

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |   |                                 |
|--------------------|---|---------------------------------|
| TERRY MALIN,       | § |                                 |
|                    | § | No. 65, 2008                    |
| Defendant Below,   | § |                                 |
| Appellant,         | § | Court Below—Superior Court      |
|                    | § | of the State of Delaware in and |
| v.                 | § | for New Castle County           |
|                    | § |                                 |
| STATE OF DELAWARE, | § |                                 |
|                    | § |                                 |
| Plaintiff Below,   | § | Cr. ID No. 0609001649           |
| Appellee.          | § |                                 |

Submitted: June 27, 2008  
Decided: September 24, 2008

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

**ORDER**

This 24<sup>th</sup> day of September 2008, upon consideration of the appellant’s brief pursuant to Supreme Court Rule 26(c) (“Rule 26(c)”), his attorney’s motion to withdraw and the State’s response, it appears to the Court that:

(1) In October 2006, the appellant, Terry Malin, was charged with one count of Attempted Murder in the First Degree, Burglary in the Second Degree, Robbery in the First Degree, and Theft of a Motor Vehicle, two counts of Attempted Rape in the First Degree, and four counts of Possession of a Deadly Weapon During the Commission of a Felony (PDWDCF). At a Superior Court bench trial in December 2007, Malin was found not guilty of one count of

Attempted Rape in the First Degree and Theft of a Motor Vehicle. Malin was adjudged guilty of one count of Attempted Rape in the First Degree, Assault in the First Degree (as a lesser-included offense of Murder in the First Degree), Burglary in the Second Degree, Robbery in the First Degree, and four counts of PDWDCF.

(2) In January 2008, the Superior Court sentenced Malin to a total of fifty-three years at Level V suspended after fifty years for two years at Level IV suspended after six months for Level III probation. This is Malin's direct appeal.

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

(4) 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.<sup>1</sup> First, this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims.<sup>2</sup> Second, 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.<sup>3</sup>

(5) In his written points submitted for this Court’s consideration Malin alleges that: (a) he was not advised of his Miranda rights; (b) he was denied a speedy trial; (c) the evidence against him was insufficient and inconsistent; (d) he was under the influence of “psychiatric medication” during trial and was unable to “reconstruct the crime scene and events”; (e) at trial and sentencing the trial judge “relied on impermissible factors and exhibited a closed mind,” and (f) his trial counsel was ineffective. It is well-settled that the Court will not consider a claim of ineffective assistance of counsel that is raised for the first time on direct appeal.<sup>4</sup> For that reason, the Court has not considered Malin’s allegations of ineffective assistance of counsel.

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<sup>1</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, 744 (1967).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

(6) The Superior Court record reflects the following sequence of events. At noon on September 4, 2006, sixty-year old Martha Oxford was watching television at her home in New Castle, Delaware, when Malin knocked on her door.<sup>5</sup> Oxford recognized Malin as the son of a handyman who had done work for her over the years. When Oxford answered the door Malin told her that his car had broken down, and he asked to use the telephone. Oxford let Malin in. Once inside Oxford's residence, Malin Malin attacked Oxford, tying her hands behind her back with a rope and putting his belt around her neck. Malin attempted without success to penetrate Oxford's vagina and/or anus with his penis. He then tightened the belt around her neck until she lost consciousness.

When Oxford regained consciousness she found that Malin was still in her bedroom, rummaging through her belongings. Malin hog-tied Oxford and left, taking with him her car keys, cell phone and credit cards.

Oxford went to the hospital where she was examined by a sexual assault nurse. At trial, the nurse testified that Oxford suffered from redness, swelling and an abrasion in her vaginal/anal area. According to the nurse, Oxford also suffered a traumatic injury to her left vocal cord and hemorrhaging of her eyes and throat, all of which were consistent with strangulation.

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<sup>5</sup> The Court has used a pseudonym to identify the victim. Del. Supr. Ct. R. 7(d).

