

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT SCOTT,	§
	§
Defendant Below-	§ No. 41, 2003
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. IN00-05-0002
Plaintiff Below-	§
Appellee.	§

Submitted: August 15, 2003  
Decided: October 21, 2003

Before **BERGER, STEELE** and **JACOBS**, Justices

**ORDER**

This 21<sup>st</sup> day of October 2003, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Robert Scott, filed an appeal from the Superior Court’s January 2, 2003 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In April 2000, Scott was indicted on charges of Aggravated Menacing, Possession of a Deadly Weapon During the Commission of a Felony, Offensive Touching, and Criminal Mischief. On November 20, 2001, the Superior Court dismissed the charges against Scott but then, on November 27, 2001, vacated

the order of dismissal and ordered the case to be scheduled for trial.<sup>1</sup> On April 2, 2002, the day of trial, Scott pleaded guilty to the sole charge of Aggravated Menacing and the State dismissed the remaining charges. He was sentenced to 2 years incarceration at Level V, to be suspended after 15 months for 9 months of decreasing levels of probation. Scott did not file a direct appeal from his conviction and sentence.

(3) In this appeal, Scott claims that: a) his guilty plea was coerced; b) the State did not fulfill its promise of a probationary sentence; c) the Superior Court violated double jeopardy by vacating its order of dismissal and scheduling trial; and d) his counsel provided ineffective assistance in connection with the guilty plea proceedings.

(4) Scott's first claim of a coerced guilty plea is refuted by the record. The transcript of the guilty plea colloquy clearly reflects that Scott understood the nature of the plea and its consequences, was satisfied with the representation provided by his counsel and knowingly, intelligently and voluntarily entered the plea. When asked by the judge if he understood he could "receive up to 5 years incarceration for that offense," Scott answered, "Yes, sir." Absent clear and

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<sup>1</sup>The transcript of the office conference held that date reflects that the State's case against Scott was mistakenly dismissed because it appeared that the victim was not present for trial. In fact, the victim was present at the call of the trial calendar and, therefore, the case could have proceeded to trial that day.

convincing evidence to the contrary, Scott is bound by the representations he made at the time the plea was entered.<sup>2</sup>

(5) Equally without merit is Scott's second claim that the State failed to fulfill its promise that he would be sentenced to probation. There is no evidence in the record that the State made any promise to Scott with respect to his sentence. In fact, when asked by the judge if "anybody promised you what the sentence of the Court was going to be," Scott replied, "No."

(6) Scott's third claim of a double jeopardy violation was waived at the time of his voluntary guilty plea.<sup>3</sup> The claim of a double jeopardy violation is without merit in any case. In a criminal proceeding, jeopardy does not attach until the jury has been empaneled and sworn or, in a non-jury trial, when the first witness has been sworn.<sup>4</sup> Because jeopardy had not yet attached when the Superior Court vacated its order of dismissal and scheduled Scott's case for trial, Scott's claim of a double jeopardy violation must fail.

(7) Scott's final claim of ineffective assistance of counsel is also meritless. In order to prevail on his claim that his counsel was ineffective in connection with the entry of his guilty plea, Scott must show that, but for his

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<sup>2</sup>*Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

<sup>3</sup>*Downer v. State*, 543 A.2d 309, 311-12 (Del. 1988) (A voluntary guilty plea waives a claim of error occurring prior to the entry of the plea).

<sup>4</sup>*Tarr v. State*, 486 A.2d 672, 674 (Del. 1984).

counsel's unprofessional errors, he would not have pleaded guilty but would have insisted on proceeding to trial.<sup>5</sup> There is no evidence that any action on the part of counsel during the guilty plea proceedings resulted in prejudice to Scott. In fact, Scott's plea of guilty to aggravated menacing provided him with a substantial benefit, since three additional charges, two of them serious felonies, were dismissed.<sup>6</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele  
Justice

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<sup>5</sup>*Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

<sup>6</sup>*Downer v. State*, 543 A.2d 309, 312-13 (Del. 1988).