

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER C. MCCOY,	§
	§
Defendant Below-	§ No. 203, 2001
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr.A. Nos. VN94-10-0103-03,
	§ VN94-10-0107-03,
Plaintiff Below-	§ VN98-05-0776-01
Appellee.	§

Submitted: November 8, 2001
Decided: December 10, 2001

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

ORDER

This 10th day of December 2001, upon consideration of the appellant's brief filed under Supreme Court Rule 26(c), the appellant's counsel's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Walter McCoy, appeals from the Superior Court's adjudication and sentencing of him for violation of probation (VOP). McCoy's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). McCoy's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, McCoy's attorney informed him of the provisions of Rule 26(c) and provided McCoy with a copy of the motion to withdraw and the accompanying brief.

McCoy also was informed of his right to supplement his attorney's presentation. McCoy has raised one issue for this Court's consideration. He contends that the Superior Court abused its discretion by refusing to follow the recommendation of McCoy's probation officer at sentencing. The State has responded to the position taken by McCoy's counsel as well as the point raised by McCoy and has moved to affirm the judgment of the Superior Court.

(2) 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

(3) The record of the VOP hearing reflects that McCoy admitted to violating the conditions of his probation. The record also reflects that McCoy had violated his probation on several previous occasions. After considering McCoy's history of probation violations, the Superior Court determined that McCoy's probationary sentences should be revoked and that McCoy should serve six months at Level V incarceration on each of his three underlying charges, notwithstanding

¹*Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S.

the recommendation of McCoy's probation officer that McCoy be sentenced to Level III probation. McCoy contends it was error for the Superior Court not to follow the probation officer's recommendation. The State contends that the sentence was well within the Superior Court's discretion.

(4) This Court has reviewed the record carefully and has concluded that McCoy's appeal is wholly without merit and devoid of any arguably appealable issue. Given McCoy's history of violating probation, it was well within the Superior Court's discretion to revoke his probation and impose a prison sentence, notwithstanding the probation officer's recommendation to the contrary.² We are satisfied that McCoy's counsel has made a conscientious effort to examine the record and the law and has properly determined that McCoy 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

429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

² See *Jones v. State*, Del. Supr., No. 223, 2001, Walsh, J. (Oct. 31, 2001) (ORDER).