

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SCOTT O. JOHNSON,	§	
	§	
Defendant Below-	§	No. 577, 2003
Appellant,	§	
	§	
v.	§	Court Below---Superior Court
	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. No. IN02-12-2258
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: May 13, 2004
Decided: July 20, 2004

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

ORDER

This 20th day of July 2004, 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, Scott O. Johnson, pleaded guilty to one count of Possession of a Controlled Substance Within 300 Feet of a Park, Recreation Area or Place of Worship.¹ He was sentenced to 5 years incarceration at Level V, to be suspended following successful completion of the Key Program, with the balance of the sentence to be served at Level IV, to be suspended after 6 months for 2 years at Level III. This is Johnson's direct appeal.

¹ Del. Code Ann. tit. 16, § 4768 (2003).

(2) Johnson'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.²

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

² *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) Johnson raises several issues for this Court's consideration, which may fairly be summarized as follows: a) his counsel improperly waived the preliminary hearing on his behalf and the Superior Court improperly accepted the waiver; b) his constitutional rights were violated by the Probation/Parole officer who searched him; c) he was given an illegal sentence; d) the Superior Court should have permitted him to withdraw his guilty plea because the State did not fulfill its part of the bargain; and e) his counsel provided ineffective assistance.

(5) The transcript of Johnson's June 3, 2003 plea colloquy reflects that, in exchange for Johnson's guilty plea to one count of Possession of a Controlled Substance Within 300 Feet of a Park, Recreation Area or Place of Worship, the State agreed to dismiss the additional charges of Possession with Intent to Deliver Cocaine, Resisting Arrest, Loitering, and Possession of Drug Paraphernalia. The transcript also reflects that Johnson had reviewed the guilty plea form with his counsel and understood its contents, understood he was waiving his right to a trial and to present a motion to suppress, understood he could receive a potential maximum sentence of 15 years Level V incarceration, admitted he was guilty of the crime to which he was pleading guilty, and was satisfied with the representation provided by his counsel. Based upon these representations, the

Superior Court found that Johnson had entered his guilty plea knowingly, intelligently and voluntarily.

(6) In the absence of clear and convincing evidence to the contrary, Johnson is bound by the representations he made during the guilty plea colloquy.³ In addition, Johnson's voluntary guilty plea constitutes a waiver of any alleged defects or errors occurring prior to the entry of the plea.⁴ For these reasons, we find Johnson's first two claims regarding his waiver of the preliminary hearing and the search by the Probation/Parole officer to be without merit.

(7) Johnson's third claim of an illegal sentence is based upon his argument that the Superior Court imposed a period of probation in excess of the statutory maximum permitted under amended Del. Code Ann. tit. 11, § 4333.⁵ However, under the savings statute of the Delaware criminal code,⁶ as interpreted by the federal precedents,⁷ Johnson is not entitled to any benefit conferred by the

³ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

⁴ *Downer v. State*, 543 A.2d 309, 311-12 (Del. 1988).

⁵ Under amended Del. Code Ann. tit. 11, § 4333(b) (2), the period of probation for an offense set forth in Title 16 is limited to 18 months.

⁶ Del. Code Ann. tit. 11, § 211(b) (2001).

⁷ Because the savings statute is modeled, in part, on a federal statute, federal caselaw may be used to interpret it. *State v. Ismaeel*, Del. Super., Cr. ID No. 0304002130, Stokes, J. (Jan. 13, 2004), *aff'd*, Del. Supr., No. 17, 2004, Steele, C.J. (June 25, 2004).

amended statute because its effective date was subsequent to the date of the crime to which he pleaded guilty.⁸ Johnson's claim is, thus, without merit.

(8) Johnson next claims that he should have been permitted to withdraw his guilty plea because the State did not fulfill its promise to recommend only a probationary sentence in exchange for Johnson's cooperation in a future drug investigation. The plea agreement itself does not reflect any such promise by the State. In fact, during the plea colloquy, Johnson stated that he understood that he could receive as much as a 15-year Level V sentence and that no one had promised him what his sentence would be. It appears that, in a collateral agreement, the prosecutor offered to recommend probation if Johnson provided substantial assistance in a drug investigation. It also appears, however, that the prosecutor did not believe Johnson provided substantial assistance and, for that reason, did not recommend probation for Johnson at the sentencing hearing. Because Johnson has failed to demonstrate that the prosecutor breached any enforceable agreement, this claim must fail.

⁸ *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661 (1974). The record reflects that the crime was committed in December 2002; however, the amended statute did not become effective until May 31, 2003.

(9) Johnson's final claim of ineffective assistance of counsel was not decided on the merits in the Superior Court. We, therefore, decline to address it for the first time in this direct appeal.⁹

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

⁹ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).