

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD FISHER,	§
	§ No. 135, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr.A. Nos. VN03-10-2074;
	§ 2082; 2083
Plaintiff Below-	§
Appellee.	§

Submitted: August 12, 2005
Decided: October 18, 2005

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

ORDER

This 18th day of October 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 defendant-appellant, Donald Fisher, was found to have committed a violation of probation (“VOP”) in connection with his sentences for convictions of Felony Theft and Forgery in the Second Degree. He was sentenced to a total of 5 years incarceration at Level V, to be suspended after 2 years for probation. This is Fisher’s direct appeal from his probationary sentences.

(2) Fisher’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.¹

(3) Fisher’s counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Fisher’s counsel informed Fisher 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. Fisher also was informed of his right to supplement his attorney’s presentation. Fisher responded with a brief that raises several issues for this Court’s consideration. The State has responded to the position taken by Fisher’s counsel as well as the issues raised by Fisher and has moved to affirm the Superior Court’s judgment.

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).

(4) Fisher raises several issues for this Court's consideration that may fairly be summarized as follows: a) there was insufficient evidence presented at the VOP hearing to support his VOP sentences; b) his VOP sentences are illegal because they violate the SENTAC² guidelines; and c) his counsel provided ineffective assistance.³

(5) In July 2004, Fisher pleaded guilty to one count of Felony Theft and two counts of Forgery in the Second Degree. On the theft conviction, he was sentenced to 3 years incarceration at Level V, suspended immediately for 1 year at Level III probation. On each of the forgery convictions, he was sentenced to 1 year incarceration at Level V, suspended immediately for 1 year at Level II probation. In addition, he was ordered to obtain gainful employment, undergo an assessment by Gamblers' Anonymous, follow any counseling recommendations, refrain from gambling, and complete his schooling in Philadelphia.

(6) During January 2005, while on probation, Fisher allegedly deposited approximately seven fraudulent checks at Citizens Bank in University Plaza in Newark, Delaware, and subsequently made a number of

² SENTAC stands for Sentencing Accountability Commission.

³ We decline to address this claim in Fisher's direct appeal of his VOP sentences. *Horne v. State*, 2005 WL 1949967 (Del. 2005).

withdrawals from the bank. As a result of the fraudulent transactions, Citizens Bank allegedly lost \$3,587.42.

(7) On March 24, 2005, a contested VOP hearing was held in the Superior Court. Trooper Daniel Grassi of the Delaware State Police testified that, on January 20, 2005, he was contacted by the branch manager of the Citizens Bank at University Plaza in Newark, Delaware. He was asked to investigate a customer of Citizens Bank who allegedly passed a number of bad checks between the dates of January 4, 2005 and January 20, 2005. His investigation revealed that all of the checks had been returned because no accounts existed for the checks and that the customer had withdrawn \$3,587.42. Trooper Grassi testified that Fisher was well known to bank personnel and that surveillance cameras at the bank yielded photographs that showed Fisher making the fraudulent deposits and withdrawals.

(8) Fisher's probation officer testified that Fisher had missed several appointments with him, was not attending school and had not enrolled in Gamblers' Anonymous, as required by his original sentencing order. Fisher himself admitted that he had not reported to his probation officer since December 2004.

(9) Fisher claims that there was insufficient evidence presented at the VOP hearing to support the finding that he had committed a VOP. We

have reviewed the transcript of the VOP hearing and find Fisher's claim to be without merit. There was ample testimony, including that of Fisher himself, supporting the State's allegations that Fisher had not complied with the conditions of his sentencing order and that he had committed new offenses.

(10) Fisher also claims that his sentences are illegal because they violate the SENTAC guidelines. It is well-settled that the Superior Court's deviation from the non-binding SENTAC guidelines does not, in and of itself, constitute a valid basis for appealing a sentence.⁴ Absent any evidence that Fisher's sentences exceeded the statutory limits, we find this claim to be without merit.⁵

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

⁴ *Mayes v. State*, 604 A.2d 839, 846 (Del. 1992).

⁵ *Id.* at 842-43.

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