

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORMAN HENRY,	§
	§
Defendant Below,	§ No. 110, 2015
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware,
	§ in and for Sussex County
STATE OF DELAWARE,	§
	§ Cr. ID No. 1206004571
Plaintiff Below,	§
Appellee.	§

Submitted: June 22, 2015

Decided: September 8, 2015

Before **HOLLAND, VALIHURA, and VAUGHN**, Justices.

**ORDER**

This 8<sup>th</sup> day of September 2015, upon consideration of the appellant’s Supreme Court Rule 26(c) brief, the State’s response, and the record below, it appears to the Court that:

(1) On August 20, 2012, the appellant, Norman Henry, pled guilty to Drug Dealing. During his guilty plea colloquy with the Superior Court, Henry affirmed that he was guilty of Drug Dealing and subject to sentencing as a habitual offender under 11 *Del. C.* § 4214(a). The Superior Court sentenced Henry as a

habitual offender to eight years of Level V incarceration. Henry filed an untimely appeal, which was dismissed.<sup>1</sup>

(2) On April 21, 2014, Henry filed his first motion for postconviction relief under Superior Court Criminal Rule 61 (“Rule 61”). Henry argued that his trial counsel provided ineffective assistance and that the State failed to produce evidence in violation of *Brady v. Maryland*.<sup>2</sup> On May 7, 2014, the Office of the Public Defender filed a motion for postconviction relief in Henry’s case. The Public Defender argued that Henry’s conviction should be vacated because the State’s failure to disclose misconduct at the Office of the Chief Medical Examiner (“OCME”) violated *Brady v. Maryland*.

(3) In a letter dated May 27, 2014, the Public Defender informed the Superior Court that it had mistakenly identified Henry as someone eligible for Rule 61 relief based on misconduct at the OCME and withdrew the motion. Henry informed the Superior Court that he was convicted of Drug Dealing and was therefore eligible for Rule 61 relief based upon misconduct at the OCME. Henry also stated that he wanted to withdraw his *pro se* motion for postconviction relief and proceed with the motion filed by the Public Defender. The Superior Court notified the Public Defender that Henry was convicted of Drug Dealing.

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<sup>1</sup> *Henry v. State*, 2013 WL 3929191 (Del. July 25, 2013).

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”).

(4) On July 28, 2014, the Superior Court informed Henry that the Public Defender would re-enter their appearance and represent him on the OCME issues. In a letter dated September 22, 2014, the Superior Court stated that it had received confirmation from the Office of Conflict Counsel that postconviction counsel (“Postconviction Counsel”) was appointed to represent Henry. The Superior Court entered a schedule for the postconviction proceedings.

(5) On October 6, 2014, Henry filed an amended *pro se* motion for postconviction relief. This motion was essentially a duplicate of the motion for postconviction relief that the Public Defender filed on May 7, 2014. Henry argued that his conviction should be vacated because the State’s failure to disclose misconduct at the Office OCME violated *Brady v. Maryland*.

(6) The Superior Court informed Postconviction Counsel that any filings needed to come from his office and that he had until October 30, 2014 to file any amendments to the Rule 61 motion. Postconviction Counsel informed the Court that Henry wished to proceed on the amended motion for postconviction relief filed on October 6, 2014. After trial counsel filed an affidavit in response to Henry’s motion and the State filed a response, the Superior Court informed the parties that they could disregard the scheduling order because the sole issue raised by Henry’s motion related to OCME misconduct.

(7) On February 16, 2015, the Superior Court denied Henry's amended motion for postconviction relief. The Superior Court found that Henry was bound by his representations during the August 20, 2012 guilty plea colloquy. The Superior Court also noted that the OCME misconduct related to pilfering of drugs and not false testing reports. This appeal followed.

