

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES UPSHUR,	§	
	§	No. 139, 2005
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in Cr. A.
	§	Nos. 02-10-1084; 02-08-0224,
STATE OF DELAWARE,	§	0225, 0234 through 0240.
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0207009470A

Submitted: May 6, 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 State's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Charles Upshur, has appealed from the Superior Court's denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The State has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of Upshur's opening brief that the appeal is without merit. We agree and affirm.

(2) Upshur was found guilty in February 2003 of Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, Possession of Marijuana, Conspiracy in the Second Degree, three counts of Possession of Drug Paraphernalia, and three counts of Endangering the Welfare of a Child. Upshur was sentenced to a total of thirty years followed by probation.

(3) On direct appeal, Upshur contended that the Superior Court should have suppressed statements that he had made during a police interrogation. This Court concluded that Upshur's statements were admissible and affirmed Upshur's conviction.¹

(4) On March 15, 2005, Upshur filed a motion for postconviction relief. Upshur alleged (1) ineffective assistance of counsel, (2) illegal sentence, and (3) illegal search and seizure. By order dated March 28, 2005, the Superior Court denied Upshur's postconviction motion. This appeal followed.

(5) When reviewing the Superior Court's denial of a postconviction motion pursuant to Rule 61, this Court must consider the procedural requirements of the rule before addressing any substantive issues.² Rule 61(i)(4) provides that any ground for relief that was formerly adjudicated is

¹*Upshur v. State*, 2004 WL 542164 (Del. Supr.).

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

thereafter barred, unless reconsideration of the claim is warranted in the interest of justice. 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 demonstrates “cause for relief from the procedural default” and “prejudice” stemming from the alleged grievance. Rule 61(i)(5) provides 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.

(6) It appears from the Superior Court record that the police stopped Upshur’s girlfriend while she was operating a vehicle registered to Upshur. The police seized paraphernalia and suspected illegal substances from Upshur’s girlfriend and two envelopes containing suspected illegal substances from Upshur’s vehicle. The suspected illegal substances seized from Upshur’s girlfriend and the vehicle field-tested positive for cocaine.

(7) After searching Upshur’s residence, the police seized more suspected illegal substances, some of which did not field-test positive for cocaine. A forensic chemist in the Office of the Chief Medical Examiner determined later, however, that all of the substances seized from Upshur’s residence tested positive for cocaine.

(8) In his postconviction motion and now on appeal, Upshur argues that his defense counsel was ineffective when he did not seek to introduce at trial the police reports indicating that some of the substances found in Upshur's residence had not field-tested positive for cocaine. To prevail on his claim of ineffective assistance of counsel, Upshur must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different.³

(9) The Superior Court concluded, and we agree, that Upshur's claim of ineffective assistance of counsel is without merit. In view of the forensic chemist's trial testimony that proved that the substances seized from Upshur's residence tested positive for cocaine, Upshur cannot establish a reasonable probability that the outcome of his trial would have been different had his defense counsel presented the results of the initial field tests conducted by the police.

(10) Second, Upshur claims, as he did in his Superior Court motion, that he should have been sentenced for possessing only 9.8 grams of cocaine (the amount that field-tested positive) as opposed to the more than 100 grams

³*Strickland v. Washington*, 466 U.S. 668 (1984).

of cocaine that were introduced into evidence at his trial. Upshur's claim is without merit. Upshur was properly sentenced for trafficking in 100 grams or more of "mixture containing cocaine"⁴ and for possessing with intent to deliver cocaine after having previously been convicted of an offense under Chapter 47.⁵

(11) Finally, Upshur claims that the evidence seized at his residence should have been suppressed because the search warrant did not establish probable cause. We agree with the Superior Court that the claim is barred pursuant to Rule 61(i)(3). Upshur has not demonstrated cause for his failure to raise the claim or prejudice from the alleged violation of his rights. Moreover, Upshur has not shown a basis under Rule 61(i)(5) to apply the exception to the procedural bar.

(12) Furthermore, having reviewed the Superior Court record, we conclude that the suppression claim is barred under Rule 61(i)(4) as formerly adjudicated.⁶ Upshur has made no showing that reconsideration of this

⁴Del. Code Ann. tit. 16, § 4753A(a)(2)(c)(2002).

⁵Del. Code Ann. tit. 16, § 4763(a)(3)(2002).

⁶In October 2002, Upshur filed a motion to suppress the evidence seized from his residence. The Superior Court rejected and returned the motion with instructions for refile; but, the motion was not refiled. Nonetheless, at a suppression hearing held on January 15, 2003, Upshur moved to suppress the statements that he had made during the police interrogation. The Superior Court denied Upshur's motion.

previously adjudicated claim is warranted in the interest of justice.⁷ A Delaware Court is not required to revisit an issue “simply because the claim is refined or restated.”⁸

(13) It is manifest on the face of Upshur’s opening brief that this appeal is without merit. The issues presented 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

⁷Super. Ct. Crim. R. 61(i)(4).

⁸*Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992) (quoting *Riley v. State*, 585 A.2d 719, 721 (Del. 1990)).