

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN M. FRANKLIN,	§	
	§	No. 622, 2005
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in S03-04-
	§	1083R1 - 1089R1.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0304010407C

Submitted: February 6, 2006
Decided: May 17, 2006

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

ORDER

This 17th day of May 2006, 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, John M. Franklin, has appealed the Superior Court’s decision dated November 29, 2005, that summarily denied his first 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 Franklin’s opening brief that the appeal is without merit. We agree and affirm.

(2) In June 2003, Franklin was charged by information with eleven offenses: five counts of Rape in the First Degree, one count of Terroristic Threatening, one count of Endangering the Welfare of a Child, one count of Driving Under the Influence (fourth offense), two counts of Unlawful Sexual Contact in the Third Degree and one count of Sexual Harassment. On October 27, 2003, the Superior Court severed the charges into three cases and proceeded to a jury trial on the single charge of Driving Under the Influence (fourth offense) (“the DUI case”).

(3) The jury convicted Franklin in the DUI case. Thereafter, the trial judge ordered a presentence investigation and, in January 2004, sentenced Franklin to four years at Level V suspended after six months and upon successful completion of the Key Program, for decreasing levels of supervision. On direct appeal, this Court affirmed.¹

(4) In December 2003, the trial judge presided over Franklin’s second case, a jury trial on two counts of Unlawful Sexual Contact in the Third Degree and one count of Sexual Harassment (“the USC case”). Franklin was acquitted in the USC case.²

¹*Franklin v. State*, 2004 WL 2419098 (Del. Supr.).

²*See State v. Franklin*, Del. Super., Cr. ID No. 0304010407B, docket at 11.

(5) One month after the sentencing in the DUI case, the trial judge presided over Franklin's third case, which was also a jury trial. In that case, Franklin was convicted of five counts of Rape in the First Degree, one count of Terroristic Threatening and one count of Endangering the Welfare of a Child ("the rape case"). Immediately following the jury verdict in the rape case and after reviewing the presentence report that was filed in the DUI case, the trial judge sentenced Franklin to a total of 127 years at Level V, including seventy-five years mandatory, followed by six months at Level III. On direct appeal, this Court affirmed.³

(6) In August 2005, Franklin filed a motion for postconviction relief in the rape case. Franklin also filed a related motion to expand the record to include an affidavit,⁴ and a "motion of recusal" seeking to disqualify the trial judge from considering the postconviction motion.⁵ Franklin also requested an evidentiary hearing.

³*Franklin v. State*, 2005 WL 528674 (Del. Supr.).

⁴Franklin sought to expand the record to include an affidavit from his sister attesting to his history of learning difficulties at school.

⁵Franklin alleged that the Trial Judge's participation in the DUI case, the USC case and the rape case, was objectively improper, and that the Trial Judge was, in fact, biased and would not treat Franklin's postconviction motion fairly.

(7) The trial judge denied the recusal motion but permitted Franklin to expand the record to include the affidavit. In the same decision, the trial judge summarily denied Franklin’s postconviction motion. This appeal followed.

(8) In his opening brief on appeal, Franklin argues that his defense counsel was ineffective when she failed to make a pretrial request to disqualify the trial judge. In a related claim, Franklin argues that the trial judge abused his discretion when he declined to disqualify himself from considering the postconviction motion. As to both claims, Franklin alleges that the trial judge derived information from the DUI case and the USC case that prejudiced Franklin in the rape case.

(9) On appeal from a judge’s disqualification decision, this Court must determine “whether, as a matter of subjective belief, the judge was satisfied that he or she could proceed to hear the case free of bias or prejudice concerning a party.”⁶ In addition, the Court must determine whether objectively there was

⁶*Jackson v. State*, 684 A.2d 745, 752-53 (Del. 1996) (citing *Los v. Los*, 595 A.2d 381, 384-85 (Del. 1991)).

“an appearance of bias” that warranted the judge’s disqualification.⁷ The standard of review is abuse of discretion.⁸

(10) In this case, the trial judge subjectively determined that he could consider Franklin’s postconviction motion free from bias and prejudice. The trial judge also concluded that there was no objective basis upon which to find an appearance of bias that would disqualify him from considering Franklin’s motion.

