

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BILLY G. JOHNSON,	§
	§ No. 641, 2011
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0611012659
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 17, 2012

Decided: February 6, 2012

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

ORDER

This 6th day of February 2012, 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, Billy G. Johnson, filed an appeal from the Superior Court’s November 8, 2011 order denying his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) The record before us reflects that, in 2008, Johnson was found guilty by a Superior Court jury of Delivery of Cocaine and Conspiracy in the Second Degree. He was sentenced as a habitual offender to a total of 7 years of Level V incarceration, to be suspended after 5 years for probation. Johnson's convictions were affirmed by this Court on direct appeal.² Johnson's first two postconviction motions were denied by the Superior Court. This Court affirmed the Superior Court's denial of his first postconviction motion.³ Johnson now appeals from the Superior Court's denial of his third postconviction motion.

(3) In this appeal, Johnson claims that a) his constitutional rights were violated when he was convicted of the crime of Liability for the Conduct of Another, which did not appear in his indictment; and b) his attorney provided ineffective assistance when he failed to object to the jury instruction on accomplice liability, which, in essence, subjected him to a finding of guilt on that unindicted charge.

¹ Supr. Ct. R. 25(a).

² *Johnson v. State*, Del. Supr., No. 592, 2008, Jacobs, J. (July 13, 2009).

³ *Johnson v. State*, Del. Supr., No. 206, 2010, Berger, J. (Sept. 21, 2010). Johnson did not appeal from the Superior Court's denial of his second postconviction motion.

(4) Prior to addressing the merits of claims made in postconviction motions, the Superior Court is required to apply the procedural requirements of Rule 61.⁴ The record before us reflects that Johnson's first claim was previously raised and decided against him in his first postconviction motion. Because we conclude that reconsideration of the claim is not warranted in the interest of justice under Rule 61(i) (4), Johnson is procedurally barred from pursuing the claim again in these proceedings and the Superior Court properly so found.

(5) Johnson's second claim is that his counsel provided ineffective assistance by failing to object to the Superior Court's jury instruction on accomplice liability, subjecting him to a finding of guilt on an indicted charge. Because the record before us does not reflect that there was any proper basis for objecting to that jury instruction, we conclude that Johnson's second claim is meritless⁵ and the Superior Court properly so found.

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

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

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/ Myron T. Steele
Chief Justice