IN THE SUPREME COURT OF THE STATE OF DELAWARE

REGINALD MCRAE,	§	
	§	
Defendant Below-Appellant,	§	No. 505, 2000
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Kent County
	§	Cr.A. Nos. IK00-01-0776-0778
Plaintiff Below-Appellee.	§	IK00-01-0780
	§	IK00-01-0782-0785

Submitted: August 1, 2001
Decided: October 1, 2001

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

O R D E R

This 1st day of October 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) The defendant-appellant, Reginald McRae, was found guilty by a Superior Court jury of Trafficking in Cocaine, Possession of a Narcotic Schedule II Controlled Substance, Maintaining a Vehicle for Keeping Controlled Substances, Possession of Drug Paraphernalia, Driving While

Suspended,[1] Failure to Stop on Command, Driving a Vehicle Under the Influence of Alcohol and Reckless Driving.[2] McRae was declared an habitual offender and was sentenced to life in prison on the trafficking conviction.[3] He also received sentences of 1 year in prison on each of the possession convictions, 1 year in prison on the conviction for maintaining a vehicle and 30 days in prison on the conviction for driving while suspended. The remainder of McRae's sentences consisted of fines, all of which were suspended. This is McRae's direct appeal.

(2) McRae'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

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[1]The defendant stipulated prior to trial that he was guilty of this charge.

[2]McRae was originally charged with Trafficking in Cocaine, Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance, Maintaining a Vehicle for Keeping Controlled Substances, Possession of a Narcotic Schedule II Controlled Substance and Possession of Drug Paraphernalia, in addition to the various traffic offenses.

[3]11 Del. C. § 4214(b).

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.[4]

(3) McRae's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, McRae's counsel informed McRae of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief. McRae was also informed of his right to supplement his attorney's presentation. McRae responded with a brief that raises seven issues for this Court's consideration. The State has responded to the position taken by McRae's counsel as well as the issues raised by McRae and has moved to affirm the Superior Court's judgment.

(4) McRae raises seven issues for this Court's consideration. He claims that: a) his convictions for Trafficking in Cocaine and Possession of Cocaine subjected him to double jeopardy;[5] b) the cocaine introduced as evidence at trial should have been suppressed because there was a gap in the

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[4]*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).

[5]While McRae's claim is worded differently, we have re-cast the claim so that we may resolve the double jeopardy issue, which is laudably conceded by the State.

chain of custody; c) he should not have been declared an habitual offender because the State failed to disclose his prior criminal record and he was not given an opportunity to admit or deny his previous convictions at a hearing; d) the judge failed to personally interrogate the jurors during voir dire; e) the testimony of a forensic specialist from the Medical Examiner's Office should have been excluded because the State failed to notify the defense of his proposed testimony; f) there was insufficient evidence to sustain his convictions because there was no evidence that he had been cited for the traffic violations, there were no intoxilyzer or blood test results, and the testimony of the police officers was inconsistent; and g) his counsel provided ineffective assistance.[6]

(5) At trial, Corporal Colby A. Cox of the Delaware State Police testified that early in the morning of January 24, 2000, he stopped a car that did not appear to have a license plate on Route 13 southbound in Kent County, Delaware. At the time, he was a member of the Governor's Task Force, which was charged with enforcing the drug laws in certain areas of

[6]McRae also claims there is new evidence supporting his innocence. Because that claim has not been presented to the Superior Court in the first instance, however, we will not consider it in this appeal. Supr. Ct. R. 8.

Kent County known for high levels of drug activity, and was working as part of a team with Corporal Matthew Rigby and Corporal Walter Gygrynuk, also of the Delaware State Police. At about 2:30 a.m., after verifying that the car was properly licensed and giving the driver permission to continue on his way, Corporal Cox got back into his police car, which was parked in the shoulder, looked in his rear view mirror and noticed a second car behind him in the right hand lane of Route 13. The car was moving at a high rate of speed and almost collided with him as it passed; it then continued down Route 13 and veered into the left lane. After radioing Corporal Rigby, who was in the area, for back-up, Corporal Cox followed the car down Route 13. He noted that it was veering from side to side. Although there was snow in the area, there was little on the roadway and conditions were not slippery. As the car slowed down abruptly, it turned right onto Plymouth Road without using the right turn lane and without using a turn signal. Once on Plymouth Road, the car accelerated. Corporal Cox used his air horn a few times and turned on his flashers and siren. By now, Corporal Rigby was behind him. Corporal Cox was able to identify the car as a 1989 maroon Oldsmobile Cutlass with a Delaware license.

