

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK BARNES,	§
	§
Defendant Below-	§ No. 473, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN99-11-0216
Plaintiff Below-	§ IN99-11-1205
Appellee.	§

Submitted: May 2, 2001
Decided: May 16, 2001

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This 16th day of May 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 July 2000, the defendant-appellant, Mark Barnes, was convicted by a Superior Court jury of Possession of a Firearm by a Person Prohibited and Theft of a Firearm. On the first conviction, Barnes was sentenced to two years incarceration at Level V, to be suspended after six months for eighteen months probation at Level III. On the second

conviction, he was sentenced to one year incarceration at Level V, to be suspended for 1 year at Level II probation. This is Barnes' direct appeal.

(2) Barnes' 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.¹

(3) Barnes' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Barnes' counsel informed Barnes 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. Barnes was also informed of his right to supplement his attorney's presentation. Barnes responded with two letters containing two issues for this Court's

¹*Penon 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).

consideration.² The State has responded to the position taken by Barnes' counsel as well as the issues raised by Barnes and has moved to affirm the Superior Court's judgment.

(4) Barnes raises two issues for this Court's consideration. He claims: i) his trial attorney was ineffective in failing to question witnesses about inconsistencies in their testimony, point out the exculpatory nature of certain evidence and object to certain evidence introduced by the State; and ii) the evidence introduced at trial was insufficient to support his conviction.

(5) The facts adduced at trial were as follows: On October 30, 1999, Eric Wagner, an officer with the Wilmington Police Department, went to sleep at approximately 11:30 p.m., leaving his service revolver and his wallet on top of the entertainment center in the den of his Wawaset Park residence. Wagner testified that he was awakened by a work-related phone call around 2:00 a.m. and went downstairs to talk so he would not wake his daughter, who was sleeping in an upstairs bedroom. He then discovered that his gun was missing, his wallet was open and there were cigarette ashes scattered around the entertainment center. Wagner testified

²Barnes' January 16, 2001 letter was later supplemented by his April 6, 2001 letter.

that neither he nor his wife, Stacey, smoked and that they did not permit anyone else to smoke in their house.

Stacey had been out with her friend, Linda Heintz, and her cousin, Frances Quillen, that night. Barnes, an acquaintance of Quillen's, had joined the group at a nightclub called the Big Kahuna in Wilmington. At closing time at 1:00 a.m., the group, including Barnes, Stacey's sister and two other male friends, decided to go to a bar in Pennsylvania. They first returned to the Wagners' residence so Quillen could pick up her car and belongings. During the ride back to the Wagners' residence, Stacey Wagner and Barnes had a loud disagreement. When the group returned to the Wagners' residence, Stacey entered the front door using her key. Stacey testified that she opened the back door to let her two friends in, but did not know that Barnes had also entered the residence. The two other male friends came in their own car and did not enter the Wagner residence. Stacey's sister left in her car after arriving at the Wagner residence.

Quillen testified that, while at the Wagner residence, she observed Barnes standing at the entertainment center smoking a cigarette. After telephoning a friend and learning that the bar in Pennsylvania was going to close early, she went outside the residence and told the group that the plans

had changed. At that point, Barnes was standing beside Quillen's car waiting for her. Linda Heintz also observed Barnes near the entertainment center. She testified that she saw him light a cigarette, stand in front of the entertainment center for 10-15 minutes looking intently at it, even though the television set was off, and saw him touch something on top of it. Heintz considered this behavior to be "unusual," given that Barnes was in a stranger's home. She also testified that, when Barnes left the residence, he hurried to get ahead of her and was holding his arms at waist level, with his elbows out. Heintz did not observe Barnes take the gun.

Quillen testified that, after they left the Wagner residence, Barnes asked her to drop him off in the City of Wilmington. Because Quillen was unfamiliar with Wilmington, Barnes directed her to where he wanted to be dropped off. Barnes was staying at the YMCA, but she did not see the YMCA when she dropped him off. After dropping Barnes off, Quillen telephoned Eric Wagner to ask for directions out of Wilmington. As she was on her way home, Quillen received a call from Wagner telling her that his gun had been taken. Quillen then drove back to the Wagners' residence. Detective William Brown, who investigated the case, testified that, based on Quillen's description, he believed Barnes had been dropped

off at Eighth and West Streets, an area known for drug activity. A search of Barnes' room at the YMCA did not yield the gun and it was never recovered.

(6) Barnes first claims that his counsel was ineffective. This Court will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.³ Accordingly, we will not consider Barnes' claims of ineffective assistance of trial counsel, as those claims have been raised for the first time in this direct appeal.

(7) Barnes also claims that there was insufficient evidence presented at trial to sustain his convictions. This claim is without merit. When a defendant challenges the sufficiency of the evidence to sustain his conviction of a crime, the relevant inquiry is "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt."⁴ Direct evidence is not necessary to establish guilt; circumstantial evidence is sufficient.⁵ A conviction for Possession of a Firearm by a Person Prohibited requires

³*Wing v. State*, Del. Supr., 690 A.2d 921, 923 (1996).

⁴*Seward v. State*, Del. Supr., 723 A.2d 365, 369 (1999) (citing *Robertson v. State*, 596 A.2d 1345, 1355 (1991)).

⁵*Seward* at 369.

proof that the defendant is a “prohibited person” and that he “knowingly possesse[d] . . . a deadly weapon”⁶ A conviction for Theft of a Firearm requires proof that the defendant “[took], exercise[d] control over or obtain[ed] a firearm of another person intending to . . . appropriate it.”⁷ We have reviewed in detail the transcript of the trial and conclude that the evidence of Barnes’ guilt, while entirely circumstantial, was more than sufficient to sustain the jury’s verdict.⁸

(8) This Court has reviewed the record carefully and has concluded that Barnes’ appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Barnes’ counsel has made a conscientious effort to examine the record and has properly determined that Barnes 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.⁹

⁶11 Del. C. § 1448(b). In this case, the parties stipulated that Barnes was prohibited by law from possessing a firearm.

⁷11 Del. C. § 1451(a).

⁸*Williams v. State*, Del. Supr., 539 A.2d 164, 167-68, cert. denied, 488 U.S. 969 (1988).

⁹Barnes also filed a motion to proceed pro se and for enlargement of time on March 7, 2001. His fundamental complaint was that he had not been given enough time to prepare

BY THE COURT:

/s/ Randy J. Holland
Justice

his points for consideration by this Court. We permitted Barnes to provide his counsel with additional points and permitted additional time for the filing of an amended opening brief and an amended response. The motion is, therefore, moot.