IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY J. BARLOW,	§	
	§	
Defendant Below-Appellant,	§	No. 565, 2003
	§	
	§	Court Below---Superior Court
v.	§	of the State of Delaware,
	§	in and for Kent County
STATE OF DELAWARE,	§	Cr. A. Nos. IK02-01-0043; 0044
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 8, 2004
Decided: August 17, 2004

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

O R D E R

This 17th day of August 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) On October 23, 2002, the defendant-appellant, Anthony J. Barlow, was found guilty by a Superior Court jury of Robbery in the First Degree and Criminal Impersonation. On December 11, 2002, he was sentenced as an habitual offender[1] to 25 years incarceration at Level V on the robbery conviction and to 1

[1] Del. Code Ann. tit. 11, § 4214(a) (2001).

year incarceration at Level V, to be suspended for 1 year Level III probation, on the criminal impersonation conviction.[2] This is Barlow's direct appeal.

(2) Barlow'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.[3]

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

[2] Following a hearing regarding the signature on one of Barlow's plea agreements, the Superior Court on October 30, 2003 re-sentenced Barlow as an habitual offender to the same sentence he had received on December 11, 2002.

[3] *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).

Barlow's counsel as well as the issues raised by Barlow and has moved to affirm the Superior Court's judgment.

(4) Barlow raises seven issues for this Court's consideration. He claims: a) he should not have been adjudged an habitual offender because he did not have three separate prior qualifying felony convictions; b) the trial judge gave an improper jury instruction on the charge of first degree robbery; c) his constitutional right to a speedy trial was violated; d) the State's evidence on the robbery charge was insufficient to satisfy the corpus delicti rule; e) the trial judge improperly ordered him to undergo immunodeficiency virus testing; f) he was improperly prevented from presenting the testimony of a defense witness; and g) his trial counsel provided ineffective assistance.

(5) On December 27, 2001, a security guard named Rondal Bryant became suspicious as he observed the behavior of an individual, later identified as Barlow, outside the Dover Mall in Dover, Delaware. According to Bryant, he and two other security guards were standing outside a set of doors leading into the Strawbridge & Clothier department store when Barlow got out of his car, walked up to the doors and said, "Oops, wrong doors." Bryant watched as Barlow got back into his car, drove to the next set of doors, which led into the men's

department, and went inside. Bryant followed Barlow, and as Bryant watched, Barlow began grabbing different items of clothing from the shelves.

(6) Bryant, who had a radio, notified the department store security office about the situation. As Barlow attempted to exit the store with the clothing in his arms, Bryant stopped him, identified himself as a security guard, and told Barlow to come with him. Barlow refused and, pushing towards Bryant, bit him on the chin. In the struggle, Barlow fell to the floor. An off-duty correction officer saw what was happening and ran over to assist. When additional security guards arrived, Barlow was subdued and taken back to the security office.

(7) Following notification by the store, Officer Lawrence Simpkiss of the Dover Police Department arrived at the security office to take Barlow into custody. When Officer Simpkiss asked Barlow to identify himself, Barlow said that his name was Derrick Herrera. On the way to the police station, Barlow identified himself as Donald Hicks. At the police station, Officer Simpkiss conducted an investigation of prior arrest records and determined Barlow's true identity.

(8) Barlow's first claim is that the State did not prove he had the requisite three prior offenses to qualify him for habitual offender status. The record reflects that, at the habitual offender hearing, the State presented evidence that Barlow had been convicted of second degree forgery in 1992, attempted cocaine delivery in

1997, and second degree robbery in 1999. The transcript of the habitual offender hearing reflects that the Superior Court's determination of Barlow's habitual offender status was supported by substantial evidence and was free from abuse of discretion or legal error.[4] This claim is, therefore, without merit.

(9) Barlow's second claim is that the trial judge erred in instructing the jury on first degree robbery because there was no separate instruction on the defendant's mental state. Delaware law provides that a defendant is not entitled to any particular instruction, only a correct statement of the substance of the law.[5] Here, the trial judge used the Superior Court's pattern jury instruction on first degree robbery as that offense is defined in Del. Code Ann. tit. 11, § 832(a) (1). The judge provided a correct statement of the law to the jury and, therefore, no separate instruction with respect to the defendant's mental state was required.[6]

(10) Barlow next claims that his constitutional right to a speedy trial was violated. The four factors for determining whether delay has resulted in a violation of the right to a speedy trial are: the length of the delay; the reason for the delay; the defendant's assertion of his speedy trial right; and prejudice to the defendant.[7]

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[4] *Walker v. State*, 790 A.2d 1214, 1221-22 (Del. 2002).
[5] *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998).
[6] *Bialach v. State*, 744 A.2d 983, 985-86 (Del. 2000).
[7] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

(11) The record reflects that Barlow was arrested on December 27, 2001, indicted on February 4, 2002, and arraigned on February 14, 2002. After that date, Barlow was free on bond while awaiting trial, which took place on October 21, 2002. In addition to being free on bond during the bulk of the time between arrest and trial, the record reflects that Barlow failed to file a speedy trial motion in the Superior Court, contributed himself to any delay by requesting a continuance of the June 2002 final case review because of a change of counsel, and failed to demonstrate any prejudice due to any delay. Under these circumstances, there is no basis for Barlow's claim of a speedy trial violation.

(12) Barlow's next claim is that the evidence of the robbery offense was insufficient to satisfy the corpus delicti rule.[8] As the trial transcript reflects, however, the testimony of Rondal Bryant constituted sufficient independent evidence to support Barlow's robbery conviction and the testimony of Officer Simpkiss constituted sufficient independent evidence to support his criminal impersonation conviction. This claim is, thus, without merit.

(13) Barlow argues that it was improper for the judge to order him to undergo immunodeficiency virus testing. While the judge is mandated by statute

[8] *DeJesus v. State*, 655 A.2d 1180, 1199-1202 (Del. 1995) (in order to satisfy its burden of proof, the State must present some evidence of the crime apart from the defendant's confession).

to order such testing under certain circumstances,[9] there is no prohibition against ordering such testing under other circumstances. We conclude that the judge was within his discretion to order such testing in this case, since Barlow bit Bryant on the chin. Even assuming error on the part of the judge, any such error does not undermine the validity of Barlow's convictions and sentences.

(14) Barlow's next claim is that he was denied the opportunity to present the testimony of a defense witness. Barlow does not identify the witness nor does he state how the witness's testimony would have aided his case. In the absence of any record support for this claim, we find it to be meritless.

(15) Barlow's final claim is that his trial counsel provided ineffective assistance. This claim was not presented to the trial court in the first instance. Because there has been no adjudication of the claim by the Superior Court, we decline to decide it for the first time in this direct appeal.[10]

(16) This Court has reviewed the record carefully and has concluded that Barlow's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Barlow's counsel has made a conscientious effort to

[9] Del. Code Ann. tit. 11, § 3912 (2001) (when a defendant has been charged with an offense which has sexual intercourse or sexual contact as an element when the circumstances of the case demonstrate a possibility of transmission of human immunodeficiency virus, the court, at arraignment, shall order the defendant to undergo such testing at the request of the victim).
[10] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

examine the record and has properly determined that Barlow could not raise a meritorious claim in this appeal.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice