

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACKIE JACKSON,	§	
	§	No. 568, 2003
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County in IS01-
	§	08-0268; IS01-08-0275 to 0277
STATE OF DELAWARE,	§	IS01-09-0481; IS01-08-0599
	§	to 0602.
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0107021899

Submitted: February 3, 2005  
Decided: February 17, 2005

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

**ORDER**

This 17<sup>th</sup> day of February 2005, 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, Jackie Jackson, 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 Jackson’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 September 2001, Jackson and a co-defendant, Mark Guess, were charged with numerous offenses stemming from three hotel burglaries that occurred during June and July 2001 in Rehoboth Beach and Dewey Beach, Sussex County, Delaware. Jackson and Guess were tried jointly before a jury in the Superior Court.

(3) On the eve of trial, Jackson, who had been represented by an Assistant Public Defender, requested leave to dismiss his counsel and to represent himself. After determining that Jackson's request to proceed *pro se* was knowing and voluntary,<sup>2</sup> the Superior Court granted his request and appointed his former counsel as standby counsel.

(4) On January 18, 2002, the jury convicted Jackson of two counts of Burglary in the Second Degree, and Conspiracy in the Second Degree, and one count of Misdemeanor Theft, Receiving Stolen Property, Unlawful Use of a Credit Card, and Criminal Impersonation. The jury also convicted Jackson of one count of Attempted Burglary in the Second Degree and a related count of Conspiracy in the Second Degree; however, the Superior Court vacated those offenses prior to sentencing.

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<sup>2</sup>*Briscoe v. State*, 606 A.2d 103, 107-08 (Del. 1992).

(5) On February 22, 2002, the Superior Court sentenced Jackson to a total of twenty-four years at Level V, suspended after thirteen years, for seven years at Level III and four years at Level II.<sup>3</sup> Jackson requested that his former counsel represent him on appeal. On direct appeal, this Court affirmed Jackson's conviction and sentence.<sup>4</sup>

(6) In May 2003, Jackson filed a motion for postconviction relief. In his motion as later amended, Jackson raised the following claims of error: (a) ineffective assistance of counsel; (b) violation of his constitutional right of confrontation; (c) denial of his motion to suppress; (d) denial of his motion for a continuance; (e) denial of his motion to dismiss two jurors; (f) violation of his constitutional right to counsel; (g) deficient jury instruction on reasonable doubt; (h) *Brady* violations; and (i) prosecutorial misconduct during closing argument.

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<sup>3</sup>The Superior Court denied the State's motion to declare Jackson a habitual offender.

<sup>4</sup>*Jackson v. State*, 2003 WL 161250 (Del. Supr.).

(7) The Superior Court denied Jackson's ineffective assistance of counsel claim on its merits and applied the procedural bars of Rule 61(i)(3)<sup>5</sup> and (i)(4)<sup>6</sup> to deny the remaining postconviction claims. This appeal followed.

(8) On appeal, Jackson argues that his constitutional right of confrontation was violated when he was denied the opportunity to cross-examine a hotel guest whose statements were admitted as an exception to the hearsay rule. The Superior Court denied the claim as procedurally barred pursuant to Rule 61(i)(3) for Jackson's failure to show cause for relief and prejudice from the alleged violation of his right. The claim is also barred as formerly adjudicated pursuant to Rule 61(i)(4).<sup>7</sup> Jackson has not demonstrated that reconsideration of the claim is warranted in the interest of justice.<sup>8</sup>

(9) Jackson argues that the Superior Court abused its discretion when it denied his second oral motion for continuance.<sup>9</sup> We agree with the Superior

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<sup>5</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 movant can establish cause for the procedural default and prejudice from the violation of the movant's rights).

<sup>6</sup>Rule 61(i)(4) bars a claim that is formerly adjudicated unless reconsideration is warranted in the interest of justice.

<sup>7</sup>*See Jackson v. State*, 2003 WL 161250, at \*\*3 (Del. Supr.) (determining on direct appeal that hearsay issue was moot because the convictions related to the hotel guest's statements were ultimately vacated by the Superior Court).

<sup>8</sup>Super. Ct. Crim. R. 61(i)(4).

<sup>9</sup>Jackson requested the continuance on the basis that the State allegedly did not provide required discovery until the first day of trial, leaving him without adequate time to

Court that Jackson’s claim is barred pursuant to Rule 61(i)(3), as he has shown neither cause for failure to raise the claim on his direct appeal nor prejudice as a result of the denial of a continuance. Furthermore, Jackson has not made a colorable claim of a miscarriage of justice to warrant application of the exception in Rule 61(i)(5).<sup>10</sup>

(10) “The Sixth Amendment does not grant the right to counsel at photographic displays conducted by the prosecution for the purpose of allowing a witness to attempt an identification of the offender.”<sup>11</sup> Thus, in this case, Jackson’s claim that he was entitled to have counsel at two photographic displays is barred pursuant to Rule 61(i)(3), as he has shown neither cause for failure to raise the claim nor prejudice. Moreover, Jackson has not made a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

(11) Jackson argues that the Superior Court issued a faulty and deficient jury instruction on “reasonable doubt.” Jackson’s claim is not

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prepare his defense.

