

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL STUART,	§
	§
Defendant Below-	§ No. 174, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. No. VS97-07-0073-04
Plaintiff Below-	§
Appellee.	§

Submitted: September 8, 2000

Decided: October 25, 2000

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This 25th day of October 2000, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Michael Stuart, appeals from the Superior Court's April 3, 2000 order finding him guilty of a violation of probation ("VOP"). He was sentenced to 4 years incarceration at Level V, with credit for time previously served, to be suspended following successful completion of the Key Program for 1 year at Level IV Crest Program. The remaining sentence was to be suspended for 1 year at Level

III Crest Aftercare Program upon successful completion of the Crest Program.¹

(2) Stuart's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). 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.²

(3) Stuart's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Stuart's counsel informed Stuart of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Stuart was also

¹The record reflects that Stuart pleaded guilty to second degree burglary in October 1997 and was sentenced to 4 years incarceration at Level V, to be suspended for 1 year at Level III, followed by 1 year at Level II. The record further reflects that this was Stuart's fourth VOP on this conviction.

²*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).

informed of his right to supplement his attorney's presentation. Stuart responded with a brief that raises three issues for this Court's consideration. The State has responded to the position taken by Stuart's counsel as well as the issues raised by Stuart and has moved to affirm the Superior Court's judgment.

(4) Stuart raises three issues for this Court's consideration. First, he claims the Department of Correction has not given him credit for time previously served at Level V; second, he claims the prosecutor referred to him as an "idiot" for not accepting a plea agreement that would dispose of his VOP charge as well as other pending charges, indicating bias or vindictive prosecution; and third, he claims the sentencing order requires him to spend more time in the Crest Program than the length of his Level V sentence, amounting to an improper enlargement of his sentence and double jeopardy.

(5) Stuart's claim that the Department of Correction has not given him proper credit for time previously spent at Level V is unavailing. As the appellant, Stuart has the burden of providing this Court with "a fair and accurate account of the context in which the claim of error occurred."³

³*Slater v. State*, Del. Supr., 606 A.2d 1334, 1336-37 (1992).

Stuart, however, offers no factual support for his claim. This Court, therefore, has no adequate basis for evaluating its merits.

(6) Stuart's next claim of bias or prosecutorial vindictiveness is equally unavailing. Because this issue was not raised at the VOP hearing below, this Court will review it under a plain error standard. Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.⁴ Stuart has failed to demonstrate how any alleged error on the part of the Superior Court prejudiced his case. Stuart himself admitted he failed to report to his probation officer, which was the basis for the Superior Court's finding that he violated his probation. Under these circumstances, there was no plain error.

(7) Stuart's final claim is that his participation in the Key and Crest Programs will improperly enlarge his sentence and expose him to double jeopardy. This claim, too, is unavailing. After finding that Stuart violated his probation a fourth time, the Superior Court reimposed his original sentence of 4 years incarceration at Level V, with credit for time previously served. The Superior Court also ordered that the sentence

⁴*Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986).

would be suspended for 1 year at Level IV upon successful completion of the Key Program and would, in turn, be suspended for 1 additional year at Level III upon successful completion of the Crest Program. In sentencing Stuart for the probation violation, the Superior Court acted within its discretion in suspending the original sentence on the condition that Stuart successfully complete the Key and Crest Programs.⁵ There is no evidence to support Stuart's claim that his participation in the Key and Crest Programs will cause his probationary sentence to exceed his incarcerative sentence.

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

⁵*Ingram v. State*, Del. Supr., 567 A.2d 868, 869-70 (1989).

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:

Randy J. Holland
Justice