

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| BRYAN A. JONES, | § |
| | § |
| Defendant Below- | § No. 575, 2003 |
| Appellant, | § |
| | § |
| v. | § Court Below—Superior Court |
| | § of the State of Delaware, |
| STATE OF DELAWARE, | § in and for New Castle County |
| | § Cr.A. No. IN0-03-0951 |
| Plaintiff Below- | § Cr. ID 0303003566 |
| Appellee. | § |

Submitted: April 13, 2004
Decided: May 28, 2004

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

ORDER

This 28th day of May 2004, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Bryan A. Jones, was convicted by a Superior Court jury of one count of Robbery in the First Degree. The Superior Court sentenced Jones to eight years at Level V incarceration, to be suspended after serving six years for two years at decreasing levels of supervision. This is Jones' direct appeal.

(2) Jones' counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Jones' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Jones' attorney informed him of the provisions of Rule 26(c) and provided Jones with a copy of the motion to withdraw and the accompanying brief. Jones also was informed of the right to supplement his attorney's presentation. Jones has raised several issues for this Court's consideration. The State has responded to Jones' points, as well as the position taken by Jones' 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

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).

(4) The trial record fairly supports the following version of events. On March 5, 2003, an Iowa truck driver named Joseph Dehner drove to Wilmington to pick up a load of wire at Interstate Steel. He parked his truck at the plant at 9:30 p.m. and planned to sleep in his truck overnight. Before retiring, he walked two blocks to a bar, hoping to eat and play a game of pool. At approximately 10:30 p.m., he left the bar and began to walk back to his truck. He noticed three men following him, whom he had seen earlier in the evening. He looked over his shoulder and saw that two of the men had pulled do-rags from their heads down over their faces. One of the men poked an object into Dehner's back and stated he had a gun. The robbers took \$15 in cash and a knife from Dehner's pocket, as well as the keys to Dehner's truck. The robber without the mask, whom Dehner identified in court as Jones, threatened to stab Dehner with his own knife. The robbers then threw the keys into the street. After the robbers left, Dehner retrieved his keys and returned to his truck to call the police. In the process of making the call, Dehner saw police stop the three men whom he believed had just robbed him. Dehner explained to police what had happened. The police recovered Dehner's knife from Jones as well as \$5 in cash.

(5) Jones testified in his own defense at trial. He testified that Dehner approached him about obtaining drugs and prostitutes. Jones stated

that when he refused to sell Dehner drugs, Dehner pulled a knife on him. Jones claimed he was able to wrestle the knife away from Dehner. Jones stated he then picked up a piece of bread from the ground and sold it to Dehner as cocaine. Jones testified that when Dehner discovered he had been duped, he became angry and told police he had been robbed. During the course of his testimony, Jones admitted that he had prior criminal convictions for second degree robbery and criminal impersonation.

(6) On appeal, Jones raises the following four issues: (a) the indictment against him was defective; (b) Dehner's initial statement to police was contradicted by his testimony at trial; (c) the prosecutor engaged in misconduct by referring to Jones as a "street kid" and referring to the victim as "Iowa Joe;" and (d) the trial judge erred in overruling defense counsel's objection to the prosecutor's question regarding the inconvenience caused to Dehner by having to return to Delaware to testify at trial.

(7) With respect to his first claim, Jones asserts that the indictment against him was defective because it alleged that he was armed with a bottle but the only evidence presented at trial reflected that Jones possessed a knife. We find no merit to this argument. The indictment against Jones, in fact, stated that Jones "when in the course of committing theft, did use or threaten the immediate use of force upon Joseph Denner [sic], with the intent

to compel said person to deliver up property or to engage in other conduct which aided in the commission of the theft, and in the course of the commission of the crime or the immediate flight therefrom, the defendant or another participant in the crime was armed with and used or threatened the use of a dangerous instrument.” The indictment does not mention either a bottle or a knife. Thus, there simply is no factual support for Jones’ first contention.

(8) Jones next alleges reversible error because Dehner’s testimony at trial was inconsistent with the statement he originally gave to the police. Specifically, Jones asserts that Dehner told police that he was threatened with a bottle, but at trial Dehner claimed he was threatened with a knife. Jones had the opportunity to cross-examine Dehner on this point at trial but failed to do so. Having failed to raise the issue below, this Court is not obligated to consider it on appeal.² Even assuming inconsistencies existed between Dehner’s statement to police and his trial testimony, these inconsistencies were for the jury to resolve.³ Given the undisputed testimony that Jones was in possession of Dehner’s knife when police

² Del. Supr. Ct. R. 8.

³ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

arrested him, a reasonable juror certainly could have concluded, beyond a reasonable doubt, that Jones had threatened Dehner with the knife.⁴

(9) Jones next contends that the prosecutor engaged in misconduct by referring to him as “a street kid” and referring to Dehner as “Iowa Joe.” There were no objections to the prosecutor’s references at trial. Accordingly, we review this contention for plain error.⁵ During his testimony, Jones himself testified that he was “street-wise.” Dehner testified that his first name was Joe and that he was from Iowa. The prosecutor’s characterizations were thus based on the testimony presented. We find nothing so clearly prejudicial about the prosecutor’s statements to reflect that the integrity of the trial was jeopardized.⁶

(10) Finally, Jones asserts the Superior Court erred in allowing the State to cross-examine Dehner, over defense counsel’s objection, regarding Dehner’s efforts to appear at trial. This Court reviews a trial court’s evidentiary rulings for abuse of discretion.⁷ The record in this case reflects that Jones testified that Dehner was looking for drugs. Following Jones’ testimony, the prosecutor recalled Dehner to the stand to question him about the drug tests he was required to undergo for his job as a truck driver and the

⁴ *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).

⁵ *Cabrera v. State*, 840 A.2d 1256, 1272 (Del. 2004).

⁶ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁷ *Hardin v. State*, 844 A.2d 982, 987 (Del. 2004).

lengths to which Dehner went in order to be present to testify at trial in Delaware. When defense counsel objected, the trial judge overruled the objection on the ground that the prosecutor's questions were relevant to Dehner's credibility. We agree. Given that Jones challenged Dehner's credibility as a witness, we find no abuse of discretion in the trial court's ruling permitting the prosecutor's questions to rehabilitate Dehner's credibility.

(11) This Court has reviewed the record carefully and has concluded that Jones' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Jones' counsel has made a conscientious effort to examine the record and the law and has properly determined that Jones 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/ Randy J. Holland
Justice