

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARCUS D. DENNIS,	§	
	§	No. 291, 2012
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware in
v.	§	and for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 1109010347
Appellee.	§	

Submitted: January 24, 2013

Decided: April 23, 2013

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

O R D E R

This 23rd day of April 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, it appears to the Court that:

(1) Ralph Short, age 78, and his 63-year old wife, Linda Short, were the victims of a home invasion and robbery at their home in Dagsboro, Delaware, on September 11, 2011. The appellant, Marcus Dennis (“Dennis”), and his girlfriend, Tonya Carpenter, were charged with having committed those crimes. Dennis was charged with two counts of Robbery in the First Degree, and one count each of Burglary in the Second Degree, Assault, Aggravated Menacing, and Wearing a Disguise during the Commission of a Felony.

(2) At the conclusion of a three-day trial in March 2012, a Superior Court jury convicted Dennis on one count of Robbery in the First Degree and on the single counts of Burglary in the Second Degree and Wearing a Disguise during the Commission of a Felony. On May 11, 2012, the Superior Court sentenced Dennis to a total of thirty years at Level V, suspended after eleven years and successful completion of the Key Program, for one year at Level IV Crest suspended after successful completion for eight years at Level III Aftercare. This is Dennis' direct appeal.

(3) On appeal, Dennis' defense counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c) ("Rule 26(c)").¹ Dennis' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues.² In response to his counsel's brief and motion, Dennis has submitted a number of issues for the Court's consideration.³ The State, in turn, has responded to the position taken by Dennis' counsel as well as to the issues raised by Dennis and has moved to affirm the Superior Court's judgment.⁴

(4) 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. First, the Court must be satisfied that defense counsel made a conscientious examination

¹ See Del. Supr. Ct. R. 26(c)(i) (governing appeals without merit).

² *Id.*

³ Del. Supr. Ct. R. 26(c)(iii).

⁴ *Id.*

of the record and the law for claims that could arguably support the appeal.⁵ Second, 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.⁶

(5) The trial transcript in this case reflects that at 8:00 p.m. on September 11, 2011, Ralph and Linda Short were watching television in their front room when a male intruder wearing a mask came through the front door. Brandishing a BB rifle, the male intruder demanded that the couple turn over Mrs. Short's "pills." A female intruder who came in behind the male intruder went directly to the kitchen and began searching for pill bottles.

(6) Initially believing that the intruders were playing a joke, Mr. Short attempted to argue with the male intruder. The male intruder reacted to Mr. Short by ordering him, and then kicking him, to the floor. The male intruder tied Mr. Short's wrists and ankles together using a nylon rope he had brought with him.

(7) The male intruder then demanded that Mrs. Short show him where she kept her medication. Mrs. Short complied and led the intruder down the hallway to the bedroom where she kept her prescription medication. When the male intruder

⁵ *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).

⁶ *Id.*

and Mrs. Short left the front room, the female intruder spoke to Mr. Short and apologized for what was taking place.

(8) Mrs. Short gave the male intruder her pill bottles containing Oxycodone and Oxycontin. The intruders also took a pill bottle of Vicodin, a prescription pain medication that was prescribed to Mr. Short. Once the intruders had the pill bottles in hand, they left. Mrs. Short called 911.

(9) Mr. Short told the police that he thought he recognized the female intruder as Tonya, someone who had been inside of the Shorts' home multiple times under the guise of needing water for her car radiator. The Shorts told the police that after one such visit from Tonya, they noticed that some of Mrs. Short's prescription pain medication was missing, and they suspected that Tonya had stolen it.

(10) Using the information provided by the Shorts, the police soon identified a female suspect, Tonya Carpenter ("Carpenter"). The police also learned that Carpenter lived with her boyfriend named Marcus Dennis. In a search of Carpenter's and Dennis' house two days after the robbery, the police found a black ski mask and thirty-four Oxycodone pills in a prescription bottle with Dennis' name on it.

(11) When questioned by the police, Carpenter admitted that she and Dennis had robbed the Shorts. Dennis initially denied any involvement in the

crimes; however, once he learned that Carpenter had identified him as a participant, Dennis also confessed.

(12) Dennis has raised ineffective assistance of counsel among the issues he has submitted for the Court's consideration. It is well-settled that this Court will not consider a claim of ineffective assistance of counsel that was not raised in and considered by the Superior Court.⁷ In this case, Dennis' ineffective assistance of counsel claim was not raised in the Superior Court; therefore, we have not considered the claim here.

