

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN D. PRICE,	§
	§
Defendant Below-	§ No. 255, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr.A. Nos. PK99-06-0103
Plaintiff Below-	§ and PK99-06-0106
Appellee.	§

Submitted: September 25, 2000

Decided: October 20, 2000

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

ORDER

This 20th 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, John D. Price, pled guilty on April 27, 2000 to two counts of attempted delivery of cocaine. The Superior Court sentenced Price, pursuant to the terms of his plea agreement, to ten years in jail followed by probation. This is Price's direct appeal.

(2) Price's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). In his motion to withdraw, Price's counsel represents that he has conducted a conscientious review of the record and has concluded

there are no meritorious issues on which to base an appeal. By letter, Price's attorney informed him of the provisions of Rule 26(c) and provided Price with a copy of the motion to withdraw and the accompanying brief, which identifies two arguable issues for the Court's consideration. Price was informed of his right to supplement his attorney's presentation but has raised no additional issues for this Court's consideration. The State has responded to the position taken by defense counsel and has moved to affirm the Superior Court's judgment.

(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

(4) The record reflects that Price was arrested in May 1999 on criminal charges arising from three separate incidents. Undercover police, with the aid of a confidential informant, purchased drugs from Price on three separate occasions in April and May of 1999. Price was indicted on three counts of

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).

delivery of cocaine, two counts of maintaining a vehicle for keeping controlled substances, three counts of possession of drug paraphernalia, and one count of driving with a suspended license. Prior to the scheduled trial date, Price's counsel filed a motion seeking to compel the State to disclose the identity of its confidential informant. The Superior Court denied the motion. Thereafter, Price entered into a plea agreement pursuant to Superior Court Criminal Rule 11(e)(1)(C). In exchange for Price pleading guilty to two counts of attempted delivery, the State agreed to nolle pros the remaining seven charges, to not seek habitual offender sentencing,² and to recommend a total mandatory sentence of 10 years in jail followed by probation. The Superior Court accepted Price's guilty plea and sentenced Price in accordance with his plea agreement.

(5) The first arguable issue identified by defense counsel is whether the Superior Court erred in denying Price's motion to compel the State to disclose the identity of its confidential informant. Counsel contends that the confidential informant was a direct party to the alleged drug transactions, therefore, disclosure of his identity was required under *State v. Flowers*.³ Alternatively, defense counsel argues that, even if the informant was not a party, disclosure of

²The State asserts, and defense counsel does not dispute, that Price had enough prior felony convictions to make him eligible for a mandatory life sentence as an habitual offender.

³Del. Super., 316 A.2d 564 (1973).

the informant's identity was required because the informant's testimony would have materially aided the defense.⁴

(6) This claim fails for the alternative reasons that Price waived his right to appeal the Superior Court's ruling by entering a guilty plea⁵ and because it lacks merit. Pursuant to Delaware Uniform Rule of Evidence 509, the prosecution has a privilege to refuse to disclose the identity of a confidential informant unless it appears that the informant may be able to give testimony that would materially aid the defense. The defense has the burden of establishing, beyond mere speculation, that the informant's testimony would materially aid the defense.⁶ In this case, the Superior Court conducted an *in camera* review of the State's affidavit submitted in opposition to the defense's motion. The Superior Court concluded, based upon the affidavit, that the confidential informant arranged the three meetings between Price and the undercover police officer but that the informant did not take part in any of the transactions. Moreover, the Superior Court, after considering defense counsel's supplemental written submission, concluded that the defense had not sustained its burden of proving that the informant's testimony would materially aid the defense. The

⁴Del. Unif. R. Evid. 509(c)(2).

⁵See *Downer v. State*, Del. Supr., 543 A.2d 309, 312-13 (1988).

⁶*Hooks v. State*, Del. Supr., No. 43, 1992, Holland, J. (Aug. 17, 1992) (ORDER).

Superior Court therefore denied Price's motion to disclose. After reviewing the record, we find the Superior Court's decision to be carefully considered and free from error. Consequently, the Court finds no merit to this first arguable issue.

(7) The second arguable issue is that Price's guilty plea was not knowing and voluntary due to his counsel's alleged ineffective assistance. This Court will not consider ineffective assistance of counsel claims for the first time on direct appeal.⁷ Moreover, to the extent that Price asserts his guilty plea was not knowing and voluntary, contrary to the express finding of the Superior Court that it was, the appropriate procedure was to move to withdraw his plea pursuant to Superior Court Criminal Rule 32(d). This Court will consider on appeal only those questions that were fairly presented to the trial court in the first instance.⁸ We decline to consider this issue for the first time on appeal.

(8) This Court has carefully reviewed the record and has concluded that Price's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Price's counsel has made a conscientious effort to examine the record and has properly determined that Price could not raise a meritorious claim in this appeal.

⁷*Desmond v. State*, 654 A.2d 821, 829 (1994).

⁸See Supr. Ct. R. 8.

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

BY THE COURT:

/s/ Carolyn Berger
Justice