IN THE SUPREME COURT OF THE STATE OF DELAWARE

IRA M. BROWN,	§	
	§	No. 271, 2012
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. ID No. 1012017349
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: December 17, 2012
Decided: February 4, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

O R D E R

This 4th day of February 2013, 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 2011, the defendant-appellant, Ira M. Brown, was found guilty by a Superior Court jury of Resisting Arrest and Possession of Marijuana. The jury was hung on the additional charges of Trafficking in Heroin, Possession With Intent to Deliver Heroin, Possession of a Controlled Substance Within 300 Feet of a Place of Worship and Possession of a Controlled Substance Within 1000 Feet of a School. At a second trial in

November 2011, the jury found Brown guilty of those additional charges.[1] On April 25, 2012, Brown was sentenced to a total of 42½ years of Level V incarceration, to be suspended after 10 years for decreasing levels of supervision.[2] This is Brown's direct appeal.

(2) Brown's trial 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 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.[3]

(3) Brown's counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Brown's counsel informed Brown 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. Brown

[1] Brown also was acquitted of the charge of Possession of Drug Paraphernalia.
[2] At the sentencing hearing, Brown also was sentenced on an additional drug-related charge to which he had pleaded guilty the day before.
[3] *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).

also was informed of his right to supplement his attorney's presentation. Brown responded with a brief that raises three issues for this Court's consideration. The State has responded to the position taken by Brown's counsel as well as the issues raised by Brown and has moved to affirm the Superior Court's judgment.

(4) Brown raises three issues for this Court's consideration. He claims that a) his constitutional right to confront two witnesses against him was violated; b) his convictions of Trafficking in Heroin and Possession With Intent to Deliver Heroin were unsupported by the evidence presented at trial; and c) he was denied his right to a lesser-included offense jury instruction.

(5) The evidence at trial established that, at approximately 1:45 p.m. on December 28, 2010, a detective with the City of Wilmington Police Department and Operation Safe Streets observed Brown on the corner of 27th and Claymont Streets from an undercover vehicle. The detective observed several individuals approach Brown and then follow him into an adjacent courtyard. Each time, the individuals emerged after approximately two to three minutes. After observing these activities for about fifteen minutes, the detective moved his vehicle so as to have a better vantage point. Soon

thereafter, he saw what he believed to be a hand-to-hand drug transaction between Brown and two women.

(6) The detective then contacted the Mobile Enforcement Team, which conducts pedestrian and motor vehicle stops, and asked them to conduct a stop on Brown. When an officer from the Team stepped out of his vehicle and approached Brown, Brown fled southbound on Claymont Street. The officer pursued him. As Brown ran westbound on 27th Street, the officer observed Brown run toward the rear of a supermarket on the left side and toss several items to the ground with his left hand. As the officer called to Brown to stop, Brown lost his footing and fell down about ten feet from where the items had been discarded.

(7) After handcuffing Brown, the officer retrieved a bag of what appeared to be marijuana on the ground next to Brown. The officer also retrieved the discarded items, packages that appeared to contain a large number of baggies of heroin. All of the items were turned over to the detective. Testing of the items by the Medical Examiner's office confirmed the presence of marijuana and over four grams of heroin. The items had been recovered within 300 feet of North East Church of Christ and within 1000 feet of East Side Charter School.

(8) Brown's first claim is that his constitutional right to confront two witnesses against him was violated. Specifically, Brown contends that the State's failure to present the testimony of the two women whom police observed engaging in a drug transaction with Brown constitutes reversible error. The Confrontation Clause of the Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."[4] The record in this case reflects that the women who engaged in the drug transaction with Brown were never detained or questioned by police, nor were they presented as witnesses against Brown at trial.[5] Because the women did not appear at trial as witnesses against Brown, there was no violation of Brown's Sixth Amendment right of confrontation. We, therefore, conclude that his first claim is without merit.[6]

(9) Brown's second claim is that his convictions of Trafficking in Heroin and Possession With Intent to Deliver Heroin were unsupported by the evidence presented at trial. When presented with a claim of insufficiency of the evidence, a court must ascertain whether any rational

[4] *Crawford v. Washington*, 541 U.S. 36, 42 (2004).
[5] The State was not required to call the women as witnesses at trial. *Pettigrew v. State*, Del. Supr., No. 112, 2007, Berger, J. (Oct. 23, 2007) (citing *United States ex rel. Drew v. Myers*, 327 F. 2d 174, 179 n. 16 (3d Cir. 1964)).
[6] To the extent that Brown claims that the State improperly offered the prior statements of the witnesses into evidence pursuant to Del. Code Ann. tit. 11, §3507, that claim is meritless since the State offered no such prior statements into evidence at trial.

trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.[7] The record in this case reflects that the police observed Brown engaging in what appeared to be a hand-to-hand drug transaction. Soon thereafter, as Brown fled from an approaching police officer, he was observed tossing items to the ground with his left hand. On inspection, those items turned out to be packages containing marijuana and heroin. Given the temporal and spatial links between what the police observed, Brown's attempt to flee and what the police discovered on the ground near Brown, there clearly was sufficient evidence presented at trial for the jury to conclude that Brown was guilty of both Trafficking in Heroin and Possession With Intent to Deliver Heroin.[8] We, therefore, conclude that Brown's second claim is without merit.

(10) Brown's third claim is that he was entitled to a lesser-included jury instruction. Specifically, he contends that the jury should have been instructed on the lesser-included charge of Possession of Heroin.[9] Under Delaware's "party autonomy" rule, a trial judge is required to provide a

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[7] *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).

[8] Del. Code Ann. tit. 16, §§4753A(a) (3) a. and 4751. Moreover, a police witness testified at trial regarding the distances between the drug transactions and the church and school, providing sufficient evidence to support the convictions of Possession of a Controlled Substance Within 300 Feet of a Place of Worship and Possession of a Controlled Substance Within 1000 Feet of a School. Del. Code Ann. tit. 16, §§4768 and 4767.

[9] Del. Code Ann. tit. 16, §4753.

lesser-included offense instruction upon request by either party if the evidence presented at trial is such that a jury could rationally find the defendant guilty of the lesser-included offense and acquit the defendant of the greater offense.[10] The record in this case does not reflect that a request for a lesser-included instruction was made. Even if such a request had been made, there was no basis for such an instruction. The evidence at trial was that Brown engaged in a hand-to-hand drug transaction and, soon thereafter, tossed aside over four grams of heroin near a church and a school while attempting to escape from the police. Under those circumstances, a jury could not rationally convict Brown of possession without convicting him of the greater charges. As such, the lesser-included jury instruction was not warranted. We, therefore, conclude that Brown's third claim, too, is without merit.

(11) This Court has reviewed the record carefully and has concluded that Brown's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Brown's counsel has made a conscientious effort to examine the record and the law and has properly determined that Brown could not raise a meritorious claim in this appeal.

[10] *Wiggins v. State*, 902 A.2d 1110, 1113 (Del. 2006).

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/ Myron T. Steele
Chief Justice