IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALLISON LAMONT NORMAN,	§	
	§	No. 155, 2013
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0504005647A
Appellee.	§	

Submitted: September 20, 2013
Decided: December 17, 2013

Before **HOLLAND, JACOBS** and **RIDGELY,** Justices.

O R D E R

This 17th day of December 2013, it appears to the Court that:

(1) The appellant, Allison Lamont Norman, has appealed the Superior Court's denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. After careful consideration of the parties' briefs on appeal and the Superior Court record, the Court has concluded that the denial of postconviction relief should be affirmed.

(2) The record reflects that on April 7, 2005, Norman went on a shooting spree that began in Laurel, Delaware, and ended in Salisbury, Maryland. Along the way, Norman shot at several people, killing two and wounding several others, leaving one woman paralyzed.

(3) Norman was indicted in Maryland and Delaware for murder and other offenses. Maryland authorities, however, decided not to prosecute Norman after determining that, under Maryland law, Norman was suffering from a mental disorder on April 7, 2005 that made him "not criminally responsible" for his conduct that day.[1]

(4) In Delaware, Norman asserted an insanity defense at his Superior Court jury trial. Hoping to obtain a verdict of "not guilty by reason of insanity," Norman sought to convince the jury that he lacked "substantial capacity to appreciate the wrongfulness of [his] conduct."[2] The jury also considered the option of rendering a verdict of "guilty, but mentally ill."[3]

(5) In his case in chief, Norman presented expert testimony that supported his insanity defense and a "not guilty by reason of insanity" verdict. In rebuttal, the State sought to negate the insanity defense and a "not guilty by reason of insanity" verdict by presenting expert and other testimony that Norman's mental state on April 7, 2005 was proximately caused by voluntary intoxication.[4]

(6) On June 21, 2007, after a three-week trial, the jury found Norman guilty of Murder in the First Degree and the other offenses that were charged in the

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[1] Md. Code Ann., Crim. Proc § 3-109 (2013).

[2] Del. Code Ann. tit. 11, § 401(a) (Supp. 2013).

[3] Del. Code Ann. tit. 11, § 401(b).

[4] Del. Code Ann. tit. 11, §§401(c), 421.

Delaware indictment. The jury rejected Norman's insanity defense and a "guilty, but mentally ill" verdict. After a four-day penalty hearing, the jury voted unanimously in favor of the death penalty. On September 28, 2007, the Superior Court sentenced Norman to death.

(7) On direct appeal, this Court affirmed the Superior Court judgment of conviction but reversed the death sentence and remanded for a new penalty hearing.[5] On remand the State elected not to pursue a second penalty hearing, and on July 31, 2009, the Superior Court sentenced Norman to life in prison.

(8) On June 7, 2010, Norman filed a *pro se* motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61"). Norman also filed a motion for appointment of counsel, which the Superior Court granted in October 2010.

(9) In October 2011, after several months of apparent discord between Norman and his court-appointed counsel (hereinafter "Counsel"), Norman requested the appointment of new counsel. After a hearing on November 17, 2011, the Superior Court declined to appoint new counsel, but informed Norman that he could supplement the postconviction motion prepared by Counsel with issues he wanted the court to consider.

[5] *Norman v. State*, 976 A.2d 843 (Del. 2009).

(10) Counsel's postconviction motion and Norman's supplement to the motion collectively alleged claims of ineffective assistance of counsel, both trial and appellate, claims of error made by the Superior Court trial judge, and claims of prosecutorial misconduct. By memorandum opinion dated March 6, 2013, the Superior Court denied the postconviction motion as supplemented. This appeal followed.

(11) On appeal, Norman's second motion for appointment of counsel remains pending before the Court. The Court previously considered Norman's first motion for appointment of counsel and his motion and affidavit to proceed *pro se* on appeal. By Order dated May 1, 2013, the Court granted Norman's request to proceed *pro se* after concluding that Norman's dissatisfaction with his Superior Court court-appointed counsel did not justify the appointment of different counsel on appeal.

