

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER L. SMITH,	§
	§ No. 94, 2013
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0105019765
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 9, 2013
Decided: April 30, 2013

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

ORDER

This 30th day of April 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, Walter L. Smith, filed an appeal from the Superior Court’s February 14, 2013 order denying his fifth postconviction motion pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) The record before us reflects that, in March 2002, a Superior Court jury found Smith guilty of Attempted Rape in the First Degree, Assault in the First Degree, Burglary in the First Degree and Wearing a Disguise During the Commission of a Felony. He was sentenced to thirty-six years of Level V incarceration. This Court affirmed Smith's convictions on direct appeal.² Since that time, Smith has filed five postconviction motions, including the one from which he now appeals. This Court affirmed the Superior Court's denials of all four of Smith's previous postconviction motions.³

(3) In his appeal from the Superior Court's denial of his fifth postconviction motion, Smith claims that his conviction should be vacated because his trial counsel was ineffective during plea negotiations, thereby violating his Sixth Amendment rights. He contends that, due to his counsel's ineffectiveness, he did not accept the State's plea offer, which entailed a twenty-year prison term, sixteen years less than the one he is

¹ Supr. Ct. R. 25(a).

² *Smith v. State*, 2002 WL 31873704 (Del. Dec. 23, 2002).

³ *Smith v. State*, 2004 WL 1874668 (Del. Aug. 13, 2004); *Smith v. State*, 2008 WL 732009 (Del. Mar. 20, 2008); *Smith v. State*, 2010 WL 2169490 (Del. May 27, 2010); *Smith v. State*, 2012 WL 3870567 (Del. Sept. 6, 2012).

currently serving. Smith asks that this matter be remanded to the Superior Court for an evidentiary hearing.

(4) Delaware law requires that, when reviewing a postconviction motion, the Superior Court first determine whether the procedural requirements of Rule 61 have been met prior to considering the substantive merits of the defendant's claims.⁴ 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.⁵ The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.⁶

(5) Smith's claim fails for the following reasons. First, it is time-barred pursuant to Rule 61(i) (1). Moreover, the claim is procedurally barred pursuant to Rule 61(i) (2) and (3) because it was not asserted in a previous postconviction motion nor was it asserted in the proceedings leading to the judgment of conviction.

⁴ *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).

⁵ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁶ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

(6) Smith's attempt to avoid the time and procedural bars by asserting a violation of his constitutional rights pursuant to Rule 61(i) (5) due to his counsel's ineffective assistance also must fail. Smith himself admits that his trial counsel presented the State's plea offer to him, but that he rejected it and proceeded to trial. He offers no reliable factual support for his claim of ineffectiveness in connection with the plea offer, only unsubstantiated assertions made eleven years after the fact. Nor does he explain why he waited until his fifth postconviction motion to assert the claim. Because Smith has not sustained his burden of demonstrating that his counsel rendered ineffective assistance in connection with the plea bargaining process, we conclude that Rule 61's time and procedural bars preclude his claim.

(7) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented 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/ Myron T. Steele
Chief Justice