

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN MERILLO,	§
	§ No. 38, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr.A. Nos. IK03-08-0148; 0150;
	§ 0153
Plaintiff Below-	§
Appellee.	§

Submitted: June 27, 2005

Decided: August 16, 2005

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

ORDER

This 16th 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) On November 12, 2003, the defendant-appellant, Steven Merillo, pleaded guilty to Robbery in the First Degree, Aggravated Menacing and Attempting to Wear a Disguise During the Commission of a Felony. On the robbery charge, Merillo was sentenced to eight years incarceration at Level V, to be suspended after three years for one year at Level III probation. On the aggravated menacing charge, he was sentenced to two years incarceration at Level V, to be suspended for the Level IV Crest

program and, upon successful completion of the program, for six months Level III Aftercare. Merillo was to be held at Level V pending space availability at Level IV. Finally, on the charge of attempting to wear a disguise during the commission of a felony, Merillo was sentenced to two years incarceration at Level V, suspended for one year at Level III.

(2) In May 2004, Merillo filed a motion for postconviction relief arguing that, because aggravated menacing is a lesser-included offense of first-degree robbery, his convictions on those charges violate double jeopardy and should be vacated.¹ In its response to the motion, the State conceded the double jeopardy violation and agreed that Merillo's conviction of aggravated menacing should be vacated. However, the State also moved for a hearing in order to request that Merillo's robbery sentence be increased to reflect the Superior Court's original sentencing plan. At a hearing on January 7, 2005, the Superior Court vacated Merillo's aggravated menacing conviction. Its sole modification to the sentencing order was to add the Level IV Crest program and 6 months of Level III Aftercare to Merillo's robbery sentence, with Merillo to be held at Level V pending space availability at Level IV.

¹ *Poteat v. State*, 840 A.2d 599 (Del. 2003).

(3) Merillo's 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

(4) Merillo's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Merillo's counsel informed Merillo 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. Merillo also was informed of his right to supplement his attorney's presentation. While Merillo did not respond with a brief, he previously had informed his counsel of three issues he wished to be considered by this Court on appeal. The State has responded to the position taken by Merillo's counsel as well as the issues raised by Merillo and has moved to affirm the Superior Court's judgment.

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).

(5) Merillo raises three issues for this Court's consideration, which may fairly be summarized as follows. He claims that his modified sentence on the robbery conviction is illegal because it violates the terms of his plea agreement and, therefore, he should be permitted to withdraw his guilty plea.

(6) This Court has held that, after a related sentence has been vacated on appeal, a trial judge may sentence a defendant up to the combined duration of the original sentences in a manner consistent with the judge's original sentencing plan without violating either double jeopardy or due process.³ For that reason, a defendant who challenges his sentence on double jeopardy grounds has no legitimate expectation of finality with respect to his original sentence.⁴

(7) Because Merillo challenged his sentence on double jeopardy grounds, he had no legitimate expectation of finality with respect to his original sentence. Moreover, there is no evidence that the Superior Court exceeded the combined duration of Merillo's original sentences or re-sentenced Merillo in a manner inconsistent with its original sentencing plan. Merillo's assertion that the Crest and Aftercare programs were not part of the original plea agreement is incorrect. In fact, he agreed to participate in

³ *White v. State*, 576 A.2d 1322, 1328 (Del. 1990) (en banc).

⁴ *Id.*

those programs as part of his sentence for aggravated menacing. We, therefore, find no merit to Merillo's claims.

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