<sup>10</sup>Rule 61(i)(5) provides, in part, that the bar to relief in Rule 61(i)(3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

<sup>11</sup>*Evans v. State*, 1999 WL 1090558, at \*\*2 (Del. Supr.) (citing *United States v. Ash*, 413 U.S. 300, 317-21 (1973)).

supported by the record. The Superior Court was correct to bar the claim pursuant to Rule 61(i)(3) for Jackson's failure to show cause for the procedural default and prejudice. Furthermore, Jackson has not made the requisite showing of a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

(12) Jackson contends that the State failed to disclose, or delayed the disclosure of, alleged *Brady*<sup>12</sup> material.<sup>13</sup> The Superior Court properly barred the claim pursuant to Rule 61(i)(3). The record does not support Jackson's claim. Jackson has not established that any of the material was exculpatory or that he was prejudiced as a result of any alleged deficiencies in the substance or timing of the State's discovery response.<sup>14</sup> Moreover, Jackson has not made the requisite showing of a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

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<sup>12</sup>*Brady v. Maryland*, 373 U.S. 83 (1963). A *Brady* violation occurs when the prosecutor fails to disclose favorable evidence that is material to either the guilt or punishment of the defendant.

<sup>13</sup>Jackson contends that the State failed to disclose his statement that was recorded by police, portions of the police report, and a SUSCOM tape.

<sup>14</sup>*Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988).

(13) Jackson claims that the prosecutor made an improper “supplemental charge” when, in her closing statement, she referred to a statutory rebuttable presumption that was included in the Superior Court’s jury instructions in this case.<sup>15</sup> Contrary to Jackson’s claim, however, the prosecutor did not err during closing argument when she referred to the Superior Court’s jury instruction. The Superior Court thus properly barred Jackson’s claim under Rule 61(i)(3) as he has not established cause for failing to raise the claim and prejudicial error. Furthermore, Jackson has not made the requisite showing of a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

(14) Jackson also alleges two instances of prosecutorial misconduct when the prosecutor in her closing argument allegedly misrepresented the evidence. Jackson’s claims are not supported by the record. The Superior Court thus properly barred Jackson’s claim under Rule 61(i)(3) as he has not established cause for failing to raise the claim and prejudicial error. Moreover, Jackson has not made the requisite showing of a colorable claim of a

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<sup>15</sup>Title 11, section 306(c)(2) of the Delaware Code provides that “[a] person found in possession of goods acquired as a result of the commission of a recent crime is presumed to have committed the crime.”

miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

(15) Jackson argues, as he did without success in his direct appeal, that the State presented insufficient evidence to sustain the burglary and conspiracy charges stemming from one of the hotel burglaries.<sup>16</sup> Jackson's claim is barred as formerly adjudicated.<sup>17</sup> He has not shown why the claim should be reconsidered in the interest of justice.<sup>18</sup>

(16) The Superior Court was not required to consider Jackson's untimely motion to suppress that he presented on the first morning of trial. Jackson's claim to the contrary is procedurally barred under Rule 61(i)(3), as he has shown neither cause nor prejudice for not presenting the issue on appeal. Furthermore, Jackson has not made the requisite showing of a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

(17) Jackson argues that the Superior Court should have disqualified two jurors who overheard two other jurors on the first day of trial discussing

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<sup>16</sup>*See Jackson v. State*, 2003 WL 161250, at \*\*2 (Del. Supr) (determining on direct appeal that reasonable juror could conclude from evidence that Jackson was guilty of a burglary charge and related conspiracy charge).

<sup>17</sup>Super. Ct. Crim. R. 61(i)(4).

<sup>18</sup>*Id.*



the case and commenting on the witnesses. The Superior Court determined, and we agree, that Jackson's claim is barred pursuant to Rule 61(i)(3) for his failure to show cause for the procedural default and prejudice.<sup>19</sup> Furthermore, Jackson has not made the requisite showing of a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

(18) Finally, Jackson alleges that his counsel was ineffective with respect to each of the foregoing postconviction claims. To prevail on his claim of ineffective assistance of counsel, Jackson must show that counsel's representation fell below an objective standard of reasonableness, and that the deficiencies in representation caused actual prejudice.<sup>20</sup>

(19) Having carefully reviewed Jackson's postconviction claims and the Superior Court record, including his counsel's Rule 61(g)(2) affidavit,<sup>21</sup> it is clear that Jackson has failed to establish that his counsel was ineffective and

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<sup>19</sup>The record reflects that the Superior Court carefully investigated the allegation of juror impropriety, questioned each of the jurors individually, and took appropriate action to excuse the two offending jurors. The Superior Court also reminded the remaining jurors that they must not discuss the case until all of the evidence had been presented, and that they must decide the case based solely upon the evidence presented.

<sup>20</sup>*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>21</sup>Rule 61(g) (2) provides that if a postconviction motion alleges ineffective assistance of counsel, the judge may direct the lawyer who represented the movant to respond to the allegations and may consider an affidavit submitted as part of the record.

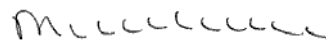
that he was prejudiced by her representation. Because Jackson did not substantiate concrete allegations of actual prejudice, the Superior Court properly exercised its discretion in summarily disposing of Jackson's Rule 61 motion without requiring an evidentiary hearing.<sup>22</sup>

(20) We find it manifest on the face of the opening brief that the judgment of the Superior Court should be affirmed. 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.

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/ Myron T. Steele  
Chief Justice



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<sup>22</sup>*Grace v. State*, 1996 WL 415902 (Del. Supr.) (citing *Younger v. State*, 580 A.2d 552, 556 (Del. 1990)).