IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY N. EVANS,	§	
	§	No. 540, 2001
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County in VS96-05-
	§	0415-04.
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 9605014140

Submitted: February 11, 2002
Decided: April 26, 2002

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

O R D E R

This 26th day of April 2002, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response, it appears to the Court that:

(1) The appellant, Jerry N. Evans, filed this appeal from the Superior Court's sentence for Evans' fourth violation of probation (VOP). Evans' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). Evans' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Evans' counsel informed him of the provisions of Rule 26(c) and provided

Evans with a copy of the motion to withdraw, the hearing transcript and the accompanying brief. Evans also was informed of his right to supplement his attorney's presentation. Evans has raised several issues for this Court's consideration. The State has responded to the position taken by Evans' counsel as well as the points raised by Evans and has moved to affirm the Superior Court's decision.

(2) 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.[1]

(3) In 1996, Evans pled guilty to Burglary in the Third Degree and was sentenced to three years at Level V imprisonment, suspended for two

[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).

years at Level II probation. In January 2000, March 2001, and July 2001, Evans was adjudged guilty of VOP and was sentenced.[2]

(4) As a result of his arrest on August 11, 2001 on drug charges, Evans was charged with VOP, and a hearing was scheduled. On October 1, 2001, after a contested "fast track" VOP hearing, Evans was adjudged guilty of VOP. Evans was sentenced to 18 months at Level V, suspended upon completion of the Key Program, for nine months at a Level IV Residential Substance Abuse Treatment Program, suspended upon completion of the Program for six months at Level III Aftercare.

(5) At the October 1 VOP hearing, Officer Michael Rapa of the Seaford Police Department testified that he made contact with Evans on August 11, 2001, at 4:00 a.m. in a section of town known as a high crime, high drug area. Officer Rapa arrested Evans when a computer search revealed a warrant out of the Harrington Police Department for the unauthorized use of a vehicle. During a pat-down search of Evans, Officer Rapa discovered a drug pipe, which Evans said he used to smoke marijuana,

[2]In January 2000, Evans was sentenced to three years at Level V imprisonment, suspended upon completion of the Boot Camp Program, for two years at Level III Boot Camp Aftercare. In March 2001, Evans was sentenced to 18 months at Level V imprisonment suspended for 18 months at Level III. In July 2001, Evans was sentenced to 18 months at Level V imprisonment suspended for 18 months at Level III.

and two pieces of an off-white chunky substance folded up in a Mountain Dew soft drink label. Officer Rapa conducted a field test of the substance and determined that it tested positive for crack cocaine.[3]

(6) Evans' probation officer, Carey Bittenbender, testified that Evans violated the conditions of his probation when he: (i) failed to report his August 11 arrest on felony drug charges within 72 hours; (ii) missed a required weekly probation visit on August 13, 2001; (iii) failed to report a change in his address; and (iv) violated his 10:00 p.m. curfew at the time of his arrest on August 11, 2001. Evans disputed the charge that he failed to report his arrest, testifying that he made the report by leaving a voice mail message at Officer Bittenbender's office. Evans admitted, however, that he missed the weekly visit on August 13, and he admitted that he violated his curfew on the night of his arrest. At the conclusion of Evans' testimony, the Superior Court found him guilty of VOP.

(7) Evans complains that he was improperly given a "fast track" VOP hearing instead of a "regular" hearing. The Superior Court places a VOP case on a "fast track" calendar when the probationer has been charged

[3]The Superior Court expressly declined to consider the field test testimony when finding Evans guilty of VOP. *See* VOP Hr'g Tr., Oct. 1, 2001, at 21.

with new crimes.[4] In this case, because Evans had been charged with new crimes, he was scheduled for a "fast track" VOP hearing on September 6, 2001, and rescheduled to appear for a "fast track" contested VOP hearing on October 1, 2001.

(8) Whether or not Evans' case was on a "fast track" calendar, it is clear from the record that he received a hearing that comported with the requirements of due process.[5] Evans appeared at the hearing with counsel, who cross-examined Officers Rapa and Bittenbender. Moreover, Evans testified in his own defense, denying certain alleged violations and offering justification or excuses for others.

(9) Evans complains that the State should not have been allowed to discuss or introduce evidence concerning the then-pending drug charges that resulted from his arrest on August 11, 2001.[6] Evans' claim is unavailing.

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[4] *Perry v. State*, 741 A.2d 359, 361 n. 3 (1998).

[5] "[D]ue process requires that a probationer receive notice of the alleged violations of probation, an opportunity to appear and present evidence, a conditional right to confront adverse witnesses, and an independent decisionmaker." *Gibbs v. State*, 760 A.2d 541, 543 (Del. 2000) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)).

[6] As a result of his arrest on August 11, 2001, Evans was indicted on September 17, 2001 for Possession of a Controlled Substance within 1000 Feet of a School, Possession of a Narcotic Drug, and Possession of Drug Paraphernalia. Evans pled guilty on November 21, 2001, to Possession of a Narcotic Drug. *State v. Evans*, Del. Super., No. 0108008844, Stokes, J. (Nov. 21, 2001).

First, it is clear that the rules of evidence do not apply in a VOP hearing.[7] Moreover, it is clear that the Superior Court has the authority to revoke probation on the basis that the probationer has been charged with new criminal conduct.[8] In this case, the Superior Court properly revoked Evans' probation based on (i) Evans' admissions that he had violated probation; (ii) Officer Rapa's testimony that Evans was in a high crime and high drug area at 4:00 a.m.; and (iii) Officer Rapa's testimony that Evans was found in possession of drug paraphernalia on August 11, 2001.

(10) Evans claims that his attorney was ineffective because she did not object to the State's evidence concerning the pending drug charges and did not adequately prepare him to testify. This Court will not, however, consider on appeal any claim of ineffective assistance of counsel that was not raised in the trial court. Accordingly, we will not consider Evans' claim of ineffective assistance of counsel for the first time in this appeal.[9]

(11) The Court has reviewed the record carefully and has concluded that Evans' appeal is wholly without merit and devoid of any arguably

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[7]D.R.E. 1101(b)(3).

[8]*See Gabbert v. State*, 1995 WL 420798 (Del. Supr.)

[9]*Wing v. State*, 690 A.2d 921, 923 (Del. 1996).

appealable issue. We also are satisfied that Evans' counsel has made a conscientious effort to examine the record and the law and has properly determined that Evans 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