightstick. The robber then drove erratically through the parking lot, driving the getaway car over some dividers or a curb, which caused two tires on the car to explode.

(4) Using information provided to the store security guard by a person who witnessed the getaway, Delaware State Police Officer Corporal Keith Janowski ("Corporal Janowski") ascertained that the getaway car was a white Chevy Corsica with tag number 961013, owned by Debra

Thomas. Approximately 45 minutes after the robbery, and while Corporal Janowski was en route to Thomas' residence, Wilmington police located the getaway car, parked one block from Thomas' home.

(5) Before going to Thomas' home, Corporal Janowski examined the car, noting that the vehicle was a white Chevy Corsica with tag number 961013 and two blown-out tires. According to Corporal Janowski's trial testimony, the car was "a mess," with "blood and beer cans and stuff on the inside." Upon arriving at Thomas' house, Thomas informed Corporal Janowski that her daughter's boyfriend, Cook, had access to the car on March 31, while she and her daughter were in New York attending a funeral.

(6) Corporal Janowski prepared a police report, identifying Cook as the person in possession of the getaway car during the period of time the robbery took place. Delaware State Police Officer Mark Hawk ("Detective Hawk") then prepared a six person photographic line-up that included Cook's picture. Detective Hawk showed the photo line-up to the store cashier, who identified Cook as the person who robbed her. Furthermore, at trial, both the cashier and the security guard identified Cook as the robber.

(7) At trial, Cook admitted that he drove Thomas' car on March 31, 1996, but he denied committing the robbery. According to Cook, after his girlfriend and Thomas left for a funeral, Cook took the car and went out "riding around drinking and carrying on" with his friends. Later that day, when he ran out of money, Cook loaned the car to a "known drug dealer named E.Q." in exchange for cocaine. E.Q. was suppose to use the car for five hours and then return it to Cook. Cook spent the remainder of the day in a crack house, waiting for E.Q. to return. According to Cook, when E.Q. did not return, Cook stayed at the crack house all night. Cook finally telephoned his girlfriend the next day to tell her what he had done with the car. According to Cook, it was then that he learned that the car had been involved in a robbery, and that he was a suspect.

(8) On direct appeal, Cook raised two claims: (i) that the Superior Court committed error in not giving a "missing evidence" jury instruction as to a missing piece of paper with the getaway car license plate number on it; and (ii) that the Superior Court made improper remarks to the jury prior to the jury's deliberations. This Court concluded that both

of Cook's arguments were without merit and affirmed the Superior Court's judgment.[1]

(9) In September 1999, Cook filed a *pro se* motion for postconviction relief, alleging ineffective assistance of counsel. Cook alleged that his counsel (i) did not provide him with a copy of discovery information until the first day of trial, and (ii) failed to request a "missing evidence" jury instruction as to the blood that was in the getaway car. By order dated March 28, 2000, the Superior Court denied Cook's motion. This appeal followed.

(10) In his opening brief on appeal, Cook reiterates his allegations of ineffective assistance of counsel. Cook also raises a claim of prosecutorial misconduct. Cook did not raise his prosecutorial misconduct claim in his postconviction motion. As a result, this Court will consider Cook's claim only for plain error.[2] Plain error is error that is so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[3]

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[1] *See Cook v. State*, Del. Supr., 728 A.2d 1173 (1999).
[2] Supr. Ct. R. 8.
[3] *Trump v. State*, Del. Supr., 753 A.2d 963, 971 (2000) (citing *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986)).

(11) Cook complains that the prosecutor improperly inferred that the defense had an opportunity to, but chose not to, test blood evidence, when in fact the State had not collected blood evidence and thus such evidence was unavailable for testing. The record reflects that, on redirect examination, the prosecutor asked Detective Hawk if the defense had ever contacted the police about having the blood tested. Detective Hawk answered, "No." Defense counsel objected on the basis that the question improperly suggested that the defense had an obligation to produce evidence. The trial court sustained the objection. The Superior Court then gave an immediate curative instruction to the jury to disregard the question and answer.[4]

(12) This Court finds that any prejudicial harm the prosecutor's question may have created, either implying that blood evidence was available for testing when it was not, or implying that the defense had a burden to produce evidence when it did not, was mitigated by the immediate curative instruction given by the Superior Court. Cook was not deprived of a fair trial as a result of the prosecutor's question. The

[4] The trial judge instructed the jury: "Members of the jury, you're instructed that in a criminal case, a defendant is not required to come forth with any evidence whatsoever. So you're instructed to disregard the last question of [the prosecutor] and the last answer of Detective Hawk and give it no weight or effect whatsoever." Tr. at 215.

curative jury instruction "permitted the jury to properly discharge its function with the bounds of the law."[5] Cook has failed to demonstrate plain error.

