

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY LOPER,	§	
	§	
Defendant Below-	§	No. 11, 2004
Appellant,	§	
	§	
v.	§	Court Below---Superior Court
	§	of the State of Delaware,
	§	in and for Kent County
STATE OF DELAWARE,	§	Cr. A. No. VK03-07-0555-01
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: July 16, 2004  
Decided: September 20, 2004

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

**ORDER**

This 20<sup>th</sup> day of September 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, Gregory Loper, was found to have violated his probation at a violation of probation (“VOP”) hearing on December 12, 2003. His probation was revoked and he was sentenced to 2 years incarceration at Level V, to be suspended after 6 months for 2 years Level III probation. The terms of a

previous no-contact order also were re-imposed.<sup>1</sup> This is Loper's direct appeal of his VOP sentence.<sup>2</sup>

(2) Loper'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.<sup>3</sup>

(3) Loper's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Loper's counsel informed Loper 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. Loper also was informed of his right to supplement his attorney's

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<sup>1</sup> Loper had been sentenced in November 2003 to 2 years incarceration at Level V, suspended for 1 year Level III probation, after pleading guilty to Non-Compliance with Bond. At that time, Loper, with the assistance of counsel, admitted to having contact with Suzanne Fontella in violation of a May 2003 no-contact order imposed by a Justice of the Peace.

<sup>2</sup> A review of the Superior Court docket reflects that, in June 2004 after serving this VOP sentence, Loper again was found in violation of his probation.

<sup>3</sup> *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).

presentation. Loper responded with a brief that raises twelve issues for this Court's consideration. The State has responded to the position taken by Loper's counsel as well as the issues raised by Loper and has moved to affirm the Superior Court's judgment.

(4) Loper raises twelve issues for this Court's consideration, which may fairly be summarized as follows: (a) he was not notified in writing concerning the basis for the VOP; (b) he was not given an opportunity to call witnesses at the VOP hearing; (c) the State presented insufficient evidence to support a VOP; (d) he was subjected to a selective and vindictive prosecution; (e) the prosecutor had a conflict of interest; (f) his sentence was improperly long; and (g) the no-contact order he was found to have violated was overly broad.

(5) The transcript of the VOP hearing reflects the following. The hearing was attended by Loper, his counsel, the prosecutor, and Michelle Williams, an officer with Adult Probation and Parole. Williams offered the following evidence in support of her argument that Loper had violated the conditions of his probation, which prohibited him from making contact with Suzanne Fontella and her family or coming within 100 feet of Ms. Fontella's place of employment. On November 21, 2003, she spoke with Dover Mall Security, who advised that Loper had been seen around the Dover Mall and that Ms. Fontella was employed by one of the

businesses there. On November 26, 2003, Williams contacted Loper and told him to have no further contact with the Dover Mall. Only two days later, another officer from Probation and Parole spotted Loper at the Dover Mall. Finally, on November 30, 2003, Loper was seen going to Sam's Club, where Suzanne Fontella's mother worked.

(6) Loper's attorney argued that Loper did not go to Sam's Club to see Suzanne Fontella, but simply stopped at the store to ask if Suzanne Fontella's mother was there. Upon being told she was there, Loper immediately left the store. The Superior Court judge ruled that Loper's motivation for going to Sam's Store was irrelevant and that Loper clearly had violated the express terms of the no-contact order. In urging the judge to impose a period of incarceration, the prosecutor argued that Loper was a registered sex offender, that he had been stalking the victim and that, unless he was given a prison term, he would not leave Suzanne Fontella or her family alone.

(7) Loper's claims are meritless. The VOP hearing transcript clearly reflects that Loper, who was represented by counsel, understood that the reason for the hearing was his violation of the court-ordered conditions of his probation. Loper's contention that his inability to call witnesses prejudiced his case is without any factual support. There clearly was sufficient evidence presented to support the

finding of a VOP.<sup>4</sup> Moreover, Loper essentially admitted to the violation when he admitted he went to Suzanne Fontella's mother's place of employment. There is no evidence that Loper was subjected to a selective and vindictive prosecution or that the prosecutor had a conflict of interest. Loper has presented no evidence to support the argument that his sentence was improper or illegal. Finally, Loper's argument that the no-contact order was overly broad is without any factual or legal support.<sup>5</sup>

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

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<sup>4</sup> *Brown v. State*, 249 A.2d 269, 272 (Del. 1968) (evidence at a VOP hearing need only be such as to reasonably satisfy the judge that the probationer's conduct has not been as good as required by the terms and conditions of probation).

<sup>5</sup> Del. Code Ann. tit. 11, § 2108(a) (5).