

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BARRY PHOENIX,	§
	§
Defendant Below-	§ No. 127, 2003
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. VN96-07-1072-09
Plaintiff Below-	§
Appellee.	§

Submitted: July 3, 2003  
Decided: August 19, 2003

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

**ORDER**

This 19th day of August 2003, 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) In February 2003, the defendant-appellant, Barry Phoenix, was found by the Superior Court to have committed a violation of probation (“VOP”) in connection with his April 1997 sentence for third degree

burglary.<sup>1</sup> The Superior Court sentenced Phoenix to one year incarceration at Level V for the VOP. This is Phoenix' direct appeal of his VOP sentence.

(2) Phoenix' 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>2</sup>

(3) Phoenix' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Phoenix' counsel informed Phoenix 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. Phoenix also was informed of his right to supplement his attorney's presentation. Phoenix

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<sup>1</sup>Phoenix' original burglary sentence was 2 years incarceration at Level V, to be suspended for 2 years at decreasing levels of probation. The record reflects that this was Phoenix' ninth VOP in connection with that sentence.

<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).

responded with a brief that raises two issues for this Court's consideration. The State has responded to the position taken by Phoenix' counsel as well as the issues raised by Phoenix and has moved to affirm the Superior Court's judgment.

(4) Phoenix raises two issues for this Court's consideration. He claims that: a) the Superior Court abused its discretion and committed legal error by finding that he had committed a VOP in connection with his burglary conviction; and b) his counsel provided ineffective assistance at the VOP hearing.

(5) The transcript of the VOP hearing reflects that the Superior Court's finding of a VOP was based upon Phoenix' violation of a no-contact order involving two minor children. The no-contact order originally was included as a condition of Phoenix' probation on a separate sentence for unlawful sexual contact in the third degree. In November 2000, the Superior Court also included the no-contact provision as a condition of probation on Phoenix' burglary sentence.<sup>3</sup> At the time of the instant VOP hearing, the no-contact provision remained as a condition of probation on Phoenix' burglary sentence.

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<sup>3</sup>The record reflects that Phoenix' probation officer requested that the no-contact provision be included as part of his probationary sentence for burglary because it was the only probationary sentence then being served by Phoenix.

(6) The Superior Court has the authority to impose a wide range of specific conditions of probation.<sup>4</sup> Moreover, the Superior Court has the authority to terminate a probationary sentence “at any time.”<sup>5</sup> We find no error or abuse of discretion on the part of the Superior Court in imposing the no-contact provision as a condition of Phoenix’ probationary sentence for burglary.<sup>6</sup> Nor do we find any error or abuse of discretion on the part of the Superior Court in finding that Phoenix had committed a VOP in connection with his burglary sentence by violating the no-contact order.<sup>7</sup>

(7) This Court will not consider ineffective assistance of counsel claims that are raised for the first time on direct appeal.<sup>8</sup> In this case, Phoenix did not raise a claim of ineffective assistance of counsel in the VOP proceeding in the Superior Court. Accordingly, we will not consider that claim in this appeal.

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<sup>4</sup>DEL. CODE ANN. tit. 11, § 4204(c) (2001); *Wyatt v. State*, 498 A.2d 1088, 1089 (Del. 1985).

<sup>5</sup>DEL. CODE ANN. tit. 11, § 4333 (2001); *Williams v. State*, 560 A.2d 1012, 1015 (Del. 1989).

<sup>6</sup>Indeed, the record reflects that Phoenix himself agreed to the inclusion of the no-contact order as a condition of his probationary sentence for burglary.

<sup>7</sup>The probation officer presented evidence at the hearing that Phoenix had lived in the same house with the children who were the subject of the no-contact order.

<sup>8</sup>*Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

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