

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD GIBBS,	§	
	§	No. 203, 2006
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in S03-06-
	§	0519I.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0305016899
Appellee.	§	

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

Submitted: September 7, 2006

Decided: November 30, 2006

ORDER

This 30th day of November 2006, upon consideration of the appellant's opening brief and appendix, the State's motion to affirm and the Superior Court record, it appears to the Court that:

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

(2) In October 2003, a Superior Court jury convicted Gibbs of Escape after Conviction. At his sentencing in December 2003, Gibbs moved to dismiss his counsel as incompetent. The Superior Court denied the motion but, after conducting the requisite colloquy, allowed Gibbs to proceed pro se. The Superior Court declared Gibbs a habitual offender and sentenced him to twenty years at Level V with credit for time served, followed by six months at Level IV work release.

(3) In his pro se direct appeal, Gibbs alleged that (i) his conviction by an all-white jury deprived him of a fair trial; (ii) he was entitled to a jury instruction on a lesser-included offense; (iii) the Superior Court erred when instructing the jury; (iv) there was insufficient evidence to support his conviction; (v) the sentence imposed violated the Eighth Amendment; (vi) his due process rights were violated; and (vii) his defense counsel was ineffective. In his ineffective assistance of counsel claim, Gibbs reiterated the allegations of incompetence that he had previously raised in his motion to dismiss counsel as well as new allegations.

(4) By order dated February 4, 2005, this Court affirmed the Superior Court's judgment as to all of Gibbs' claims except for his claim of ineffective

assistance of counsel.¹ The Court deferred consideration of the ineffective counsel claim to give Gibbs an opportunity to raise the allegations in their entirety in the Superior Court, and the Superior Court to rule on them after developing an appropriate record.²

(5) On August 11, 2005, Gibbs filed a motion for postconviction relief and separate motions for the appointment of counsel, an evidentiary hearing, and recusal of the trial judge. Among other claims, Gibbs alleged that his defense counsel was ineffective, the Superior Court lacked jurisdiction to try him, and the Superior Court failed to inquire into his conflict with his defense counsel.

(6) The Superior Court directed that Gibbs' defense counsel ("his counsel") file an affidavit in response to the allegations of ineffectiveness. His counsel filed a lengthy affidavit opposing the allegations. By order dated March 29, 2006, the Superior Court denied Gibbs' motion for postconviction relief.³ This appeal followed.

(7) On appeal Gibbs argues some but not all of the claims that he raised in his postconviction motion. To the extent Gibbs has not briefed claims

¹*Gibbs v. State*, 2005 WL 535011 (Del. Supr.).

²*Id.* ¶ 20.

³*State v. Gibbs*, 2006 WL 1149161 (Del. Super. Ct.)

that he raised on postconviction relief, those claims on appeal are deemed waived and abandoned.⁴

(8) In a claim that he raised, but on which the Superior Court declined to rule, Gibbs argues that this Court erred when deferring consideration of his ineffective assistance of counsel claim on direct appeal. The Court concludes that Gibbs' claim is without merit.⁵

(9) 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.⁶ Rule 61(i)(3) bars from consideration any ground for relief that was not raised in the proceedings leading to the conviction unless the petitioner can establish (i) cause for failing to timely raise the claim and (ii) actual prejudice.⁷ Rule

⁴*Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

⁵*See Johnson v. State*, 765 A.2d 926, 929 (Del. 2000) (deferring consideration of plain error claims on direct appeal and remanding to Superior Court to rule in the first instance on postconviction motion); *Shockley v. State*, 2006 WL 1277809 (Del. Supr.) (declining consideration of postconviction claims that were neither raised nor ruled upon in the Superior Court).

⁶*Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁷Del. Super. Ct. Crim. R. 61(i)(3) (2006).

61(i)(5) provides in part that the procedural bar of Rule 61(i)(3) shall not apply to a jurisdictional claim.⁸

(10) Gibbs argues on appeal that the Superior Court lacked jurisdiction to try him because of an invalid waiver of preliminary hearing. The record reflects, however, that Gibbs waived his preliminary hearing and was properly charged by information.⁹ Gibbs' jurisdictional claim is barred pursuant to Rule 61(i)(3), as he has provided no basis under Rule 61(i)(5) to excuse the procedural default.

(11) Gibbs argues on appeal that the Superior Court failed to inquire into the conflict with his counsel. The sentencing transcript reflects, however, that the Superior Court thoroughly considered Gibbs' conflict with his counsel. Gibbs' claim to the contrary is barred pursuant to Rule 61(i)(3), as he has not demonstrated a basis under Rule 61(i)(5) upon which to excuse the procedural default.

(12) Gibbs argues on appeal that his counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, Gibbs must show that (i)

⁸Del. Super. Ct. Crim. R. 61(i)(5) (2006).

⁹See Del. Super. Ct. Crim. R. 7(b) (2006) (providing that an offense may be prosecuted by information if the defendant waives prosecution by indictment).

his counsel's representation fell below an objective standard of reasonableness, and (ii) the deficiencies in his counsel's representation caused actual prejudice.¹⁰

(13) The Court has carefully considered Gibbs' allegations ineffective counsel in conjunction with the record. The record supports the Superior Court's findings that his counsel's performance was reasonable and/or that Gibbs did not demonstrate that alleged error on the part of his counsel was prejudicial to his case.

(14) 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, there was no abuse of discretion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹⁰*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).