

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN ELLEGOOD,	§
	§
Defendant Below-	§ No. 104, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN00-10-0306
Plaintiff Below-	§ and -0307
Appellee.	§

Submitted: May 21, 2001

Decided: June 26, 2001

Before **VEASEY**, Chief Justice, **WALSH**, and **HOLLAND**, Justices.

ORDER

This 26th day of June 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 March 2001, the defendant-appellant, Benjamin Ellegood (“Ellegood”), pled guilty to one count of misdemeanor theft and one count of terroristic threatening. The Superior Court sentenced Ellegood to a total of two years at Level 5 imprisonment, suspended for time served, with the balance to be served at Level III probation. This is Ellegood’s direct appeal.

(2) Ellegood's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Ellegood's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Ellegood's attorney informed him of the provisions of Rule 26(c) and provided Ellegood with a copy of the motion to withdraw and the accompanying brief. Ellegood also was informed of his right to supplement his attorney's presentation. Ellegood has raised several issues for this Court's consideration. The State has responded to the position taken by Ellegood's counsel as well as the points raised by Ellegood and has moved to affirm the Superior Court's decision.

(3) 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) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this 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.¹

¹*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) Ellegood's first assertion is that the Superior Court lacked jurisdiction over him because the Court of Common Pleas had dismissed the charges against him at his preliminary hearing. The record reflects that Ellegood was arrested on September 12, 2000 on charges of second degree robbery and terroristic threatening. On September 21, 2000, the Court of Common Pleas dismissed the charges and discharged Ellegood. On October 10, 2000, however, a grand jury indicted Ellegood on charges of attempted first degree robbery, second degree robbery, and terroristic threatening. On December 20, 2000, Ellegood, who was rearrested and committed in default of bail, applied for state habeas corpus relief on the ground that the dismissal of the charges at the preliminary hearing precluded his subsequent reindictment. The Superior Court summarily denied that petition, and Ellegood did not appeal.

(5) Superior Court Criminal Rule 5.1(b) expressly states that the dismissal of a criminal charge at a preliminary hearing "shall not preclude the state from instituting a subsequent prosecution for the same offense."² This Court previously has held that a subsequent indictment on criminal charges cures "any defect or irregularity, jurisdictional or procedural, in the original

²*Accord* Fed. R. Crim. P. 5.1(b).

complaint, warrant, or preliminary hearing.”³ Accordingly, we find no merit to Ellegood’s first contention.

(6) Ellegood’s second complaint is that, because the State initially charged him only with second degree robbery and terroristic threatening, it was improper for the State to indict him later for attempted first degree robbery in addition to the other charges. To the extent Ellegood is challenging the sufficiency of the evidence to support his indictment on a charge of attempted first degree robbery, there is no right to challenge the adequacy of the evidence underlying an indictment.⁴ To the extent Ellegood is challenging some other defect in the indictment, his guilty plea operates as a waiver of any such claim.⁵ Accordingly, we find no merit to Ellegood’s second contention.

(7) Finally, Ellegood contends that his attorney was ineffective for failing to raise the previous two issues as grounds for dismissing the indictment. This Court, however, will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.⁶ Accordingly,

³*Evan v. Redman*, Del. Supr., No. 4, 1987, Horsey, J. (Apr. 28, 1987) (ORDER).

⁴*See Costello v. United States*, 350 U.S. 359, 363-64 (1956).

⁵*Claire v. State* 294 A.2d 836, 838 (1972).

⁶*Desmond v. State*, Del. Supr., 654 A.2d 821, 829 (1994); *Duross v. State*, Del. Supr., 494 A.2d 1265, 1267 (1985).

we will not consider Ellegood's claim of ineffective assistance for the first time in this direct appeal.

(8) This Court has reviewed the record carefully and has concluded that Ellegood's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Ellegood's counsel has made a conscientious effort to examine the record and has properly determined that Ellegood 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/Joseph T. Walsh
Justice