

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KELLY D. FULLMAN,	§
	§ No. 144, 2015
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 1402006667
Plaintiff Below-	§
Appellee.	§

Submitted: July 16, 2015
Decided: September 8, 2015

Before **STRINE**, Chief Justice; **VAUGHN**, and **SEITZ**, Justices.

ORDER

This 8th day of September 2015, upon consideration of the appellant’s brief filed under 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 October 2014, a Superior Court jury convicted the defendant-appellant, Kelly Fullman, of one count each of Possession of a Firearm by a Person Prohibited, Possession of a Weapon with an Obliterated Serial Number; Possession of Ammunition by a Person Prohibited; and Resisting Arrest. On February 24, 2015, the Superior Court sentenced Fullman to a total period of twenty-one years at Level V incarceration, to be suspended after serving six

years in prison for decreasing levels of supervision. This is Fullman's direct appeal.

(2) Fullman's counsel has filed a brief and a motion to withdraw under Supreme Court Rule 26(c). Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, counsel informed Fullman of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief and appendix. Fullman also was informed of his right to supplement his attorney's presentation. Fullman has raised several issues for inclusion in the Rule 26(c) brief. The State has responded to the Rule 26(c) brief and Fullman's additional points and has moved to affirm the Superior Court's judgment.

(3) The trial transcript reflects that, on February 10, 2014, a Wilmington police officer was on patrol in the city near Washington and Eighth Streets when he observed a car with a broken tail light. The officer activated his emergency signal, and the car pulled over. As soon as the car came to a stop, a passenger, later identified as Fullman, opened the left rear door of the car and began running away. While he was running, Fullman was clutching at an object in his waistline. The officer pursued Fullman in his vehicle and ordered him to stop over the vehicle's public address system. The officer saw Fullman pull a gun from his waistband and hold it in his hand while he was trying to open a

gate. After Fullman fled down a narrow alley, the officer pulled his vehicle around the block to intercept Fullman on the other side of the alley. As the officer pulled up, he testified that he saw Fullman throw the gun into a garbage can. After the officer took Fullman into custody, other officers arrived and retrieved a loaded gun from the trash can. The gun was tested, but no DNA or fingerprint evidence was recovered. Fullman did not take the stand at trial but, through his counsel, argued that the evidence was insufficient to prove him guilty of the charges.

(4) In response to his counsel's brief on appeal, Fullman raises several questions, all of which challenge the sufficiency of the evidence and the credibility of the arresting officer. He also raises a claim asserting that his trial counsel was ineffective for failing to submit an affidavit from a witness who claimed that the gun was his and for failing to request a continuance when the same witness failed to show up on the second day of trial. This Court, however, will not consider a claim of ineffective assistance of counsel for the first time on direct appeal.¹

(5) The standard and scope of review applicable to the consideration of defense counsel's 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

¹ *Johnson v. State*, 962 A.2d 233, 234 (Del. 2008).

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 in order to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.²

(6) Fullman's allegations of error on appeal all relate to the sufficiency of the evidence presented against him at trial. He challenges the State's assertion that there was ever a traffic stop because the State presented no witnesses, no dash cam video, no vehicle registration number, and no description of any other suspects in the vehicle. He also challenges the lack of DNA or fingerprint evidence recovered from the gun. He also points out several inconsistencies between the arresting officer's written report, his affidavit for a search warrant to obtain a buccal swab, his testimony at the preliminary hearing, and his testimony at trial. Because of these inconsistencies, Fullman concludes that the officer perjured himself at trial.

(7) In reviewing his challenge to the sufficiency of the evidence, this Court, viewing the evidence in the light most favorable to the State, must determine whether any rational juror could have found Fullman guilty beyond a

² *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).

reasonable doubt of the crimes charged.³ In this case, the arresting officer testified that, upon effectuating a traffic stop, Fullman fled from the stopped vehicle as it pulled over. The officer ordered Fullman to stop. Fullman did not stop. The officer saw Fullman with a gun in his hand and saw Fullman throw the gun into a trash can. Fullman stipulated that he was a person prohibited from possessing a gun. To the extent the arresting officer gave testimony that differed from statements made in his police report or at the preliminary hearing, defense counsel thoroughly cross-examined the officer about those inconsistencies and argued those inconsistencies in her closing argument. Defense counsel also argued the lack of corroborating evidence as a reason for the jury to find Fullman not guilty. The jury, however, is the sole judge of the credibility of the witnesses appearing before the trial court and is responsible for resolving any conflicts in the testimony.⁴ It was within the purview of the jury to resolve any conflicts in the testimony against Fullman. We find no merit to his claim.

(8) The Court has reviewed the record carefully and has concluded that Fullman's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Fullman's counsel has made a conscientious

³ *Id.* at 1307 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

⁴ *McCoy v. State*, 112 A.3d 239, 268 (Del. 2014).

effort to examine the record and has properly determined that Fullman 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/ Collins J. Seitz, Jr.
Justice