(8) On appeal, Postconviction Counsel filed a brief and a motion to withdraw under Supreme Court Rule 26(c) ("Rule 26(c)"). Postconviction Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. Postconviction Counsel informed Henry of the provisions of Rule 26(c) and provided Henry with a copy of the motion to withdraw and the accompanying brief. Postconviction Counsel also informed Henry of his right to identify any points he wished this Court to consider on appeal. Henry raised one issue for this Court's consideration. The State has responded to Henry's submission and asked this Court to affirm the Superior Court's judgment.

(9) When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), this Court must: (i) be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (ii) conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an

adversary presentation.<sup>3</sup> This Court reviews the Superior Court’s denial of postconviction relief for abuse of discretion and questions of law *de novo*.<sup>4</sup> The Court must consider the procedural requirements of Rule 61 before addressing any substantive issues.<sup>5</sup>

(10) On appeal, the only issue Henry raises is based on the Public Defender’s argument in a different Superior Court case that the OCME misconduct rendered a guilty plea involuntary under *Brady v. United States*.<sup>6</sup> No arguments based upon *Brady v. United States* were made in the Superior Court proceedings. We will not consider Henry’s *Brady v. United States* claim for the first time on appeal.<sup>7</sup>

(11) Postconviction Counsel properly concluded that there are no arguably appealable issues. Henry’s motion for postconviction relief was time-barred<sup>8</sup> unless he could plead a colorable claim of a miscarriage of justice due to a

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<sup>3</sup> *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *Leacock v. State*, 690 A.2d 926, 927-28 (Del. 1996).

<sup>4</sup> *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

<sup>5</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>6</sup> 397 U.S. 742, 750-57 (1970) (holding “a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise” while recognizing that agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant).

<sup>7</sup> Supr. Ct. R. 8.

<sup>8</sup> Superior Ct. Crim. 61(i)(1) (providing that motion for postconviction relief may not be filed more than one year after conviction becomes final). Henry’s conviction became final in September 2012, but he did not file his motion for postconviction relief until April 2014.

constitutional violation.<sup>9</sup> After Henry filed his amended motion for postconviction relief in October 2014, this Court held that a defendant's valid guilty plea waives any right to challenge the strength of the State's evidence, including the chain of custody of the drug evidence.<sup>10</sup> This Court has rejected claims that the State's failure to disclose misconduct at the OCME constitutes a colorable claim of a miscarriage of justice.<sup>11</sup> The plea colloquy in this case reflects that Henry entered his guilty plea knowingly, intelligently, and voluntarily and affirmed that he was guilty of Drug Dealing. Henry cannot reopen his case to make claims that do not address his guilt and involve impeachment evidence that would only be relevant at a trial.<sup>12</sup>

(12) Under the circumstances of this case, we are satisfied that Postconviction Counsel has made a conscientious effort to examine the record and the law and has properly determined that Henry could not raise a meritorious claim in this appeal. We also conclude that Henry's appeal is wholly without merit and devoid of any arguably appealable issue.

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<sup>9</sup> Super. Ct. R. 61(i)(5) (providing Rule 61(i)(1) does not apply to colorable claim of miscarriage of justice). This is the version of Rule 61(i)(5) that was in effect when Henry filed his first motion for postconviction relief in April 2014. Rule 61 was subsequently amended.

<sup>10</sup> *Brown v. State*, 108 A.3d 1201, 1202 (Del. 2015).

<sup>11</sup> See, e.g., *McMillan v. State*, 2015 WL 3444673, at \*2 (Del. May 27, 2015) (concluding defendant who entered knowing and voluntary guilty plea did not plead colorable claim of miscarriage of justice based on *Brady v. Maryland* claim involving misconduct at OCME); *Brown v. State*, 2015 WL 3372271, at \*2 (Del. May 22, 2015) (same).

<sup>12</sup> *Brown v. State*, 108 A.3d at 1202; *McMillan v. State*, 2015 WL 3444673, at \*2; *Brown v. State*, 2015 WL 3372271, at \*2.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Karen L. Valihura  
Justice