

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMIL WATSON,	§
	§
Defendant Below-	§ No. 556, 1999
Appellant,	§
	§
v.	§ Court Below— Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN98-07-0250
Plaintiff Below-	§ IN98-07-0255
Appellee.	§ IN98-08-1856

Submitted: April 4, 2000

Decided: May 24, 2000

Before **WALSH, HOLLAND** and **HARTNETT**, Justices

ORDER

This 24th day of May 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, Emil Watson, was found guilty by a Superior Court jury of trafficking in cocaine and maintaining a vehicle for keeping controlled substances. He was found not guilty of possession with intent to deliver a narcotic schedule II controlled substance. On the trafficking conviction, Watson was sentenced to 3 years incarceration at Level V and a fine of \$50,000, \$40,000 of which was suspended. On the

conviction for maintaining a vehicle, he was sentenced to 3 years incarceration at Level V, suspended for 3 years at Level IV, suspended after 6 months at Level IV for 2½ years at Level III, suspended after 1 year at Level III for 1½ years at Level II. This is Watson's direct appeal.

(2) Watson's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Watson's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. Watson's counsel states that he informed Watson 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. Watson also was informed of his right to supplement his attorney's presentation. Watson responded with a submission that raises three issues for this Court's consideration. The State has responded to the position taken by Watson's counsel as well as the issues raised by Watson and has moved to affirm the convictions and sentences.

(3) Watson has raised these issues for this Court's consideration: i) his trial counsel provided ineffective assistance; ii) the evidence at trial was insufficient to sustain his convictions; and iii) his appearance at trial in prison attire was prejudicial.

(4) 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

(5) Watson's first claim is unavailing. This Court will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.² Accordingly, we will not consider Watson's claim of ineffective assistance of counsel for the first time in this direct appeal.

(6) Watson next claims that the evidence at trial was insufficient to sustain his convictions for trafficking in cocaine and maintaining a vehicle. Essentially, Watson contends that there was no factual basis for a finding of guilt because the cocaine was located in a vehicle belonging to someone else who admitted ownership of both the vehicle and the cocaine,

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).

²*Wing v. State*, Del. Supr., 690 A.2d 921, 923 (1996).

thereby proving the cocaine did not belong to him. Because Watson did not raise this issue below, we review it on appeal for plain error.³ Under a plain error standard, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.⁴

(7) In order to convict Watson of trafficking in cocaine, the State had to present evidence that he was “knowingly in actual or constructive possession of” the cocaine.⁵ It was undisputed that at the time of Watson’s arrest in the parking lot of Motel 6, New Castle, Delaware, he was seated in the passenger seat of a car owned by his girlfriend, Kim Bunting, who was inside the motel, and that, following seizure of the vehicle, a bag of cocaine was found behind the driver’s seat. In order to prove constructive possession of the cocaine the State had to present evidence that Watson: i) knew the location of the cocaine; ii) had the ability to exercise dominion

³Supr. Ct. R. 8.

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

⁵16 Del. C. § 4753A (a) (2) a.

and control over the cocaine; and iii) intended to guide the destiny of the cocaine.⁶

(8) In order to convict Watson of maintaining a vehicle for keeping controlled substances the prosecution had to present evidence that he “knowingly” kept or maintained a “vehicle . . . which is used for keeping or delivering [controlled substances] in violation of this chapter.”⁷ Proof of a single incident of transporting drugs in a vehicle meets the statutory requirement.⁸

(9) The State presented the following evidence at trial: the bag found in Bunting’s car contained 65 smaller bags of cocaine; the total weight of the bag was 6.18 grams; Watson stated to the police detective in charge of the investigation that his fingerprints might be found on the bag, that Bunting gave him the bag and he placed it behind the driver’s seat and that the cocaine was being sold, but that it belonged to Bunting; Watson made a phone call to Bunting while he was in police custody and asked her to admit the drugs were hers; according to the police detective, Watson’s

⁶*Hoey v. State*, Del. Supr., 689 A.2d 1177, 1181 (1997) (citing *McNulty v. State*, Del. Supr., 655 A.2d 1214, 1217 (1995)).

⁷16 *Del. C.* § 4755(a) (5).

⁸*Lonergan v. State*, Del. Supr., No. 197, 1990, Walsh, J., 1991 WL 57128 (Apr. 3, 1991) (ORDER).

manner on the phone was intimidating; according to the detective, Bunting admitted to him on the phone that the drugs were hers, but later told him in person that the drugs were not hers; Bunting told the detective that her fingerprints would not be found on the bag of cocaine; Bunting testified at trial that she did not remember what she told the detective on the phone, but that the drugs were not hers; the police detective testified that there was no paraphernalia found with Watson at the time of his arrest that would indicate he was planning to use the drugs himself and that the bags of cocaine were packaged for sale, not for personal use. Based upon the evidence presented, and resolving the credibility issues against Watson, a rational jury could have found that Watson had constructive possession of the bag of cocaine and that he knowingly maintained the vehicle for keeping or delivering the drugs. Watson's claim of insufficient evidence to sustain his convictions, thus, fails under a plain error standard of review.⁹

(10) Finally, Watson claims that his appearance at trial in prison attire was prejudicial. The record reflects that on the day of trial Watson

⁹Likewise, to the extent Watson claims the search warrant that led to the discovery of the cocaine was invalid, that claim is unavailing. Watson did not have a legitimate expectation of privacy in Bunting's vehicle and, therefore, lacks standing to challenge the search warrant that led to the discovery of the cocaine. *Righter v. State*, Del. Supr., 704 A.2d 262, 265 (1997).

requested a continuance because he had no civilian clothes to wear. Noting that the trial had been scheduled for several months, the Superior Court afforded Watson an additional 10 minutes to locate civilian clothing before jury selection began, but declined to continue the trial. The record indicates that jury selection and trial proceeded, with Watson still dressed in prison attire. It appears from the record that there was no request for juror voir dire regarding Watson's prison attire, no further attempt to obtain civilian clothing for Watson, and no request for an instruction from the judge regarding Watson's prison attire. The record does not indicate that Watson's counsel had any objection to proceeding with trial following his apparently unsuccessful attempt to locate civilian clothing.

(11) Given the length of time the defense was on notice of the trial date, there was no abuse of discretion by the Superior Court in handling the request for a continuance as it did. Given that defense counsel did not raise the issue of Watson's attire again following his unsuccessful attempt to locate civilian clothing, it cannot be said that the Superior Court erred by compelling Watson to proceed to trial in prison garb.¹⁰ Because

¹⁰*Smith v. State*, Del. Supr., No. 512, 1997, Holland, J., 1998 WL 736382 (Oct. 6, 1998) (ORDER) (citing *Estelle v. Williams*, 425 U.S. 501, 504 (1976)). Accord *Andrus v. State*, Del. Supr., No. 359, 1998, *en banc*, 1998 WL 736338 (Oct. 1, 1998) (ORDER); *Payne v. State*, Del. Supr., 367 A.2d 1010, 1018 (1976).

Watson's counsel did not object to his prison attire at any time prior to or during trial, this Court will not address the issue for the first time on appeal.¹¹ Any claim of ineffective assistance of counsel for failing to raise such an objection should be asserted by filing a postconviction motion pursuant to Superior Court Criminal Rule 61.

(12) This Court has reviewed the record carefully and has concluded that Watson's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Watson's counsel has made a conscientious effort to examine the record and has properly determined that Watson 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:
Randy J. Holland
Justice

¹¹Supr. Ct. R. 8.