

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY J. THOMAS,	§
	§
Defendant Below-	§ No. 258, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. VN99-05-0674
Plaintiff Below-	§ Cr. ID 9903017270
Appellee.	§

Submitted: August 16, 2002
Decided: August 29, 2002

Before **VEASEY**, Chief Justice, **WALSH**, and **HOLLAND**, Justices.

ORDER

This 29th day of August 2002, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In April 2002, the Superior Court found the defendant-appellant, Anthony Thomas, in violation of the terms of a previously-imposed probationary sentence. The Superior Court modified Thomas's sentence to include supervision at Level IV for six months or until the expiration of a protection from abuse (PFA) order, whichever is longer. This is Thomas's direct appeal.

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

(3) 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) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this 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

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) The record reflects that Thomas pleaded guilty in May 1999 to one count of fourth degree rape involving a fourteen-year-old victim. He was sentenced to ten years at Level V incarceration, suspended after serving eighteen months for six and a half years at Level IV halfway house, suspended after six months for six years at decreasing levels of probation. A special condition of Thomas's sentence prohibited him from any contact with the victim or any underage female. In January 2002, an administrative warrant was issued charging Thomas with his second violation of probation. The administrative warrant charged Thomas with violating probation by committing a new criminal offense, by failing to report to his probation officer, and by living in a home with his ex-wife and six-year-old daughter in violation of the "no contact" condition in his sentence.

(5) At the VOP hearing, Thomas admitted that he had a new conviction for criminal contempt of a Family Court PFA order. Thomas argued, however, that he was living with his ex-wife, who had initially sought the PFA, with her consent and that his ex-wife had sought to have the PFA order vacated. Thomas further argued that he was not aware that the "no contact" condition of his sentence applied to his daughter. The Superior

Court found Thomas in violation of his probation and subsequently sentenced him.

(6) On appeal, Thomas contends that he received ineffective assistance of counsel during the VOP proceedings, that he did timely report to the probation office, and that the Superior Court erred in sentencing him by ordering him not to have contact with his ex-wife and daughter. Thomas contends that the Superior Court abused its discretion by refusing to consider that his ex-wife wants Thomas to live with her and she does not believe that Thomas constitutes a threat to their daughter.

(7) This Court will not consider claims of ineffective assistance of counsel for the first time on appeal.² Furthermore, even assuming that Thomas did not violate his probation by failing to timely report to his supervising officer, the point is moot in light of Thomas's admission that he committed a new offense for which he pleaded guilty to criminal contempt. The record of the VOP hearing supports the Superior Court's finding that Thomas violated the terms of his probation. Finally, regardless of his ex-wife's desire to allow Thomas to live in her home, it was not an abuse of discretion for the Superior Court to sentence Thomas to a Level IV program

² *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

and order him to have no contact with his ex-wife and daughter until permission was granted by his probation officer and Family Court.

(8) The Court has reviewed the record carefully and has concluded that Thomas's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Thomas's counsel has made a conscientious effort to examine the record and the law and has properly determined that Thomas 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/Joseph T. Walsh
Justice