

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK A. HUBBARD,	§
	§
Defendant Below-	§ No. 557, 2000
Appellant,	§
	§
v.	§ Court Below— Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. VN99-04-0339-01
Plaintiff Below-	§ VN98-03-1412-01
Appellee.	§

Submitted: May 14, 2001
Decided: July 19, 2001

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

ORDER

This 19th day of July 2001, 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 April 1999, the defendant-appellant, Derrick A. Hubbard, pleaded guilty to a charge of Possession with Intent to Distribute Cocaine and was sentenced to the first offender boot camp diversion program.¹ In July 2000, Hubbard was released from boot camp and began an Aftercare

¹11 Del. C. § 6712.

program. He violated his probation by, among other things, failing to report to his probation officer. He was apprehended in October 2000 and in November 2000 was re-sentenced to a mandatory 5 years in prison at Level V on the drug charged, reduced by time spent at Level V prior to boot camp. Also, Hubbard's VOP sentence from a previous drug possession charge was reimposed to run consecutively for 8 years at Level III, to be suspended after 3 years for 5 years at Level II. This is Hubbard's direct appeal.

(2) Hubbard'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.²

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).

(3) Hubbard's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Hubbard's counsel informed Hubbard 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. Hubbard was also informed of his right to supplement his attorney's presentation. Hubbard responded with a brief that raises one issue for this Court's consideration. The State has responded to the position taken by Hubbard's counsel as well as the issues raised by Hubbard and has moved to affirm the Superior Court's judgment.

(4) Hubbard raises one issue for this Court's consideration. He claims that his due process rights were violated at the revocation of probation hearing because he was not properly represented by counsel, his character witnesses were not permitted to speak and his probation was revoked solely on the basis of hearsay evidence.

(5) Hubbard's due process claim is without merit. The transcript of the revocation of probation hearing reflects that Hubbard had completed the boot camp program and was on Level III probation when the violations were

committed. Hubbard's probation officer, Michael Wiant, testified that Hubbard violated his probation by failing to report to his probation officer, report a new address, report for group counseling for drug abuse, maintain full-time employment and abide by a 10:00 p.m. to 6:00 a.m. curfew. Essentially, Hubbard began his Level III probation, met with his probation officer once and then absconded from probation. In his testimony, Hubbard did not deny violating his probation. In mitigation, he stated that he turned himself in to the authorities so he could enter an 18-month treatment program. Once Hubbard admitted violating his probation, however, the Superior Court was required by statute to reimpose the mandatory 5-year sentence that it had suspended previously when Hubbard entered the boot camp program.³ It had no discretion to permit Hubbard to enter a treatment program. There was no due process violation under these circumstances.

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

³11 Del. C. § 6712(h); *Whitner v. State*, Del. Supr., 762 A.2d 18, 19 (2000).

conscientious effort to examine the record and has properly determined that Hubbard 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/ E. Norman Veasey
Chief Justice