(13) Dennis also raises two claims of prosecutorial misconduct. The first claim concerns the disposition of unrelated criminal charges that were brought against Mr. Short in the months following the home invasion/robbery of the Shorts. The prosecutor reported on the status of the charges against Mr. Short on March 12, 2012, the first day of Dennis' trial, proffering that the prosecutor assigned to Mr. Short's case had dropped the charges earlier that day.⁸ Dennis would now have us find that the charges against Mr. Short were dropped as a result of prosecutorial misconduct. The record, however, does not support such a claim.

(14) Nor does the record support Dennis' claim that the prosecutor deliberately elicited false identification testimony from Mr. Short during direct

⁷ *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

⁸ Mr. Short was arrested and charged after he fired buckshot over the head of a man who was not welcome at the Shorts' home. Apparently, Mr. Short believed that the man had cheated the Shorts out of money and had stolen prescription medication from them.

examination. The trial transcript reflects that, when answering a question on direct examination, Mr. Short testified in error that he had identified Dennis as the male intruder. The Superior Court immediately sustained defense counsel's objection, instructed the jury to disregard the testimony, and later denied defense counsel's motion for mistrial. We agree with the Superior Court's rulings on the matter. The record does not support Dennis' claim that the prosecutor intended to elicit the erroneous testimony from Mr. Short. Any prejudice to Dennis from the unexpected testimony was cured by the Superior Court's instructions to the jury.

(16) In other claims on appeal, Dennis asks the Court to consider that the arrest and search warrants lacked probable cause. Having reviewed the affidavits of probable cause for the warrants, however, we conclude that the claims are without merit.

(17) The affidavit of probable cause used to obtain the search warrant included allegations that, on several occasions between May and August 2011, a confidential informant purchased crack cocaine from Dennis at the search location, *i.e.*, the house Dennis shared with Carpenter, and that, as of September 2011, there were several reports of high-volume vehicle traffic at the house. The affidavit also detailed the September 2011 home invasion/robbery of the Shorts and Dennis' and Carpenter's possible connection to those crimes. All of the information in the affidavit provided ample probable cause for the magistrate to believe that drug

evidence and/or evidence from the home invasion/robbery of the Shorts would be found at Dennis' house.⁹ Similarly, the affidavit of probable cause used to obtain the arrest warrant alleged sufficient facts, chief among them Carpenter's statement implicating Dennis in the home invasion/robbery, to determine that there was probable cause to arrest Dennis.¹⁰

(18) Dennis raises issues with respect to his sentencing, including a claim that he was sentenced in excess of the applicable SENTAC guidelines. His claim is without merit. SENTAC guidelines are voluntary and nonbinding and do not provide a basis for appeal.¹¹

(19) Dennis also claims that the sentencing aggravator "vulnerability of victim" should not have applied in his case because the age of the victim, *i.e.*, Mr. Short, was already included as an element in his underlying conviction on first degree robbery. Dennis' claim is without merit.

(20) The sentencing aggravator "vulnerability of victim" applies when the Superior Court determines that the defendant "knew, or should have known, that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health."¹² In this case, as the

⁹ See *Bradley v. State*, 51 A.3d 423, 431 (Del. 2012) (discussing "totality of the circumstances test" used to determine if search warrant is supported by probable cause).

¹⁰ *McDonald v. State*, 947 A.2d 1073, 1078 (Del. 2008).

¹¹ See *Benge v. State*, 2004 WL 2743431 (Del. Supr.) (citing *Siple v. State*, 701 A.2d 79, 82-83 (Del. 1997)).

¹² See Delaware Sentencing Accountability Commission (SENTAC) Benchbook Description of

Superior Court apparently determined and as reflected in the record, Mr. Short was obviously frail and in poor health on September 11, 2011, when Dennis invaded his home, knocked him to the floor, and hogtied him with a nylon rope. Therefore, when sentencing Dennis, the Superior Court's use of "vulnerability of victim" as an aggravating factor was appropriate.

(21) Finally, it appears that Dennis has raised one or more issues concerning the ski mask that was seized during the search of his house. To the extent Dennis claims that the State was required to test the ski mask for DNA evidence, his claim is without merit.¹³ Delaware law does not require that the State perform any specific testing on the physical evidence that it gathers.¹⁴

(22) The Court has reviewed the record carefully and has concluded that Dennis' appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Counsel made a conscientious effort to examine the record and the law and properly determined that Dennis could not raise a meritorious claim on direct appeal.

Aggravating Factors for Exceptional Sentences at 125 (2012) (defining "vulnerability of victim").

¹³ The Court has not considered Dennis' claim that his defense counsel should have requested DNA testing of the ski mask.

¹⁴ See *Anderson v. State*, 1999 WL 504332 (Del. Supr.) (citing *Deberry v. State*, 457 A.2d 744, 751 (Del. 1983)).

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/ Henry duPont Ridgely
Justice