(6) As the Cutlass made a left turn from Plymouth Road into the Felton Mobile Home Park, Corporal Cox followed with his siren still on. The Cutlass then turned right onto a private drive. As it made an abrupt stop in front of one of the mobile homes, Corporal Cox noticed that there were three people inside. The male driver, later identified as McRae, exited the car and began to flee on foot. Corporal Cox called out and identified himself as a state police officer, but McRae continued to run, eventually reaching Old New Road. By now, Corporal Rigby was also in pursuit. When he was about ten feet away from McRae, Corporal Cox, who was carrying a flashlight, noticed McRae moving his left hand towards his pocket and throwing two plastic bags onto the ground. Corporal Cox shined his flashlight on the objects, yelled to Corporal Rigby that some objects had been tossed aside and continued in pursuit. He and Corporal Rigby caught up with McRae and handcuffed him. Corporal Gygrynuk, who had just driven onto the scene, stayed with McRae while Corporal Cox and Corporal Rigby went back to examine the discarded objects. They found two plastic bags containing a rocklike white substance. Corporal Cox testified that it took 20-25 seconds to locate the bags.

(7) Corporal Gygrynuk testified that, while Corporal Cox and Corporal Rigby were investigating the discarded objects, McRae was sprawled out on the ground with his hands handcuffed behind him. McRae smelled of alcohol, his speech was slurred and he had difficulty walking. Corporal Gygrynuk further testified that it was difficult for him to fingerprint McRae once they arrived at Troop 3 because he kept falling and passing out. Corporal Gygrynuk stated that he did not find any drug-related paraphernalia on McRae's person when he searched him at the police station.

(8) Corporal Cox testified that he took custody of the plastic bags at the scene and transported them to Troop 3. When he arrived at Troop 3, he saw McRae on a bench sleeping. McRae had a strong odor of alcohol about him, was slurring his speech, and was swaying back and forth on the bench. He unsuccessfully attempted to blow into the intoxilyzer machine several times, then lay down on the bench and fell asleep. Corporal Cox testified that he gave the plastic bags to Corporal Rigby at Troop 3, who filled out an evidence envelope. Once the substance in the bags was weighed and field tested, Corporal Cox placed the bags into the evidence envelope, sealed the envelope and took it to the temporary evidence locker. He stated that there

was no money or drug paraphernalia found in the Cutlass. Corporal Cox stated that the suspected crack cocaine in the plastic bags weighed 11.21 grams and that, in his experience, the weight and the packaging of the suspected crack cocaine was consistent with drugs intended for distribution, rather than for personal use.

(9) Corporal Michael Nichols, evidence technician for the Delaware State Police, testified that Sergeant Weaver, his supervisor, transferred the evidence envelope from the temporary evidence locker to the permanent evidence locker on January 24, 2000. On February 2, 2000, Corporal Nichols gave a locked box containing the evidence envelope with the plastic bags to a courier for transport to the Medical Examiner's Office. He testified that he examined the envelope before it was placed in the box and there was no evidence of tampering. On April 4, 2000, Corporal Nichols received the box back from the Medical Examiner's Office, took the envelope out, logged it in and placed it in the permanent evidence locker.

(10) Sergeant David Weaver of the Delaware State Police testified that he was the supervisor in the evidence unit on January 24, 2000. Corporal Cox requested that he test the plastic bags for latent fingerprints. Sergeant

Weaver placed his initials on the evidence envelope when he removed the bags for processing. Sergeant Weaver stated that his testing revealed no usable fingerprints on the bags, but also stated that this was not unusual.

