

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD FITZSIMMONS,	§	
	§	
Defendant Below-	§	No. 441, 2003
Appellant,	§	
	§	
v.	§	Court Below---Superior Court
	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. Nos. IN02-12-0049 thru
	§	0055
Plaintiff Below-	§	
Appellee.	§	

Submitted: December 5, 2003  
Decided: February 9, 2004

Before **HOLLAND, BERGER** and **STEELE**, Justices

**ORDER**

This 9<sup>th</sup> day of February 2004, 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, Edward Fitzsimmons, was found guilty by a Superior Court jury of two counts of Aggravated Intimidation, one count of Terroristic Threatening, two counts of Breach of Bond Conditions and two counts of Harassment. He was sentenced to a total of 10 years incarceration at Level V, to be suspended after 2 years for decreasing levels of probation. This is Fitzsimmons' direct appeal.

(2) Fitzsimmons' 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 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.<sup>1</sup>

(3) Fitzsimmons' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Fitzsimmons' counsel informed Fitzsimmons 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. Fitzsimmons was also informed of his right to supplement his attorney's presentation. Fitzsimmons responded with a brief that raises one issue for this Court's consideration. The State has responded to the position taken by Fitzsimmons' counsel as well as the issue raised by Fitzsimmons and has moved to affirm the Superior Court's judgment.

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<sup>1</sup> *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) Fitzsimmons raises one issue for this Court's consideration. He claims that his counsel provided ineffective assistance.

(5) Fitzsimmons did not raise this issue in the Superior Court. It is settled law that this Court will not consider a claim of ineffective assistance of counsel that is raised for the first time on direct appeal.<sup>2</sup> Accordingly, we will not review Fitzsimmons' ineffective assistance of counsel claim in this appeal.

(6) This Court has reviewed the record carefully and has concluded that Fitzsimmons' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Fitzsimmons' counsel has made a conscientious effort to examine the record and has properly determined that Fitzsimmons 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/ Carolyn Berger  
Justice

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<sup>2</sup> *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).