

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SEAN HAINES,	§	
	§	No. 219, 2000
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County
	§	Cr.A.Nos. 98-09-0472, 0472;
STATE OF DELAWARE,	§	98-10-0122; 99-01-0025.
	§	
Plaintiff Below,	§	Def. ID Nos. 9901000044;
Appellee.	§	9808020732; 9809014046.

Submitted: October 11, 2000

Decided: November 13, 2000

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

ORDER

This 13th day of November 2000, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In February 1999, Haines pleaded guilty to aggravated harassment, aggravated menacing, and resisting arrest. In March 1999, Haines pleaded guilty to third degree assault. On April 23, 1999, after a presentence investigation, the Superior Court sentenced Haines on all four charges to a total of nine years at Level V with credit for time served,

suspended after six months for 18 months at a Level IV Long-Term Residential Substance Abuse Treatment Program at the Delaware Recovery Center, suspended upon completion for Level IV Home Confinement or Level IV Aftercare, followed by four years at Level III. Haines did not file an appeal.

(2) Less than a week after sentencing, Haines moved for modification of his sentence. The Superior Court denied Haines' motion. Haines did not file an appeal. In June 1999, Haines again moved for modification of his sentence. The Superior Court denied Haines' motion. Haines did not file an appeal.

(3) By letter dated August 6, 1999, Haines' mother complained to the Superior Court about the lack of drug treatment for Haines. In response to Mrs. Haines' concerns, by letter dated August 11, 1999, the Superior Court requested that the Treatment Access Center ("TASC") conduct Haines' Addiction Severity Index as soon as possible to facilitate Haines' placement in the Recovery Center Program.

(4) By order dated September 14, 1999, the Superior Court modified Haines' sentence to provide that, upon successful completion of the Recovery Center Program, Haines should be placed at Level III

Aftercare for the balance of any Level IV sentence. As a special condition of probation, the Superior Court ordered TASC to continue to monitor Haines' substance abuse treatment.

(5) By order dated August 13, 1999, the Superior Court denied Haines' petition for a writ of habeas corpus. Haines did not file an appeal.

(6) On December 13, 1999, Haines appeared at Drug Court Track 1 for a TASC status conference. Haines was found to be in compliance; however, the Superior Court modified Haines' April 1999 probationary sentence to add the special condition of zero tolerance for all drugs and alcohol.

(7) In the latter part of January 2000, Haines was again summoned to appear at Drug Court Track 1 for a TASC status conference. Before the February 7 status conference could take place, however, Haines was returned to the Superior Court on an administrative warrant.

(8) On February 7, 2000, the Superior Court found Haines guilty of violation of probation ("VOP"). The Superior Court revoked Haines' probation and sentenced him to a total of eight years at Level V with credit for time served, suspended for 18 months at Level IV Home Confinement, followed by six years at Level III. Haines did not file an appeal.

(9) In early April 2000, Haines again was summoned to appear at Drug Court Track 1 for a status conference on April 17, 2000. On April 14, however, prior to the April 17 status conference, Haines was again returned to the Superior Court on an administrative warrant. Haines was charged with drinking alcohol on two recent occasions, in violation of the zero tolerance condition of his sentence.

(10) At the VOP hearing on April 17, 2000, Haines admitted to having used alcohol earlier in the month on two occasions. Consequently, the Superior Court found Haines guilty of VOP. The Superior Court revoked Haines' probation and sentenced him to eight years at Level V, with credit for time served; upon successful completion of the Greentree Program, the balance was suspended for six months at Level III with Crest Aftercare, followed by four years at Level III. This appeal followed.

(11) On appeal, Haines' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). Haines' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. Haines' counsel states that he informed Haines of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief, and the complete hearing transcript.

Haines was also informed of his right to supplement his attorney's presentation. Haines responded with a submission that raises several issues for this Court's consideration. The State has responded to the position taken by Haines' counsel as well as to the issues raised by Haines and has moved to affirm the Superior Court's order.

(12) 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) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the 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

(13) On appeal from his April 17 conviction of VOP, Haines claims that he should not have had to participate in the Drug Court TASC status conferences because he was not initially convicted of drug crimes nor was he subsequently charged with drug crimes. Second, Haines claims that he was denied due process because he was not given fair notice of the

alleged probation violation and the April 17 VOP hearing. Third, Haines claims that the April 17 revocation of probation improperly was based upon hearsay evidence. Haines' contentions are without merit.

(14) Haines complains that he was not "eligible" for the Drug Court TASC status conferences that were scheduled monthly from December 1999 through April 2000. Haines, however, did not raise any issue concerning the Drug Court TASC status conferences at his April 17 VOP hearing. As a result, Haines has waived appellate review of this issue in the absence of plain error.² Plain error is not evident here. As a special condition of his probation, TASC was ordered to monitor Haines' treatment. There is nothing in the record to support Haines' claim that he should not have had to attend the Drug Court TASC status conferences. Moreover, it is not clear why Haines is complaining about having had TASC status conferences, as he was initially referred to TASC for substance abuse treatment at his request and the request of his mother.

(15) Haines argues that he was deprived of due process because he was not given fair notice of the alleged probation violation or of the VOP hearing. Haines did not raise these issues at the VOP hearing.

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*,

Consequently, he has waived appellate review of these claims in the absence of plain error.³ Plain error is not evident here. The record does not support Haines' claims that he received inadequate notice of the alleged probation violation and VOP hearing. It appears from the record that Haines received notice of the alleged probation violation on April 14, 2000, when Haines was arrested pursuant to an administrative warrant. According to Haines, he was taken before a Superior Court Judge on April 14 and advised that a VOP hearing would be held on April 17, 2000.

(16) Finally, Haines complains that he was convicted of VOP on the basis of hearsay evidence. At the April 17, 2000, hearing, however, Haines did not raise a hearsay objection. Accordingly, Haines has waived review of this issue in the absence of plain error.⁴ Plain error is not evident here. Hearsay evidence is admissible at a VOP hearing so long as there is competent evidence to prove the alleged violation.⁵ It appears from the record that Haines freely admitted to the Superior Court that he had consumed alcohol on two occasions and had violated his probation. Haines' own admissions corroborated the probation officer's testimony and

486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

² See Supr. Ct. R. 8.

³ *Id.*

⁴ *Id.*

provided an adequate basis for finding him guilty of VOP. The evidence in a VOP hearing need only be “such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the terms and conditions of probation.”⁶

(17) This Court has reviewed the record carefully and has concluded that Haines’ appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Haines’ counsel has made a conscientious effort to examine the record and has properly determined that Haines 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/ Carolyn Berger
Justice

⁵ *Brown v. State*, Del. Supr., 249 A.2d 269, 272 (1968).

⁶ *Id.* (quoting *Manning v. United States*, 5th Cir., 161 F.2d 827, 829 (1947)).