(11) Having carefully reviewed the record and the parties’ positions on appeal, the Court is satisfied that there are no objective grounds upon which to doubt the impartiality of the trial judge and no reason to disturb his discretionary ruling.⁹ Furthermore, in view of the disposition of Franklin’s recusal issue on appeal, the Court concludes that there is no merit to the claim that Franklin’s counsel was ineffective when she failed to file a pretrial motion to disqualify.¹⁰

⁷*Id.*

⁸*Id.*

⁹*See In re Wittrock*, 649 A.2d 1053, 1054 (Del. 1994) (“[p]revious contact between the judge and a party, in the same or a different judicial proceeding, does not require automatic disqualification.”) (quoting *Los v. Los*, 595 A.2d 381, 384 (Del. 1991)).

¹⁰*Cf. Skinner v. State*, 607 A.2d 1170, 1173 (Del. 1992) (holding that rejection of the underlying substantive issue precluded a showing of prejudice on a related claim of ineffective assistance of counsel).

(12) Franklin alleges that his counsel was ineffective when she failed to produce “mitigating evidence” on Franklin’s behalf at sentencing, *i.e.*, evidence to substantiate his below average intelligence, mental illness and substance abuse. To prevail on his claim, Franklin must demonstrate that counsel’s representation at sentencing was objectively unreasonable and that, but for counsel’s unreasonable representation, there is a reasonable probability that the outcome of Franklin’s sentencing would have been different.¹¹

(13) Franklin faced a mandatory sentence of seventy-five years at Level V, *i.e.*, fifteen years at Level V for each of the five convictions of Rape in the First Degree.¹² Counsel’s failure to produce “mitigating evidence” at sentencing had no effect on the mandatory sentences imposed in Franklin’s case. Additionally, Franklin has not demonstrated that he was prejudiced as a result of his counsel’s alleged errors. The trial judge did not abuse his discretion when he determined that Franklin did not establish a meritorious claim of ineffective assistance of counsel.

¹¹*Brawley v. State*, 1992 WL 353838 (Del. Supr.) (citing *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984))).

¹²*See* Del. Code Ann. tit. 11, §§ 773(a)(1), 4205(b)(1) (providing that a person guilty of Rape in the First Degree is subject to a sentence of incarceration not less than fifteen years).

(14) Franklin argues that the trial judge abused the court's discretion when he decided Franklin's ineffective assistance of counsel claim without an affidavit from trial counsel and without conducting a hearing on the reasonableness of counsel's representation.¹³ We disagree. When considering Franklin's ineffective assistance of counsel claim, the trial judge assumed for the purpose of argument that counsel's representation was unreasonable. Given that assumption, neither an affidavit nor a hearing was necessary.¹⁴

(15) On appellate review, the Superior Court record is sufficient for us to consider the substance of Franklin's arguments in support of his motion for postconviction relief.¹⁵ Having carefully reviewed that record and the parties' submissions, it is manifest that the judgment of the Superior Court should be affirmed on the basis of its well-reasoned decision dated November 29, 2005.

¹³*See Horne v. State*, 887 A.2d 973, 974-75 (Del. 2005) (noting that a defendant's first motion for postconviction relief is the best opportunity to raise ineffective assistance of counsel, and thus the "preferable practice" in the Superior Court is to obtain an affidavit from trial counsel responding to an allegation of ineffectiveness).

¹⁴*See* Del. Super. Ct. Crim. R. 61(d)(4) (providing that the Superior Court may summarily dismiss a postconviction motion if it "plainly appears from the motion" and the record that the defendant is not entitled to relief).

¹⁵*Compare Horne v. State*, 887 A.2d 973, 975 (Del. 2005) (determining that Superior Court record without affidavit or sworn testimony was "incomplete and inadequate" on appeal to review the reasonableness of trial counsel's representation).

The issues on appeal are controlled by settled Delaware law. To the extent that judicial discretion is implicated, 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/ Henry duPont Ridgely
Justice