(11) Josefina Tengoncian, forensic chemist with the Medical Examiner's Office, testified that she examined the drug evidence on March 2, 2000. After confirming that the envelope had not been tampered with, she opened it and weighed the contents of the plastic bags. She stated that John Turner, the evidence specialist, also weighed the contents of the bags. The contents of the bags had a total weight of 11.21 grams. Dr. Tengoncian further testified that she tested the contents of the two plastic bags on April 3, 2000, which revealed it was crack cocaine, and signed her report on April 12, 2000.

(12) John Turner, forensic evidence specialist with the Medical Examiner's Office, also testified. Initially he was not named by the prosecution as a witness, but was called on the last day of trial to explain the status of the drug evidence between the dates of February 2, 2000, when Troop 3 first sent the lock box with the drug evidence from Wilmington to the Medical Examiner's Office in Dover, and March 2, 2000, when the evidence

was weighed by the Medical Examiner's Office and the process of analysis was begun. Turner testified that he is responsible for all of the evidence that comes into the Medical Examiner's Office. He explained that, when the box arrived at the Medical Examiner's Office on February 2, 2000, the list of evidence in the box contained two items from another case that were not in the box. Turner made a note of this discrepancy on the sheet that accompanied the box and sent the box back to Troop 3 by courier on February 9th. Because there was no one at Troop 3 available to accept the box, it was returned to the Medical Examiner's Office until February 16th, when another attempt was made to deliver it to Troop 3. Because there was again no one at Troop 3 to accept the box, it was returned to the Medical Examiner's Office until February 23rd. On that date, the box was successfully returned to Troop 3 for correction of the list and was sent back to the Medical Examiner's Office the same day. It was held in the evidence vault until March 2nd, when it was logged in.

(13) Turner testified that the box was locked in his evidence vault while it was at the Medical Examiner's Office. He further testified that when he examined the box on March 2, 2000, the list accurately reflected the

contents of the box, Sergeant Weaver's initials were on the sheet and none of the contents had been disturbed. On that date, Turner removed the evidence from the box and weighed it. Turner testified that he did not inventory the items in the box on February 16th or February 23rd when it was returned from Troop 3 to the Medical Examiner's Office, but stated that he sent it out locked and received it back locked. In addition, the courier did not have the combination to the box. Turner further testified that the initial discrepancy regarding the list and the transporting of the box between Troop 3 and the Medical Examiner's Office were dealt with in accordance with standard operating procedures.

(14) McRae originally was indicted on one count of Trafficking in Cocaine, one count of Possession with Intent to Distribute a Narcotic Schedule II Controlled Substance and one count of Possession of a Narcotic Schedule II Controlled Substance, among other charges. At the prayer conference during trial, the Superior Court judge ruled that the separate charge of Possession of Cocaine would be dismissed, but that the jury would be instructed on Possession of Cocaine as a lesser included offense of Possession with Intent to Deliver. Reflecting his rulings at the prayer conference, the

Superior Court judge instructed the jury first on Trafficking in Cocaine and then on Possession with Intent to Deliver, with Possession of Cocaine as a lesser-included offense.

(15) McRae is correct that his dual convictions for Trafficking in Cocaine and Possession of Cocaine subjected him to double jeopardy. The Double Jeopardy Clause prohibits multiple punishments for the same offense.[7] The general test to determine whether separate counts of an indictment actually charge two offenses or only a single offense is whether each count requires proof of a fact that the other does not.[8] A conviction for Trafficking in Cocaine requires proof of knowing possession of cocaine and possession of a quantity between 5 and 50 grams.[9] The offense of Possession of Cocaine only requires proof of knowing possession of cocaine.[10] In this case, however, McRae was charged with and was ultimately convicted of possessing cocaine in an amount exceeding 5 grams. There is, thus, an identity of

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[7]*Seward v. State*, Del. Supr., 723 A.2d 365, 375 (1999).

[8]*Id.; Blockburger v. United States*, 284 U.S. 299, 304 (1932).

[9]16 Del. C. § 4753A.

