

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATHANIEL ALLEN,	§
	§ No. 58, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr. ID No. 0701007652
	§
Plaintiff Below-	§
Appellee.	§

Submitted: March 16, 2009

Decided: April 27, 2010

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

ORDER

This 27th day of April 2010, 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 March 22, 2007, the defendant-appellant, Nathaniel Allen, pleaded guilty to one count of Possession With Intent to Deliver Oxycodone. He was sentenced to 15 years of incarceration at Level V, to be suspended after 3 years for 6 months at Level IV and 1 year at Level III probation. This Court affirmed Allen’s conviction on direct appeal.¹

¹ *Allen v. State*, Del. Supr., No. 213, 2007, Steele, C.J. (Jan. 14, 2008).

(2) In January 2009, following the filing of Allen's *pro se* motion to correct an illegal sentence under Superior Court Criminal Rule 35(a), the Superior Court issued a modified order sentencing Allen to 5 years incarceration at Level V, to be suspended after 3 years for 6 months at Level IV, in turn to be followed by 1 year at Level III probation. Allen then appealed to this Court arguing that the Superior Court erred by failing to appoint counsel for his re-sentencing hearing and by failing to rule on his motion to withdraw his guilty plea. The State subsequently moved to remand the matter to the Superior Court for an evidentiary hearing on those issues. This Court granted the motion to remand and retained jurisdiction.²

(3) The Superior Court scheduled an evidentiary hearing for July 17, 2009 and appointed counsel to represent Allen. Following the hearing, the Superior Court reinstated its previous sentencing order and further determined that the motion to withdraw guilty plea would be decided in the context of a Rule 61 postconviction motion. This is Allen's appeal of that ruling.

(4) Allen'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 pursuant

² *Allen v. State*, Del. Supr., No. 58, 2009, Ridgely, J. (June 12, 2009).

to 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 arguably could 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.³

(5) Allen's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Allen's counsel informed Allen 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. Allen also was informed of his right to supplement his attorney's presentation. Allen responded with a brief that raises three issues for this Court's consideration. The State has responded to the position taken by Allen's counsel as well as the issues raised by Allen and has moved to affirm the Superior Court's judgment.

(6) Allen raises three issues for this Court's consideration, which may fairly be summarized as follows. He claims that a) in connection with his guilty plea, the Superior Court abused its discretion by imposing an illegal 15-year Level V sentence and his attorney provided ineffective

³ *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).

assistance by advising him that he was facing a 15-year Level V sentence; and b) at his resentencing, his attorney provided ineffective assistance by refusing to argue that he should be permitted to withdraw his guilty plea and the Superior Court abused its discretion by refusing to permit him to argue that his guilty plea should be withdrawn.

(7) Allen's first claim is based upon his assumption that the Superior Court's original imposition of a 15-year sentence on his conviction of Possession With Intent to Deliver Oxycodone was erroneous. While the Superior Court ultimately re-sentenced Allen to 5 years of Level V incarceration, Allen was, in fact, subject to a 15-year Level V sentence, in accordance with the Superior Court's original sentencing order.⁴ Because there was no error or abuse of discretion on the part of the Superior Court in imposing a 15-year Level V sentence, and because there was no error on the part of Allen's counsel in advising him that he was facing a 15-year Level V sentence,⁵ we conclude that Allen's first claim is without merit.

(8) Allen's second claim is that his counsel at his resentencing improperly refused to argue that he should be permitted to withdraw his guilty plea and the Superior Court abused its discretion by refusing to allow

⁴ The charge of Possession With Intent to Deliver Oxycodone is a Class C felony. Del. Code Ann. tit. 16, §4751(a). As such, Allen was facing a sentence range of "up to 15 years to be served at Level V." Del. Code Ann. tit. 11, §4205(b)(3). Both the State and Allen's current court-appointed counsel agree on that point.

⁵ *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).

him to withdraw his guilty plea. The transcript of the resentencing hearing reflects that Allen's counsel had advised his client that a request to withdraw his March 22, 2007 guilty plea should be made by way of a Rule 61 motion for postconviction relief. Nevertheless, Allen's attorney stated that he was prepared to proceed with Allen's request to withdraw his guilty plea, if the Superior Court so desired. Ultimately, in light of the State's objection, the Superior Court determined that it would consider Allen's request only by way of a Rule 61 motion and asked counsel to represent Allen on that motion.

(9) Based upon the transcript of the resentencing hearing, we conclude that Allen's claim that his counsel refused to present his request to withdraw his guilty plea to the Superior Court to be factually incorrect. Moreover, we find no error or abuse of discretion on the part of the Superior Court in ruling that Allen's request to withdraw his guilty plea be presented in the form of a Rule 61 motion.⁶ We, therefore, conclude that Allen's second claim also is without merit.

(10) This Court has reviewed the record carefully and has concluded that Allen's appeal is wholly without merit and devoid of any arguably

⁶ *Patterson v. State*, 684 A.2d 1234, 1237 (Del. 1996) (in accordance with Superior Court Rule 32(d), a motion to withdraw a guilty plea after sentencing constitutes a collateral attack on a conviction subject to the requirements of Rule 61.)

appealable issues. We also are satisfied that Allen's counsel has made a conscientious effort to examine the record and the law and has properly determined that Allen 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/ Myron T. Steele
Chief Justice