

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH B. NELSON,	§
	§
Defendant Below-	§ No. 64, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr.A. Nos. VS98-12-0123-01
Plaintiff Below-	§ VS98-12-0124-01
Appellee.	§ VS98-12-0654-01
	§ VS98-12-0656-01

Submitted: April 19, 2002

Decided: May 20, 2002

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This 20th day of May 2002, 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) In February 1999, the defendant-appellant, Keith B. Nelson, pleaded guilty to four felony charges. His Level V sentences were suspended for probation. In June 1999, Nelson was found to have committed a violation of probation ("VOP") and his Level V sentences were reimposed, to be suspended following successful completion of the

Key Program, with the remainder of his Level V time to be served at Level IV Residential Substance Abuse Treatment Program and Level III Aftercare. Nelson was admitted to the Key Program, but was dismissed before completing it.

(2) On direct appeal, Nelson argued that: a) the Superior Court improperly denied his motion for sentence modification based upon inaccurate information concerning his dismissal from the Key Program; and b) his motion for sentence modification should have been granted because he was psychologically unable to participate in the Key Program.¹ Because Nelson's direct appeal could not be decided on the basis of the record before us, we remanded the matter to the Superior Court for further fact finding regarding Nelson's dismissal from the Key Program and his mental health status.

(4) The Superior Court's report following remand was filed in this Court on December 7, 2001. The Superior Court concluded that Nelson was capable of participating in the Key Program, but would not be able to complete it because there was insufficient time left on his sentence. The Superior Court requested, and this Court permitted, a TASC evaluation so

¹Nelson's counsel filed a Rule 26(c) brief, attaching these points from Nelson for this Court's consideration.

that Nelson's substance abuse problem could be addressed in the Superior Court's modified sentencing order.

(5) On January 28, 2002, following receipt of TASC's January 16, 2002 report, the Superior Court held another hearing and re-sentenced Nelson. The January 28, 2002 sentencing order provides that the time remaining on Nelson's Level V sentences will be suspended for 1 year of Level III probation, with TASC to monitor the probation and provide outpatient treatment as recommended in its report.

(6) In this appeal from the Superior Court's January 28, 2002 sentencing order, Nelson'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 devoid of at least arguably appealable issues that it can be decided without an adversary presentation.²

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).

(7) Nelson's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Nelson's counsel informed Nelson of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief. Nelson was also informed of his right to supplement his attorney's presentation. Nelson did not submit any points for this Court to consider. The State has responded to the position taken by Nelson's counsel and has moved to affirm the Superior Court's judgment.

(8) This Court has reviewed the record carefully and has concluded that Nelson's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Nelson's counsel has made a conscientious effort to examine the record and the law and has properly determined that Nelson 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/ Randy J. Holland
Justice