IN THE SUPREME COURT OF THE STATE OF DELAWARE

2003 DEC 12 P 2:30

WILLIAM COPPER,	§	
	§	
Defendant Below-Appellant,	§	No. 375, 2003
	§	Court Below—Superior Court
	§	of the State of Delaware
v.	§	in and for New Castle County
	§	Cr.A. Nos. IN03-01-0425,
STATE OF DELAWARE,	§	-0426, and -0427
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: October 27, 2003
Decided: December 12, 2003

Before **VEASEY**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

ORDER

This 12th day of December 2003, 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) In May 2003, a Superior Court jury found the appellant, William Copper, guilty of third degree assault, menacing, and act of intimidation and not guilty of possession of a deadly weapon during the commission of a felony. The Superior Court sentenced Copper to a total period of four years and three months at Level V incarceration to be followed by twenty-two months at decreasing levels of supervision. This is Copper's direct appeal.

(2) Copper's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Copper's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Copper's attorney informed him of the provisions of Rule 26(c) and provided Copper with a copy of the motion to withdraw and the accompanying brief. Copper also was informed of his right to supplement his attorney's presentation. Copper has raised one issue for this Court's consideration. Copper claims to have newly-discovered evidence that calls into question the credibility of the victim's testimony. The State has responded to Copper's argument, as well as the position taken by Copper's counsel, 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]

[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).

(4) The victim, Vickie Christmas, testified at trial that she had dated Copper for seven or eight months. On December 28, 2002, Copper came to visit her at work, and the two made plans to meet that evening about 11 p.m. when Christmas was done work. She gave him the key to her home. Copper was supposed to meet her there. Christmas testified that she did not get off work until later than expected. She returned home before midnight. Copper was upset that Christmas was late and accused her of being with someone else. Christmas testified that Copper punched and kicked her. He threatened her with a knife and forced her to lie next to him on the bed until morning. In the morning, Copper ordered Christmas to drive him to work, which she did. Before getting out of her car, Copper told Christmas he was sorry and that he would not blame her if she called the police. After dropping him off, she went straight to the hospital. She was admitted to the hospital with cuts to her face, bruises over her body, a knee injury, and a swollen, blackened eye. Christmas testified that she has had lasting side effects from her injuries.

(5) Copper testified in his own defense. He admitted that he got into a shoving match with Christmas. He admitted kicking her and "poking" her in the eye. He denied ever punching her or threatening her with any kind

of weapon. He admitted that he had told Christmas he was sorry and would not blame her for calling the police.

(6) The only issue Copper raises on appeal relates to alleged "newly-discovered" evidence. Copper claims he has two cards from Christmas that "possibly suggest an ongoing love relationship" between them. Copper also contends that he possesses photographs, presumably of Christmas, which call into question her testimony regarding her injuries. Copper appears to assert that the "newly discovered" evidence undermines the credibility of Christmas' testimony and warrants reversal of his convictions.

(7) On appeal, however, this Court will consider only claims that were presented first to the trial court for review.[2] Copper did not raise his claim of newly-discovered evidence to the Superior Court in the first instance. Therefore, we decline to consider it in this appeal. Although a claim of newly-discovered evidence may provide the foundation for a motion for new trial under Superior Court Criminal Rule 33, we note that

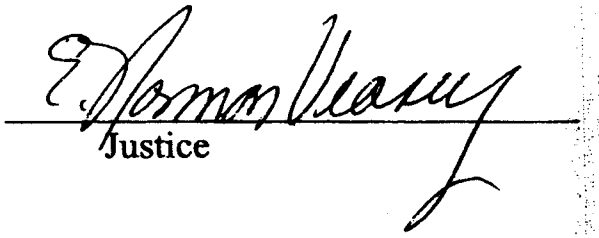
[2] DEL. SUPR. CT. R. 8 (2003).

Copper's "newly-discovered" evidence appears to be for impeachment purposes only and, thus, would not warrant a new trial.[3]

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



Justice

[3] In order to succeed on a claim of newly-discovered evidence, a defendant must show: (i) if the jury had considered the new evidence, it probably would have changed the result of the trial; (ii) the evidence must have been discovered after the trial and could not have been discovered, with due diligence, before the trial; and (iii) the evidence must not be merely cumulative or impeaching. *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987).