(12) Having considered Norman's second motion for appointment of counsel, and the State's response, the Court has again determined that Norman's motion should be denied. Rule 61(e), as amended, provides for the appointment of counsel in an indigent defendant's first postconviction proceeding. In this case, the Superior Court granted Norman's motion for appointment of counsel and appointed Counsel to represent him. Norman's subsequent dissatisfaction with his court-appointed counsel did not justify the appointment of different counsel in the

postconviction proceedings, and it does not justify the appointment of different counsel on appeal.[6]

(13) We review the Superior Court's denial of postconviction relief for abuse of discretion and review questions of law *de novo*.[7] Claims raised on appeal that were not raised in the underlying postconviction proceedings are generally not reviewed in the absence of plain error.[8]

(14) To establish ineffective assistance of trial counsel, Norman must demonstrate that trial counsel's representation fell below an objective standard of reasonableness and that, but for trial counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different.[9] Mere allegations of ineffectiveness will not suffice; a defendant must make and substantiate concrete allegations of actual prejudice.[10] Moreover, there is a strong presumption that trial counsel's conduct fell within a wide range of reasonable professional assistance and constituted sound trial strategy.[11]

(15) On appeal, Norman alleges that his trial counsel did not submit the State's case to "meaningful adversarial testing," did not adequately investigate and

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[6] *Bultron v. State*, 897 A.2d 758, 763 (Del. 2006).

[7] *Guy v. State*, ___ A.3d ___, 2013 WL 6224483, at *2 (Del. Nov. 27, 2013).

[8] Del. Supr. Ct. R. 8.

[9] *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

[10] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

[11] *Strickland v. Washington*, 466 U.S. at 689.

obtain evidence of a history of mental illness in Norman's family, and did not request instructions on the lesser-included offenses of second degree murder and manslaughter. Norman also alleges several instances of ineffective assistance of trial counsel arising from the *voir dire* of the jury.

(16) First, Norman contends that trial counsel allowed the State "to submit any/all evidence they wanted without objection," whether or not the evidence had any relevance to the crimes. He takes particular exception to trial counsel having stipulated to the admission of toxicology reports, contending that the toxicology reports, and counsel's failure to object to references made at trial about his alleged drug dealing, aided the State in rebutting the insanity defense.

(17) In their Rule 61(g) affidavit filed in response to Norman's claims of ineffective assistance of counsel, trial counsel averred that Norman, "at all times both pre-trial and during trial," was in agreement that "the defense trial strategy was to pursue a verdict of not guilty by reason of insanity." According to trial counsel, "[Norman] and counsel also agreed that there was little, if anything, to be gained by contesting the evidence of [Norman's] conduct leading to his arrest." As a result, trial counsel did not challenge the evidence that proved Norman's conduct, and instead attempted to use that evidence to support a verdict of "not guilty by reason of insanity."

(18) The Superior Court found the defense strategy "reasonable,"[12] and the defense tactic of stipulating to the toxicology reports "reasonable and appropriate," because "defense counsel knew they had to expose and address [Norman's] criminal lifestyle, including [his admitted] drug usage."[13] Having considered the parties' positions on appeal and the Rule 61(g) affidavit, we conclude, for the reasons stated by the Superior Court, that this aspect of Norman's claim of ineffective assistance of trial counsel is without merit.

(19) Norman next claims that his trial counsel were ineffective because they did not adequately investigate and obtain in a timely fashion available evidence of mental illness in Norman's family history that would have supported the insanity defense. The Superior Court denied the claim, ruling that Norman had not established "that there is any relevant connection between the diagnosis by his doctors and any mental illness of an aunt and a cousin."[14] Upon review of the claim on appeal, we agree with the Superior Court's analysis.

(20) Next, Norman claims that his trial counsel were ineffective because they did not request jury instructions on the lesser-included offenses of second degree murder and manslaughter based on extreme emotional distress. The Superior Court concluded that trial counsel made a reasonable strategic decision

[12] *State v. Norman*, 2013 WL 1090944, at *13 (Del. Super. March 6, 2013).

[13] *Id.*

[14] *Id.* at *15.

not to request jury instructions on lesser-included offenses. On appeal, we agree for the reasons assigned by the Superior Court.

(21) Next, Norman claims that his trial counsel were ineffective and the Superior Court erred when the jury was not instructed that the State had the burden of proving voluntary intoxication beyond a reasonable doubt. The Superior Court concluded that the claim lacked merit, ruling:

> What the proposed instruction suggests is that if the defense attempts to establish the affirmative defense of insanity by a preponderance of the evidence, then the State's rebuttal evidence must be beyond a reasonable doubt. The Court is satisfied this is not a proper statement of Delaware law. The burden of proving all elements of the crimes charged remains on the State throughout the trial, regardless of an insanity defense. The instructions make this clear.
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> But if the State pushes back with evidence contrary to the defendant's affirmative defense evidence, the evidentiary standard applied by the jury remains "by a preponderance of the evidence."[15]

We agree with the Superior Court's analysis and conclude that Norman's claim is without merit.

