

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TIMOTHY THOMAS,	§
	§ No. 527, 2004
Defendant Below-	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ Cr.A. Nos. IN03-07-1056;
STATE OF DELAWARE,	§ IN03-07-1057; IN03-07-1943
	§
Plaintiff Below-	§
Appellee.	§

Submitted: June 22, 2005
Decided: August 5, 2005

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

ORDER

This 5th day of August 2005, 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, Timothy Thomas, pleaded guilty to Aggravated Menacing, Wearing a Disguise During the Commission of a Felony and the lesser-included offense of Robbery in the Second Degree. Thomas was declared an habitual offender.¹ On the Aggravated Menacing conviction, he was sentenced to five years incarceration at Level V. On the conviction of Wearing a Disguise During the Commission of a Felony, he

¹ Del. Code Ann. tit. 11, § 4214(a) (2001).

was sentenced to five years incarceration at Level V, to be suspended for two years of Level III probation. On the Robbery conviction, he was sentenced to ten years of mandatory incarceration at Level V. This is Thomas' direct appeal.

(2) Thomas' 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.²

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

² *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).

raises three issues for this Court's consideration. The State has responded to the position taken by Thomas' counsel as well as the issues raised by Thomas and has moved to affirm the Superior Court's judgment.

(4) Thomas raises three issues for this Court's consideration. He claims that, in sentencing him as an habitual offender, the Superior Court improperly: a) relied upon the inaccurate statement in the presentence report that he was carrying a shotgun at the time of the robbery; b) relied upon an ineligible and unconstitutional January 2003 weapon conviction as a predicate offense; and c) relied upon his guilty plea to a June 2000 robbery of which he is innocent.

(5) Thomas' first contention is that his sentence is based on incorrect information. According to him, the judge relied on an incorrect statement in the presentence report in sentencing him: the presentence report recites that Thomas used a shotgun in the robbery. According to Thomas, however, the shotgun was in fact a fake or simulated weapon. Thomas' argument was not raised in Superior Court as required by Criminal Rule 32(c)(3). Accordingly, it is waived for purposes of appeal.³ Nevertheless, it does not appear that the judge relied on the actual nature of the weapon in sentencing Thomas. The judge was most concerned about the

³ *Mayes v. State*, 604 A.2d 839, 845 (Del. 1992).

fear and apprehension Thomas created in the victim. To a robbery victim, a simulated firearm is as intimidating as the real thing⁴ and the judge's remark does not evidence her reliance on incorrect information.

(6) As for Thomas' second claim, we are not persuaded that the 2003 weapon conviction was either "ineligible" or unconstitutional. Even if it were, however, the transcript reflects that Thomas had a sufficient number of additional violent felony convictions to support his sentencing as an habitual offender.⁵ As such, any error in that regard on the part of the Superior Court was harmless.⁶

(7) Thomas' third claim also is unavailing. He previously challenged the validity of his guilty plea to the June 2000 robbery on the ground that the victim of the robbery had recanted her statement implicating him. That challenge was unsuccessful and will not be revisited in this proceeding.⁷

(8) This Court has reviewed the record carefully and has concluded that Thomas' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Thomas' counsel has made a

⁴ *State v. Smallwood*, 346 A.2d 164, 166-67 (Del. 1975).

⁵ In fact, the record reflects that the State did not even list the conviction in question in its motion to have Thomas declared an habitual offender.

⁶ Moreover, as reflected in the transcript of the guilty plea colloquy, Thomas, who was represented by counsel, agreed that he was eligible for sentencing as an habitual offender.

⁷ *Thomas v. State*, Del. Supr., No. 431, 2003, Holland, J. (Jan. 20, 2004), *aff'g State v. Thomas*, Del. Super., Ableman, J. (Aug. 7, 2003).

conscientious effort to examine the record and has properly determined that Thomas 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/ Randy J. Holland
Justice