

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| BOBBY FOREMAN, | § |
| | § |
| Defendant Below- | § No. 67, 2000 |
| Appellant, | § |
| | § |
| v. | § Court Below—Superior Court |
| | § of the State of Delaware, |
| STATE OF DELAWARE, | § in and for Sussex County |
| | § Cr.A. No. VS93-09-0260-02 |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: September 8, 2000

Decided: October 26, 2000

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This 26th day of October 2000, 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, Bobby Foreman, appeals from a January 28, 2000 order of the Superior Court finding him guilty of a violation of probation ("VOP"). Foreman was charged with failing to abide by the rules of the Sussex Work Release Program and/or Residential Treatment Program, fighting with another resident on the work bus on December 8, 1999, and attempting to strike an officer on December 9,

1999. Foreman was sentenced to 4 years and 10 months incarceration at Level V, with credit for time previously served, to be suspended after 3 months for 1 year at Level IV, followed by 2 years at Level III, followed by 1 year at Level II.

(2) Foreman's 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) Foreman's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Foreman's counsel informed Foreman 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. Foreman was also

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).

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

(4) Foreman raises three issues for this Court's consideration. He claims that the Superior Court erred, first, in not granting a postponement of the VOP hearing so he could subpoena several witnesses, including two correctional officers, to testify on his behalf; second, in finding that he committed a VOP when the allegation against him was not contained in the administrative warrant; and, third, in basing its finding of a violation on the perjured and inconsistent testimony of a correctional officer. Foreman asks this Court to overturn his convictions, grant him another VOP hearing or modify his sentence.

(5) Foreman's claim that the Superior Court erred in not postponing the hearing to permit him to subpoena witnesses is without merit. On December 20, 1999, the Superior Court sent Foreman notice of the January 28, 2000 VOP hearing. It also sent him a copy of a letter appointing the Public Defender's Office to represent him at the hearing. In

a letter dated December 21, 1999, Foreman asked the Superior Court to appoint counsel from outside the Public Defender's Office in Georgetown, Delaware, to represent him. In that letter, Foreman confirmed his understanding that the VOP hearing had been scheduled for January 28, 2000 and his intention to subpoena witnesses for the hearing. On January 8, 2000, the Superior Court sent a letter to Foreman denying his request for an attorney from outside the Public Defender's Office in Georgetown. The record does not indicate any further attempts by Foreman to have his witnesses subpoenaed until the morning of the VOP hearing. At that time, Foreman told his attorney he had seven witnesses he wished to be subpoenaed. The Superior Court denied Foreman's attorney's request for a continuance so that the witnesses could be subpoenaed, stating that the request had come "too late." Based upon the record before us, we find no abuse of discretion on the part of the Superior Court in denying the request for a continuance.

(6) Even if the witnesses had been permitted to testify, there is no indication that their testimony would have changed the outcome of the hearing. Foreman specifically discusses only the proposed testimony of two unnamed correctional officers. The first of these, Foreman contends,

would have testified that Sergeant Daniel Devern, an officer at the Work Release Center, threatened and verbally abused him. However, Devern's testimony at the hearing was that he received a report that Foreman and another inmate had been involved in a fight while on a bus ride back to the Center.² Foreman does not contend that the correctional officer would have contradicted these essential elements of Devern's testimony. Moreover, Foreman himself testified that he fought with the other inmate on the bus. Thus, there is no indication that the testimony of the correctional officer would have changed the Superior Court's determination that Foreman violated his probation by fighting with another inmate on the bus.

(7) There is also no indication that the testimony of the second correctional officer would have altered the outcome of the hearing. Foreman contends that this witness would have testified concerning an incident in which Officer Chapman, an officer at the Violation Center, sprayed Foreman with mace and Foreman reacted by attempting to hit him. At the hearing, however, the Superior Court granted defense counsel's

²Devern also testified that he was told a window in the bus was broken during the fight. Foreman testified that he did not believe that occurred. The Superior Court determined that a window in the bus was, in fact, broken during the fight.

motion to strike all evidence against Foreman concerning alleged violations arising out of Foreman being sprayed with mace.³ Thus, the correctional officer's testimony was not relevant to the Superior Court's determination that Foreman failed to follow a directive of the correctional staff, which was based solely on Foreman's conduct prior to being sprayed with mace.

(8) Foreman's second claim that he should not have been found guilty of a probation violation that was not contained in the administrative warrant is likewise without merit. Because this issue was not raised at the VOP hearing below, this Court will review it under a plain error standard.⁴ Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.⁵ In the context of a VOP hearing, the question is whether Foreman was afforded the minimum requirements of due process.⁶ The record reflects that Foreman and his counsel had adequate notice of his alleged violations and ample opportunity to defend

³Defense counsel specifically stated he had no objection to proceeding with evidence concerning alleged violations leading up to the use of the mace.

⁴*Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986).

⁵*Id.*

⁶Super. Ct. Crim. R. 32.1; *Perry v. State*, Del. Supr., 741 A.2d 359, 363 (1999).

against those allegations. Thus, there was no prejudice to Foreman's rights and no plain error.

(9) Foreman's final claim that the Superior Court erred in finding him guilty of a VOP based on the perjured and inconsistent testimony of a correctional officer is also without merit. Because this claim was not raised below, this Court will review it for plain error.⁷ Devern testified that it was his understanding Foreman started a fight on the bus because he was insulted by another individual. Devern testified that he and Foreman spoke about the incident on the bus, but he could not remember Foreman's exact words. Foreman testified that he did not speak to Devern at all about the incident on the bus. Foreman himself testified that he got involved in a fight on the bus because he was insulted. Questions concerning witness credibility and the resolution of conflicts in witness testimony are within the province of the trier of fact.⁸ The Superior Court determined that Foreman got involved in a fight on the bus because he was called an

⁷*Wainwright v. State*, 504 A.2d at 1100.

⁸*Tyre v. State*, Del. Supr., 412 A.2d 326, 330 (1980).

offensive name. There was competent evidence, including Foreman's own testimony, to support that finding and, therefore, there was no plain error.⁹

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

BY THE COURT:

Randy J. Holland
Justice

⁹Foreman also asks why he should be punished when the individual he was fighting with was not. Whether this individual was punished or not is irrelevant to the matters before this Court in this appeal.