IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRYANT HARRIS,	§	
	§	
Defendant Below-Appellant,	§	No. 193, 2004
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 0305005293
Plaintiff Below-Appellee.	§	
	§	

Submitted: January 31, 2005
Decided: April 11, 2005

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

O R D E R

This 11th day of April 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) The defendant-appellant, Bryant Harris, was convicted of attempted robbery, conspiracy, and possession of a firearm during the commission of a felony following a Superior Court bench trial. The Superior Court sentenced Harris to ten years in prison followed by three years at decreasing levels of supervision. This is Harris' direct appeal.

(2) Harris' counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Harris' counsel asserts that, based upon a complete and

careful examination of the record, there are no arguably appealable issues. By letter, Harris' attorney informed him of the provisions of Rule 26(c) and provided Harris with a copy of the motion to withdraw and the accompanying brief. Harris also was informed of his right to supplement his attorney's presentation. Harris has raised four issues for this Court's consideration. The State has responded to Harris' points, as well as the position taken by Harris' 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]

(4) The trial record fairly supports the following version of events: On May 7, 2003, Harris and three codefendants, Marques Comer, Paul Nocho, and Dekelvin Townsend, met at Comer's apartment and formulated a plan to rob Pocket's Liquor Store in New Castle. The four men took a shotgun and four knit

[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).

caps and drove to the liquor store in Comer's mother's car. They parked the car in a private, secluded driveway near the liquor store. Nocho testified at trial that he walked into the store and made a purchase. When he returned, he told Harris there were two clerks in the store. Harris proceeded toward the store with the shotgun hidden in his overalls and the knit cap on his head. Nocho returned to the car to wait as the get-away driver. Nocho testified that Townend's role was to act as the look-out. Comer's job was to collect the money while Harris wielded the shotgun.

(5) Unbeknownst to the four men, a concerned citizen telephoned police about the unfamiliar vehicle parked in her driveway. The caller identified four men exiting the vehicle pulling stocking caps over their faces and noted that one of the men appeared to be carrying a long pipe. The caller stated that the men were walking in the direction of the liquor store. Several police vehicles arrived on the scene within minutes. As police arrived, they saw Harris walking along Route 13 in the direction of the liquor store. With guns drawn, police officers stopped Harris and asked him if he had any weapons, to which Harris responded "yes." The officers patted him down and discovered the shotgun.

(6) Harris testified at his bench trial. He admitted to the judge that he had conspired with the others to rob the liquor store. He admitted that he assigned each coconspirator a specific role in the robbery plan. He admitted to driving with the

others to the area near the liquor store in furtherance of their conspiracy. He also admitted to carrying the shotgun. Harris' defense, however, was that by the time Nocho had returned from casing the liquor store, Harris already had decided to abandon the robbery plan and had started walking away from the liquor store. Harris asserted that the arresting officer lied when he testified that Harris was walking in the direction of the liquor store when police stopped him. The Superior Court judge concluded, however, that the prosecution had proven its case beyond a reasonable doubt and that Harris had failed to prove the affirmative defense of renunciation by a preponderance of the evidence. Harris was convicted of all three charges.

(7) Harris raises four issues in this direct appeal. First, he claims that the State failed to prove the charges beyond a reasonable doubt. Second, he asserts that the police lacked reasonable suspicion when they first stopped him. Third, he claims that the officers violated his Miranda rights when, with their weapons drawn, they asked him if he had any weapons. Finally, Harris alleges that his trial attorney provided ineffective assistance of counsel. We address these claims *seriatim*.

(8) Harris first argues that the State failed to prove all of the elements of attempted robbery beyond a reasonable doubt because Harris had renounced the

robbery plan before the police arrived. The affirmative defense of renunciation requires a defendant to establish a complete and voluntary abandonment of the criminal purpose.[2] The definition of "renunciation" in Section 541(c)(1) of Title 11 specifically excludes circumstances where a defendant abandons his plans to commit a crime because of events that lead the defendant to believe that his detection or apprehension is more probable.[3] In other words, abandonment of a criminal purpose is not voluntary simply because a defendant believes he might be caught. Under the circumstances of this case, we find no error in the Superior Court's conclusion that Harris had failed to establish the affirmative defense of renunciation by a preponderance of the evidence. It was entirely within the judge's discretion to credit the officer's testimony that Harris was walking toward, not away from, the liquor store at the time of his arrest.[4] Moreover, Harris still had the stocking cap and shotgun in his possession. We find that the State's evidence was sufficient as a matter of law to prove all three criminal charges beyond a reasonable doubt.

(9) Harris' second claim is that the Superior Court erred in denying his suppression motion based on the officers' lack of reasonable suspicion to stop him.

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[2] 11 Del. C. § 541 (2001).

[3] *Id.* § 541(c)(1).

[4] *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

In determining whether police had reasonable, articulable suspicion to conduct an investigatory *Terry*[5] stop, we must examine the totality of the circumstances, through the eyes of a reasonable, trained police officer in the same circumstances combining objective facts with a reasonable officer's subjective interpretation of those facts.[6] In this case, a concerned citizen called police around 11:30 p.m. to report suspicious activity as it was occurring in her driveway. The caller described four strangers exiting an unfamiliar vehicle, pulling stocking masks over their heads. The driveway was located in a high-crime area adjacent to a liquor store that had been robbed on prior occasions. The caller stated that one of the men appeared to be carrying a large pipe. When police arrived, they saw Harris walking along the poorly-lit highway in the direction of the liquor store. He was wearing coveralls and a knit cap on a May evening. Under these circumstances, we find no error in the Superior Court's conclusion that police had reasonable, articulable suspicion to stop Harris.

(10) Furthermore, given the caller's statement that one of the men appeared to have a weapon, it was permissible for the officers to conduct a limited

[5] *See Terry v. Ohio*, 392 U.S. 1 (1968) (authorizing brief investigatory stops by law enforcement officers based on reasonable suspicion of criminal activity).

[6] *Woody v. State*, 765 A.2d 1261, 1263 (Del. 2001).

patdown search of Harris for weapons in conjunction with their investigatory stop.[7] In this case, the officers first asked Harris if he was armed before attempting a patdown search. Harris' contention that this question violated his *Miranda*[8] rights is without merit. *Miranda* warnings are required during custodial interrogations[9] but are not required before an investigatory stop under *Terry*, as occurred here. Accordingly, we find no merit to Harris' third argument.

(11) Harris' final contention is that his trial attorney provided ineffective assistance of counsel. The Court, however, will not consider this issue for the first time on direct appeal.[10]

(12) This Court has reviewed the record carefully and has concluded that Harris' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Harris' counsel has made a conscientious effort to examine the record and the law and has properly determined that Harris could not raise a meritorious claim in this appeal.

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[7] *See Purnell v. State*, 832 A.2d 714, 720 (Del. 2003) (holding that, so long as an officer is entitled to make a *Terry* stop and has reason to believe the suspect is armed, the officer may conduct a limited patdown search of the suspect's person for weapons).

[8] *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that police officers may not subject citizens to custodial interrogations without first advising them of certain rights protecting their Fifth Amendment privilege against self-incrimination).

[9] *Marine v. State*, 607 A.2d 1185, 1192 (Del. 1992).

[10] *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

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/ Jack B. Jacobs
Justice