

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BILLY G. JOHNSON,	§
	§
Defendant Below-	§ No. 577, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. 96-07-0447
Plaintiff Below-	§
Appellee.	§

Submitted: November 25, 2002

Decided: January 6, 2003

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

ORDER

This 6th 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) The defendant-appellant, Billy G. Johnson, filed an appeal from the Superior Court's September 26, 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 Superior Court on the ground

that it is manifest on the face of Johnson's opening brief that the appeal is without merit.¹ We agree and AFFIRM.

(2) In February 1996, Johnson escaped from the Sussex Work Release Center where he was serving a probationary sentence. On April 16, 1997, Johnson pleaded guilty to Escape in the Second Degree and was sentenced to 2 years incarceration at Level V, to be suspended for decreasing levels of probation. On two separate occasions while serving his probationary sentence, Johnson tested positive for illegal drugs. In June 2000, the Superior Court found Johnson to be in violation of probation ("VOP") and reimposed a term of imprisonment.

(3) In July 2002, Johnson moved for postconviction relief in the Superior Court, arguing that, because he had never agreed to a term of probation as part of his April 16, 1997 plea agreement, he could not be sentenced to a prison term for committing a VOP. The Superior Court denied Johnson's postconviction motion, determining that the claim was untimely,² Johnson had forfeited the claim because he had failed to raise it in a direct appeal,³ and the claim was unsupported by the record, since the plea colloquy reflected that, on April 16, 1997, Johnson agreed to a suspended sentence and a term of probation as part of his plea agreement.

¹SUPR. CT. R. 25(a).

²SUPER. CT. CRIM. R. 61(i) (1).

³SUPER. CT. CRIM. R. 61(i) (3).

(4) In his appeal, Johnson claims that: a) his postconviction motion was not untimely because the Superior Court improperly relied on a sentencing date of April 16, 1997 to calculate the due date for his motion;⁴ and b) on September 26, 2000, the New Castle County Superior Court improperly “reinstated” his sentence, which had been dismissed by the Sussex County Superior Court on September 13, 1996.

(5) Johnson’s first claim is without merit. Even though the record indicates that the Superior Court’s sentencing order was not signed and docketed until September 26, 2000, it is clear that the Superior Court imposed sentence upon Johnson on April 16, 1997, immediately after he pleaded guilty to escape. Johnson’s conviction, thus, became final in May 1997⁵ and he was required to file any postconviction motion no later than May of 2000.⁶ The Superior Court, thus, properly ruled that Johnson’s postconviction motion, which was not filed until July 2002, was untimely. The record also supports the Superior Court’s determination that Johnson’s claim was procedurally defaulted because it was not asserted in the

⁴The record indicates that Johnson pleaded guilty to escape and was sentenced for that crime at the sentencing hearing on April 16, 1997. The record also indicates that, for some unknown reason, the Superior Court judge who took Johnson’s plea and imposed sentence on that date did not actually sign the sentencing order until September 26, 2000. Johnson contends that the Superior Court should have calculated the due date for his postconviction motion starting on September 26, 2000.

⁵*Jackson v. State*, 654 A.2d 829, 832-33 (Del. 1995).

⁶SUPER. CT. CRIM. R. 61(i) (1).

proceedings leading to the judgment of conviction,⁷ and the claim fell under no exception that would excuse the procedural default.⁸ Finally, the Superior Court properly determined there was no factual support for Johnson's assertion that his plea agreement did not include a term of probation.

(6) Because Johnson's second claim was not presented to the Superior Court in the first instance, he has waived the issue on appeal.⁹ The claim is without merit in any case because there is no evidence to support it. While the Superior Court docket sheet reflects that, on September 13, 1996, the Sussex County Superior Court granted a defense motion to transfer Johnson's case to New Castle County for entry of his guilty plea, there is no factual basis for Johnson's claim that the case was dismissed in Sussex County on September 13, 1996 and then improperly "reinstated" in New Castle County on September 26, 2000.

(7) It is manifest on the face of Johnson's 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, clearly there was no abuse of discretion.

⁷SUPER. CT. CRIM. R. 61(i) (3).

⁸SUPER. CT. CRIM. R. 61(i) (3) (A) and (B); SUPER. CT. CRIM. R. 61(i) (5).

⁹SUPR. CT. R. 8.

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.¹⁰

BY THE COURT:

/s/ Myron T. Steele
Justice

¹⁰On December 20, 2002, Johnson filed a "motion to compel evidence" in which he requests certain documents to support his arguments. Based upon the attachments to Johnson's opening brief, it appears that he already possesses the documents he requests, to the extent they exist. For that reason, the motion is hereby denied.