

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH SMITH,	§	
	§	No. 41, 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. 0511010139
Appellee.	§	

Submitted: July 31, 2008  
Decided: October 30, 2008

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

**ORDER**

This 30<sup>th</sup> day of October 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 December 2005, the appellant, Joseph Smith, was charged in a twelve-count indictment with one count of Murder in the First Degree, three counts of Attempted Murder in the First Degree, five counts of Possession of a Firearm During the Commission of a Felony, two counts of Possession of a Deadly Weapon by a Person Prohibited and one count of Aggravated Menacing. The charges arose from a November 10, 2005

incident in which Smith shot four acquaintances, killing one and paralyzing another.

(2) On October 16, 2006, Smith pled guilty to the murder and attempted murder charges. In exchange for the guilty plea, the State entered a *nolle prosequi* on the remaining charges, agreed to forego a death penalty hearing<sup>1</sup> and agreed to submit the matter to the Superior Court as to whether a verdict of “guilty” or “guilty, but mentally ill” should be entered.<sup>2</sup> Both the State and Smith submitted mental health evaluations and oral argument after which the Superior Court issued a thirteen-page memorandum opinion determining that a verdict of guilt was appropriate.<sup>3</sup> Thereafter, the matter proceeded to sentencing at which Smith received four consecutive life sentences.

(3) On appeal, Smith’s counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). Smith’s counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Smith’s attorney informed him of the provisions of Rule 26(c) and provided Smith with a copy of the motion

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<sup>1</sup> See Del. Code Ann. tit 11, § 4209(b)(2) (2007) (providing, in pertinent part, that a person pleading guilty to first degree murder, a crime punishable by death or life in prison, shall be subject to a punishment hearing before a jury).

<sup>2</sup> See Del. Code Ann. tit. 11, § 408 (providing, in pertinent part, for a hearing when a defendant desires to enter a plea to “guilty, but mentally ill”).

<sup>3</sup> *State v. Smith*, Del. Super., Cr. ID No. 0511010139, Scott, J. (Dec. 6. 2007).

to withdraw and the accompanying brief. Moreover, Smith’s attorney informed him of his right to supplement the brief and to respond to the motion to withdraw. Smith responded with a written submission that raises several points for this Court’s consideration. The State has responded to Smith’s points as well as to the position taken by Smith’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>4</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>5</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>6</sup>

(5) In his written points submitted for this Court’s consideration Smith alleges that: (a) there are defects in his plea, (b) he has a “basis to assert legal innocence,” and (c) ineffective assistance of counsel. It is well-settled that the Court will not consider a claim of ineffective assistance of

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<sup>4</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>5</sup> *Id.*

<sup>6</sup> *Id.*

counsel that is raised for the first time on direct appeal.<sup>7</sup> For that reason, the Court has not considered Smith's allegations of ineffective assistance of counsel.

(6) Smith's contentions of defects in his plea are contradicted by the record of the plea proceedings. It is well-settled that a defendant is bound by his answers during a guilty plea colloquy in the absence of clear and convincing evidence to the contrary.<sup>8</sup> The plea agreement, guilty plea form and transcript of Smith's guilty plea colloquy amply demonstrate that his plea was entered knowingly, voluntarily and intelligently.

(7) Smith admitted his guilt to the Superior Court during the guilty plea colloquy. Smith's conclusory assertion of innocence is not sufficient to require reversal of the concomitant conviction and sentence, particularly when he admitted his guilt in the plea colloquy.<sup>9</sup>

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

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<sup>7</sup> *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

<sup>8</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

<sup>9</sup> *Russell v. State*, 1999 WL 507303 (Del. Supr.).

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