

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALLEN J. FOOTE,	§
	§
Defendant Below-	§ No. 578, 2009
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0710001779
Plaintiff Below-	§
Appellee.	§

Submitted: April 14, 2010

Decided: June 16, 2010

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 16th day of June 2010, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) On April 10, 2008, the defendant-appellant, Allen Foote (Foote), pled guilty to one count each of first degree assault and possession of a firearm during the commission of a felony. The Superior Court sentenced Foote to a total period of thirty-five years at Level V incarceration, to be suspended after serving twenty years in prison for two years at Level IV work release. This is Foote's direct appeal.

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

(3) 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) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) 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.¹

(4) In response to his counsel's motion to withdraw, Foote filed a letter asserting that the trial court improperly based its sentencing decision

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).

on facts contained in the presentence investigation report that lacked the minimum indicia of reliability. Foote also contends that his counsel never informed him that the five year minimum mandatory sentence that she argued for on his behalf was not guaranteed. We address these claims in that order.

(5) In reviewing a sentence such as Foote's, which falls within the statutory limits, the Court will not find error of law or abuse of discretion unless it is clear from the record that the sentence has been imposed in reliance upon demonstrably false information or information lacking minimum indicia of reliability.² Foote contends that the sentencing judge relied upon unsubstantiated allegations contained in the presentence report, which his attorney never shared with him. Foote does not identify those unreliable allegations, however.

(6) The sentencing judge, in fact, identified several aggravating factors that she considered relevant to her decision to impose more than the minimum mandatory sentence for each of Foote's convictions. Specifically, the sentencing judge noted the history of Foote's domestic violence against the victim, Foote's failure to acknowledge the seriousness of the offense, the lack of remorse he expressed to the presentence investigator, and Foote's

² *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

attempts to undermine the judicial system by preventing the victim from testifying against him. Both the victim and her mother testified at the sentencing hearing about Foote's history of domestic violence against the victim and his attempts to prevent her from "snitching." Given that, we find no support for Foote's contentions that the judge sentenced him based on information lacking minimum indicia of reliability. Moreover, to the extent Foote contends that his counsel was ineffective for failing to disclose the contents of the presentence investigation report to him, this Court will not consider that claim for the first time on appeal.³

(7) Foote's second argument on appeal is that his attorney assured him that he would be sentenced to the minimum mandatory term for each conviction. He claims that he did not understand that he was not guaranteed to receive a sentence of only five years. Foote's claim, however, is flatly contradicted by the record. The transcript of the guilty plea colloquy reflects Foote's clear understanding that by pleading guilty to the two criminal offenses, he was facing a sentence that could range from a minimum of five years to a maximum of fifty years. Foote expressly stated to the Superior Court that no one had promised him what his sentence would be and that, despite what the State might recommend as a sentence, he understood that

³ *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985).

the judge ultimately would decide what the length of his sentence should be. In the absence of clear and convincing evidence to the contrary, Foote is bound by these sworn statements.⁴ Consequently, we find no merit to his second argument on appeal.

(8) The Court has reviewed the record carefully and has concluded that Foote's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Foote's counsel has made a conscientious effort to examine the record and the law and has properly determined that Foote 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/ Jack B. Jacobs
Justice

⁴ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).