

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELMER L. BROWN,	§	
	§	No. 703, 2002
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court of
	§	the State of Delaware, in and
v.	§	for Sussex County in VS01-09-
	§	0010-02.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0108023697

Submitted: April 16, 2003  
Decided: July 23, 2003

Before **VEASEY, Chief Justice, BERGER** and **STEELE**, Justices.

**ORDER**

This 23<sup>rd</sup> day of July 2003, 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) On November 26, 2002, the appellant, Elmer L. Brown, was found guilty by the Superior Court of his second violation of probation (VOP).<sup>1</sup> The Superior Court sentenced Brown to four years of Level V imprisonment, suspended after

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<sup>1</sup>Brown’s original conviction was for Possession with Intent to Deliver Cocaine. On December 3, 2001, he was sentenced to five years at Level V, suspended for ninety days at Level IV Home Confinement, followed by three years at Level III then one year at Level II. On April 5, 2002, Brown was adjudged guilty of VOP and was sentenced to four years and eleven months at Level V, suspended for one year at Level IV Residential Substance Abuse Treatment Program, suspended upon successful completion of the program, for three years at Level III Aftercare.

successful completion of the Key Program, for one year at the Level IV Crest Program and two years of Level III Aftercare. This is Brown's appeal.

(2) Brown's trial counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). The standard and scope of review is twofold. 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. 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.<sup>2</sup>

(3) Brown's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Brown's counsel informed Brown of the provisions of Supreme Court Rule 26(c) and provided him with a copy of the motion to withdraw and the Rule 26(c) brief. Brown was also informed of his right to supplement his attorney's presentation. Brown responded with a submission that raises issues for this Court's consideration. The State has responded to the position taken by Brown's counsel as well as to the issues raised by Brown and has moved to affirm the Superior Court's judgment.

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<sup>2</sup>*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 (1967).

(4) Brown was charged with having violated three conditions of his probation: (i) being off limits on a different housing tier; (ii) getting discharged from the Crest Program, and (iii) consuming alcohol. At the uncontested VOP hearing, Brown admitted that he had violated his probation as charged, but through counsel, he offered explanations and mitigating circumstances and requested leniency in sentencing.

(5) On appeal, Brown argues that he had been inappropriately placed on “Last Chance Contract” status and that, as a result, he was wrongfully discharged from the Crest Program. Second, Brown complains that his program counselor did not attend the VOP hearing and that, as a result, he was unable to establish that (i) he was inappropriately placed on “Last Chance Contract” status and (ii) the Crest Program was willing to reinstate him. Brown’s claims, however, are unavailing.

(6) At the hearing, Brown admitted that he had violated probation as charged. Brown’s counsel argued that the “Last Chance Contract” was used only in “extreme cases,” and that, in Brown’s opinion, he did not qualify for the contract. Moreover, Brown’s counsel argued that the Crest Program was willing to reinstate Brown. Nonetheless, the Superior Court found Brown guilty of VOP and sentenced him to the Key and Crest Programs to address his substance abuse problem and need for rehabilitation. There was competent evidence, including Brown’s own testimony,

to support the conviction. Upon finding a VOP, the Superior Court was within its discretion to reimpose any period of incarceration remaining on that sentence.<sup>3</sup>

(7) This Court has reviewed the record carefully and has concluded that Brown's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Brown's counsel made a conscientious effort to examine the record and properly determined that Brown could not raise a meritorious issue 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/ Myron T. Steele  
Justice

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<sup>3</sup>*Ingram v. State*, 567 A.2d 868, 869 (Del. 1989).