

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYLE ROANE,	§
	§
Defendant Below-	§ No. 45, 2005
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0301008114
Plaintiff Below-	§
Appellee.	§

Submitted: June 17, 2005
Decided: August 12, 2005

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

ORDER

This 12th day of August 2005, after considering the parties' briefs and the record below, it appears to the Court that:

(1) The appellant, Kyle Roane, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. We find no merit to the issues Roane raises on appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that a Superior Court jury convicted Roane in July 2003 of Robbery in the First Degree. The Superior Court sentenced Roane as an habitual offender to twenty years imprisonment. This Court

affirmed Roane's conviction and sentence on direct appeal.¹ In June 2004, Roane filed his first motion for postconviction relief. After full briefing, including an affidavit from Roane's trial counsel, the Superior Court summarily rejected Roane's motion. This appeal followed.

(3) Roane raises three issues in his opening brief on appeal.² First, Roane asserts that his trial counsel was ineffective for failing to investigate a prior inconsistent witness statement and for failing to bring the inconsistency to the jury's attention. Second, Roane asserts that his trial counsel was ineffective for failing to object to an allegedly "fraudulent predicate felony," which the Superior Court improperly relied on in sentencing Roane as an habitual offender. Third, Roane argues that the Superior Court committed reversible error in failing to give a proposed *Dixon*³ instruction.

(4) In order to establish a claim of ineffective assistance of counsel, a defendant must show: (a) counsel's representation fell below an objective standard of reasonableness; and (b) there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would

¹ *Roane v. State*, 2004 WL 1097692 (Del. Supr.).

² To the extent that Roane's postconviction motion raised additional claims not briefed on appeal, those claims have been waived. See *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

³ See *Dixon v. State*, 673 A.2d 1220, 1224-25 (Del. 1996) (holding that a person who uses no force to obtain property and who, after abandoning the property, uses force in an attempt to flee, has not committed the crime of robbery).

have been different.⁴ There is a strong presumption that counsel's representation was professionally reasonable.⁵

(5) Roane first asserts that his trial counsel was ineffective for failing to investigate and challenge at trial the prior inconsistent statement made by witness Christopher White to the police. Roane did not raise a claim concerning Christopher White's statement in his postconviction motion. To the extent Roane is now raising a new claim, that claim is barred from review because it was not presented to the Superior Court in the first instance.⁶

(6) To the extent Roane's ineffectiveness claim relates to the victim Jim Casula's statement to police,⁷ we find no merit to Roane's contention. As the Superior Court found, defense counsel was aware of the inconsistencies in the victim's prior statement and made a tactical decision to challenge those inconsistencies during the cross-examination of the investigating officer. In his affidavit, counsel stated that he chose that strategy because he believed that the victim might be able to "more credibly

⁴ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁵ *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

⁶ Del. Supr. Ct. R. 8.

⁷ In his postconviction motion, Roane argued that defense counsel was ineffective for failing to uncover and challenge inconsistencies in "the victim's" statement to police. The Superior Court interpreted "the victim" to mean Jim Casula, the store clerk whom Roane bit during the course of the robbery.

explain away such inconsistencies.” The Superior Court concluded that Roane had failed to establish that his counsel’s strategy fell below an objective standard of reasonableness. We agree. Accordingly, we find no merit to Roane’s first claim.

(7) Roane’s second claim is that his trial counsel was ineffective for failing to object to Roane’s sentencing as an habitual offender on the ground that Roane’s 1998 conviction was for simple possession rather than possession with intent to deliver. In his affidavit, defense counsel concedes that he was unaware at sentencing that Roane’s 1998 conviction was a misdemeanor and not a felony. Counsel points out, however, that, even without considering the 1998 conviction, Roane had the requisite prior felony convictions to be declared an habitual offender. In fact, the Superior Court previously had declared Roane to be an habitual offender in 2000. Accordingly, the Superior Court found that counsel’s error notwithstanding, Roane had failed to establish prejudice from his counsel’s mistake. We agree. Accordingly, we reject Roane’s second claim of ineffective assistance of counsel.

(8) Roane’s final argument on appeal is that the Superior Court erred in failing to grant defense counsel’s request for a *Dixon*⁸ instruction.

⁸ *Dixon v. State*, 673 A.2d 1220, 1226-28 (Del. 1996).

Defense counsel requested the Superior Court to instruct the jury that a person is not guilty of robbery if the person uses no force to obtain property, abandons the property, then uses force in an attempt to flee. At trial, the Superior Court concluded that the evidence did not warrant such an instruction because Roane did not abandon all of the stolen property. This Court affirmed that ruling on direct appeal. Accordingly, this final claim is procedurally barred under Superior Court Criminal Rule 61(i)(4) because it was previously adjudicated.⁹

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁹ *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992).