(13) When reviewing the Superior Court's denial of a postconviction motion pursuant to Rule 61, this Court first must consider the procedural requirements of the rule before addressing any substantive issues.[6] Rule 61(i)(3) bars from consideration any ground for relief that was not raised in the proceedings leading to the conviction unless the petitioner can establish: (i) cause for failing to timely raise the claim, and (ii) actual prejudice from failing to raise the claim.

(14) A successful claim of ineffective assistance of counsel can constitute "cause" under Rule 61(i)(3).[7] To prevail on an ineffective assistance of counsel claim, a petitioner must establish: (i) that the attorney's representation fell below an objective standard of reasonableness, and that (ii) but for the counsel's unprofessional errors, the outcome of the trial would have been different.[8]

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[5] *Mills v. State*, Del. Supr., 732 A.2d 845,849 (1999).
[6] *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990).
[7] *Id.* at 556.
[8] *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

(15) On appeal as in his postconviction motion, Cook claims that his trial counsel ("defense counsel") was ineffective because he did not provide Cook with discovery until the first day of trial. Specifically, Cook complains that defense counsel failed to "inform the defendant about blood samples and/or other evidence that counsel was aware of."

(16) It appears from the record that, in the Rule 61(g)(2) affidavit responding to Cook's allegations, defense counsel stated that it was his "normal practice to share discovery information with clients when it is received." Defense counsel further stated that there was nothing in his file to indicate that such information was not provided to Cook. Nonetheless, assuming that defense counsel did not provide discovery information "about blood samples and/or other evidence" to Cook, Cook has not demonstrated that he was prejudiced by defense counsel's oversight. Indeed, the record reflects that blood samples were not preserved, and Cook does not allege the nature of the "other evidence" that defense counsel did not provide to him. Cook has made no showing how the alleged inadequate conduct of defense counsel prejudiced Cook's trial. As a result, Cook has not demonstrated ineffective assistance of counsel as to this claim. The claim is procedurally barred pursuant to Rule 61(i)(3).

(17) Next, Cook argues that defense counsel was ineffective for failing to request a "missing evidence" jury instruction with respect to the blood that the police found in the car, but failed to collect and preserve. Cook claims that the blood evidence was crucial to his defense of misidentification, and that he was entitled to either collection and preservation of the blood or the appropriate "missing evidence" jury instruction and inference.

(18) As this Court discussed on Cook's direct appeal, "[t]he State is required to preserve evidence that may be material to a defendant's guilt or innocence."[9] Once it has been established that the State must bear responsibility for the loss of material evidence, a defendant is entitled to a jury instruction creating a presumption that the missing evidence would have been exculpable to the defendant.[10]

(19) Cook has not established that the blood in the getaway car was material to his guilt or innocence. Evidence is material only if there is a reasonable probability that it will affect the result of the proceeding.[11] In this case, in view of the eyewitness testimony that incriminated Cook and

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[9] *See Cook*, 728 A.2d at 1175 (citations omitted).
[10] *Lolly v. State*, Del. Supr., 611 A.2d 956 (1992).
[11] *Michael v. State*, Del. Supr., 529 A.2d 752, 755 (1987) (citing *Brady v. State of Maryland*, 373 U.S. 83 (1963).

Cook's trial testimony that he was "riding around drinking and carrying on" with friends, the blood in the car was not material to Cook's guilt or innocence.[12] Accordingly, because Cook has not demonstrated that he was entitled to a "missing evidence" jury instruction, Cook was not prejudiced by defense counsel's failure to request such an instruction. This aspect of Cook's ineffective assistance of counsel claim is barred pursuant to Rule 61(i)(3).

(20) In this case, the Superior Court's denial of Cook's motion for postconviction relief was appropriate. It is manifest on the face of Cook's opening brief that the appeal is without merit. The issues raised 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 AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice

[12] *Lolly v. State*, Del. Supr., 611 A.2d 956, 958 (1992) (where blood at the scene of the crime was material where there were no eyewitnesses who saw the defendant in the

process of committing the crime).