IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMER A. JENKINS,	§	
	§	No. 28, 2008
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. 0701012400
Appellee.	§	

Submitted: October 6, 2008
Decided: October 22, 2008

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

O R D E R

This 22nd day of October 2008, upon consideration of the appellant's brief pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response, it appears to the Court that:

(1) After a three-day Superior Court jury trial in November 2007, the appellant, Wilmer A. Jenkins, was found guilty of Rape in the Second Degree, a class B felony.[1] After the jury verdict, the Superior Court ordered the preparation of a presentence report. On January 11, 2008, the Superior Court sentenced Jenkins to the statutory maximum, *i.e.*, twenty-five years at

[1] Del. Code Ann. tit. 11, § 772 (2007).

Level V imprisonment, suspended after twenty years for decreasing levels of supervision.[2]

(2) On appeal, Jenkins' counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"). Jenkins' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Jenkins' attorney informed him of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief. Jenkins' attorney also informed him of his right to supplement the brief and to respond to the motion to withdraw. Jenkins responded with a written submission that raises several points for this Court's consideration. The State has responded to Jenkins' points as well as to the position taken by his counsel and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold.[3] First, this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for

[2] *See* Del. Code Ann. tit., 11 § 4205(b)(2) (providing that a prison sentence for a class B felony shall be up to 25 years).
[3] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

arguable claims.[4] Second, this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[5]

(4) The evidence presented at trial indicated that on the morning of January 16, 2007, Jenkins, age sixty-five, forced his twenty-year old granddaughter, Ellen Gates, to perform oral sex on him.[6] The sexual assault occurred in the living room of Gates' great-grandmother's apartment in Seaford, Delaware.[7]

(5) On the day of the assault, Gates was alone in her great-grandmother's apartment. According to Gates, Jenkins telephoned her that morning and said that he was coming over. Gates tried to discourage Jenkins from visiting by telling him that she had to go to the store.

(6) According to Gates, Jenkins arrived at the apartment at approximately 8:00 a.m. Gates let him in. Once inside the apartment Jenkins exposed his penis to Gates and threatened to hurt her if she did not do what he said.

---

[4] *Id.*
[5] *Id.*
[6] The Court has used a pseudonym to identify the victim. Del. Supr. Ct. R. 7(d).
[7] Gates had spent the preceding five months living with and taking care of her great-grandmother.

(7) In the ensuing assault, Jenkins forced Gates to raise her shirt above her breasts and then forced his penis into her mouth while holding the back of her head by her hair. Jenkins ejaculated in Gates' mouth and on her breasts, hand, and shirt. He then left the apartment. Gates called her mother and then the police.

(8) Gates went to the hospital where she was examined by Terri Purse, a sexual assault nurse examiner. Gates arrived at the hospital wearing the same gray tee shirt that she had worn during the assault. The tee shirt had a wet stain on the right shoulder. Purse took the shirt from Gates for DNA testing. Purse also drew blood from Gates and took swabbings from her mouth, breasts, sternum and hand. Later, at the Seaford police station, Purse took a dried-secretion swabbing from Jenkins' penis.

(9) Seaford Police Detective Eric Chambers questioned Jenkins at the Seaford police station on the same day as the assault. Jenkins told Chambers that he visited Gates that morning at her request. According to Jenkins, after arriving at the apartment, he spoke briefly to Gates and then retreated alone to the bathroom where he masturbated and ejaculated into a gray tee shirt that he had found on the bathroom floor.

(10) Amrita Lal-Paterson, a DNA analyst from the Office of the Chief Medical Examiner, was assigned to examine the forensic evidence

collected by Purse. At trial, Lal-Paterson testified that each of the swabs taken from Gates, as well as the stain tested on the tee shirt, contained sperm cells that matched the DNA sample taken from Jenkins. Lal-Paterson also testified that the penile swab from Jenkins contained a mixture of cells attributable to Jenkins and Gates. Purse testified as to a "pattern injury" on the inside of Gates' mouth where it appeared prolonged pressure on the outside of Gates' mouth had forced her teeth to make an abrasive impression on her gums.

(11) At trial, Jenkins testified that Gates initiated their sexual encounter the morning of January 16, 2007. According to Jenkins, Gates voluntarily performed oral sex on him.

(12) Jenkins' written points raise the following issues: (a) violation of *Miranda* rights, (b) insufficient evidence, (c) prosecutorial misconduct, (d) illegal sentence, and (e) ineffective assistance of counsel.

