IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAMAR COMER,	§	
	§	No. 619, 2010
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. 0410023811
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: April 22, 2011
Decided: June 13, 2011

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

O R D E R

This 13th day of June 2011, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Lamar Comer, filed an appeal from the Superior Court's August 31, 2010 order denying his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61.[1] We find no merit to the appeal. Accordingly, we affirm.

[1] Because this was Comer's first postconviction motion and because Comer raised claims of ineffective assistance of counsel, the Superior Court requested Comer's attorneys to file affidavits. Super. Ct. Crim. R. 61(g)(1) and (2); *Horne v. State*, 887 A.2d 973, 975 (Del. 2005).

(2) The record reflects that, in May 2006, Comer was found guilty by a Superior Court jury of Murder in the First Degree, Attempted Assault in the First Degree, Conspiracy in the Second Degree, Reckless Endangering in the First Degree and three counts of Possession of a Firearm During the Commission of a Felony. Comer's convictions stemmed from an incident that occurred at 7:00 p.m. on October 25, 2004, in which Baheem Mitchell, an innocent bystander, was shot and killed when Comer and two co-conspirators opened fire on a car driven by Frank Johnson at the corner of Fifth and Monroe in Wilmington, Delaware. Comer was sentenced to life in prison on the murder conviction and to a total of thirty-one years at Level V, to be followed by probation, on his remaining convictions.

(3) On direct appeal, this Court reversed Comer's murder conviction due to a faulty jury instruction on the murder charge. We remanded the case to the Superior Court for a new trial or, in the alternative, imposition of a conviction of manslaughter as a lesser-included offense. The State chose the latter alternative. Judgment was entered accordingly and Comer was re-sentenced.

(4) In his appeal from the Superior Court's denial of his first motion for postconviction relief, Comer claims that his counsel provided ineffective assistance by failing to a) challenge the original charge of first

degree murder; b) raise as an issue on appeal the alleged delayed disclosure of certain ballistics evidence; c) challenge the State's withholding of the statements of two alleged witnesses to the crime; d) request an instruction on reckless endangering as a lesser-included offense of first degree murder; e) raise his conspiracy conviction as an issue on appeal; f) raise his manslaughter conviction as an issue on appeal; and g) raise his assault conviction as an issue on appeal. To the extent Comer does not assert claims in this appeal that previously were raised in the Superior Court, any such claims are deemed to be waived and will not be addressed by this Court.[2]

(5) In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.[3] Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.[4] The

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[2] *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his postconviction motion filed in the Superior Court, Comer also claimed that his counsel failed to object to certain jury instructions, failed to conduct a direct examination of a witness and failed to challenge the denial of his motion for judgment of acquittal.
[3] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).
[4] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.[5]

(6) Comer's first claim is that his counsel failed to challenge the charge of first degree murder. The record reflects that Comer's counsel vigorously challenged the murder conviction in a motion for judgment of acquittal as well as on direct appeal, which resulted in this Court's reversal of the conviction. Moreover, there was no basis for challenging the original charge of first degree murder. The charge was proper and the evidence presented at trial supported Comer's conviction of that charge. The conviction was reversed not because there was insufficient evidence to support it, but because the jury instruction on that charge was deficient.[6] In the absence of any evidence of error on the part of his counsel that resulted in prejudice to him, we conclude that Comer's first claim of ineffective assistance is without merit.

(7) Comer's second claim is that his counsel failed to raise as an issue on appeal the State's allegedly delayed disclosure of ballistics evidence.[7] The record reflects that the State's ballistics expert testified that the fatal bullet ricocheted off a surface such as concrete, asphalt or brick

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[5] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[6] *Comer v. State*, 977 A.2d 334 (Del. 2009).
[7] We will address the merits of this claim even though it appears that Comer did not squarely present it to the Superior Court in the first instance.

before it hit the victim. The record further reflects that Mitchell, the victim of the shooting, was an innocent bystander killed when multiple gunshots were fired at a car driven by Johnson, the intended target, on a busy city street. Whether information concerning the substance of the expert's testimony was delayed or not, the testimony that the fatal bullet ricocheted before it struck Mitchell was immaterial to the evidence presented by the State at trial that resulted in Comer's conviction. In the absence of any evidence of error on the part of his counsel resulting in prejudice to him, we conclude that Comer's second claim also is without merit.

