

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY J. JENKINS,	§	
	§	No. 12, 2005
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County in
	§	Cr. A. No. PS04-05-0518.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0405008778

Submitted: May 13, 2005
Decided: August 17, 2005

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

ORDER

This 17th day of August 2005, 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 appellant, Anthony Jenkins, was charged in June 2004 with multiple counts of Rape in the Second Degree and other charges for offenses occurring between February and May 2004 involving a fourteen-year old female. It appears from the record that at the time of Jenkins' arrest in May 2004, the fourteen-year old female was pregnant.

(2) On October 20, 2004, Jenkins entered a guilty plea to one charge of Rape in the Fourth Degree. In return, the State entered a *nolle prosequi* on twenty counts of Rape in the Second Degree and one count each of Unlawful Sexual Contact in the Second Degree and Endangering the Welfare of a Child. Consistent with the plea agreement, the Superior Court ordered a presentence investigation.

(3) At Jenkins' sentencing on December 10, 2004, the State recommended that the Superior Court impose thirty months at Level V, a sentence within the applicable truth-in-sentencing guideline (TIS guideline).¹ Under the circumstances of this case, however, the Superior Court imposed a sentence beyond the applicable TIS guideline, reasoning that the vulnerability of the victim and an offense against a child were aggravating factors that justified an enhanced sentence.²

(4) The Superior Court sentenced Jenkins to ten years at Level V supervision suspended after five years and upon successful completion of the Level V Family Problems Program for three years of probation. This is Jenkins' direct appeal.

¹Del. Sentencing Accountability Commission (SENTAC) Benchbook at 34 (2005).

²See SENTAC Benchbook at 94 (2005) (listing factors that justify an exceptional sentence).

(5) Jenkins’ trial counsel (“defense counsel”) has filed a brief, statement and a motion to withdraw pursuant to Rule 26(c). In the brief, defense counsel states that “[t]he only significant legal question is whether the Court abused its discretion and illegally enhanced” Jenkins’ sentence beyond the recommended TIS guideline. Defense counsel’s Rule 26(c)(ii) statement asserts that based upon her careful and complete examination of the record, there are no meritorious issues.

(6) 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. First, 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.³ Second, 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.⁴

(7) By letter, defense counsel informed Jenkins of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the

³*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*Id.*

accompanying brief and the sentencing transcript that she ordered for this appeal. Defense counsel also informed Jenkins of his right to supplement the Rule 26(c) brief and to respond to her motion to withdraw.

(8) Jenkins supplemented defense counsel’s presentation with one claim. The State has responded to the legal question identified by defense counsel and to the claim raised by Jenkins and has moved to affirm the Superior Court’s judgment.

(9) Jenkins claims that he was denied the opportunity to review the presentence report as required by Superior Court Criminal Rule 32(c)(3).⁵ He further contends that the Superior Court erroneously assumed that Jenkins was the father of the victim’s unborn child. Because Jenkins did not raise either claim in the Superior Court, the claims will be reviewed only for plain error.⁶

(10) Jenkins has not shown plain error. Under Rule 32(c)(3), a defendant’s counsel shall be permitted to read the presentence report.⁷ In this case, Jenkins does not contend that defense counsel was not permitted to read

⁵See Super. Ct. Crim. R. 32(c)(3) (providing that the Superior Court shall allow the defendant’s counsel . . . and the attorney general to read the report of the presentence investigation and shall afford the parties an opportunity to comment on the report and to present information relating to any factual inaccuracy).

⁶*Eaddy v. State*, 1996 WL 313499 (Del. Supr.) (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (defining plain error as mistakes which are “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process”).

⁷Super. Ct. Crim. R. 32(c)(3).

the report. Even assuming that the report was not reviewed, Jenkins has not shown that he was prejudiced as a result because paternity was not in dispute.

