

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY L. JOHNSON,	§
	§
Defendant Below-	§ No. 617, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. No. S98-06-0595
Plaintiff Below-	§
Appellee.	§

Submitted: January 29, 2003

Decided: March 6, 2003

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices

**ORDER**

This 6<sup>th</sup> day of March 2003, 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 defendant-appellant, Gary L. Johnson, filed an appeal from the Superior Court's October 8, 2002 order denying his 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 Johnson's opening brief that the appeal is without merit.<sup>1</sup> We agree and AFFIRM.

(2) In February 1999, Johnson was found guilty by a Superior Court jury of Delivery of Cocaine. He was sentenced to 25 years incarceration at Level V, to be suspended after 15 years for 1 year at Level IV Home Confinement and 9 years at Level III probation. This Court affirmed Johnson's conviction and sentence on direct appeal.<sup>2</sup>

(3) In this appeal, Johnson claims that his counsel provided ineffective assistance by failing to argue, both at trial and on appeal, that the Superior Court did not follow *Brookins v. State*, 354 A.2d 422 (Del. 1976) in admitting a police photograph of him into evidence.<sup>3</sup> To the extent Johnson has not argued other grounds to support his appeal that were raised previously, those grounds are deemed waived and will not be addressed by this Court.<sup>4</sup>

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<sup>1</sup>SUPR. CT. R. 25(a).

<sup>2</sup>*Johnson v. State*, Del. Supr., No. 164, 1999, Walsh, J. (Dec. 20, 1999).

<sup>3</sup>Under *Brookins*, there are 3 prerequisites for the admission of a police photo into evidence: a) the prosecution must show a demonstrable need to introduce the photo; b) the photo must not imply that the defendant has a prior criminal record; and c) the introduction of the photo must not draw particular attention to its source.

<sup>4</sup>*Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his motion for postconviction relief, Johnson also argued that his counsel provided ineffective assistance by failing to argue, at trial and on appeal, that the evidence presented at trial was insufficient to support  
(continued...)

(4) In order to prevail on his claim of ineffective assistance of counsel, Johnson must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.<sup>5</sup> Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."<sup>6</sup>

(5) Johnson has provided no evidence that his counsel's representation fell below an objective standard of reasonableness. In fact, his counsel did argue, both at trial and on direct appeal, that the police photograph should not be admitted into evidence because it was unduly suggestive.<sup>7</sup> Furthermore, Johnson has provided no evidence that an explicit citation to *Brookins* by his counsel would have had any impact on the outcome of his trial.

(6) It is manifest on the face of Johnson's opening brief that this appeal is without merit because the issues presented on appeal are controlled

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<sup>4</sup>(...continued)  
his conviction.

<sup>5</sup>*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>6</sup>*Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

<sup>7</sup>Also, the trial transcript reflects that the Superior Court did, at least implicitly, engage in a *Brookins* analysis when it decided to admit the police photo into evidence.

by settled Delaware law and, to the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

s/ Joseph T. Walsh  
Justice