## IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANUEL NIEVES,	§
	§ No. 625, 2012
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. 0107022700
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 24, 2013 Decided: February 19, 2013

## Before HOLLAND, BERGER and JACOBS, Justices

## ORDER

This 19<sup>th</sup> 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, Manuel Nieves, filed an appeal from the Superior Court's October 22, 2012 order adopting the October 8, 2012 report of the Superior Court Commissioner, which recommended that Nieves's seventh motion for postconviction relief pursuant to Superior Court Criminal Rule 61 be denied.<sup>1</sup> The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court's judgment on the ground that it is

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<sup>&</sup>lt;sup>1</sup> Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

manifest on the face of the opening brief that the appeal is without merit.<sup>2</sup> We agree and affirm.

- (2) The record reflects that, in March 2002, Nieves was found guilty by a Superior Court jury of multiple counts of Rape in the First Degree and related charges. This Court affirmed Nieves's convictions on direct appeal.<sup>3</sup> Since that time, Nieves has filed six postconviction motions. This Court has affirmed the Superior Court's denials of all six motions.<sup>4</sup>
- (3) In this appeal, Nieves claims that the victim's videotaped out-of-court statements, which were admitted into evidence under Del. Code Ann. tit. 11, §3507, should not have been reviewed by the jury during its deliberations.
- (4) Before considering the merits of claims made in postconviction proceedings, the Superior Court must first consider whether the procedural requirements of Rule 61 apply.<sup>5</sup> In this case, the Superior Court ruled that Nieves's claim had been raised previously in his sixth postconviction motion and, therefore, was barred as formerly adjudicated under Rule 61(i) (4). We

<sup>3</sup> Nieves v. State, 2003 WL 329589 (Del. Feb. 11, 2003).

<sup>&</sup>lt;sup>2</sup> Supr. Ct. R. 25(a).

<sup>&</sup>lt;sup>4</sup> Nieves v. State, 2005 WL 1200861 (Del. May 18, 2005); Nieves v. State, 2010 WL 2541733 (Del. June 24, 2010); Nieves v. State, 2011 WL 181434 (Del. Jan. 13, 2011); Nieves v. State, 2011 WL 2750741 (Del. July 15, 2011); Nieves v. State, 2011 WL 5829554 (Del. Nov. 18, 2011); Nieves v. State, 2012 WL 112501 (Del. Jan. 12, 2012); Nieves v. State, 2012 WL 3252860 (Del. Aug. 9, 2012).

<sup>&</sup>lt;sup>5</sup> Younger v. State, 588 A.2d 1121, 1127 (Del. 1991).

have reviewed the record and conclude that the identical issue raised by Nieves in this proceeding was raised, addressed and rejected by this Court in the proceedings on Nieves's sixth postconviction motion.<sup>6</sup> In the absence of any evidence of a miscarriage of justice that would overcome the procedural bar under Rule 61(i) (5), we conclude that the Superior Court properly denied Nieves's postconviction motion as procedurally barred under Rule 61(i) (4).

(5) It is manifest on the face of the opening brief that this appeal is without merit because the issues raised on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

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

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<sup>&</sup>lt;sup>6</sup> Nieves v. State, 2012 WL 3252860 (Del. Aug. 9, 2012).