

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH T. VINCENT,	§	No. 98, 2004
	§	
Defendant Below,	§	Court Below—Superior Court of
Appellant,	§	the State of Delaware in and for
	§	Sussex County in VS02-08-
v.	§	0087-01; VS97-03-0100-06;
	§	VS98-04-0365-06.
STATE OF DELAWARE,	§	
	§	Def. ID Nos. 0207014925
Plaintiff Below,	§	9702016072
Appellee.	§	9803012625

Submitted: July 26, 2004
Decided: November 17, 2004

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 17th day of November 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 January 25, 2004, the appellant, Joseph T. Vincent was arrested for Driving Under the Influence (4th offense) (“DUI”).¹ In February 2004, Vincent was charged with violation of probation (“VOP”) with respect to three guilty plea convictions: (i) Vehicular Assault, (ii) Driving Under the

¹In June 2004, Vincent pleaded guilty to this charge and was sentenced. *State v. Vincent*, Del. Super., Cr. ID No. 0401018644, Graves, J. (June 21, 2004).

Influence, Resisting Arrest, Unauthorized Use of a Vehicle, and (iii) two counts of Forgery in the Second Degree and DUI.²

(2) On February 20, 2004, the Superior Court found Vincent guilty of VOP and resentenced him to a total of five years and three months at mandatory Level V incarceration, with credit for time served. This is Vincent's appeal.

(3) Vincent's trial counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). The Court's standard and scope of review is twofold. First, 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. 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.³

² *State v. Vincent*, Del. Super., Cr. ID No. 0207014925, Graves, J. (Oct. 18, 2002); *State v. Vincent*, Del. Super., Cr. ID No. 9803012625, Lee, J. (July 21, 1998); *State v. Vincent*, Del. Super., Cr. ID No. 9702016072, Lee, J. (July 24, 1997).

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 (1967).

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

(5) Vincent was charged with VOP on the bases that he (a) failed to report the January 2004 DUI arrest, (b) failed to report a change of residence, (c) failed to abide by a curfew, and (d) consumed intoxicating substances.⁴ At the VOP hearing, Vincent admitted that he was guilty (namely of having failed to “report”⁵ and of having consumed intoxicating substances), but he offered

⁴Vincent’s probation included a zero tolerance provision for drugs and alcohol.

⁵The VOP hearing transcript reflects the following exchange:

THE COURT: Let’s get into the failure to report this incident. There is an allegation that he blew a .164 and was on zero tolerance for alcohol.

[DEFENSE COUNSEL]: That’s No. 9?

THE COURT: Yes. He changed his address, No. 5, without making the people

an explanation, *i.e.*, that he was an alcoholic, and he requested leniency in sentencing.

(6) On appeal from his VOP conviction and sentence, Vincent alleges that he proceeded without the assistance of his counsel because he was denied the opportunity to speak to counsel before the VOP hearing and because counsel was unfamiliar with his case. Vincent's claim is without merit. The record is clear that Vincent was represented by counsel at the hearing. To the extent Vincent raises ineffective assistance of counsel, this claim was not raised in the Superior Court and thus may not be raised for the first time in this appeal.⁶

(7) Vincent alleges that the Superior Court "presumed" that he was guilty and "manufactured" the case against him. Vincent's claims are not supported by the record. Indeed, it was Vincent's admissions of guilt that corroborated several of the allegations contained in the VOP report and

at probation aware of it and his arrest was at 10:32, past his 10:00 p.m. curfew. Does he admit or deny he's in violation of probation?

[DEFENSE COUNSEL]: Well, Mr. Vincent, do you admit you didn't report?

[VINCENT]: Yes, I'm guilty.

VOP Hr'g Tr., Feb. 20, 2004, at 3-4.

⁶*Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

provided an adequate basis to support the Superior Court's decision to revoke probation.⁷

(8) Vincent makes a number of claims with respect to the VOP sentence. First, he contends that the sentence was excessive in that it was based upon (a) an alleged "technical violation" of probation, (b) coerced guilty pleas, and (c) a DUI charge that, at the time of the VOP sentencing, was not yet resolved. Vincent also alleges that the VOP sentence was imposed without regard to sentencing standards and without regard to a written contract that he had with the Crest Program. Vincent's sentencing claims are all without merit.

(9) In this appeal, Vincent may challenge the VOP proceedings and sentence. He may not, however, use the appeal to collaterally attack the voluntariness of his prior guilty pleas.⁸

(10) There is nothing in the record to support Vincent's claim that he was in the Crest Program at the time he was charged with VOP. It appears from the VOP report that Vincent was at Level III Aftercare when he violated probation.

⁷Del. Code Ann. tit. 11, § 4334(c); *Walley v. State*, 2004 WL 1058411 (Del. Supr.) (citing *Brown v. State*, 249 A.2d 269, 272 (Del. 1968)); *Ross v. State*, 1991 WL 316973 (Del. Supr.) .

⁸*Weaver v. State*, 779 A.2d 254, 258 n.17 (Del. 2001).

(11) Appellate review of a criminal sentence in Delaware is limited to a determination of whether the sentence is within the statutory limits.⁹ When imposing a sentence upon a conviction of VOP, the Superior Court “may continue or revoke the probation or suspension of sentence, and may require the probation violator to serve the sentence imposed, or any lesser, sentence, and if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.”¹⁰ Sentencing guidelines for VOP sentences are voluntary and are not binding on the sentencing judge.¹¹

(12) Under the circumstances of this case, the Court concludes that the Superior Court did not abuse its discretion when sentencing Vincent. Vincent does not claim, and the record does not reflect, that his VOP sentence exceeded the Level V time originally imposed or the authorized statutory limits. The Superior Court properly stated on the record numerous aggravating circumstances, including lack of amenability, repetitive criminal conduct, and

⁹*Siple v. State*, 701 A.2d 79, 83 (Del. 1997) (citing *Mayes v. State*, 604 A.2d 639, 645 (Del. 1992)).

¹⁰Del. Code Ann. tit. 11, § 4334(c); *Larson v. State*, 1995 WL 236670 (Del. Supr.).

¹¹*Siple v. State*, 701 A.2d 79, 83 (Del. 1997) (citing *Mayes v. State*, 604 A.2d 639, 645 (Del. 1992)).

the need for community safety, to justify imposing VOP sentences that exceeded the presumptive standard sentences.¹²

(13) This Court has reviewed the record carefully and has concluded that Vincent's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Vincent's counsel made a conscientious effort to examine the record and properly determined that Vincent could not raise a meritorious issue 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

¹²See, e.g., *Boo'ze v. State*, 2004 WL 691903 (Del. Supr.); *Shepherd v. State*, 1996 WL 585904 (Del. Supr.).