(11) The October 20, 2004 plea agreement signed by Jenkins provided that he would pay all costs related to the victim's pregnancy, including counseling and medical costs. Moreover, defense counsel informed the Superior Court at sentencing that Jenkins understood that "there is a child soon to be born," that he would have child support responsibilities, and that "he is anxious to be a stand-up guy with regard to this."⁸ At no point during the sentencing proceeding did Jenkins contradict the plea agreement or defense counsel's assessment of his responsibilities and attitude concerning the victim's pregnancy. Indeed, when the Superior Court asked prior to imposing the sentence if there was anything Jenkins wanted to say, Jenkins responded, "No."⁹

(12) Now, however, Jenkins attempts to challenge the sentence by repudiating the representations that defense counsel made to the Superior Court on his behalf. Thus, notwithstanding defense counsel's statements to the Superior Court concerning Jenkins' remorseful attitude about the victim's

⁸Sentencing Tr. at 3-4 (Dec. 10, 2004).

⁹*Id.* at 4.

pregnancy and his desire “to be a stand-up guy,” Jenkins now argues that the Superior Court’s reasoning for exceeding the TIS guideline was flawed because there was no DNA evidence presented to show that he was the father of the victim’s unborn child.¹⁰

(13) This Court reviews the sentencing of a criminal defendant pursuant to an abuse of discretion standard.¹¹ “Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature.”¹² Although there are voluntary sentencing guidelines, the sentencing judge is not bound by them.¹³ In this case, it is clear that the sentence imposed by the Superior Court was well within the applicable statutory maximum.¹⁴

(14) When a sentence is within the statutory limits, this Court will not find error unless it is clear that the sentence was unconstitutional or was based

¹⁰In an effort to bolster his revelation that the child’s paternity is uncertain, Jenkins’ written submission alleges that the victim told him that she had been “sexually active” with other males before him and “was a mother of [two] children who were placed for adoption in August 2003.”

¹¹*Walt v. State*, 727 A.2d 836, 840 (Del. 1999) (citing *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992)).

¹²*Mayes v. State*, 604 A.2d 839, 842 (Del. 1992) (quoting *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989)).

¹³*Mayes v. State*, 604 A.2d at 845 (quoting *Ward v. State*, 567 A.2d at 1297).

¹⁴*See* Del. Code Ann. tit. 11, § 770 (defining specific offense of Rape in the Fourth Degree, a class C felony); *see* Del. Code Ann. tit. 11, § 4205(b)(3) (providing that the term of incarceration for a class C felony is up to fifteen years at Level V).

upon factual predicates which are either false, impermissible, or lack minimum indicia of reliability.¹⁵ At Jenkins' sentencing, the Superior Court stated:

Well, Mr. Jenkins, I think you got your deal when your lawyer was able to negotiate the charges down. I cannot, for the life of me, believe that you didn't or weren't suspicious of the age of this child [given] the circumstances of your rendezvous in the early morning hours[.] I think you knew exactly what was going on and I think that it's just plain kind of shocking you had an ongoing relationship with this young girl. Now you have a child; now she's got a child. Her life has changed forever. There are aggravating factors: The vulnerability of the victim and an offense against a child.¹⁶

(15) Based upon the record, we conclude that the Superior Court acted within its discretion by relying on the aggravating factors articulated at sentencing to justify imposing an enhanced sentence. Nothing in the record suggests that the sentence was unconstitutional or that the Superior Court sentenced Jenkins upon the basis of false, impermissible or unreliable factual predicates. The record shows that the sentence was a "logical deliberative product of an open-minded jurist."¹⁷

(16) This Court has reviewed the record carefully and has concluded that Jenkins' appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that defense counsel has made a conscientious effort to

¹⁵*Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

¹⁶Sentencing Tr. at 4-5 (Dec. 10, 2004).

¹⁷*Siple v. State*, 701 A.2d at 86.

examine the record and has properly determined that Jenkins 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/ Henry duPont Ridgely
Justice