IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEORGE P. JOHNSON,	§
	§ No. 570, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr. ID No. 0706025356
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 14, 2013 Decided: February 14, 2013

Before HOLLAND, BERGER and JACOBS, Justices

ORDER

This 14th day of February 2013, 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, George P. Johnson, filed an appeal from the Superior Court's October 12, 2012 order denying his motion for a new trial pursuant to Superior Court Criminal Rule 33. 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 this appeal is without merit.¹ We agree and affirm.

- (2) The record before us reflects that, in April 2008, following a two-day trial, Johnson was found guilty by a Superior Court jury of Delivery of Cocaine to a Minor, Delivery of Cocaine Within 300 Feet of a Park and Criminal Trespass in the Third Degree.² He was sentenced to a total of 20 years of Level V incarceration, to be suspended after 10 years for decreasing levels of supervision. This Court affirmed Johnson's convictions on direct appeal.³ In December 2008, Johnson filed a Rule 61 motion for postconviction relief. This Court affirmed the Superior Court's denial of that motion.⁴
- (3) In his appeal from the Superior Court's denial of his motion for a new trial, Johnson claims that the Superior Court erroneously denied his motion because "newly discovered evidence" establishes that the police officer who testified that he witnessed the drug transaction lied under oath because his view was obstructed by buildings in the area. The "newly discovered evidence" upon which Johnson relies is a map and photographs

¹ Supr. Ct. R. 25(a).

² The jury acquitted Johnson of the charge of Endangering the Welfare of a Child.

³ Johnson v. State, Del. Supr., No. 204, 2008, Jacobs, J. (Sept. 19, 2008).

⁴ Johnson v. State, Del. Supr., No. 182, 2009, Jacobs, J. (Aug. 11, 2009).

of the area surrounding the Liberty Court Apartments in Dover, Delaware, where the police officer testified that the drug transaction occurred.

- (4) Rule 33 requires that a motion for a new trial based upon newly-discovered evidence be filed within two years of final judgment. The judgment in Johnson's case was final in 2008. Because Johnson's motion was filed over three years after the judgment became final, and because the time limits of Rule 33 are "jurisdictional and mandatory," we conclude that Johnson's motion was untimely under Rule 33. While the Superior Court denied Johnson's motion on substantive grounds, this Court may affirm the decision on grounds different from those relied upon by the Superior Court. Because we conclude that Johnson's motion was untimely, we, therefore, affirm the Superior Court's judgment, albeit on the basis of a different rationale than that used by the Superior Court.
- (5) 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.

⁸ Unitrin v. Amer. Gen. Corp., 651 A.2d 1361, 1390 (Del. 1995).

⁵ *Maxion v. State*, 686 A.2d 148, 151 (Del. 1996).

⁶ Downes v. State, 771 A.2d 289, 291 (Del. 2001).

⁷ The Superior Court found Johnson's "newly-discovered evidence" to be merely impeachment evidence and, therefore, concluded that Johnson had offered no independent substantive evidence meriting a new trial. *Downes v. State*, 771 A.2d at 291.

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/ Carolyn Berger Justice