IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT J. BROWN,	§	
	§	
Defendant Below-Appellant,	§	No. 222, 2003
	§	
	§	Court Below---Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. Nos. IN02-06-0072 and 0073
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: December 12, 2003
Decided: February 9, 2004

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

O R D E R

This 9th 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, Albert J. Brown, was found guilty by a Superior Court jury of Possession of Marijuana and Resisting Arrest.[1] He was sentenced on the possession conviction to 2 years of Level V incarceration, to be

[1] The indictment also charged Brown with Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, Maintaining a Dwelling for Keeping Controlled Substances, Conspiracy, and Possession of Drug Paraphernalia. At trial, Brown was found not guilty of Maintaining a Dwelling for Keeping Controlled Substances and a mistrial was declared with respect to the remaining charges.

suspended after 18 months for probation. He was sentenced on the resisting arrest conviction to 1 year of Level V incarceration. This is Brown's direct appeal.

(2) Brown'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 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.[2]

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

[2] *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).

Brown's counsel as well as the issue raised by Brown and has moved to affirm the Superior Court's judgment.

(4) Brown raises twelve issues for this Court's consideration. He claims that: a) the Superior Court improperly denied him a continuance, allowed inconsistent evidence to be presented to the jury, failed to declare a mistrial when the prosecutor improperly referred to inadmissible evidence in her opening statement, engaged in unethical conduct, did not permit him to confront the witnesses against him, and imposed an excessively harsh sentence; b) the prosecution falsified the evidence against him and failed to produce the lab report to the defense; c) the police caused him physical harm; c) the jury delivered an inconsistent verdict; and d) his counsel provided ineffective assistance. Most of these claims were not presented to the Superior Court in the first instance. Accordingly, they will be reviewed on appeal for plain error.[3]

(5) The evidence at trial established the following. In order to investigate possible drug activity at 709 North Jefferson Street, Wilmington, Delaware, the Wilmington Police Department set up surveillance at that location on May 23, 2002. During the surveillance, Brown was observed by the police entering and

[3] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (Plain error occurs when an error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.")

leaving the residence wearing a distinctive multi-colored shirt that, from a distance, appeared to be plaid. Brown also was observed sitting on the front porch smoking what appeared to be a marijuana cigarette. Following the surveillance, the police obtained a search warrant for the residence. At the time the search warrant was executed, some officers were stationed behind the residence to prevent any suspects from escaping. As the police entered the front door, two African-American men, one of whom was identified later as Brown, left through the back door. He ran through the back yard, into an alley, and back onto the street in front of the residence, where a police officer recognized him and arrested him.

(6) While executing the search warrant on the second floor of the residence, the police found several bags of heroin and cocaine, materials used for packaging illegal drugs, and a scale. More cocaine was found in the kitchen on the first floor. In the basement, a bag containing cocaine was found on a table next to the multi-colored shirt the officers had seen Brown wearing earlier, along with a cell phone and the remains of a cigarette that later tested positive for marijuana. In addition to Brown, three other individuals were arrested, each of whom was in possession of cocaine, heroin or large sums of money consistent with the sale of drugs.

(7) On cross examination, the officers conceded that, during their surveillance, they had never observed Brown himself engaging in any drug transactions. They also conceded that the search of Brown by police following his arrest did not reveal the presence of any drugs or a large sum of money indicating drug dealing.

(8) During the State's case, the attorneys conducted a voir dire examination of Detective Randolph Pfaff. Pfaff testified that, during the execution of the search warrant, he took custody of a cell phone that was located with the multi-colored shirt and the remains of a marijuana cigarette. He further testified that, after he arrived back at the station with the evidence, the cell phone rang. He answered the phone and a woman's voice on the other end of the line asked to speak to her husband. When Pfaff asked the woman who her husband was, she answered, "You know it's Al's phone." Following argument by counsel, the Superior Court ruled that the statement was hearsay and would not be admitted into evidence.

