

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAYNE AVERILL,	§
	§ No. 595, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0810004628
	§
Plaintiff Below-	§
Appellee.	§

Submitted: May 20, 2010

Decided: June 29, 2010

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 29<sup>th</sup> day of June 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 February 10, 2009, the defendant-appellant, Wayne Averill, entered pleas of guilty to Unlawful Sexual Conduct Against a Child and Sexual Offender Loitering. In exchange for the pleas, the State dismissed 4 additional indicted charges. On the conviction of unlawful sexual conduct, Averill was sentenced to 2 years of Level V incarceration, to be suspended after 1 year for 1 year of Level IV Home Confinement or Work Release. On

the loitering conviction, he was sentenced to 3 years of Level V incarceration.<sup>1</sup> This is Averill's direct appeal.

(2) Averill'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 defense 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.<sup>2</sup>

(3) Averill's counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Averill's counsel informed Averill 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. Averill also was informed of his right to supplement his attorney's presentation. Averill responded with a brief that raises several issues. The State has responded to

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<sup>1</sup> Averill also was sentenced on violations of probation to a total of 30 years of Level V incarceration, to be suspended after 6 years for 9 years of probation at Level III.

<sup>2</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).

the position taken by Averill's counsel as well as the issues raised by Averill and has moved to affirm the Superior Court's judgment.

(4) Averill raises six issues for this Court's consideration. He claims that: a) he was forced into accepting the plea because he did not have an attorney until the day of trial; b) he was sentenced without an updated presentence report; c) he was improperly sentenced for one of his three probation violations; d) the two charges of unlawful sexual conduct constitute a double jeopardy violation; e) he was prejudiced at the sentencing hearing by the misrepresentation by the prosecutor that he was on Level IV Work Release at the time of the crimes; and f) he was not actually guilty of the unlawful sexual conduct charge.

(5) The transcript of the guilty plea hearing reflects the following. During the plea colloquy, the defendant acknowledged that he had reviewed the plea agreement and the guilty plea form with his attorney and that he understood the questions and answered them truthfully. He further acknowledged that no one had promised him what his sentence would be, that the court was not bound by any sentencing recommendation by the prosecution, that no one had coerced him into pleading guilty, and that he faced a maximum of 2 years at Level V on the unlawful sexual conduct charge and a maximum of 3 years at Level V on the loitering charge.

Finally, the defendant admitted that he had, in fact, committed the crimes of unlawful sexual conduct against a child and sexual offender loitering. On these grounds, the Superior Court accepted the defendant's guilty pleas as knowing and voluntary.

(6) At the sentencing hearing, after lengthy presentations by the prosecutor, defense counsel, the defendant's probation officer, as well as the defendant himself, and consideration by the Superior Court of a psychiatric report on Averill, the Superior Court imposed sentence for unlawful sexual conduct against a child and sexual offender loitering. The Superior Court also imposed sentence for a number of outstanding probation violations.

(7) The transcript of Averill's plea hearing reflects that his guilty plea was knowing and voluntary. As such, Averill is bound by the sworn statements he made at the hearing.<sup>3</sup> Moreover, his voluntary guilty plea constitutes a waiver of any alleged errors or defects occurring prior to the entry of the plea.<sup>4</sup> Averill's first and final claims of coercion and actual innocence are, therefore, unavailing.

(8) Averill's remaining four claims relate to his sentences. Our review of the transcript of the sentencing hearing reflects no error or abuse of discretion on the part of the Superior Court. Any error on the part of the

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<sup>3</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

<sup>4</sup> *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2003).

prosecutor in stating that Averill was on work release when the crimes were committed was corrected by the testimony of Averill's probation officer. As for Averill's claim that an updated presentence report was not available, Averill's history of childhood abuse and criminal history were discussed in detail at the sentencing hearing. Averill himself spoke at length concerning those issues. There is no indication that the lack of an updated presentence report had any impact on the outcome of the proceedings. To the extent that Averill seeks to assert claims of ineffective assistance of counsel, any such claims are properly raised in a Rule 61 postconviction motion. To the extent that Averill seeks to assert a claim that his sentences are illegal, any such claim is properly raised in a Rule 35 motion for correction of sentence.<sup>5</sup>

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

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<sup>5</sup> The Superior Court docket reflects that Averill filed two motions for sentence modification, the first on December 9, 2009 and the second on March 23, 2010, both of which were denied by the Superior Court.

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/ Henry duPont Ridgely  
Justice