[10]16 Del. C. § 4753.

statutory elements between the two offenses in this case that renders McRae's dual convictions impermissible.[11]

(16) McRae's claim that the cocaine introduced as evidence at trial should have been suppressed because the chain of custody was broken is without merit. The crux of McRae's claim is that the State failed to establish the chain of custody of the cocaine between the dates of February 2, 2000, when the lock box with the drug evidence was sent from Troop 3 in Wilmington to the Medical Examiner's Office in Dover, and March 2, 2000, when it was weighed at the Medical Examiner's Office. The proper standard for the admission of items into evidence over a chain of custody objection is whether there is a reasonable probability that the evidence offered is what the proponent says it is—that is, that the evidence has not been misidentified and no tampering or adulteration has occurred.[12] In the absence of a clear abuse of discretion, any "breaks" in the chain of custody go to the weight, rather

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[11] 11 Del. C. § 206. The Superior Court judge appears to have recognized this issue when he dismissed the separate possession count at the prayer conference. Once the jury had convicted McRae of both trafficking and possession as a lesser-included offense of possession with intent to distribute, however, the Superior Court should immediately have dismissed the possession conviction.

[12] *Baker v. State*, Del. Supr., No. 74, 1988, Holland, J., 1988 WL 137190 (Nov. 21, 1988) (ORDER) (citing *Tricoche v. State*, Del. Supr., 525 A.2d 151, 153 (1987)).

than the admissibility, of the evidence.[13] The trial testimony of Corporal Cox, Corporal Nichols, Sergeant Weaver, Josefina Tengoncian and John Turner established to a reasonable probability that the drug evidence was what the prosecution said it was and that it had not been tampered with or adulterated. Moreover, the testimony of John Turner satisfactorily explained the whereabouts of the drug evidence between the dates of February 2, 2000 and March 2, 2000, and also established that proper procedures for handling the evidence were followed during that time.

(17) Also without merit is McRae's claim that he should not have been ruled an habitual offender because the State failed to disclose his previous criminal record and he was not afforded an opportunity to admit or deny his previous convictions at a hearing. The record indicates that the State notified McRae that his prior criminal record was available for inspection on March 16, 2000. The record further indicates that McRae was aware at least since April 2000 of the State's intention to have him sentenced as an habitual offender. The State's written plea offer, which was made on April 26, 2000 at McRae's initial case review, reflected the State's intention. At the close

[13]*Id.* (citing *United States v. Gay*, 774 F. 2d 368, 374 (10th Cir. 1985)).

of trial, after the prosecutor stated that the State would be seeking to have McRae declared an habitual offender, the Superior Court judge announced that the hearing on McRae's habitual offender status would be held at the time of sentencing. Finally, the transcript of McRae's sentencing hearing on September 19, 2000 reflects that his attorney had consulted with him concerning the State's intention not only on April 26, 2000, but also several times thereafter. It also reflects that McRae chose not to dispute his two prior trafficking convictions. In a colloquy with the Superior Court, McRae stated that he did not dispute the two prior convictions and specifically agreed that he had been convicted of trafficking in cocaine on October 19, 1995 and again on June 28, 1996.

(18) McRae's next claim that the Superior Court judge improperly failed to personally question the jurors during voir dire is also unavailing. McRae misstates the standard to be applied to voir dire questioning by the trial judge. The correct standard is that the trial judge should reserve to himself or herself the function of interrogating prospective jurors during voir dire, rather than permitting counsel to do so.[14] While there is no evidence before

[14] *Parson v. State*, Del. Supr., 275 A.2d 777, 783 (1971).

us indicating how voir dire was actually conducted, there would have been no error or abuse of discretion in the Superior Court judge delegating to the court clerk the task of reading the general voir dire questions to the jury array, if indeed that is what occurred.[15] McRae has failed to show any error or abuse of discretion by the Superior Court judge in connection with voir dire, or any prejudice to him.

