

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAVERLY N. WHITE,	§	
	§	No. 40, 2004
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County in
	§	IS02-02-0092, S02-04-0409,
STATE OF DELAWARE,	§	IS01-10-0709.
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0110013949

Submitted: April 29, 2004
Decided: August 2, 2004

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

ORDER

This 2nd day of August 2004, 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 appellant, Waverly N. White, has appealed from the Superior Court’s denial of his motion for postconviction relief pursuant to Superior Court Criminal 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 White’s opening brief that the appeal is without merit. We agree and affirm.

(2) In April 2002, a Superior Court jury found White guilty of Robbery in the First Degree, Assault in the Third Degree, and Possession of Drug Paraphernalia. The Superior Court sentenced White to twenty-four years at Level V incarceration followed by probation. On direct appeal, this Court affirmed White's conviction and sentence.¹

(3) In December 2003, White filed a motion for postconviction relief. White alleged that his trial counsel was ineffective when he failed to (a) cross-examine a State's witness, Frank Petroccitto, concerning Petroccitto's criminal record and (b) request a continuance to subpoena any other criminal records of Petroccitto. By decision dated January 8, 2004, the Superior Court summarily denied White's motion. This appeal followed.

(4) In his opening brief on appeal, White reiterates his claim that his trial counsel was ineffective in failing to cross-examine Petroccitto. According to White, had the jury been presented with information impeaching Petroccitto's credibility, the jury would have found Petroccitto's testimony unreliable, and the outcome of White's trial would have been different. White also argues that the Superior Court abused its discretion when it denied relief

¹*White v. State*, 816 A.2d 776 (Del. 2003).

without ordering responses to his motion and holding an evidentiary hearing.

White's claims are without merit.

(5) To prevail on a claim of ineffective assistance of counsel, a defendant must show that (a) counsel's representation fell below an objective standard of reasonableness, and (b) the deficiencies in counsel's representation caused actual prejudice.² Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."³ Although not insurmountable, the standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."⁴

(6) The Superior Court concluded that trial counsel's performance in cross-examining Petroccitto was reasonable, and that White provided no support for his claim that alleged errors on the part of his counsel resulted in prejudice to him. The record supports the Superior Court's conclusions.

(7) White did not in the Superior Court, and he has not on appeal, established actual prejudice from his trial counsel's failure to more thoroughly

²*Strickland v. Washington*, 466 U.S. 668, 688, 684 (1984).

³*Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996) (quoting *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990)).

⁴*Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

cross-examine Petroccitto. The Superior Court did not abuse its discretion when it denied White's ineffective assistance of counsel claim.

(8) The Superior Court is not required to conduct an evidentiary hearing on a Rule 61 motion if, on the face of the motion, it appears that the petitioner is not entitled to relief.⁵ In this case, because White did not substantiate concrete allegations of actual prejudice, his motion was subject to summary dismissal.⁶ The Superior Court properly exercised its discretion in summarily disposing of White's Rule 61 motion without requiring an evidentiary hearing.

(9) We find it manifest on the face of the opening brief that the judgment of the Superior Court should be affirmed on the basis of the Superior Court's decision of January 8, 2004. The issues on appeal are controlled by settled Delaware law. To the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

⁵*Hawkins v. State*, 2003 WL 22957025 (Del. Supr.) (citing *Maxion v. State*, 686 A.2d 148, 151 (Del. 1996)).

⁶*Grace v. State*, 1996 WL 415902 (Del. Supr.) (citing *Younger v. State*, 580 A.2d 552, 556 (Del. 1990)).

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the appellee's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice