

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN FOLKS,	§
	§ No. 563, 2006
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0306015047A
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 26, 2007

Decided: February 26, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 26th day of February 2007, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, John Folks, filed an appeal from the Superior Court's September 25, 2006 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In January 2004, Folks was found guilty by a Superior Court jury of Robbery in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. He was sentenced as a habitual offender to a total of 40 years of Level V incarceration. On direct appeal,

this Court affirmed Folks' conviction, but vacated his sentences on the ground that the State had not established Folks' habitual offender status beyond a reasonable doubt.¹ On remand, the Superior Court sentenced Folks on the robbery conviction to 12 years of Level V incarceration, to be suspended after 10 years for 2 years of probation, and on the weapon conviction to 10 years of Level V incarceration. Those sentences were affirmed by this Court on direct appeal.²

(3) In this appeal, Folks claims that a) his robbery and weapon convictions constitute a violation of double jeopardy; b) the State violated his constitutional rights during the jury selection process; c) the Superior Court abused its discretion by permitting the State to file its response to his postconviction motion beyond the due date, ignoring his arguments, and failing to schedule an evidentiary hearing; and d) his counsel provided ineffective assistance at trial and on appeal.

(4) Folks' first claim is that his robbery and weapon convictions constitute a violation of double jeopardy. Because Folks failed to present this claim in his direct appeal, it is barred in this proceeding³ unless he can

¹ *Folks v. State*, Del. Supr., No. 291, 2004, Steele, C.J. (Apr. 25, 2005).

² *Folks v. State*, Del. Supr., No. 311, 2005, Steele, C.J. (Jan. 26, 2006).

³ Super. Ct. Crim. R. 61(i) (3).

demonstrate a miscarriage of justice because of a constitutional violation.⁴ This Court has consistently rejected the claim that concurrent convictions of robbery and weapon violations constitute a violation of double jeopardy.⁵ Thus, in the absence of any evidence of a constitutional violation, we conclude that Folks' first claim is procedurally barred.

(5) Folks' second claim is that the State violated his constitutional rights by preventing African-Americans from serving on his jury.⁶ Once again, because this claim was not raised in Folks' direct appeal, it is barred in this proceeding⁷ unless he can demonstrate a miscarriage of justice because of a constitutional violation.⁸ In order to succeed on this claim, Folks must demonstrate that the prosecution improperly exercised its peremptory challenges with the intention of removing African-Americans from the venire.⁹ While Folks refers to the transcript of jury selection in support of his claim, the transcript does not reflect the existence of a constitutional violation. In the absence of any such record evidence, we conclude that Folks' second claim also is procedurally barred.

⁴ Super. Ct. Crim. R. 61(i) (5).

⁵ *Thomas v. State*, 467 A.2d 954, 959 (Del. 1983).

⁶ The record reflects that Folks is an African-American.

⁷ Super. Ct. Crim. R. 61(i) (3).

⁸ Super. Ct. Crim. R. 61(i) (5).

⁹ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

(6) Folks' third claim is that the Superior Court abused its discretion in connection with his postconviction motion---specifically, by permitting the State to file its response to his postconviction motion beyond the due date, ignoring his arguments by failing to cite the cases he cited, and failing to schedule an evidentiary hearing.

(7) While the record reflects that the Superior Court gave the State an extension in which to file its response to Folks' postconviction motion, there is no evidence that the Superior Court abused its discretion in so doing.¹⁰ There is, furthermore, no evidence that, because it did not cite the same cases Folks did, the Superior Court ignored arguments made by Folks in his postconviction motion. Rather, the Superior Court's decision reflects that it properly addressed Folks' claims and cited the appropriate authority in denying those claims. Finally, there is no support for Folks' claim that the Superior Court abused its discretion by determining that an evidentiary hearing was unnecessary to its decision on Folks' postconviction motion.¹¹

(8) Folks' final claim is that his counsel provided ineffective assistance both at trial and on appeal. In order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness

¹⁰ Super. Ct. Crim. R. 45(b).

¹¹ Super. Ct. Crim. R. 61(h)(1) and (3).

and that, but for his counsel's unprofessional errors, the result of the proceeding would have been different.¹² Moreover, the defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal of his claims.¹³

(9) To the extent Folks argues that his counsel provided ineffective assistance by failing to assert a double jeopardy violation and a *Batson* violation, any such argument must fail. Folks' counsel cannot be faulted for failing to raise claims that have been determined to be without merit. Folks claims that his trial counsel provided ineffective assistance by failing to object to the Superior Court's initial finding that he was a habitual offender. However, because Folks' habitual offender sentence was vacated in his initial appeal,¹⁴ he cannot demonstrate that any error on the part of his counsel with respect to that sentence resulted in prejudice to him. Folks' various claims of error on the part of his counsel during the course of trial were properly denied by the Superior Court as too conclusory and vague to merit consideration.¹⁵ Finally, Folks claims that his appellate attorney "abandoned" him by filing a Rule 26(c) brief in his second appeal after re-sentencing. Rule 26(c) permits an attorney to withdraw if there is no merit

¹² *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¹³ *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

¹⁴ *Folks v. State*, Del. Supr., No. 291, 2004, Steele, C.J. (Apr. 25, 2005).

¹⁵ *Dawson v. State*, 673 A.2d at 1196.

to an appeal. Here, this Court found no merit to Folks' second appeal, thereby agreeing that counsel's withdrawal was appropriate.¹⁶

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹⁶ *Folks v. State*, Del. Supr., No. 311, 2005, Steele, C.J. (Jan. 26, 2006).