(9) Brown's first claim is that the Superior Court improperly denied his pretrial request for a continuance. He contends that he requested a continuance because he had not had an opportunity to confer with his counsel about the search warrant, which he alleged was forged, and that the Superior Court judge

improperly denied the request on the ground that Brown's counsel was competent to represent him. The request for a continuance was made immediately prior to jury selection and the record does not reflect that there had been any previous complaint by Brown about his counsel. Moreover, the record reflects that Brown was ably represented by his counsel, whose efforts resulted in convictions on only 2 of the original 7 charges against Brown. Under these circumstances, we find no abuse of discretion on the part of the Superior Court in denying the request for a continuance.[4]

(10) Brown's next claim is that the Superior Court improperly permitted inconsistent evidence to be presented to the jury. Specifically, he contends that the affidavit of probable cause and the indictment contained inconsistent information concerning his birth date and his social security number. While the record reflects that there were discrepancies between the birth date and social security number appearing on those documents, there is no evidence that the discrepancies led to a misidentification of Brown in this case. We, therefore, find no error in connection with this claim.

(11) Brown claims that the Superior Court should have declared a mistrial when the prosecutor improperly referred to a cell phone in her opening statement.

[4] *Stevenson v. State*, 709 A.2d 619, 630-31 (Del. 1998).

There was no impropriety in the prosecutor's reference in her opening statement to the cell phone that was found in the residence. During the State's case, the prosecutor, in the exercise of caution, asked for voir dire concerning the call that Detective Pfaff received on the cell phone. Following voir dire, the Superior Court ruled that the substance of the call received on the cell phone, not any reference to the cell phone itself, was inadmissible. We, therefore, find no error with respect to this claim.

(12) Brown next claims that the Superior Court engaged in unethical conduct in its various rulings prior to and during trial. We have reviewed carefully the entire record in this case and find no basis whatsoever for this claim.

(13) Brown's next claim is that the Superior Court did not permit him to confront the witnesses against him. Brown appears to argue that the State should have presented the testimony of two women who were arrested along with him in order to substantiate its claim that he was a drug dealer. The State was not compelled to present the testimony of the two women. If, as Brown suggests, the women would have testified that he was a drug dealer, it is not clear why Brown should complain that they did not testify. We find no error with respect this claim.

(14) Brown's last claim of impropriety on the part of the Superior Court is that it imposed an excessively harsh sentence. Brown was sentenced to 2 years of

Level V incarceration on the possession conviction and 1 year of Level V incarceration on the resisting arrest conviction. Brown does not claim that these sentences exceed the statutory limits. Rather, he argues that the sentences exceed the TIS guidelines. However, as this Court has repeatedly held, sentences that are within the statutory guidelines may not be challenged simply because they exceed the TIS guidelines.[5]

(15) Brown also claims that the prosecution falsified the evidence against him. Specifically, he alleges that the police forged the name of Justice of the Peace Roberts on documents relating to the search warrant. In support of his allegation, Brown states that the signature on each document appears to be different and that the signature on at least one of the documents resembles that of one of the police detectives. Brown's claim of falsified evidence amounts to no more than an unsubstantiated allegation. Brown's additional claim that the prosecution did not produce a lab report regarding the marijuana cigarette to the defense is without factual support.

(16) Brown's next claim is that the police caused him physical harm. Specifically, he alleges that, after he was handcuffed, he was slammed to the ground, kicked and dragged across the concrete. There is no substantiation in the

[5] *Mays v. State*, 604 A.2d 839, 845 (Del. 1992).

record for these allegations. Moreover, the claim amounts to a separate complaint unrelated to Brown's claims of error in connection with his convictions and sentences.

(17) Brown claims that the jury delivered an inconsistent verdict against him by convicting him of possession of marijuana and yet not convicting him of trafficking in cocaine and possession with intent to deliver cocaine. His argument appears to be that, because a quantity of cocaine and the marijuana cigarette were found in close proximity to each other, they must have belonged to the same person. There is no inconsistency in the jury's verdict. The evidence at trial simply did not support convictions against Brown for trafficking and possession with intent to deliver, but clearly did support his conviction for marijuana possession.

(18) Brown's final claim is that his counsel provided ineffective assistance. This Court has consistently held that it will not consider a claim of ineffective assistance of counsel on direct appeal if that issue has not been decided on the merits in the Superior Court.[6] Accordingly, Brown's claim of ineffective assistance of counsel will not be considered in this direct appeal.

[6] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

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