IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH ALAN VIA,	§	
	§	
Defendant Below-Appellant,	§	No. 154, 2001
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. No. VN96-08-0591-02
Plaintiff Below-Appellee.	§	Cr. ID 9605005583
	§	

Submitted: August 20, 2001
Decided: September 19, 2001

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

O R D E R

This 19th day of September 2001, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Keith Alan Via, pled guilty in 1996 to one count of driving under the influence. The Superior Court sentenced Via to five years at Level V imprisonment, suspended after six months for four and a half years of Level IV work release and decreasing levels of probation. In 1997, Via was found in violation of the conditions of his Level IV release. The Superior Court sentenced him to four and a half years at Level V imprisonment, suspended upon successful completion of a Level V

treatment program for three years of Level III probation. In 2001, Via was found in violation of the terms of his probation. The Superior Court sentenced Via to three years and nine months at Level V imprisonment, suspended after completion of the Key Program for Level III probation. Via now appeals from that sentence.

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

(4) Via raises the following five points for the Court to consider: (1) he never received written notice of the alleged probation violations as required by Superior Court Criminal Rule 32.1; (2) he was not permitted to present witnesses or evidence at the VOP hearing; (3) it was error for the Superior Court to "fast track" his VOP hearing; (4) he was denied effective assistance of counsel because he met with appointed counsel only minutes before the VOP hearing; and (5) the Superior Court erred by exceeding the sentencing guidelines.

(5) With respect to Via's first four claims, we note that Via did not raise any objection to the court below. Accordingly, we review these claims for plain error.[2] The record of the VOP hearing reflects unequivocally that Via, through his court-appointed counsel, admitted to the violations reported by his probation officer. Accordingly, we find no plain error with respect to manner in which the VOP hearing was conducted, the notice provided to Via, the "fast track" scheduling of the hearing, or the performance of his

[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).

[2] Supr. Ct. R. 8.

court-appointed counsel. Review of these claims is not warranted in the interest of justice.[3]

(6) The heart of Via's complaint is that the Superior Court's Level V sentence was excessive under the circumstances because, Via asserts, he had done well on Level II probation supervision for an extended period and because he was actively, and on his own initiative, seeking help for his relapse in drug use. Via does not assert that the Superior Court's sentence was not statutorily authorized. Furthermore, Via recognizes that the sentencing guidelines are voluntary and are not binding on the sentencing court.[4] Nonetheless, Via asserts that the sentencing court should be required to articulate reasons for deviating from the guidelines, and the failure to do so constitutes reversible error. Although Via is correct that the sentencing court should explain its reasons for departing from the sentencing guidelines,[5] this Court has held that the sentencing court's failure to do so is not reversible error.[6] Accordingly, there is no merit to Via's claim.

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[3] *See Monroe v. State*, Del. Supr., 652 A.2d 560, 563 (1995).

[4] *See Mayes v. State*, Del. Supr., 604 A.2d 839, 845 (1992).

[5] 11 *Del. C.* § 4204(m).

[6] *Mayes v. State*, 604 A.2d at 846.

(7) The Court has reviewed the record carefully and has concluded that Via's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Via's counsel has made a conscientious effort to examine the record and the law and has properly determined that Via 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