(13) The Court has not considered Jenkins' ineffective assistance of counsel claim. It is well-settled that the Court will not consider a claim of ineffective assistance of counsel that is raised for the first time on direct appeal.[8]

[8] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

(14) Jenkins complains that Chambers did not advise him that his interview at the police station was being videotaped. Jenkins' complaint is unavailing. Under the circumstances, Chambers was not required to inform Jenkins that the interview was being videotaped.[9]

(15) Jenkins states that he "does not remember" being advised of his *Miranda* rights.[10] Jenkins' suggestion that he did not receive *Miranda* warnings is belied by the record. The Court has reviewed the video tape of Jenkins' interview with Chambers. The video depicts Chambers informing Jenkins of his rights before asking any questions.

(16) Jenkins contends that the evidence was insufficient to establish that he was guilty of second degree rape. When a defendant challenges the sufficiency of the evidence, this Court must review whether a rational trier of fact viewing the evidence in the light most favorable to the prosecution could find beyond a reasonable doubt the existence of every element of the offense charged.[11] "[A] victim's testimony alone, concerning alleged sexual

---

[9] *See* Del. Code Ann. tit. 11, § 2402(c)(5)(b),(e) (providing that it is lawful for a law-enforcement officer in the course of the officer's regular duty to intercept an oral communication if the law-enforcement officer is a party to the oral communication or the oral interception is being made as part of a video tape recording).

[10] *See Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that statements obtained during custodial interrogation are inadmissible absent a prior warning advising a suspect of rights under Fifth Amendment).

[11] *Barnett v. State*, 691 A.2d 614, 618 (Del. 1997) (citing *Morrisey v. State*, 620 A.2d 207, 213 (Del. 1993)).

contact, is sufficient to support a guilty verdict if it establishes every element of the offense charged."[12]

(17) A person is guilty of Rape in the Second Degree when the person intentionally engages in sexual intercourse with another person, and the sexual intercourse occurs without the person's consent.[13] In this case, a review of the record in the light most favorable to the prosecution supports the jury verdict that found Jenkins guilty of Rape in the Second Degree beyond a reasonable doubt. Gates testified that she was forced to perform oral sex on Jenkins. The forensic evidence collected by Purse and testified to by Purse and Lal-Paterson corroborated Gates' testimony. Jenkins testified at trial and submitted his version of the facts to the jury. The jury, as the trier of fact and sole judge of witness credibility, was free to accept the portions of Gates' testimony that were called into question by Jenkins.[14]

(18) Jenkins argues generally that the prosecutor's closing remarks made reference to facts not in evidence. Jenkins does not identify what part of the closing remarks was based on facts not in the record. Having reviewed the trial transcript, it does not appear that the prosecutor's closing remarks

[12] *Farmer v. State*, 844 A.2d 297, 300 (Del. 2004).
[13] *See* Del. Code Ann. tit. 11, § 772 (defining rape in the second degree).
[14] *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).

went beyond reasonable inferences from the evidence. Jenkins' claim is without merit.

(19) Jenkins raises several claims related to his sentence. Jenkins argues that (a) the Superior Court improperly considered his 1967 manslaughter conviction for causing the death of his then wife; (b) his sentence is disproportionate to the crime; and (c) the prohibition against contact with minors was improper because Gates was not a minor.

(20) In Delaware, "[a]ppellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature."[15] "[I]n reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably [impermissible information]."[16]

(21) There is no evidence in the record that the trial judge at sentencing was improperly influenced by information gleaned from the presentence report concerning Jenkins' 1967 manslaughter conviction in the death of his wife. To the contrary, the sentencing transcript reflects that the trial judge considered Jenkins' manslaughter conviction only as background

[15] *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).
[16] *Id*. at 843.

information to explain why the presentence report reflected that Gates was not "technically" Jenkins' granddaughter.[17]

(22) The transcript of the sentencing proceeding reflects that the trial judge's decision to impose the maximum sentence allowed by law was the result of a logical and conscientious process[18] and was based upon the presence of aggravating factors, including Gates' vulnerability to Jenkins and Jenkins' undue depreciation of the crime.[19] Finally, under all the circumstances of the case, we cannot say that the trial judge's inclusion of a prohibition against contact with minors was an abuse of discretion.[20]

(23) The Court has reviewed the record carefully and has concluded that Jenkins' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Jenkins' counsel made a conscientious effort to examine the record and properly determined that Jenkins could not raise a meritorious claim in this appeal.

---

[17] Hr'g Tr. at 14 (Jan. 11, 2008). Although it is not entirely clear, the Court has surmised from the transcript that Gates' mother was not Jenkins' biological daughter.
[18] *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).
[19] *See* SENTAC (Delaware Sentencing Accountability Commission) Benchbook at 100 (2008) (listing factors that justify an exceptional sentence).
[20] *See* Del. Code Ann. tit. 11, § 4204 (m) (providing that as a condition of any sentence the court may order the offender to engage in a specified act or to refrain from engaging in a specified act as deemed necessary by the court to ensure the safety of the public).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice