

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEREK M. ROGERS,	§	
	§	No. 334, 2003
Defendant Below-	§	
Appellant,	§	Court Below---Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	Cr. A. Nos. IN02-01-0088; 0089
STATE OF DELAWARE,	§	2427; 2428
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: October 24, 2003
Decided: December 12, 2003

Before **HOLLAND, STEELE** and **JACOBS**, Justices

ORDER

This 12th day of December 2003, 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, Derek M. Rogers, was found guilty by a Superior Court jury of Attempted Robbery in the First Degree, Assault in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony,¹ and Wearing a Disguise.² He was sentenced to a total of 22 years

¹ The first count was in connection with the robbery charge and the second count was in connection with the assault charge.

incarceration at Level V, to be suspended after 17 years for probation. This is Rogers' direct appeal.

(2) Rogers' 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: first, 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 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.³

(3) Rogers' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Rogers' counsel informed Rogers 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. Rogers was also informed of his right to supplement his attorney's

² Rogers initially was charged with Attempted Murder in the First Degree. Prior to jury selection, the State moved to amend that charge to Assault in the First Degree. The defense did not object to the amendment and the Superior Court granted the motion.

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).

presentation. Rogers responded with a brief that raises three issues for this Court's consideration. The State has responded to the position taken by Rogers' counsel as well as the issues raised by Rogers and has moved to affirm the Superior Court's judgment.

(4) Rogers raises three issues for this Court's consideration. He claims that: a) the State and the Superior Court violated his due process rights by failing to conduct a preliminary hearing within ten days of his arrest; b) the Superior Court erred by permitting the State to amend the indictment before trial; and c) his sentence for two counts of possession of a firearm violated double jeopardy because there was only one victim.

(5) The evidence at trial established that 77 year-old Helen Johnson was the victim of an attempted robbery and assault. Johnson owned a liquor store located at Vandever Avenue and Locust Street in Wilmington, Delaware. Rogers, who was a regular customer, came to the store early in the morning of December 19, 2001 to purchase a bottle of gin. Later that morning, Rogers returned to the store and talked about cleaning a basement and finding a gun. According to Johnson, Rogers then put a hood over his head, brandished a shotgun and demanded money. The gun discharged and Johnson was shot in the right arm and chest. Johnson was interviewed by the police and identified Rogers as the man

who shot her. She testified at trial that she has limited use of her right arm and hand due to her injuries.

(6) Rogers testified in his own defense. He stated that he had known Johnson for many years and had never had any trouble with her before. According to Rogers, on the day of the robbery he saw a friend named Dave Brown and they cleaned out a garage together. After finishing the job, they heard about the shooting. On December 24, 2001, the police took him to the station to give a statement. He denied robbing and shooting Johnson.

(7) Rogers' first claim is that his due process rights were violated because there was no preliminary hearing within ten days of his arrest. Under the Superior Court Rules, a defendant is entitled to a preliminary hearing, unless he waives it.⁴ The record reflects that, on January 4, 2002, Rogers waived his preliminary hearing. Therefore, Rogers first claim is without merit.

(8) Rogers' second claim is that the Superior Court erred by permitting the State to amend the indictment before trial.⁵ The original indictment charged Rogers with Attempted Murder in the First Degree. Prior to jury selection, the

⁴ SUPER. CT. CRIM. R. 5(d).

⁵ Because there was no objection to the amendment at trial, we review Rogers' claim for plain error. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (plain error exists where the error was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process).

State moved to amend the indictment to charge Rogers with first degree assault rather than first degree attempted murder.⁶ Defense counsel did not object to the amendment.

This Court reviews for abuse of discretion the Superior Court's decision to grant a motion to amend the indictment.⁷ The Superior Court may permit the amendment of an indictment at any time before the verdict if no additional offense is charged and substantial rights of the defendant are not prejudiced.⁸ In this case, the Superior Court properly exercised its discretion in permitting the State to amend the indictment prior to jury selection to charge Rogers with a less serious lesser-included offense of its original charge.

(9) Rogers' third claim is that his indictment for two counts of possession of a firearm constituted a violation of double jeopardy because there was only one victim.⁹ The constitutional prohibition against double jeopardy prohibits the State from charging the same conduct repetitively in multiple counts.¹⁰ This Court has

⁶ Assault in the First Degree is a lesser-included offense of Murder in the First Degree. *Ward v. State*, 575 A.2d 1156, 1158 (Del. 1990).

⁷ *Coffield v. State*, 794 A.2d 588, 590-91 (Del. 2002).

⁸ *Norwood v. State*, 2003 WL 29969, *3 (Del. 2003) (TABLE) (citing SUPER. CT. CRIM. R. 7(e)).

⁹ Because this issue was not raised below, we also review it for plain error. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

¹⁰ *Seward v. State*, 723 A.2d 365, 375 (Del. 1999).

previously held that, with respect to weapon offenses, the General Assembly intended separate convictions for each felony the defendant committed while in possession of the weapon.”¹¹ There is no double jeopardy violation in such circumstances because the defendant is not subjected to a double punishment for the same offense.¹²

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

¹¹ *Williamson v. State*, 707 A.2d 350, 363 (Del. 1998).

¹² *Id.*