IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN M. FRANKLIN,	§	
	§	No. 46, 2004
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County in S03-04-
	§	1090I.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0304010407A

Submitted: July 7, 2004
Decided: October 19, 2004

Before BERGER, JACOBS and RIDGELY, Justices.

O R D E R

This 19th day of October 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 appellant, John M. Franklin, was charged by Information with one count of Driving Under the Influence.[1] After a two-day jury trial, Franklin was found guilty as charged. He was sentenced to four years at Level V

[1]Title 21, section 4177(a)(5) of the Delaware Code provided, at the time, that a person shall not drive a vehicle when the person's alcohol concentration is, within four hours after the time of driving, .10 or more.

supervision, suspended after serving six months and upon successful completion of the Key Program, for six months at Level IV Crest Program, followed by one year at Level III supervision. This is Franklin's direct appeal.

(2) Franklin's trial counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw is twofold. First, this 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. Second, 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) Franklin's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Franklin's counsel informed him 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. Franklin also was informed of his right to supplement

[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).

his attorney's presentation. Franklin responded with a submission that raises three issues for this Court's consideration. The State has responded to the position taken by Franklin's counsel as well as to the issues raised by Franklin and has moved to affirm the Superior Court's judgment.

(4) The evidence at trial established the following events. At approximately 8:45 a.m. on April 15, 2003, Franklin reported to the Probation and Parole Office in Georgetown for a routine office visit. From her office window, Probation Officer Victoria Rollison watched Franklin drive his pick-up truck onto the property and toward the entrance of the building. Franklin signed into the building at 8:47 a.m. and waited in the reception area. Approximately ninety minutes later, Officer Rollison called Franklin into her office.

(5) During their forty-five minute meeting, Officer Rollison observed that Franklin's face was extremely red, his eyes were glassy and bloodshot, and that he periodically slurred his words. In response to Officer Rollison's routine questioning, Franklin stated that he had last had a drink two years ago, and that the redness in his face was due to medication for skin cancer.

Notwithstanding Franklin's responses to her questions, Officer Rollison believed that Franklin was impaired.

(6) At the request of Officer Rollison, Probation Officer Hans Mulford, a certified alcohol testing technician, spoke to Franklin on the morning of April 15. Officer Mulford testified that Franklin had a "very strong" odor of alcohol about him, glassy eyes, a flushed face, and slurred his speech, all of which led Officer Mulford to believe that Franklin was intoxicated or that he had been drinking. When Officer Mulford asked Franklin when he had last had a drink, Franklin responded, at first, that he had not had a drink in two years, but then he changed his answer to state that he had taken a drink two days previously.

(7) Franklin's wife, Karen Franklin, testified that Franklin was "totally drunk" when he got home from work on April 14, 2003, and that when she left for work at 5:45 a.m. on April 15, his speech was "still slurred." According to Karen Franklin, Franklin intended to drive to work later that morning after first taking their daughter to the babysitter.

(8) Probation Officer Lisa Hudson testified that she was asked to search Franklin's vehicle at around 11:00 a.m. on April 15. Officer Hudson

located a half-empty vodka bottle under the bench seat of Franklin's truck. Moreover, Officer Hudson noticed that Franklin slurred his speech, and that he smelled of alcohol when she observed him speaking to another probation officer.

(9) After searching Franklin's vehicle, Officer Hudson contacted Delaware State Police Officer Francis Fuscellaro and asked him to investigate Franklin for allegedly driving under the influence. Upon contacting Franklin, Officer Fuscellaro noticed that Franklin's face was flushed, his eyes were bloodshot and glassy, and that he had a moderate odor of alcohol on his breath. Franklin reported to Officer Fuscellaro that he had driven to the Probation and Parole Office that morning, and that he had not had anything to drink since 8:30 the previous evening when he'd had "a couple of shots." Officer Fuscellaro then transported Franklin to Troop 4 to administer field tests. Based on the result of Franklin's performance on the tests, as well as his earlier observations, Officer Fuscellaro concluded that Franklin was under the influence. At approximately 11:51 a.m. on April 15, Officer Fuscellaro took Franklin's blood alcohol level and determined that it was .105.

(10) At trial, Franklin took the stand in his own defense and admitted that he had driven to the Probation and Parole Office on April 15, 2003, parked his truck and walked into the office at approximately 8:45 to 9:00 a.m. Franklin testified that he'd had some vodka the night before, but that he had felt no impairment on the morning of April 15. Franklin also testified that he uses a medication for a skin condition that causes redness in his face, and that he has physical problems with his leg that affected his performance on the physical field tests.

(11) In his first issue on appeal, Franklin alleges ineffective assistance of counsel. Franklin alleges that his counsel was ineffective at trial when she failed to discuss a defense strategy with him and to subpoena witnesses and medical records for trial. Franklin alleges that his counsel was ineffective on appeal when she failed to request an extension of time on his behalf.

(12) The Court will not consider Franklin's claim that his counsel was ineffective at trial. This claim was not presented to the Superior Court in the

first instance. Because there was no adjudication of the claim by the Superior Court, we decline to decide the claim for the first time in this direct appeal.[3]

(13) Franklin's claim that his counsel was ineffective on appeal is without merit. Specifically, Franklin complains that his counsel failed to get an extension of time that he needed to conduct further research on his appellate issues. The Court, however, has reviewed the record and has determined that Franklin could not raise a meritorious argument on appeal. Consequently, Franklin cannot demonstrate that he was prejudiced by his counsel's failure to request an extension of time.[4]

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

[4] *See Younger v. State*, 580 A.2d 552, 556 (Del. 1990) (requiring that petitioner

for postconviction relief demonstrate actual prejudice); *see Brittingham v. State*, 1995 WL 715837 (Del. Supr.) (rejecting, for lack of prejudice, petitioner's claim of ineffective appellate counsel when review of record on direct appeal demonstrated no arguably appealable issue).

(14) In his second and third claims, Franklin alleges, generally, that the prosecutor deliberately elicited "false testimony" from the probation officers and police officer who testified against him, and that the Superior Court committed error when it admitted the testimony. Specifically, Franklin appears to contest Officer Rollison's testimony that she observed him driving his truck on the morning of April 15, 2003. Franklin's own testimony, however, undermines his claim that Officer Rollison testified falsely, as Franklin admitted on the stand that he drove to the Probation and Parole Office the morning of April 15, parked his truck and walked into the building. In the absence of any record support for Franklin's claim that the probation and police officers testified falsely, we conclude that Franklin's second and third claims are without merit.

(15) This Court has reviewed the record carefully and has concluded that Franklin's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Franklin's counsel made a conscientious effort to examine the record and has properly determined that Franklin 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/ Jack B. Jacobs
Justice