

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDDIE B. SMITH,	§
	§
Defendant Below-	§ No. 355, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr.A. No. VK98-01-0386-01
Plaintiff Below-	§
Appellee.	§

Submitted: December 23, 2002
Decided: January 10, 2003

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

ORDER

This 10th day of January 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, Eddie B. Smith, was indicted on six separate drug charges. On February 11, 1999, Smith pleaded guilty to a lesser-included charge of Attempted Delivery of Cocaine. He was sentenced to 6 years incarceration at Level V, to be suspended after 3 years for 1 year of Level III probation, followed by 1 year of Level II probation.

(2) On June 6, 2002, a violation of probation (“VOP”) hearing was held in the Superior Court based upon allegations of several VOP’s committed by Smith, including a December 21, 2001 arrest for selling cocaine to an undercover police officer. The Superior Court found that Smith violated his probation by failing to appear for a scheduled appointment with his probation officer, smoking marijuana, failing to make payments on a fine imposed by the Superior Court, and being charged with several criminal offenses. The Superior Court reimposed a sentence of 6 years at Level V, to be suspended upon successful completion of the Key Program, followed by 1 year at Level IV Crest, followed by 1 year at Level III Crest Aftercare. This is Smith’s direct appeal.

(2) Smith’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.¹

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

(4) Smith raises ten issues for this Court's consideration, which may fairly be summarized as follows: a) hearsay testimony was improperly admitted at the VOP hearing; b) the sentencing guidelines were not followed; c) there was insufficient evidence to support the finding of a VOP; d) the original guilty plea was coerced; and e) a credit of 3 years of Level V time should have been applied to his VOP sentence.

¹*Penon 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) The transcript of the June 6, 2002 VOP hearing reflects that Officer Dale Barr of Probation and Parole testified on behalf of the State. Officer Barr was Smith's supervising officer at the time Smith was on probation. Officer Barr filed a violation report on March 5, 2002 alleging that Smith had violated his probation by missing a scheduled office visit with him, smoking marijuana on two separate occasions, failing to produce a required urine sample and failing to make payments on a fine assessed by the Superior Court. Officer Barr also testified that he was aware Smith had been arrested on new drug charges.

(6) Officer Steven Rust of the Milford Police Department testified at the VOP hearing concerning Smith's alleged sale of cocaine to an undercover police officer. Officer Rust stated that, on November 30, 2001, as part of an undercover drug operation, he listened on a monitor as Detective Lonnie Feaster purchased cocaine from Smith. He testified that Detective Feaster later identified Smith by looking at his photograph and that an informant also confirmed Smith's identity.

(7) Smith testified on his own behalf. He admitted that he had missed an appointment with his probation officer. He also admitted that he told Officer

Barr he had smoked marijuana. Smith denied that he had ever been asked to submit a urine sample.

(8) Smith's first four claims are without merit. First, hearsay is admissible at a VOP hearing.² Second, the Truth in Sentencing guidelines are voluntary and non-binding and, as such, may not serve as the sole basis for a claim of an illegal sentence.³ Third, as reflected in the transcript of the VOP hearing, there was more than sufficient evidence to support the Superior Court's finding of a VOP.⁴ Fourth, there is simply no evidence in the record to support Smith's claim that the guilty plea he entered on February 11, 1999 was coerced.

(9) With respect to his fifth and final claim, Smith alleges that he already had served 3 years at Level V in connection with his February 11, 1999 sentence at the time of the VOP hearing. He claims that the Superior Court improperly failed to credit those 3 years to its VOP sentence and instead reimposed the full 6 year sentence. In its initial response to appellant's Rule

²*Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

³*Mayes v. State*, 604 A.2d 839, 845 (Del. 1992).

⁴*Brown v. State*, 249 A.2d at 272. (The evidence in a VOP hearing need only be "such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.")

26(c) brief, the State argued that there was no evidence to support Smith's allegation and, in any case, defense counsel conceded at the VOP hearing that Smith had served only 7 days of his February 11, 1999 sentence.

(10) Because the record was unclear as to how much time Smith had served on his February 11, 1999 sentence, the Court directed Smith's counsel and counsel for the State to submit supplemental memoranda addressing the issue. In their memoranda, both agree that the Superior Court's June 6, 2002 VOP sentencing order erroneously failed to credit Smith with time he already had served on his February 11, 1999 sentence. According to counsel for the State, the Sussex Correctional Institute records reflect that Smith should be credited with 2 years, 10 months and 1 day of Level V time, which includes 7 days Smith spent at Level V while waiting for his VOP hearing.

(11) This Court has reviewed the record carefully and has concluded that, with respect to his first four claims, Smith's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Smith's counsel has made a conscientious effort to examine the record and has properly determined that Smith could not raise a meritorious claim as to those four claims in this appeal.

NOW, THEREFORE, IT IS ORDERED that, as to Smith's first four claims, the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

IT IS FURTHER ORDERED that, with respect to Smith's fifth claim, this matter is REMANDED to the Superior Court for the purpose of vacating its June 6, 2002 VOP sentencing order and entering a modified VOP sentencing order that accurately reflects the amount of time Smith already has served on his February 11, 1999 sentence, in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice