

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT J. BROWN,	§
	§
Defendant Below-	§ No. 222, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0703022100
Plaintiff Below-	§
Appellee.	§

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

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

ORDER

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

(1) A Superior Court jury found the defendant-appellant, Albert Brown (Brown), guilty of one count each of possession with intent to deliver cocaine and possession of drug paraphernalia. The Superior Court sentenced Brown to a total period of eleven years at Level V incarceration to be suspended after serving five years in prison for decreasing levels of supervision. This is Brown's direct appeal.

(2) Brown's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Brown's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Brown's attorney informed him of the provisions of Rule 26(c) and provided Brown with a copy of the motion to withdraw and the accompanying brief. Brown also was informed of his right to supplement his attorney's presentation. He responded with a fifty-one page document containing forty-one numbered arguments. The State has responded to Brown's arguments, as well as to the position taken by Brown's 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: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) 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.¹

(4) Thirty-nine of the forty-one issues that Brown enumerates for the Court's review are claims of ineffective assistance of counsel. This

¹ *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).

Court will not review such claims, however, for the first time on direct appeal.² Brown's two remaining issues are a charge of prosecutorial misconduct and a charge that the Court of Common Pleas abused its discretion in denying a continuance of the preliminary hearing.

(5) With respect to his allegation of prosecutorial misconduct, Brown contends that the prosecutor engaged in misconduct during his rebuttal by arguing to the jury that police evidence technicians were too overwhelmed with cases to fingerprint each plastic bag recovered in every drug arrest. Defense counsel objected to the argument, and the trial judge struck the comment and ordered the jury to disregard it. To the extent Brown now implies that his counsel was ineffective for failing to request a mistrial, we will not review that claim on direct appeal.³ Moreover, given the strength of the eyewitness testimony against Brown and the trial judge's prompt curative instruction to the prosecutor's improper argument, any error by the prosecutor was rendered harmless beyond a reasonable doubt.⁴

(6) Finally, we need not reach Brown's contention that the Court of Common Pleas abused its discretion in failing to continue his preliminary hearing. Defense counsel had requested the continuance on the ground that

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

³ *Id.*

⁴ *Justice v. State*, 947 A.2d 1097, 1102 (Del. 2008).

the testifying officer did not have sufficient knowledge of the events to testify. In light of Brown's subsequent indictment, however, any alleged error in the preliminary hearing was rendered moot.⁵

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

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/ Myron T. Steele
Chief Justice

⁵ *Joy v. Superior Court*, 298 A.2d 315, 316 (Del. 1972).