

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS E. SHORTS,	§
	§
Defendant Below,	§ No. 165, 2013
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 1209010470
Plaintiff Below,	§
Appellee.	§

Submitted: July 9, 2013  
Decided: July 19, 2013

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

**ORDER**

This 19<sup>th</sup> day of July 2013, 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) On February 27, 2013, after the Superior Court denied his motion to suppress the results of a blood alcohol test, the appellant, Thomas Shorts, pled guilty to one count of Driving Under the Influence (4<sup>th</sup> Offense) and one count of Noncompliance with Bond. The Superior Court immediately sentenced Shorts to a total period of seven years at Level V incarceration to be suspended after serving six months, to be followed by eighteen months at Level III probation. This is Shorts' direct appeal.

(2) Shorts' counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Shorts' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Shorts' attorney informed him of the provisions of Rule 26(c) and provided Shorts with a copy of the motion to withdraw and the accompanying brief. Shorts also was informed of his right to supplement his attorney's presentation. Shorts' only argument is that his trial counsel was ineffective at the suppression hearing. The State has responded to Shorts' issue, as well as to the position taken by Shorts' 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.<sup>1</sup>

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<sup>1</sup>*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).

(4) In response to his counsel's brief, Shorts only argument on appeal is that his trial counsel was ineffective at the suppression hearing. As the State points out, however, this Court will not consider a claim of ineffective assistance of counsel for the first time on direct appeal if that issue has not been addressed to and decided on the merits by the trial court in the first instance.<sup>2</sup> The record in this case reflects that, on the day the Superior Court denied his suppression motion, Shorts requested a continuance in order to obtain substitute counsel. After the Superior Court denied his request for a continuance, Shorts decided to accept the State's plea offer. During the plea colloquy, Shorts stated under oath that, while he was not happy with his counsel, he accepted his counsel's performance and that he was knowingly and voluntarily pleading guilty because he was, in fact, guilty of the charged offenses. Under these circumstances, we will not address his claim of ineffectiveness for the first time on direct appeal.<sup>3</sup>

(5) This Court has reviewed the record carefully and has concluded that Shorts' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Shorts' counsel has made a

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<sup>2</sup> *Johnson v. State*, 962 A.2d 233, 234 (Del. 2008).

<sup>3</sup> *See id.*

conscientious effort to examine the record and the law and has properly determined that Shorts 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/ Jack B. Jacobs  
Justice