

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMIL WATSON,	§
	§
Defendant Below-	§ No. 283, 2004
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. VN02-05-1920-01
Plaintiff Below-	§
Appellee.	§

Submitted: November 23, 2004
Decided: January 19, 2005

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

ORDER

This 19th day of January 2005, 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) In February 2004, the Superior Court found the defendant-appellant, Emil Watson, guilty of violating the terms of his probation and sentenced him to three years at Level V imprisonment. Watson did not appeal. Instead, he filed a motion for modification of sentence, which the Superior Court denied on June 16, 2004. This is Watson's appeal from the Superior Court's denial of his motion for modification of sentence.

(2) Watson's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Watson's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Watson's attorney informed him of the provisions of Rule 26(c) and provided Watson with a copy of the motion to withdraw and the accompanying brief. Watson also was informed of his right to supplement his attorney's presentation. Watson responded with a letter complaining that his VOP sentence is excessive and that, at the time of he was found guilty of violating probation, he had not been convicted of the underlying criminal charges that formed the basis of the VOP charge. The State has responded to the position taken by Watson's counsel, as well as the Watson's points, 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) A proceeding under Superior Court Criminal Rule 35 presupposes a valid conviction.² To the extent Watson now complains about his underlying VOP adjudication, no relief is available to him in this proceeding.³

(5) To the extent Watson complains that his VOP sentence exceeded the Truth in Sentencing guidelines, his motion to modify his sentence was filed more than 90 days after his sentence was imposed.⁴ We find no error or abuse in the Superior Court's denial of Watson's untimely motion.⁵

(6) This Court has reviewed the record carefully and has concluded that Watson's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Watson's counsel has made a

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).

² *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

³ *Id.*

⁴ SUPER. CT. CRIM. R. 35(b) (motions for reduction of sentence must be filed within 90 days after sentence is imposed).

⁵ *See Defoe v. State*, 750 A.2d 1200, 1202 (Del. 2000).

conscientious effort to examine the record and the law and has properly determined that Watson 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/Henry duPont Ridgely
Justice

Oc: Clerk (orig. +3)
Xc: Hon. Peggy L. Ableman
James A. Bayard, Jr., Esq.
Gregory E. Smith, Esq.
Justices (8)
D. Collins
P. Naylor
File