(8) Comer's third ineffectiveness claim is that his counsel failed to challenge the State's withholding of the statements of two alleged witnesses to the crime. The record reflects that the testimony of one of the defense witnesses raised the possibility that the fatal shot was fired by someone other than Comer and that two witnesses had knowledge of that. While the street names of the two alleged witnesses to the crime were given to police, the witnesses themselves were never identified or located. While Comer faults his counsel for failing to locate the witnesses, he does not indicate what more his counsel could have done to locate them. Nor does the record reflect that any statements as described by Comer ever existed. As such, the State may not be faulted for failing to produce them. In the absence of any

evidence of error that resulted in prejudice to him, we conclude that Comer's third claim also is without merit.

(9) Comer next claims that his counsel provided ineffective assistance by failing to request an instruction on reckless endangering as a lesser-included offense of first degree murder.[8] The record reflects that the charge of first degree murder[9] addressed Comer's intent regarding Johnson, the target of the shooting, while the charge of reckless endangering[10] addressed the fact that innocent bystanders were placed in danger by the firing of multiple gunshots on a busy city street. Because the evidence at trial demonstrated that Comer acted with intent to kill Johnson, there was no rational basis for instructing the jury on reckless endangering. Defense counsel, therefore, may not be faulted for not requesting such an instruction. We, therefore, conclude that Comer's fourth claim of ineffective assistance of counsel is without merit.

(10) Comer's last three claims may fairly be summarized as a claim that his counsel provided ineffective assistance for failing to challenge the sufficiency of the evidence that supported his convictions of conspiracy, manslaughter and assault. In reviewing a claim of insufficiency of the

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[8] We will address the merits of this claim even though it appears that Comer did not squarely present it to the Superior Court in the first instance.
[9] Del. Code Ann. tit. 11, § 636(a)(1).
[10] Del. Code Ann. tit. 11, § 604

evidence, the Court will uphold a conviction as long as any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find the defendant guilty beyond a reasonable doubt.[11]

(11) As to the first of Comer's claims regarding insufficiency of the evidence, the record reflects that Comer and his two companions fired their pistols simultaneously at Johnson's car, providing a rational basis for a jury to conclude that they had conspired with each other prior to the attack.[12] As to the second claim, this Court previously ruled on direct appeal that there was sufficient evidence presented at trial to support the charge of manslaughter as a lesser-included offense of murder in the first degree[13] and Comer has offered no reason why that ruling should be revisited in the interest of justice.[14] As to the third claim, Comer argues that his conviction of attempted first degree assault[15] is invalid because it conflicts with his conviction of the charge of manslaughter[16] by requiring proof of intent. The record reflects that Comer acted with intent to kill Johnson and recklessly caused the death of Mitchell. There was, therefore, no conflict between the two charges and no basis for a challenge to the sufficiency of the evidence

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[11] *Word v. State*, 801 A.2d 927, 929 n.7 (Del. 2002).
[12] *Jackson v. Virginia*, 443 U.S. 307, 324-25 (1979); Del. Code Ann. tit. 11, §512.
[13] *Comer v. State*, 977 A.2d at 343-44.
[14] Super. Ct. Crim. R. 61(i)(4).
[15] Del. Code Ann. tit. 11, § 613(a)(1).
[16] Del. Code Ann. tit. 11, § 632.

on the assault charge. In the absence of any support for Comer's claim of insufficient evidence to support his convictions of conspiracy, manslaughter and assault, his counsel may not be faulted for failing to challenge those convictions on that ground. We conclude, therefore, that Comer's last three claims also are without merit.

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

BY THE COURT:

/s/ Randy J. Holland
Justice