

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEON F. JOHNSON,	§
	§
Defendant Below-	§ No. 99, 2004
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID 0202010750
Plaintiff Below-	§
Appellee.	§

Submitted: September 23, 2004
Decided: November 4, 2004

Before **HOLLAND, BERGER, and JACOBS**, Justices.

ORDER

This 4th of November 2004, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) On February 13, 2004, the defendant-appellant, Leon Johnson, was found guilty of violating the no-contact provision of an earlier-imposed probationary sentence. The Superior Court resentenced Johnson to three and a half years at Level V imprisonment to be suspended after serving one year for two years of decreasing levels of supervision. This is Johnson's appeal.

(2) Johnson's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Johnson's counsel asserts that, based upon

a complete and careful examination of the record, there are no arguably appealable issues. By letter, Johnson's attorney informed him of the provisions of Rule 26(c) and provided Johnson with a copy of the motion to withdraw and the accompanying brief. Johnson also was informed of his right to supplement his attorney's presentation. Johnson has raised several issues for this Court's consideration. The State has responded to Johnson's arguments, as well as the position taken by Johnson's counsel, and has moved to affirm the Superior Court's judgment.

(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) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this 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.¹

(4) The record reflects that Johnson pled guilty on December 2, 2002 to one count of second degree assault and one count of terroristic threatening. The incident involved Johnson holding a knife to the throat of

¹*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).

the victim, who was his girlfriend. The Superior Court sentenced Johnson to a total period of four years at Level V imprisonment, suspended for time served and three years at Level II probation. A condition of the sentence required that Johnson have no contact with the victim. In February 2003 and again in September 2003, Johnson was found in violation of his probation by having contact with the victim. Following the second VOP hearing, the Superior Court added a zero tolerance provision to the conditions of the sentence.

(5) At the February 2004 VOP hearing, Johnson's former probation officer testified that he saw Johnson riding in a car with the victim. Johnson did not deny the allegation. His sole contention was that he and the victim love each other and that she wanted to have contact with him. The Superior Court found Johnson in violation of his probation. The Superior Court revoked Johnson's probation and sentenced him to serve a year in prison followed by decreasing levels of supervision.

(6) Although not easily understood, Johnson appears to raise three arguable claims in this appeal. First, he contends the Superior Court denied him due process because he was not allowed to ask leading questions of an unidentified hostile witness. Johnson next claims that the Superior Court

never imposed a zero tolerance provision with respect to the condition of his probation prohibiting contact with the victim. Finally, Johnson alleges a double jeopardy violation. Although it is not entirely clear, Johnson appears to argue that he could not be found guilty on three separate occasions of violating probation by having contact with the victim.

(7) None of these contentions has merit. To the extent Johnson argues that the Superior Court refused to permit him to ask leading questions of a hostile witness in accordance with Delaware Rule of Evidence 611(c), it is difficult to assess Johnson's argument because he has not identified the alleged hostile witness. In any event, there is nothing in the transcript of the VOP hearing to support Johnson's contention that the Superior Court denied him the right to ask leading questions of a hostile witness. Moreover, the Delaware Rules of Evidence do not apply to VOP hearings.² Accordingly, this first claim is without merit.

(8) Furthermore, Johnson's contention that the Superior Court never imposed a zero tolerance provision with respect to the no-contact restriction is contradicted by the record. The Superior Court's sentencing order clearly prohibited Johnson from having contact with the victim.

² *Brewington v. State*, Del. Supr., No. 525, 2001, Veasey, C.J. (May 20, 2002) (citing Del. R. Evid. 1101(b)(3)).

Following his second VOP adjudication, the Superior Court’s sentencing order incorporated by reference all previous conditions of the sentence, including the no-contact provision. It also clearly imposed a zero tolerance for Johnson’s violation of any conditions of his sentence. Johnson’s contention to the contrary is simply unsupported by the record.

(9) Finally, Johnson asserts an unspecified double jeopardy violation. He appears to argue that principles of double jeopardy should have prohibited the State from prosecuting him more than once for violating probation by having contact with the victim. While it is true as a general rule that double jeopardy prohibits multiple prosecutions for the same offense,³ that principle does not apply in Johnson’s case. While the nature of his probation violations was similar, i.e. having contact with the victim, the contact occurred on multiple occasions that were “separated in time and space.”⁴ His multiple probation violations, therefore, did not constitute the “same” offense for double jeopardy purposes.

(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

³ See *Poteat v. State*, 840 A.2d 599, 602 (Del. 2003).

⁴ *Washington v. State*, 836 A.2d 485, 491 (Del. 2003).

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