

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEROME D. CLARK,	§
	§
Defendant Below-	§ Nos. 347, 2001 and 362, 2001
Appellant,	§ (Consolidated)
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. VN97-11-0904-04
Plaintiff Below-	§ Cr. ID 9711003630
Appellee.	§

Submitted: January 15, 2002

Decided: April 1, 2002

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

ORDER

This first day of April 2002, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Jerome D. Clark, pleaded guilty in 1998 to one count of Robbery in the Second Degree. The Superior Court sentenced Clark to five years at Level V imprisonment, suspended after one year for four years of decreasing levels of supervision. In January 2001, Clark was arrested on new criminal charges and, as a result, a violation of probation (VOP) report was filed against him. Clark appeared with his appointed counsel at the VOP hearing in July 2001. At the start of the hearing, Clark requested a continuance so that his family could retain private

counsel for him. The Superior Court denied the continuance request. Clark requested in the alternative that he be permitted to represent himself at the hearing, which the Superior Court permitted him to do. Clark was found guilty of his fourth violation of probation (VOP). The Superior Court sentenced him, effective July 12, 2001, to a period of one year, two months, and nineteen days at Level V imprisonment, with credit given for 135 days previously served. Clark now appeals from that judgment.

(2) In his opening brief on appeal, Clark raises the following three issues: (1) his appointed counsel below was ineffective and had a conflict of interest; (2) given his appointed counsel's conflict of interest, the Superior Court erred in refusing to grant Clark a continuance on the day of the VOP hearing in order to allow Clark time to obtain new counsel; and (3) he was denied due process because he was arrested in January 2001 and was not afforded a hearing until July 2001. We have considered Clark's contentions and find them to be without merit.

(3) In his opening brief, Clark complains that his counsel was ineffective for failing to file a motion to dismiss the VOP charges. Ordinarily, this Court will not consider claims of ineffective assistance of counsel for the first time on direct appeal unless the claim was raised first to

the trial court.¹ Clark did raise vague complaints about his counsel's performance to the Superior Court at the VOP hearing, which the Superior Court rejected. To prevail on a claim of ineffective assistance of counsel, Clark must establish: (a) that defense counsel's representation fell below an objective standard of reasonableness; and (b) that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the case would have been different.² As explained further below, we find no error in counsel's refusal to file a motion to dismiss on the ground of unnecessary delay. Therefore, we reject Clark's allegation of ineffective assistance of counsel.

(4) Furthermore, we find no error in the Superior Court's refusal to grant Clark a continuance on the morning of the scheduled hearing in order to retain substitute counsel. As the Superior Court correctly noted, Clark had had sufficient time prior to the hearing to retain substitute counsel. The record reflects in fact that the VOP hearing initially had been scheduled in February, but the Superior Court postponed it at Clark's request so that Clark at that time could retain new counsel. Given Clark's prior opportunity

¹ *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

² *Outten v. State*, 720 A.2d 547, 551-52 (Del. 1998) (citing the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

to retain counsel, we find no abuse of the Superior Court's discretion in refusing Clark's last minute request for a further continuance.³

(5) Finally, we find no merit to Clark's claim that his due process rights were violated because there was unnecessary delay in scheduling the VOP hearing. The record reflects that Clark was arrested on the VOP charge in January 2001. The VOP hearing was scheduled for February but was continued at Clark's request so that he could retain substitute counsel. The hearing was then rescheduled for March but then was postponed by the Court until April. In April, the State was granted a continuance due to the absence of a witness. Thereafter, the hearing was rescheduled and was held in July.

(6) For a criminal complaint to be dismissed pursuant to Superior Court Criminal Rule 48 due to unnecessary delay, we have held that the delay, unless of constitutional dimensions, must be attributable to the prosecution and must have prejudiced the defendant in some measurable way.⁴ The record reflects that less than three months of the six-month delay in this case was attributable to the prosecution. Some of the delay was caused by Clark himself and other delay was necessitated by the Superior

³ See *Riley v. State*, 496 A.2d 997, 1018 (Del. 1985).

Court's schedule. Furthermore, a six-month delay is not sufficiently long enough to be presumptively prejudicial, and Clark has made no attempt to articulate any specific prejudice he suffered as a result of the delay. Accordingly, we reject Clark's contention that the Superior Court should have dismissed his case for unnecessary delay.

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

BY THE COURT:

/s/ Randy J. Holland
Justice

⁴ *State v. Harris*, 616 A.2d 288, 291 (Del. 1992).