

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK R. KOESTER,	§	
	§	
Defendant Below-	§	No. 83, 2000
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr.A. Nos. 99-08-0167
Plaintiff Below-	§	0168
Appellee.	§	0172

Submitted: August 29, 2000

Decided: October 6, 2000

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

ORDER

This 6th 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, Mark R. Koester, was found guilty by a Superior Court jury of driving under the influence, driving after judgment prohibited and failure to stop at a stop sign. On the charge of driving under the influence, Koester was sentenced to 5 years incarceration at Level V, with credit for time served, to be suspended after 2 years and successful completion of the Key Program for 12 months at Level IV (Crest Program). Following successful completion of that program, Koester was to be placed at Level III (Aftercare

Program) for a period of 2 years. On the charge of driving after judgment prohibited, Koester was sentenced to 30 months incarceration at Level V, to be suspended after 90 days and successful completion of the Key and Crest Programs for 30 months at Level III (Aftercare Program). On the charge of failure to stop at a stop sign, Koester did not receive a prison sentence. This is Koester's direct appeal.

(2) Koester'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) Koester's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Koester's counsel informed Koester of the provisions of Rule 26(c) and provided

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).

him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Koester was also informed of his right to supplement his attorney's presentation. Koester responded with a submission that raises four issues for this Court's consideration. The State has responded to the position taken by Koester's counsel as well as the issues raised by Koester and has moved to affirm the Superior Court's judgment.

(4) Koester raises four issues for this Court's consideration. Koester claims that: i) the prosecutor violated the Superior Court's order not to speak to the jury about his statement at the accident scene; ii) the State's witnesses offered conflicting versions of the events leading to his arrest; iii) the State's witnesses improperly discussed their testimony outside the courtroom before they took the stand; and iv) he received ineffective assistance of counsel, consisting of counsel's failure to: retrieve 911 phone calls, correctly inform him of his probable sentence upon a finding of guilt; object to the testimony of the State's witnesses; consult with him before trial about his defense; properly cross-examine the State's witnesses; and allow him to testify fully at trial.

(5) Koester's first claim is that the prosecutor spoke to the jury about his statement at the accident scene in violation of the Superior Court's order. Prior to trial, the Superior Court judge ruled that a portion of Koester's statement was inadmissible and instructed the prosecutor to advise the State's

witnesses about this restriction. The record reflects that the prosecutor did so and there was no testimony elicited by the prosecutor based upon the inadmissible portion of Koester's statement. The record also reflects that the prosecutor spoke to the judge about the statement on only two occasions—once prior to trial before the jury entered the courtroom and once at sidebar, outside the hearing of the jury. Koester's claim of impropriety on the part of the prosecutor is, thus, without merit.

(6) Koester's second claim is that the State's witnesses gave conflicting testimony, entitling him to a reversal of his conviction for driving under the influence. Essentially, Koester claims that the evidence was insufficient to sustain the conviction. When a defendant argues that the evidence was insufficient to support a guilty verdict, the proper standard of appellate review requires this Court to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the charged offense beyond a reasonable doubt.²

(7) A review of the trial record reveals the following: witnesses for the State, and Koester himself, testified that he ran the stop sign, drove into a ditch and fled from the accident scene before the police arrived; witnesses for the

²*Morrissey v. State*, Del. Supr., 620 A.2d 207, 213 (1993).

State testified that Koester smelled of alcohol and his speech was slurred; Koester testified that he had been drinking alcohol prior to the accident, that he did not have a driver's license and that he was worried about going to jail if the police were called to the accident scene; a witness for the State testified that Koester told her he had been drinking, did not have a license and was afraid of going to jail if the police were called; the investigating police officer testified that Koester told him he had been drinking, and that Koester failed field sobriety tests and appeared to be under the influence of alcohol; and witnesses for the State testified that beer cans either fell out of or were thrown by Koester out of his van before the police arrived at the accident scene. This evidence was more than sufficient to sustain a conviction for driving under the influence of alcohol.³ Koester's claim of insufficient evidence to support his conviction on that charge is, therefore, without merit.

(8) Koester's third claim is that the State's witnesses discussed their testimony with each other outside the courtroom before taking the stand. The record does not reflect that any such discussion took place. There is no indication that defense counsel ever objected to any such discussion or that the Superior Court judge was aware of any such discussion. In the absence of any factual support for this claim, we find that it, too, is without merit.

³21 Del. C. § 4177.

(9) Koester's fourth, and final, claim is that he was provided ineffective assistance of counsel. This Court will not hear a claim of ineffective assistance of counsel raised for the first time on direct appeal.⁴ Accordingly, we will not consider Koester's claims of ineffective assistance of counsel for the first time in this direct appeal.

(10) This Court has reviewed the record carefully and has concluded that Koester's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Koester's counsel has made a conscientious effort to examine the record and has properly determined that Koester 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/ Joseph T. Walsh
Justice

⁴*Wing v. State*, Del. Supr., 690 A.2d 921, 923 (1996).