

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK A. HARRIS,	§
	§
Defendant Below-	§ No. 706, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. VN93-01-0010-02
Plaintiff Below-	§ VN00-12-0690-01
Appellee.	§

Submitted: March 21, 2003

Decided: April 25, 2003

Before **HOLLAND, BERGER** and **STEELE**, Justices

**ORDER**

This 25<sup>th</sup> day of April 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 20, 2002, the defendant-appellant, Mark Harris, was found to have committed a violation of probation (“VOP”) in connection with a 1993 conviction for Possession of Cocaine Within 1000 Feet of a School<sup>1</sup> and a

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<sup>1</sup>Harris was originally sentenced on that conviction to 30 years incarceration at Level V, to be suspended for 10 years of decreasing levels of probation. He was sentenced at the same time to 3 years incarceration at Level V on each of two additional drug convictions.

2001 conviction for Receiving Stolen Property.<sup>2</sup> Harris was sentenced on the VOP to a total of 10 years, 15 months incarceration at Level V, to be suspended after 10 years, 9 months for 6 months at Level IV. This is Harris' direct appeal of his VOP sentence.

(2) Harris' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). 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) 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; and (b) 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>3</sup>

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<sup>2</sup>Harris was sentenced on that conviction to 2 years incarceration at Level V, to be suspended after 9 months for 15 months at Level II.

<sup>3</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).

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

(4) Harris raises two issues for this Court's consideration. He claims that the Superior Court improperly violated him on his 10-year probationary sentence for cocaine possession because: a) the VOP occurred when he was serving his probationary sentence for receiving stolen property and he was not notified that he could be violated on prior probationary sentences; and b) the 10-year probationary sentence for cocaine possession already had been dismissed by the Superior Court and, therefore, could not serve as the basis for a subsequent VOP.

(5) Harris' claims appear to be based upon a misunderstanding of the record. The record reflects that in 1993 Harris was sentenced on three drug charges to a total of 36 years incarceration at Level V, to be suspended after 6 years for 10 years at decreasing levels of probation. While the record reflects that in 1997 the Superior Court suspended 3 years of Level V incarceration for 18 months of Level III probation on one of Harris' 1993 sentences, the 30-year sentence at Level V, suspended for 10 years of probation, remained intact. The record also reflects that, at a VOP hearing on June 28, 2001, the Superior Court dismissed a VOP in connection with that sentence, but did not in any way modify the sentence itself.

(6) In addition to being based on factual errors, Harris' claims also are without legal merit. Upon finding a VOP, the Superior Court is authorized to reimpose any previously suspended prison term.<sup>4</sup> The Level V time reimposed by the Superior Court at the November 20, 2002 VOP hearing was within the amount of Level V time still remaining on Harris' 1993 and 2001 sentences. To the extent Harris argues that he could not be violated on a probationary sentence he had not yet begun to serve, that argument, too, is without merit. The

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<sup>4</sup>*Ingram v. State*, 567 A.2d 868, 869 (Del. 1989) (citing DEL. CODE ANN. tit. 11, § 4334(c)).

Superior Court has discretion to terminate a probationary sentence at any time, even if the defendant has not yet begun to serve it.<sup>5</sup>

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

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<sup>5</sup>DEL. CODE ANN. tit. 11, §§ 4301, 4333; *Williams v. State*, 560 A.2d 1012, 1013, 1015 (Del. 1989).

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.<sup>6</sup>

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>6</sup>To the extent Harris argues that his counsel provided ineffective assistance, this Court will not consider any such claim for the first time on direct appeal. *Wing v. State*, 690 A.2d 921, 923 (Del. 1996).