

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |   |                                 |
|--------------------|---|---------------------------------|
| ROGER L. JOHNSON,  | § |                                 |
|                    | § | No. 440, 2011                   |
| Defendant Below,   | § |                                 |
| Appellant,         | § | Court Below—Superior Court      |
|                    | § | of the State of Delaware in and |
| v.                 | § | for Kent County                 |
|                    | § |                                 |
| STATE OF DELAWARE, | § |                                 |
|                    | § |                                 |
| Plaintiff Below,   | § | Cr. ID No. 9908000065           |
| Appellee.          | § |                                 |

Submitted: October 31, 2011

Decided: January 25, 2012

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

**O R D E R**

This 25<sup>th</sup> day of January 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 appellant, Roger L. Johnson, filed this appeal from the Superior Court’s denial of his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). The appellee, State of Delaware, has moved to affirm the judgment of the Superior Court on the ground that it is manifest on the face of Johnson’s opening brief that the appeal is without merit.<sup>1</sup>

---

<sup>1</sup> Del. Supr. Ct. R. 25(a).

(2) In May 2000, a Superior Court jury convicted Johnson of two counts of Robbery in the First Degree and Possession of a Firearm During the Commission of a Felony, and one count of Conspiracy in the Second Degree. Johnson was sentenced to eighty years at Level V. On direct appeal, this Court affirmed Johnson's convictions and sentence.<sup>2</sup>

(3) Johnson filed his first motion for postconviction relief in May 2005. Johnson alleged, in pertinent part, that his trial counsel was ineffective for failing to request a jury instruction under title 11, section 274 of the Delaware Code (hereinafter "§ 274 jury instruction").<sup>3</sup> According to Johnson, had his counsel requested a § 274 jury instruction, he would not have been convicted of Robbery in the First Degree.

(4) By report and recommendation dated March 16, 2007, a Superior Court Commissioner determined that Johnson's ineffective assistance of counsel claim was without merit, because a § 274 jury instruction was not supported by the evidence and would have detracted from the defense theory that Johnson was merely present at the scene. By order dated August 29, 2007, the Superior Court adopted the Commissioner's report and denied Johnson's first postconviction

---

<sup>2</sup> *Johnson v. State*, 2002 WL 1343761 (Del. Supr.).

<sup>3</sup> Under section 274, when two or more people are criminally liable for an offense that is divided into degrees, "each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance." Del. Code Ann. tit. 11, § 274 (2007).

motion. On appeal, we affirmed the Superior Court’s decision, concluding, in pertinent part, that “there was no basis for the [§ 274 jury] instruction that Johnson contends his counsel should have sought.”<sup>4</sup>

(5) Johnson filed his second postconviction motion on September 23, 2009. Citing our 2009 decision in *Allen v. State*, Johnson again argued that he was entitled to a § 274 jury instruction, and that his trial counsel was ineffective for failing to request the instruction (hereinafter “the § 274 issue”).<sup>5</sup> By order dated July 27, 2011, the Superior Court denied Johnson’s motion as procedurally barred under Rule 61(i).<sup>6</sup> This appeal followed.

(6) On appeal, the Court concludes that the Superior Court properly denied Johnson’s second postconviction motion as procedurally barred, and that the § 274 issue does not warrant exceptional consideration.<sup>7</sup> First, *Allen* is not retroactive.<sup>8</sup> Second, Johnson’s facts are distinguishable.

(7) In *Allen*, the Court explained that “section 274 contemplates the possibility that an accomplice defendant, who was wholly unaware of another

---

<sup>4</sup> *Johnson v. State*, 2008 WL 1778241 (Del. Supr.).

<sup>5</sup> In *Allen v. State*, a majority of the Court held that the Superior Court’s failure to give a § 274 jury instruction constituted reversible error. In an effort to reconcile prior decisions, *Allen* further ruled that any prior decision inconsistent with the *Allen* holding was “overruled.” *Allen v. State*, 970 A.2d 203, 214 (Del. 2009).

<sup>6</sup> See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to relief).

<sup>7</sup> See *id.* (providing exceptions to the procedural bars).

<sup>8</sup> *Richardson v. State*, 3A, 3d 233 (Del. 2010).

participant's intent to use a gun in a robbery, could not be convicted of Robbery in the First Degree.”<sup>9</sup>

(8) In Johnson's case, the jury concluded that there was sufficient evidence placing Johnson at the scene of, and directly involved in, an armed robbery. The Court thus concludes that Johnson was not prejudiced by his trial counsel's failure to request a § 274 jury instruction.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 25(a), that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

---

<sup>9</sup> *Allen v. State*, 970 A.2d at 213.