

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SCOTT WHITAKER,	§
	§ No. 191, 2010
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. 0906011687
	§
Plaintiff Below-	§
Appellee.	§

Submitted: September 20, 2010

Decided: October 29, 2010

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

**ORDER**

This 29<sup>th</sup> day of October 2010, upon consideration of the appellant's brief 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) The defendant-appellant, Scott Whitaker, pleaded guilty, with the assistance of counsel, to the charges of Assault in the Second Degree and Resisting Arrest. On the assault conviction, he was sentenced to 8 years of Level V incarceration, to be followed by 6 months at Level IV. On the resisting arrest conviction, he was sentenced to 1 year of Level V incarceration, to be suspended for 1 year at Level III probation. This is Whitaker's direct appeal.

(2) Whitaker'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 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>1</sup>

(3) Whitaker'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, Whitaker's counsel informed Whitaker 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. Whitaker also was informed of his right to supplement his attorney's presentation. Whitaker responded with a brief that raises 2 issues for this Court's consideration. The State has responded to the position taken by Whitaker's counsel as well as the issues raised by Whitaker and has moved to affirm the Superior Court's judgment.

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<sup>1</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).

(4) Whitaker raises 2 issues for this Court's consideration. He claims that a) he should be allowed to withdraw his guilty plea; and b) the sentencing judge relied on factual inaccuracies in sentencing him, including false information in the police report.

(5) The transcript of Whitaker's guilty plea colloquy reflects that Whitaker stated he understood that he could receive a sentence of 9 years in prison, that no one had coerced him into accepting a plea, that no one had promised him what sentence he would receive and that he had, in fact, committed the crimes to which he was pleading guilty. As such, Whitaker's guilty plea was entered knowingly and voluntarily.

(6) Whitaker's first claim is that he should be allowed to withdraw his guilty plea. A motion to withdraw a guilty plea must be made prior to the imposition of sentence.<sup>2</sup> Whitaker does not dispute that he did not move to withdraw his plea prior to his sentencing hearing. A motion to withdraw a guilty plea is addressed to the sound discretion of the Superior Court.<sup>3</sup> Moreover, the defendant bears the burden of demonstrating a fair and just reason for withdrawal.<sup>4</sup> Only where the judge determines that there was a procedural defect in the taking of the plea, that the plea was not

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<sup>2</sup> Super. Ct. Crim. R. 32(d). Otherwise, a plea may be set aside only under Rule 61. *Id.*

<sup>3</sup> *Scarborough v. State*, 938 A.2d 644, 649-50 (Del. 2007).

<sup>4</sup> *Id.*; Super. Ct. Crim. R. 11(d); Super. Ct. Crim. R. 32(d).

entered voluntarily, or that there was inadequate legal representation will a motion to withdraw a guilty plea be granted.<sup>5</sup> Whitaker has failed to demonstrate a valid reason for withdrawal of his plea. It is apparent that Whitaker wishes to withdraw his plea only because he is dissatisfied with the sentence he received. In the absence of a valid reason for withdrawal of his guilty plea, we conclude that Whitaker's first claim is without merit.

(7) Whitaker's second claim is that the judge relied on factual inaccuracies in sentencing him. In reviewing the basis for a sentence imposed by the Superior Court, this Court will not find legal error or abuse of discretion unless it is clear from the record that the sentence was imposed on the basis of demonstrably false information or information completely lacking in reliability.<sup>6</sup> While Whitaker alleges that at least 2 of the previous convictions alluded to by the judge as well as statements made in the police report were false, he provides no factual support for that allegation. Moreover, while the judge intentionally imposed a sentence that was in excess of the TIS guidelines, it was within the statutory limits and, therefore, was not illegal.<sup>7</sup> In the absence of any evidence that the judge relied on

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<sup>5</sup> *Scarborough v. State*, 938 A.2d at 650.

<sup>6</sup> *Mayer v. State*, 604 A.2d 839, 842-43 (Del. 1992).

<sup>7</sup> *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

factual inaccuracies in sentencing Whitaker or abused his discretion in any way, we conclude that Whitaker's second claim, too, is without merit.

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