

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK A. GUESS,	§	
	§	No. 111, 2005
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in IS01-08-
	§	0369-0371, 0379, 0393-0396,
STATE OF DELAWARE,	§	0400; IS01-09-0772, 0773;
	§	S01-10-0166, 0169, 0175,
Plaintiff Below,	§	0176, 0178, 0181, 0226, 0227.
Appellee.	§	
	§	Def. ID No. 0107018161

Submitted: May 9, 2005

Decided: August 5, 2005

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

ORDER

This 5th day of August 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, Mark A. Guess, 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 Guess' opening brief that the appeal is without merit. We agree and affirm.

(2) In September 2001, Guess and a co-defendant, Jackie Jackson, were charged with having committed three hotel burglaries the previous summer in Rehoboth Beach and Dewey Beach, Delaware. Guess, who drove the duo's get-away car, was also charged with several motor vehicle offenses for having led the police on an extended high speed car chase while fleeing from a fourth attempted hotel burglary.

(3) Guess was convicted of two counts each of Burglary in the Second Degree, Conspiracy in the Second Degree, Theft, and one count each of Receiving Stolen Property, Unlawful Use of a Credit Card, and Criminal Impersonation.¹ Guess was also convicted of Aggressive Driving, Reckless Driving, and several other motor vehicle offenses. He was sentenced to a total of twenty-one years at Level V, suspended after ten years, for eleven years of probation. On direct appeal, this Court affirmed the judgment of the Superior Court.²

(4) In January 2005, Guess filed a motion for postconviction relief. Guess alleged that (1) a hotel employee's testimony was inadmissible hearsay

¹Guess was also convicted of the charge of attempted burglary and a related conspiracy charge, but those convictions were vacated, *sua sponte*, by the Superior Court prior to sentencing.

²*Guess v. State*, 2003 WL 60491 (Del. Supr.).

and violated his right of confrontation; (2) the same testimony was in the nature of bad act evidence and should have been subject to a *Getz* analysis;³ and (3) his counsel's failure to object to the same testimony constituted ineffective assistance of counsel.

(5) By order dated February 25, 2005, the Superior Court denied Guess' ineffective assistance of counsel claim as without merit. The Superior Court denied as procedurally barred Guess' claims challenging the admissibility of the hotel employee's testimony. In this appeal that followed, Guess has not advanced the claim that his counsel was ineffective. As a result, that claim is waived and will not be addressed by this Court.⁴

(6) 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.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 procedurally barred,

³*See Getz v. State*, 538 A.2d 726, 734 (Del. 1988) (establishing guidelines governing admissibility of evidence of other crimes, wrongs or acts).

⁴*Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citing *Murphy v. State*, 632 A.2d 1100, 1152-1153 (Del. 1993)).

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

unless the movant demonstrates “cause for relief” and “prejudice” stemming from the alleged grievance. Rule 61(i)(5) states in pertinent part that the procedural bar of Rule 61(i)(3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation.

(7) At trial, the Superior Court admitted, over Guess’ hearsay objection, the testimony of a hotel employee describing a telephone call that the employee had received from a hotel patron reporting an attempted break-in. The Superior Court determined that the hotel patron’s statements made over the telephone to the hotel employee qualified as an “excited utterance” and thus were not excluded by the hearsay rule.⁶ In his postconviction motion and now on appeal, Guess alleges that the admission of the hotel employee’s testimony as to the hotel patron’s statements violated his Sixth Amendment right to confrontation.

(8) We agree with the Superior Court that Guess’ confrontation clause claim is procedurally barred.⁷ Guess has not demonstrated cause for his failure

⁶See Del. Unif. R. Evid. 803(2) (providing that an “excited utterance,” defined as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition . . .” is not excluded by the hearsay rule).

⁷The same claim raised by Jackson on appeal from the denial of postconviction relief was rejected as procedurally barred. *See Jackson v. State*, 2005 WL 528673 (Del. Supr.) (affirming denial of confrontation clause claim as procedurally barred pursuant to Rule 61(i)(3) and (i)(4)). *See also Gannon v. State*, 704 A.2d 272 (Del. 2001) (holding that

to raise the claim on direct appeal and prejudice from the alleged violation of his rights.⁸ Moreover, Guess 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 to the procedural bar.⁹

(9) Guess' claim that he was prejudiced by the admission of the hotel employee's testimony in the absence of a prior *Getz* analysis is also procedurally barred.¹⁰ Guess has not demonstrated cause for his failure to previously raise the claim, prejudice from the alleged violation of his rights,¹¹ or that he is entitled to relief from the procedural bar because of a constitutional violation.¹²

statements admitted as "excited utterance" exception to the hearsay rule did not violate the defendant's right to confrontation). *But cf. Crawford v. Washington*, 541 U.S. 36 (2004) (holding that prior out-of-court testimonial statement by witness is inadmissible if witness is unavailable and there is no opportunity to cross-examine the witness).

⁸Super. Ct. Crim. R. 61(i)(3).

⁹Super. Ct. Crim. R. 61(i)(5).

¹⁰Jackson raised a similar claim that was denied as moot on direct appeal. *See Jackson v. State*, 2003 WL 161250 (Del. Supr.) (concluding that hotel employee's testimony offered as evidence on charges eventually vacated did not prejudice Jackson in connection with other charges for which he was convicted).

¹¹Super. Ct. Crim. R. 61(i)(3).

¹²Super. Ct. Crim. R. 61(i)(5).

(10) 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 the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice