

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAJOR FOSTER,	§
	§ No. 590, 2008
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID Nos. 0708027105
	§ 0412011892
Plaintiff Below-	§
Appellee.	§

Submitted: April 20, 2009
Decided: May 26, 2009

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

ORDER

This 26th day of May 2009, 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 18, 2008, the defendant-appellant, Major Foster, admitted to a violation of probation (“VOP”) in connection with his 2007 sentence for Possession of Cocaine and his five 2005 sentences for Burglary. For violating his 2007 probationary sentence, Foster was sentenced to one year at Level V, with credit for seventy-five days previously served, to be suspended for nine months at Level IV work release. For violating his 2005 probationary sentences, he was sentenced to a total of thirteen years at Level

V, to be suspended for three months of Level IV work release, to be followed by two years at Level III probation, with seven years and twenty-one months to be served at Level I. This is Foster's direct appeal from his VOP sentences.

(2) Foster's 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 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.¹

(3) Foster's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Foster's counsel informed Foster of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete transcript. Foster also was informed of his right to supplement his attorney's presentation. Foster responded with a brief that

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).

raises several issues for this Court's consideration. The State has responded to the position taken by Foster's counsel as well as the issues raised by Foster and has moved to affirm the Superior Court's judgment.

(4) Foster raises several issues for this Court's consideration, which may fairly be summarized as follows. He claims that a) his arrest for the VOP was invalid because no administrative warrant was issued; b) his VOP sentences are illegal, first, because they include a period of probation exceeding two years and, second, because his seventy-five day Level V credit was not applied to his Level IV sentence; c) the amount of restitution imposed, amounting to over \$27,000, is excessive; d) his first counsel provided ineffective assistance by failing to schedule a hearing to determine whether his restitution was excessive; and e) his second counsel provided ineffective assistance by failing to object at the VOP hearing to the circumstances of his arrest.

(5) The transcript of the November 18, 2008, VOP hearing reflects that Foster, through counsel, admitted that he violated his probation by testing positive for cocaine. The Superior Court imposed sentence immediately thereafter. There was no objection raised, either prior to the hearing or at the hearing, regarding any issue, including the circumstances of Foster's arrest.

(6) Foster's first claim is that his arrest for the VOP was invalid because no administrative warrant was issued. Because Foster, who was represented by counsel, raised no prior objection to the circumstances of his arrest and admitted that he had committed a VOP, he has waived any claim regarding the circumstances of his arrest.² We, therefore, conclude that Foster's first claim is without merit.

(7) Foster's second claim is that his VOP sentences are illegal, first, because they include a period of probation exceeding two years and, second, because his seventy-five day Level V credit was not applied to his Level IV sentence. Delaware law provides for a general limitation of two years for probationary sentences.³ However, there is no such limitation in cases where the defendant requires a longer period of time to pay the amount of restitution imposed.⁴ Foster's VOP sentencing order requires that he pay over \$27,000 in restitution. On the record before us, we cannot conclude that the probationary period included in his sentence is improper. Foster's further contention that his Level V credit should have been applied to his Level IV sentence is without merit, since Delaware law requires that Level

² *Weaver v. State*, Del. Supr., No. 5, 2007, Ridgely, J. (July 18, 2007); *Melody v. State*, Del. Supr., No. 373, 2002, Holland, J. (Oct. 16, 2002).

³ Del. Code Ann. tit. 11, § 4333(b) (1).

⁴ Del. Code Ann. tit. 11, § 4333(d) (3).

V credit only be applied to a Level V sentence.⁵ Thus, because Foster has not demonstrated that his sentences are illegal, we conclude that his second claim is without merit.

(8) Foster's third claim is that the restitution he is required to pay, amounting to over \$27,000, is excessive. Because the record before us, including the transcript of the VOP hearing, does not reflect the underlying factual findings of the Superior Court with respect to the amount of restitution owed by Foster,⁶ we have no basis for appellate review and, therefore, decline to address the issue in this appeal.

(9) Foster's fourth and fifth claims are that his two attorneys provided ineffective assistance, the first by failing to object at the VOP hearing regarding the circumstances of his arrest and the second by failing to schedule an evidentiary hearing on the issue of the amount of his restitution. It is settled Delaware law that this Court will not consider allegations of ineffective assistance of counsel made for the first time on direct appeal.⁷ Because Foster's claims were not presented to the Superior Court in the first instance, we decline to address them in this appeal.

⁵ *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).

⁶ *Benton v. State*, 711 A.2d 792, 797 (Del. 1998) (At sentencing, the amount of restitution is based on evidence that is established by a preponderance of evidence).

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

(10) This Court has reviewed the record carefully and has concluded that Foster's appeal is wholly without merit and devoid of any arguably appealable issues. We also are satisfied that Foster's counsel has made a conscientious effort to examine the record and the law and has properly determined that Foster 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