

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALFRED J. EVANS,	§
	§
Defendant Below-	§ No. 479, 1999
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. VN99-01-0506-02
Plaintiff Below-	§ VN99-01-0506-03
Appellee.	§

Submitted: April 6, 2000
Decided: May 30, 2000

Before **WALSH, HOLLAND** and **HARTNETT**, Justices

ORDER

This 26th day of May 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, Alfred J. Evans, filed this appeal from two orders of the Superior Court finding him in violation of probation ("VOP"). Evans admitted violating his probation at both hearings. In its first order dated June 17, 1999, the Superior Court sentenced Evans to 2 years incarceration at Level V, suspended for 2 years at Level IV work release, suspended after serving 6 months at Level IV for

18 months at Level III. As a condition of his sentence, Evans was to be held at Level V pending space availability at Level IV. In its second order dated October 8, 1999, the Superior Court sentenced Evans to 1 year, 8 months incarceration at Level V, suspended for 1 year, 8 months at Level IV home confinement or work release, suspended after 6 months, with the remainder of the sentence to be served at Level III. Evans was again ordered held at Level V pending space availability at Level IV. This is his appeal from the Superior Court's June 17, 1999 and October 8, 1999 orders.¹

(2) Evans' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). Evans' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. Evans' counsel states that he informed Evans of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete hearing transcript. Evans was also informed of his right to supplement his attorney's presentation. Evans responded with a submission that raises several issues for this Court's consideration. The State has responded to the position taken by Evans'

¹The record indicates that Evans had also been found in violation of probation on June 7, 1999.

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

(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) 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

(4) Evans raises the following issues for this Court's consideration: i) the Superior Court abused its discretion and violated his constitutional rights when it imposed its sentences at his June 17, 1999 and October 8, 1999 VOP hearings and ii) his counsel provided ineffective assistance at the VOP hearings.

(5) Evans' contention that the Superior Court abused its discretion and violated his constitutional rights when it imposed its sentences is without merit. The Superior Court was authorized to impose any

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).

remaining portion of Evans' original sentence in connection with his violations of probation.³ The record indicates that Evans originally was sentenced to 2 years incarceration at Level V. The record also indicates that, at the time of Evans' June 17, 1999 VOP hearing, he still had the full 2-year term at Level V remaining from his original sentence. While serving his sentence for his second probation violation, Evans had remained at Level V incarceration for 4 months pending space availability at Level IV. The Superior Court took that 4-month period into account when it sentenced Evans on October 8, 1999 to 1 year, 8 months at Level V for his third probation violation. Thus, the Superior Court acted within its authority when it sentenced Evans.

(6) Evans appears to argue that his October 8, 1999 sentence for a violation of probation while in a Level V facility was illegal because the original sentencing order sentenced him to work release and did not contain the provision that he remain at Level V incarceration pending space availability at Level IV. This argument is without merit. The Superior Court had discretion to sentence Evans to Level IV for his violations of probation. Moreover, the Superior Court had discretion to impose the

³*Ingram v. State*, Del. Supr., 567 A.2d 868, 869 (1989).

condition that he be held at Level V pending space availability at Level IV.⁴ It is not clear based on the record before us whether Evans is currently serving his sentence at Level V or Level IV. If Evans is currently serving his sentence at Level IV he lacks standing to challenge his confinement at Level V pending space availability at Level IV. If, however, Evans is currently confined at Level V awaiting space availability at Level IV, he may challenge the conditions of his confinement by filing the appropriate motion in the Superior Court.⁵

(7) To the extent Evans contends that the Superior Court's sentencing orders did not give him credit for time he had already spent at Level IV, that contention is likewise without merit. A defendant sentenced for a probation violation is not entitled to credit for time served at Level IV.⁶

(8) Evans' last claim of ineffective assistance of counsel is unavailing. This Court will not consider on appeal any claim of ineffective

⁴*Stokes v. State*, Del. Supr., No. 462, 1995, Walsh, J., 1996 WL 145783 (Feb. 26, 1996) (ORDER); *Warren v. State*, Del. Supr., No. 99, 1998, Veasey, C. J., 1998 WL 382640 (June 12, 1998) (ORDER); SENTAC Benchbook, January 2000.

⁵Super. Ct. Crim. R. 35. See *Defoe v. State*, Del. Supr., No. 48, 2000, Holland, J., slip op. at 5 (Apr. 28, 2000).

⁶*Gamble v. State*, Del. Supr., 728 A.2d 1171, 1172 (1999).

assistance of counsel that was not raised below.⁷ Accordingly, we will not consider Evans' claim of ineffective assistance of counsel for the first time in this appeal.

(7) This Court has reviewed the record carefully and has concluded that Evans' appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Evans' counsel has made a conscientious effort to examine the record and has properly determined that Evans 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

⁷*Wing v. State*, Del. Supr., 690 A.2d 921, 923 (1996).