IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAMUEL M. DUNLAP,	§	
	§	
Defendant Below-	§	No. 277, 2002
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr.A. Nos. IS01-12-0461
Plaintiff Below-	§	IS01-11-0186 §
Appellee.		IS01-11-0187

Submitted: October 24, 2002
Decided: December 13, 2002

Before **HOLLAND**, **BERGER** and **STEELE**, Justices

ORDER

This 13th day of December 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) The defendant-appellant, Samuel M. Dunlap, was found guilty by a Superior Court judge of Driving Under the Influence of Alcohol ("DUI"), Driving While License is Suspended or Revoked and Driving After Judgment Prohibited. Dunlap was sentenced to a total of 8 years incarceration at Level V,

to be suspended after 15 months and successful completion of the Key Program for decreasing levels of probation. This is Dunlap's direct appeal.

(2) Dunlap's trial 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 totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[1]

(3) Dunlap's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Dunlap's counsel informed Dunlap of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Dunlap was also informed of his right to supplement

[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).

his attorney's presentation. Dunlap responded with a brief that raises two issues for this Court's consideration. The State has responded to the position taken by Dunlap's counsel as well as the issues raised by Dunlap and has moved to affirm the Superior Court's judgment.

(4) Dunlap raises two issues for this Court's consideration. He claims that: a) the breath test result indicating a blood alcohol level of .194 should have been suppressed because the arresting officer did not have reasonable suspicion to stop him for DUI; and b) the testimony of the arresting officer at the suppression hearing was not credible and should not have been allowed.

(5) In February 2002, Dunlap's counsel filed a pre-trial motion to suppress the breath test result on the ground that the arresting officer did not have reasonable suspicion to stop Dunlap for DUI. At the suppression hearing, the evidence established that Jason Bergman, a patrolman with the Millsboro police department, was on patrol the evening of November 4, 2001. At around 10:00 p.m., Bergman's attention was drawn to a green Ford Ranger driven by Dunlap. Bergman ran a registration check using the computer in his vehicle and cross checked that with the driver's license. That check revealed that the driver's license had been suspended and that the holder of the license had a history of

DUI charges. The driver of the Ranger also matched a description of the driver with the suspended license. Bergman noted that the Ranger was traveling under 10 mph in a 25 mile per hour zone and that it was weaving as it traveled westbound on Old Landing Road and crossed over Route 113. Bergman activated his emergency lights and siren and followed the Ranger to the intersection of Old Landing Road and Delaware Avenue, where it stopped.[2]

(6) After getting out of the police car, Bergman approached the Ranger and asked Dunlap for his registration, driver's license and proof of insurance. Dunlap angrily replied that Bergman was "stupid" and threw the car key at him, hitting him in the chest. As Dunlap continued his diatribe, Bergman noted that there was a strong odor of alcohol about him and that his speech was slurred. Bergman ordered Dunlap out of the Ranger, handcuffed him, placed him in the police car and drove him back to the station for a breath test. Bergman testified that he did not do any field testing because Dunlap had been combative when he was taken into custody.

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[2]At the suppression hearing, the State also played a videotape Bergman had made while he was following Dunlap's Ranger as it traveled along Old Landing Road.

(7) On cross examination, Bergman agreed that Dunlap's vehicle did not go into the shoulder as it traveled along Old Landing Road and that there was no center line marked on that portion of the road where Bergman testified he saw Dunlap's vehicle weaving back and forth. At the end of the suppression hearing, counsel for Dunlap argued that the traffic stop was illegal because there was no reasonable basis for Patrolman Bergman to believe that Dunlap was driving under the influence of alcohol and moved to suppress the results of the breath test conducted at the police station. The Superior Court denied the motion to suppress.

(8) At a subsequent Superior Court bench trial,[3] the breath test result indicating a blood alcohol level of .194 was admitted into evidence, as was a three-hour long videotape of what occurred after Dunlap was taken back to the police station and Dunlap's certified driving record showing that he previously had been adjudged an habitual offender. After admitting the stipulated evidence and reviewing the tape, the Superior Court found Dunlap guilty of the charged offenses.

[3]Dunlap agreed to the presentation of stipulated evidence at a bench trial, since he intended to appeal only the Superior Court's denial of his suppression motion.

(9) The Fourth Amendment of the United States Constitution requires that a traffic stop and any subsequent police investigation be reasonable in the circumstances.[4] The stop must be justified at its inception by a reasonable suspicion of criminal activity[5] and any further inquiry must be reasonably related in scope to the purpose for the stop.[6] Moreover, any investigation of the vehicle or its occupant beyond that required to complete the purpose for the stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion.[7] Measured against these standards, Dunlap's first claim is without merit. The traffic stop was clearly based upon a reasonable suspicion of criminal activity. Moreover, the police officer's decision

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[4]*Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2001) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81 (1975)).

[5]Id.

[6]Id.

[7]*Caldwell v. State*, 780 A.2d 1037, 1047 (Del. 2001) (citing *Ferris v. State*, 355 Md. 356, 735 A.2d 491, 499 (1999)).

to order Dunlap out of his vehicle, handcuff him and take him back to the police station for a breath test were clearly reasonable and justified based upon the police officer's observation of Dunlap's behavior.

(10) Dunlap's second claim is also without merit. The trier of fact is the sole judge of the credibility of witnesses and is responsible for resolving any conflicts in the testimony.[8] There is no evidence in the record suggesting that the Superior Court judge, as the trier of fact at the suppression hearing, abused his discretion by accepting the police officer's testimony concerning the traffic stop and Dunlap's subsequent arrest.

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

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[8] *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

BY THE COURT:

/s/ Carolyn Berger
Justice