Malin was arrested the following day in Maryland by the Maryland State Police. Malin was driving Oxford's car and had with him her cell phone and credit cards.

Malin testified in his own defense at trial. Malin recounted that on the date of the incident, he and Oxford were engaged in consensual sexual activity at Oxford's residence when an intruder appeared and demanded money from them for a previous drug sale. Malin testified that the intruder choked and robbed Oxford.

(7) Malin's first claim on appeal is that he was not advised of his Miranda rights. "Miranda warnings are required when police interrogate a suspect in a custodial setting."<sup>6</sup> Assuming, without deciding, that Malin was not given proper Miranda warnings and that he made a statement pursuant to a custodial interrogation, Malin's Miranda claim is without merit because no such statement was introduced at trial, and Malin has not contended, nor does the record reflect, that any evidence adduced at trial was obtained as a result of such statement.

(8) Malin's second claim is that he was denied his right to a speedy trial. The Court considers four factors when assessing whether there has been a speedy

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<sup>6</sup> *Tolson v. State*, 900 A.2d 639, 643 (Del. 2006).

trial violation: the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant as a result of the delay.<sup>7</sup>

(9) The record reflects that Malin was arrested in September 2006 and was held in default of bail until September 2007 when he was convicted of crimes in another case and incarcerated.<sup>8</sup> In this case, Malin's trial, initially scheduled for April 2007, was postponed in part due to a psychological examination requested by the defense. After the examination was submitted in May 2007, the trial was scheduled for September 2007.<sup>9</sup> In September 2007, both the defense and the prosecution requested a continuance, and the trial was rescheduled for October 2007. In October the trial was again postponed until December 2007 due to the unavailability of the prosecutor. Under the circumstances reflected in the record, *i.e.*, that the delay in Malin's trial was attributable in part to the defense and that Malin has alleged no prejudice to his defense, we conclude that his speedy trial claim is without merit.

(10) Malin alleges that the evidence in support of the guilty verdicts was both insufficient and inconsistent. On a claim of insufficient evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the

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<sup>7</sup> *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

<sup>8</sup> *State v. Malin*, Del. Super., Cr. ID No. 0608022475 (Nov. 16, 2007) (sentencing), *aff'd*, 2008 WL 2429114 (Del. Supr.).

<sup>9</sup> In the interim, the Superior Court held a hearing on defense counsel's motion to withdraw. Prior to trial substitute counsel entered his appearance on behalf of Malin.

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>10</sup> The trier of fact, in this case the Superior Court trial judge, is solely responsible for determining witness credibility, resolving conflicts in the testimony and drawing inferences from the proven facts.<sup>11</sup>

(11) Although Malin denied all of the charges against him, the judge, sitting as the trier of fact, chose to believe Oxford's version of the events rather than Malin's. Oxford's testimony, considered together with the other evidence, was more than sufficient to support Malin's convictions. Malin's claim is without merit.

(12) Malin alleges without further elaboration that the trial judge "relied on impermissible factors and exhibited a closed mind" at trial and sentencing. "A judge sentences with a closed mind when the sentence is based on a preconceived bias without consideration of the nature of the offense or the character of the defendant."<sup>12</sup> There is nothing in the record that supports Malin's contention that the judge had a preconceived bias and, having reviewed the trial transcript, we conclude that the Superior Court did not misapprehend any issue of fact when sentencing Malin.

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<sup>10</sup> *Dixon v. State*, 567 A.2d 854, 857 (Del. 1989).

<sup>11</sup> *Id.* at 858.

<sup>12</sup> *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

(13) Finally, Malin contends that he was under the influence of “psychiatric medication” at the time of his trial and thus was unable to “reconstruct the crime scene and events.” The trial transcript does not support Malin’s contention. We conclude that Malin’s claim is without merit.

(14) The Court has reviewed the record carefully and has concluded that Malin’s appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Malin’s counsel made a conscientious effort to examine the record and properly determined that Malin 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/ Randy J. Holland

Justice