(22) In his final claim of ineffective assistance of trial counsel, Norman alleges several instances of ineffectiveness arising from the *voir dire* of the jury. The Court agrees with the denial of Norman's claim for the reasons assigned by the Superior Court. To the extent Norman makes a claim on appeal that the Superior Court committed plain error by failing to thoroughly investigate a phone

[15] *Id.* at *7-8.

call made to an alternate juror, it does not appear that the claim was raised at trial, on appeal, or in the postconviction motion as supplemented. Therefore, the Court, in its discretion, declines to consider the claim for the first time on appeal.[16]

(23) In another claim raised for the first time on appeal, Norman contends that the Superior Court erred when it instructed the jury on voluntary intoxication. On plain error review, the Court concludes that the claim is without merit. The crux of the case was whether or not Norman's alleged insanity was the result of voluntary intoxication.

(24) The Court has considered three claims of trial court error that Norman raised in the Superior Court as claims of ineffective assistance of counsel. First, Norman claims that the Superior Court erred when admitting a witness' out-of-court statement under title 11, section 3507 of the Delaware Code.[17] The Superior Court concluded that the related ineffective assistance of counsel claim was without merit. On appeal, we agree and further conclude, on plain error review, that the Superior Court did not err when admitting the out-of-court statement. It appears that the issue was thoroughly reviewed by the trial judge, who ruled that the witness' statement was voluntary. Moreover, when further considering the issue on postconviction relief, and with the benefit of this Court's decision in

[16] Del. Supr. Ct. R. 8.

[17] *See* Del. Code Ann. tit. 11, § 3507 (2010) (governing the use of prior statements as affirmative evidence).

Taylor v. State, the Superior Court affirmed its voluntariness ruling.[18] On appeal, we can discern no basis to disturb the ruling and affirm for the reasons given by the Superior Court.

(25) Second, Norman claims on appeal that the Superior Court made a prejudicial error when admitting evidence that cocaine and marijuana was found in his girlfriend's car outside of his home. The Superior Court concluded that the related ineffective assistance of counsel claim was without merit. On appeal we agree, and on plain error review, we conclude that Norman's claim of trial court error is without merit.

(26) Third, Norman claims on appeal that the Superior Court erred when it prevented the jury from learning that Maryland prosecutors had dropped the charges against Norman. We agree with the Superior Court's determination that Norman cannot demonstrate either unreasonable representation or prejudice in appellate counsel's failure to raise the claim on direct appeal. Furthermore, on plain error review, we conclude that Norman's claim of trial court error is without merit. Simply put, the disposition of the Maryland charges had no bearing on whether there was sufficient evidence for the jury to determine Norman's guilt or innocence on the Delaware charges.

[18] *See Taylor v. State*, 23 A.3d 851, 852 (Del. 2011) (holding that statement given by witness, who had been handcuffed and told that he was being arrested was presumptively involuntary and thus inadmissible).

(27) On appeal, Norman alleges six instances of prosecutorial misconduct. In the Superior Court, he alleged only that the prosecutor misstated the law in closing argument when he remarked that Norman "knew right from wrong." The Superior Court found that the prosecutor's remark was another way of arguing the legal principle that Norman did not lack "substantial capacity to appreciate the wrongfulness of [his] conduct" and was not a misstatement of the legal standard. On appeal, we agree.[19] Because the remaining five instances of prosecutorial misconduct were not raised at trial, on appeal, or in the postconviction proceedings, the Court, in its discretion, declines to consider the balance of Norman's prosecutorial misconduct claim for the first time on appeal.

(28) Finally, Norman claims that his appellate counsel provided ineffective assistance of counsel on direct appeal for failing to raise each of the claims raised in the postconviction motion as supplemented. Norman's claim is without merit. On appeal, the Court has ruled that the postconviction claims either lack merit for the reasons assigned by the Superior Court, or were not raised in the postconviction proceedings and therefore are not ripe for appellate consideration. For these reasons, the Court concludes that Norman has not and cannot

[19] *See Collingwood v. State*, 594 A.2d 502, 505 n.4 (Del. 1991) (providing that not guilty by reason of insanity "requires the mental impairment to be so severe as to render the defendant unable to distinguish right from wrong").

demonstrate in this appeal that appellate counsel's representation fell below an objective standard of reasonableness and was prejudicial.

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

BY THE COURT:

/s/ Randy J. Holland
Justice