(19) McRae's claim that the testimony of the forensic specialist from the Medical Examiner's Office should have been excluded because the State failed to notify the defense of his proposed testimony is also without merit. At trial, following the State's motion to admit the drug evidence, the defense objected on the basis of an apparent month-long gap in the chain of custody evidence. After being asked by the Superior Court judge to attempt to fill in the gap during a 10-minute recess, the prosecutor made a telephone call to the Medical Examiner's Office and ascertained who had knowledge of the specific whereabouts of the drug evidence during that time and what his testimony

[15]In its brief, the State observes that it is customary in the Kent County Superior Court for the court clerk to read the general voir dire questions to the full jury array before the judge conducts any further voir dire of individual prospective jurors. While it is not improper to have a court clerk read the general voir dire questions, we note that only the trial judge should ask the jurors to come forward in response to those questions and decide whether to excuse them. That discussion should be on the record in the presence of both counsel.

would be if he was permitted to testify. Defense counsel inquired about when the testimony would be presented, but did not object to the testimony itself. After ascertaining that the remainder of the trial time that day could be used for the prayer conference and then dismissing the jury, the Superior Court judge ruled that the testimony from the Medical Examiner's Office would be permitted. There was still no objection from the defense. The following day, defense counsel objected to the testimony on the basis that the name of the witness had not been disclosed to the jury during voir dire. After the Superior Court judge ascertained that no one on the jury was familiar with the witness, there was no further objection from defense counsel. Under the circumstances presented here, we find no error or abuse of discretion on the part of the Superior Court in permitting the forensic specialist from the Medical Examiner's Office to clarify the specific whereabouts of the drug evidence during the time period in question.

(20) Also without merit is McRae's claim that there was insufficient evidence to sustain his convictions because there was no evidence he had been cited for the traffic violations, there were no intoxilyzer or blood test results, and the testimony of the police officers was inconsistent. 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."[16] Direct evidence is not necessary to establish guilt; circumstantial evidence is sufficient.[17] We have reviewed in detail the trial transcript and conclude that there was ample evidence to support McRae's convictions for Failing to Stop on Command and Reckless Driving.[18] We also conclude that there was ample evidence, albeit circumstantial, to support McRae's conviction for Driving a Vehicle Under the Influence of Alcohol.[19] McRae also contends that there was insufficient evidence to convict him because the testimony of the police officers was inconsistent. Under Delaware law, the jury is the sole trier of fact and is responsible for determining witness credibility and resolving any conflicts in

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[16]*Barnett v. State*, Del. Supr., 691 A.2d 614, 618 (1997).

[17]*Seward v. State*, Del. Supr., 723 A.2d 365, 369 (1999).

[18]21 Del. C. § 4103(b); 21 Del. C. § 4175(a).

[19]21 Del. C. § 4177(a); *Williams v. State*, Del. Supr., 539 A.2d 164, 167-68, cert. denied, 488 U.S. 969 (1988).

the testimony.[20] It is entirely within the discretion of the jury to accept one witness' testimony and reject the conflicting testimony of other witnesses.[21] We observe that the conflicts in the testimony cited by McRae were not serious[22] and we conclude that any such conflicts were properly resolved by the jury in rendering its verdict.

(21) McRae's final claim is that his counsel provided ineffective assistance. This Court will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.[23] Accordingly, we will not consider McRae's claim of ineffective assistance for the first time in this direct appeal.

(22) This Court has reviewed the record carefully and has concluded that McRae's double jeopardy claim is meritorious. The remainder of McRae's claims are wholly without merit and and his brief on these points is

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[20]*Tyre v. State*, Del. Supr., 412 A.2d 326, 330 (1980).

[21]*See Pryor v. State*, Del. Supr., 453 A.2d 98, 100 (1982).

[22]Specifically, McRae states that Corporal Cox saw the plastic bags being thrown and Corporal Rigby did not, Corporal Gygrynuk saw only one piece of cocaine in one of the bags and not several, and Corporal Gygrynuk stated that the bags were placed in a cupholder in Corporal Cox's vehicle, whereas Corporal Cox stated that they were in an ashtray.

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

devoid of any arguably appealable issue. We conclude that this matter must be remanded to the Superior Court for re-sentencing and entry of a sentencing order that removes McRae's conviction and sentence for the lesser-included offense of possession, but preserves all of his other convictions and sentences.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED in part and DENIED in part. With respect to all of McRae's claims except for the double jeopardy claim, the judgment of the Superior Court is AFFIRMED. With respect to the double jeopardy claim, this matter is REMANDED to the Superior Court for the issuance of a sentencing order in accordance with this Order. McRae's attorney has a continuing duty to defend him at the new sentencing. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice