

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANUEL SALABERRIOS,	§
	§
Defendant Below-	§ No. 558, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID Nos. 1101007865 and
Plaintiff Below-	§ 1104020135
Appellee.	§

Submitted: August 20, 2012
Decided: September 13, 2012

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

ORDER

This 13th day of September 2012, 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 August 2, 2011, the appellant, Manuel Salaberrios, pled guilty to two counts of Driving Under the Influence (5th Offense). The State dismissed six other charges against him. Following a presentence investigation, the Superior Court sentenced Salaberrios on each DUI count to five years at Level V incarceration to be suspended after serving two years, to be followed by one year at Level IV Crest, followed by one year at Level III Crest Aftercare. This is Salaberrios' direct appeal.

(2) Salaberrios' counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Salaberrios' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Salaberrios' attorney informed him of the provisions of Rule 26(c) and provided Salaberrios with a copy of the motion to withdraw and the accompanying brief. Salaberrios also was informed of his right to supplement his attorney's presentation. Salaberrios has raised several issues for this Court's consideration. The State has responded to Salaberrios' issues, as well as to the position taken by Salaberrios' 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

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).

(4) In response to his counsel's brief, Salaberrios raises five issues for this Court's consideration. Salaberrios contends that: (i) his trial counsel was ineffective; (ii) he was selectively prosecuted, as evidenced by other defendants convicted of similar crimes who received more favorable sentences; (iii) the Superior Court violated double jeopardy principles because it sentenced him more harshly based on his prior criminal record; (iv) his sentence is excessive and constitutes cruel and unusual punishment; and (v) the Superior Court erred by having him plead guilty before one judge and then sentenced by a different judge.

(5) With respect to Salaberrios' complaint about his counsel, this Court will not consider a claim of ineffective assistance of counsel for the first time on direct appeal if that issue has not been addressed to and decided on the merits by the trial court in the first instance.² The record in this case reflects that, on the day his trial was scheduled to begin, Salaberrios expressed to the Superior Court his dissatisfaction with his counsel and requested a continuance in order to obtain substitute counsel. After the Superior Court denied his request for a continuance, Salaberrios decided to accept the State's plea offer. During the plea colloquy, Salaberrios stated under oath that he was satisfied with his counsel's performance. Salaberrios did not raise any further concerns to the trial court regarding his

² *Johnson v. State*, 962 A.2d 233, 234 (Del. 2008).

counsel's performance. Accordingly, we will not address his claim of ineffectiveness for the first time on direct appeal.³

(6) Salaberrios' remaining claims all relate to his sentencing. As a general rule, this Court's review of a sentence is limited to ascertaining whether the sentence is within the statutory limits.⁴ While a defendant may challenge a sentence on the grounds that it is unconstitutional, based on false or unreliable information, or the result of judicial bias, Delaware does not provide for appellate review of punishments simply because the punishment deviates from sentencing guidelines.⁵

(7) In this case, Salaberrios pled guilty to two class E felonies with an authorized sentencing range of three to five years at Level V imprisonment.⁶ The Superior Court imposed the maximum five year sentence for each conviction but suspended the total sentence after four years for decreasing levels of supervision. Thus, the sentence was well within the statutory limits. We find nothing in the record to support Salaberrios' conclusory arguments that his sentence is cruel and unusual, that his sentence violates double jeopardy principles because it was based on the Superior Court's consideration of his prior criminal record, or that his sentence was the result of selective prosecution. Moreover, while a defendant is

³ *See id.*

⁴ *Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

⁵ *Id.*

⁶ DEL. CODE ANN. tit. 21, § 4177(d)(5) (Supp. 2010).

entitled to due process at his sentencing hearing, there is no requirement that the sentence be imposed by the same judge who accepted a defendant's guilty plea.⁷ Under the circumstances, we find no error in the Superior Court's sentencing procedure, nor do we find any merit to Salaberrio's claims that his sentence is unconstitutional or otherwise based on impermissible factors.⁸

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

⁷ See Del. Super. Ct. Crim. R. 32(a) (2012); *Mayfield v. State*, 2003 WL 1711946 (Del. Mar. 28, 2003).

⁸ See *Fink v. State*, 817 A.2d 781, 790 (Del. 2002).