

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC T. BREWINGTON,	§	
	§	No. 525, 2001
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware, in
v.	§	and for Kent County in
	§	VK98-04-0213-04 and K99-02-
STATE OF DELAWARE,	§	0076I.
	§	
Plaintiff Below,	§	Def. ID Nos. 9804000245 &
Appellee.	§	9902000315

Before **VEASEY**, Chief Justice, **WALSH** and **STEELE**, Justices.

Submitted: March 14, 2002

Decided: May 20, 2002

ORDER

This 20th day of May 2002, 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 1998, Brewington pleaded guilty to Burglary in the First Degree and was sentenced to five years at Level V suspended for Level IV home confinement and probation.¹ In May 1999, January 2000, and June

¹*State v. Brewington*, Del. Super., No. 9804000245, Herlihy, J. (Nov. 4, 1998).

2000, Brewington was adjudged guilty of violation of probation (VOP) and was sentenced.²

(2) In April 1999, Brewington pleaded guilty to the drug offense of Manufacture, Deliver or Possession with Intent to Deliver a Controlled Substance and was sentenced to five years at Level V suspended for Level IV work release and probation.³ In June 2000, Brewington was adjudged guilty of VOP and was sentenced.⁴

(3) On September 5, 2001, Brewington was charged with having violated the conditions of his two Level III probations when he (i) failed to report as directed to his supervising officer on July 18, 2001; (ii) tested positive for marijuana and cocaine on August 3, 2001, and for marijuana and amphetamines on August 24, 2001; and (iii) failed to abide by a 10:00 p.m.

²In May 1999, Brewington was sentenced to five years at Level V, suspended after 60 days for 16 months at Level IV Work Release, followed by one year at Level III and two years at Level II. In January 2000, Brewington was sentenced to four years and 10 months at Level V, suspended for eight months at Level IV Home Confinement, followed by one year at Level III followed by three years at Level II. In June 2000, Brewington was sentenced to four years at Level V, suspended upon successful completion of the Key Program or Recovery Center of Delaware Program, for balance at Level III.

³*State v. Brewington*, Del. Super., No. 9902000315, Vaughn, J. (April 27, 1999).

⁴Brewington was sentenced to five years at Level V, suspended for two years at Level III followed by three years at Level II.

curfew on August 15, 2001, and September 4, 2001. On September 21, 2001, Brewington and his counsel appeared in the Superior Court for a VOP hearing. At the hearing, Brewington admitted that he missed the two 10:00 p.m. curfews, but he explained that in one instance he was working, and in the other he was assisting an elderly relative. Brewington also admitted that he tested positive for marijuana and cocaine on August 3, 2001. At the conclusion of Brewington's testimony, the Superior Court found him guilty of VOP. The Superior Court sentenced Brewington,⁵ and this appeal followed.

(4) Brewington's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Brewington's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. Counsel states that she advised Brewington of the provisions of Rule 26(c), informed Brewington that he could supplement the Rule 26(c) brief, and provided him with a copy of the motion to withdraw, the accompanying brief, and the complete hearing transcript. Brewington

⁵On the burglary VOP, Brewington was sentenced to three years at Level V, suspended after 18 months. On the drug VOP, Brewington was sentenced to five years at Level V, suspended for one year at Level IV work release, followed by two years at Level III.

responded with a submission that raises several issues for this Court's consideration. The State has responded to the position taken by Brewington's counsel as well as to the issues raised by Brewington and has moved to affirm the Superior Court's judgment.

(5) 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. First, this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims. Second, 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.⁶

(6) On appeal, Brewington claims that he had no opportunity to confront Erik Farinas, the probation officer who filed the VOP report, because Officer Farinas did not attend the VOP hearing. In a related claim, Brewington complains that Officer Carruthers, the probation officer who presented the case at the VOP hearing, was not personally acquainted with Brewington, or with what Brewington "may have been going through" and

⁶*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 “progress [he] was trying to make.” Also, Brewington complains that Officer Carruthers “brought up [Brewington’s] prior past violations which had nothing to do with this violation.” Finally, Brewington appears to claim that he was not afforded a prompt VOP hearing.⁷

(7) Brewington’s claims are unavailing. Brewington was charged with VOP by an administrative warrant that issued on September 7, 2001. Brewington was held without bail, and a VOP hearing was held on September 21, 2001. Brewington’s claim that he was not afforded a prompt VOP hearing is not supported by the record.

(8) Hearsay evidence is admissible at a VOP hearing.⁸ Thus, the Superior Court could consider the hearsay evidence presented by Officer Carruthers, even though he was not personally acquainted with Brewington.

(9) The rules of evidence do not apply to a VOP hearing.⁹ Thus, contrary to Brewington’s claim, Officer Carruther’s testimony about

⁷See Super. Ct. Crim. R. 32.1 (a) (providing that when a person is taken into or held in custody on a charge of VOP, the person shall be brought without unreasonable delay before a magistrate or judge to fix bail and, if not released on bail, shall be afforded a prompt hearing on the VOP charge).

⁸*Brown v. State*, 249 A.2d 269, 272 (Del. 1968).

⁹D.R.E. 1101(b)(3).

Brewington's prior VOP convictions was admissible and properly considered by the Superior Court when determining whether to revoke or continue Brewington's probations.

(10) The Court has reviewed the record carefully and has concluded that Brewington's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Brewington's counsel has made a conscientious effort to examine the record and the law and has properly determined that Brewington could not raise a meritorious claim on 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/ E. Norman Veasey
Chief Justice